

as to any particular tract of this quantity that you examined?

A Yes sir, they are marked in that list, and nearly^{all} marked in my handwriting.

Q Approximately how many tracts did you examine?

A I will have to estimate it, I think approximately fifteen hundred.

Q Have you the figures at hand so you can tell us all those tracts you examined yourself, independent of those examined by Mr. Stewart, the total acreage that was subject to irrigation?

A. Yes sir.

Q Not the water works system but the city's irrigation system?

A For the irrigation system, there is a list, I haven't it, Mr. Stewart has the list that gives all the detail. These are the original lists that I had in the field with me, on which I marked the number of square rods that is excluded from each tract.

Q And does it also show the number of square rods that are included so as to show the amount--

A Number of square rods in the lot that was irrigated was marked on the list. The number of square rods that I excluded I marked in the list by lots as I examined them.

Q What from that did you say was the amount subject to irrigation of the whole aggregate of all those you examined independent of those examined by Mr. Stewart?

MR. A. C. HATCH: I don't want to interrupt, but would like to have in the record what they mean by that term, subject to irrigation, whether it is land that has been irrigated, now being irrigated, or may be in the future be irrigated.

MR. C. C. RICHARDS: That land that has been irrigated from the city's source of irrigation water.

A I took land out of the lots--

Q Read the question, will you, so as to keep the record.

(Question read.)

A I have the figures in my book.

Q Refer to the book then to refresh your recollection.

MR. A. C. HATCH: I understood he added to that question, land that has been irrigated.

MR. C. C. RICHARDS: Yes, I mean land that has been irrigated.

A The lots that I examined I have 365.8 acres irrigated.

Q Now, Mr. Bostaph, did you have a list of those that had been examined by Mr. Stewart? A. Yes sir.

Q Did he furnish you his list?

A They are in the same book.

Q Did he furnish you the list?

A He furnished me the list.

Q Did you take that list, go over and check up any part of his?

A Yes sir.

Q About what proportion of his did you check over?

A I think I checked perhaps between fifteen and twenty blocks.

Q What would be the percentage of the acreage -- do you remember what his acreage was?

A It would be between a third and a fourth of the blocks he examined.

Q Did you take them just as they came, or here and there, so as to get over in different parts of the city?

A I took them at different parts of the ground that he examined. I took his lists and went to the ground and looked at the separate lots that he had examined on which he had marked that which he had excluded.

Q How did your judgment agree with his upon those you did examine and check?

A It was substantially the same. There was some difference on land that had artesian wells on. He excluded them, while I did not exclude them.

Q Why didn't you exclude them?

A Sir?

Q Why didn't you exclude them, or why did you exclude them, whichever way you used the term. You included the land and excluded the wells, I understand?

A I included all the land except in one particular case, and think I made a mistake on that. I did not take any account of the wells for several reasons.

Q Why?

A The larger part of the wells did not furnish water sufficient to irrigate any material amount of land, and a considerable part of them were used in irrigating lawns that had been raised above the level of the ditch that could not be irrigated in any event by irrigating water, and the land -- I excluded the land because it was raised, not because the wells irrigated it, and then for the fact that the wells seemed to be used generally to supplement the irrigating water rather than a substitute for it.

Q From your observation of the wells as you were passing on these different tracts did they appear to be dependable?

A No sir. That is however on information, but general knowledge of wells that I guess is universally true so far as I know that a well, an artesian well is never permanent, or if it is, I never heard of it. It is temporary only.

Q Well, what do you mean by that?

A I mean that an artesian well, almost without exception, if it is not entirely without exception, will -- the water will go down lower and lower, until there is not sufficient to be available for any particular purpose after a few years.

Q And those are your reasons for excluding it?

A Those are my reasons for not taking account of the water that was supplied from artesian wells.

MR. WEDGEWOOD: I have no cross examination. I will ask if I may recall him.

MR. C. C. RICHARDS: Yes, I don't want to go into anything you don't want, and yet want to place everything at at your disposition.

SCOTT P. STEWART, recalled by the defendant Provo City,
testifies as follows:

DIRECT EXAMINATION by Mr. C. C. Richards.

Q You have heard Mr. Bostaph's testimony?

A Part of it.

Q You were associated with him in the examination of the land
known as the city lots in Provo? A. Yes sir.

Q For the purpose of ascertaining and determining the amount
or quantity of each lot, or part of the lot that you examined
that had been irrigated? A. Yes sir.

Q And that was susceptible of irrigation?

A Yes sir.

Q From the city irrigation supply? A. Yes sir.

Q As I understand You examined all of the lots and blocks that were
not examined by Mr. Bostaph? A. Yes sir.

Q That come within this inquiry?

A In what we call the platted portion.

Q I say that comes within this inquiry that we call city lots?

A Yes sir.

Q So that between the two of you you examined all of them?

A Yes sir.

Q Did you also examine some that were examined by him?

A Yes sir, I examined all that were examined by him.

Q Now, Mr. Stewart, you have a list of each of the tracts that
were examined by you? A. Yes sir.

Q Independently of his? A. Yes sir.

Q And notation of the land, all the land you estimated had
been irrigated on each of those tracts?

A Yes sir.

Q So that from it all you can tell what the aggregate is in
acreage? A. Yes sir.

Q I ask you what would be the total aggregate of the acres
that in your opinion were irrigated from these waters of the

lots that you have testified about, or that you have examined?

MR. JACOB EVANS: Does that include the lots Bostaph examined?

Q No, just those you examined independently of Mr. Bostaph?

A The acreage of the lots examined by me tabulated was 188.61 acres. In my original --

Q That is independently of the lots that he examined?

A Yes sir.

Q So that those that he examined and these that you have given should cover the whole? A. Yes sir.

Q Did you also make examination of the acreage or the quantity of land in the streets irrigated, or occupied by shade trees that were irrigated from waters that were carried out independently of the lots for the purpose of irrigating them?

A No sir, I made no definite examination.

Q That was by Mr. Bostaph, was it?

A Only casually -- yes sir. There is one qualification I would like to make here if I may.

Q Yes.

A Later checking up with the area that I quote here as 188.61 I found should be reduced by three acres?

Q By three acres?

A Making it 185.61.

CROSS EXAMINATION by Mr. Jacob Evans.

Q You said you examined the same lots Mr. Bostaph examined?

A Yes sir.

Q And will you state what acreage you found in the lots that he examined and testified amounted to 365.80 acres?

A It is almost impossible for me to give it in that, in the form in which you ask the question, and I will state the reason why, if you wish.

Q Just like to know what difference there was in your examination and Mr. Bostaph's?

A It is difficult for me to tell you for this reason. I made an examination or joint survey with representatives of the plaintiff of the area that Mr. Bostaph had examined, and also I think it was thirteen blocks which I had examined personally so that the area includes not only his but part of mine which I can give you off-hand. It would ^{be} possible for me to answer the other question --

Q You may give that.

MR. C. C. RICHARDS: Does this relate to the thirteen blocks of yours?

MR. JACOB EVANS: It includes all of the blocks that were examined by Mr. Bostaph and thirteen that were examined by you in addition?

A Yes sir.

MR. C. C. RICHARDS: The two together?

MR. JACOB EVANS: That is the way he says he can give it.

A That area examined by Mr. Bostaph, and in addition thirteen blocks examined by myself, I have tabulated as 363 acres.

Q You make it about, nearly three acres less after adding thirteen blocks than what Mr. Bostaph made his survey.

A In the joint survey, yes sir.

Q Now, can you tell us how many acres there were in the thirteen blocks which you have added to the survey of Bostaph's?

A I can give it to you block at a time, but I haven't --

Q Just calculate it, calculate the thirteen blocks that you have added to the survey or observations made by Mr. Bostaph?

A

3.22
3.11
3.44
3.14
3.03
2.68
2.25
2.49
2.53
2.97
3.09
3.10
1.89

total 36.94 acres.

Q Then if you deduct 36.94 acres, which is the thirteen blocks that you examined in addition and independent to the lots examined by Mr. Bostaph, and which he testified contain 365.8 acres, your examination would then show the tract examined by Bostaph to contain 226.06 acres, would it not?

A 326.

Q 326?

A I wish to qualify that and say that that was the result of the joint survey. It was not the result of my personal survey, but the result of the joint survey.

Q That was the result of what you and the representative of the Provo Reservoir agreed was the proper acreage to be irrigated from the waters of Provo River in Provo City?

A That is the total we arrived at approximately.

Q What was the answer?

A That is the total we arrived at approximately, but I have a list which I tabulated from our actual work without regard to Mr. Bostaph's work, which I can read, which gives our exact results.

Q Was there any agreement as between you and the representative of the plaintiff as to the area of any of these lots?

A I will answer that question in this way. As we proceeded with the survey of the lots of Provo City after going over each block, we cast up the results or the area of that block, and each took that quantity as the quantity in that block. Neither made any objection to it after we cast up those results, at the end of measurements on each block.

MR. JACOB EVANS: I believe that is all for the present.

CROSS EXAMINATION by Mr. A. C. Hatch.

Q There is one other question. Who were with you representing the plaintiff?

A The following men representing the plaintiff were with me,

at least one of them, on all of the work, and more than one of them on some of the work. Irvin Jacobs, Charles G. Johnson, Milo Bean, John R. Stewart.

CROSS EXAMINATION By Mr. Wedgewood.

- Q Just one question for my own information. Is this 188.61 the result of your work done in connection with this whole work you speak of, or was it done independently?
- A Independently.
- Q Now then, that was done by you in connection with Mr. Bostaph?
- A No sir.
- Q It is a part of the ascertaining, I mean?
- A Yes sir.
- Q Did you and he talk the matter over between yourselves and agree upon such-- the use of such data as you did agree upon, or talk upon in getting that result; in other words, did you agree on things so as to work in the same method to the same end; you understand?
- A I understand the question. We had no preliminary talk in relation to it that would govern us in using the same methods.

RECROSS EXAMINATION by Mr. A. G. Hatch.

- Q Had you instructions before you commenced your work as to what ground you were to measure and what was to be counted out?
- A No definite instructions.
- Q Had you any instructions, general?
- A I talked the matter over with Mr. Thompson, Commissioner Thompson, on the way down to the work, and Mr. Thompson accompanied me in my first day's work, but I relied on my own judgment in those matters and not on his. I considered that it was my work. I was not following instructions, but was making determinations according to my own ideas of the case.
- Q Then all of the areas that you have recorded in your survey

and examination are areas that you in your practical judgment as an irrigator and engineer thought was actually irrigated, say within the past seven or eight or ten years, is that true?

A In answering that I wish to make an explanation. The first part of my work was done--

Q Just a moment, you can answer that yes or no?

A I don't see how I can consistently answer it yes or no. The first part of my work, yes.

Q Sir?

A The first part of the work I did I answer yes. The work that I did individually I answer yes to that question. When I made a joint survey with others I would answer, I would have to qualify it.

Q It was your first survey I am asking you in regard to .

A Yes sir.

Q That excluded barns, yards, buildings and roads that were not irrigated for the purpose of producing crops of any kind, did it?

A No sir, not in the form you ask the question.

Q Then you did count some of those things that I have mentioned as being irrigated land, is that true?

A To some extent, yes sir.

Q About what area in the 138.61 would that cover?

A I would like a definition as to what you consider a road.

Q You were on the ground, I don't know anything about it, I asked roads, I don't mean public highways, I mean by that roads that are used as roads, and not for the production of crops, some of them are asphaltum, some of them are cement, some of them are gravel and some are mere mud tracks run over by cattle and horses going to and from the corrals and by wagons going back and forth with farm products, that is what I mean. Barns and corrals you understand.

A Yes sir. I would say that approximately six per cent, or six to ten per cent of the lands considered as irrigated are

not constantly under irrigation in that area, but are of such character as you have just mentioned, made up of lanes, yards, chicken runs, covered by buildings which are not permanent, and so forth.

Q Did you make actual surveys, or did you estimate as to the amount of the lot not irrigated?

A What I have just answered to is an estimate.

Q So as a matter of fact, you could not say as to any one lot just the area that had actually been irrigated of that lot, could you?

A My tabulation considers the area irrigated, and if that class of lands are to be excluded probably six per cent should be deducted.

Q You didn't answer my question at all. Read the question, please.

(Question read)

A Yes, I consider that I can.

Q Did you survey it and measure it?

A I made surveys that were reasonably accurate in every case by--

Q What do you mean by that?

A I mean by that that I had before me the dimensions of the lot six by twelve, or four by nine. I frequently stepped the width of the lot, both dimensions. I also stepped the area that I excluded and made my estimates and deductions accordingly.

Q Now, did you make any measurements at all in this examination, actual measurements, or did you do it all by stepping?

A All by stepping in my first examination.

Q In your next examination you measured, didn't you?

A Sir?

Q In your measurement in connection with the plaintiff's representatives did the result obtained differ from that made by either you or Mr. Bostaph?

A Yes sir, it differs from the results made by each of us in every-- in most cases it differs.

Q Greater or less area of irrigated lands?

A Occasionally the area is exact, the same. Occasionally the area of the joint survey was less than the area given by the first survey, both by myself and by Mr. Bostaph, but in general the joint survey showed a lesser area than the survey given by Mr. Bostaph, and the same with my own area.

Q Now, with regard to the exclusion or including of land irrigated from artesian sources, did you include in your survey those lands in the joint survey with Mr. Bostaph, that is, the one that you were working under his direction?

A In my original survey do you mean, or in the joint survey?

Q I mean the survey under which you were working under the direction of Mr. Bostaph?

A Well, in that survey we were really working together but independently, and I excluded certain areas as irrigated from artesian wells in the work that I did.

Q What did you determine in your joint survey was the area of irrigated land within the city where you surveyed with the plaintiff, just the total?

A The joint survey which covered all of the blocks surveyed by Mr. Bostaph and thirteen of the blocks surveyed by myself we found an area of 363 acres.

MR. C. C. RICHARDS: That is the figure you give before.

A Yes sir.

Q The joint survey did not cover the entire system?

A No sir, I can give the land in my personal survey that was not included in the joint survey.

Q What was that?

A 142.73 acres.

Q Now, in that joint survey you included the chicken runs, buildings, roadways, did you not?

A I will have to answer that question indirectly. We compromised on those matters all the way through. In some cases a chicken run was excluded from irrigation, in other cases it was in-

cluded for irrigation.

Q Do you mean by that that on that joint survey you agreed as to that, the figures that you have made?

A Yes sir, after finishing each block neither interposed an objection to the figures that were submitted.

Q You said to the representatives of the plaintiff, did you not, during that survey that you were not there to use your own judgment as to lands that were irrigated or not irrigated, but that you were working under instructions and proposed to follow them?

A I don't remember having made--

Q To Mr. Johnson and to Mr. Jacobs?

A Mr. who?

Q Mr. Johnson and to Mr. Jacobs?

A I don't remember having made that remark, but I might have made it.

Q And that there was no agreement between you as a matter of fact as to any one lot, was there?

A I will say that our agreement as to any one lot -- there were certain blocks in which we came out exactly, so that I could not say we did not agree on any one block, but in general we did not agree.

Q You don't mean to say that they agreed to this area surveyed by you and testified to by you as the area that you found under the joint survey?

A In certain blocks, yes.

Q Yes, but not the total? A. No sir.

Q Now, I will ask you if you didn't include within your survey the Telluride Motor Company's garage and the Interurban depot and the tracks running through that block as in the irrigated area?

A No sir, I did not.

Q Over the objection of the plaintiff's representatives?

A I think you did not understand my answer.

Q Is it included within, or is it not included within this area, those places just mentioned?

A They are not included within the area mentioned, listed.

Q Did you not include what is known as the Farnsworth property, 219 East 1st North?

A That would be Block 25, Plat B, and that area was considered irrigated from artesian wells, and was not included in the area stated.

Q The whole of that lot?

A The whole of that lot was excluded from this area given.

Q Now, after making this survey you had a meeting or conference with the representatives of the plaintiff in regard to the area irrigated in Provo City, did you not?

A I talked the matter over with representatives of the plaintiff at different times after that work was completed.

Q And did you not agree that the total acreage irrigated or susceptible of being irrigated within the city limits equaled 500 acres?

A I did not agree, no.

Q You didn't agree?

A No sir; I did not have at hand my definite figures at the time I was talking; had given the statement to the attorneys for Provo City and quoted some of the figures which were approximate.

Q Your figures there show 505.73.

A Yes sir.

Q Did you say six per cent of that would be chicken runs and roads and buildings, land not actually irrigated?

MR. C. C. RICHARDS: That is already shown is it not on the board?

MR. JACOB EVANS: No.

(Question read)

Q Not irrigated now and has not been for sometime, so far as you know?

MR. C. C. RICHARDS: Six per cent of what?

MR. A. C. HATCH: That area 505.73.

A I would say that is my best judgment.

Q Well, the 505.73 is the total of the amount of your survey, your last survey?

A My joint survey and my individual survey on the blocks that the joint survey did not cover.

Q Have you 505.73; six per cent from that would leave 475.70, the result of your calculations at the present time, would it not, 475.43.

MR. A. C. HATCH: Now I understand that the city has been claiming an area and that it was included in the Bostaph survey outside of the lots or the trees.

MR. C. C. RICHARDS: Yes sir, he has not testified to that. I overlooked it with Mr. Bostaph.

MR. A. C. HATCH: What I was going to call your attention to was the testimony of Mr. Dixon the other evening here in regard to that, that they were irrigating all of those trees now without charge of rates, from the pipeline.

MR. C. C. RICHARDS: That is not these trees we have here, that is the grass in front of the individual premises, these are different.

MR. A. C. HATCH: Covers the sidewalk trees.

MR. C. C. RICHARDS: Go ahead.

MR. A. C. HATCH: I want to ask that now.

MR. WEDGEWOOD: We have not gone into that yet.

Q This survey just refers to the city lots and city lots only?

A Yes sir.

RE-CROSS EXAMINATION by Mr. Wedgewood;

Q I would like to ask one question. You said that when you went over Bostaph's work you went over thirteen blocks in addition to him?

A. Yes sir.

Q How many blocks did Mr. Bostaph go over, that is, when you

went over his work and the thirteen, how many was there that you went over together, or how many was there more than thirteen?

A Mr. Bostaph examined one hundred and thirty-six blocks, and I examined originally fifty-eight. Now, permit an explanation there.

Q Yes sir.

A There are four half blocks in with that that I have considered as full blocks and doubled them up.

Q Now then, you and he together examined all the city lots, did you not? A. Yes sir.

Q And all the blocks likewise? A. Yes sir.

Q Now, he examined more than twice as many as you?

A Yes sir.

Q But when you come to your re-examination the thirteen blocks you reduced the acreage 36.94 acres?

A No sir.

Q Didn't you testify to that?

A No sir.

Q You put down some figures on the board here and added them?

A Yes sir.

Q That was the total?

A Yes, but that doesn't mean that area comes out of thirteen blocks. That comes out of the Bostaph area and the Stewart area.

Q What I want to get at is this, that comes out of all three of the areas or two of the areas.

A Yes sir.

THE COURT: Comes out of the threes.

MR. A. C. HATCH: 363 was the Bostaph survey, he makes 39.94 difference.

Q Is that the total reduction?

A The thirteen blocks amounted to 36.94 acres in the last survey, and I can give you what they amounted to in the first survey.

Q That is what I wanted to get at, what is the difference?

MR. C. C. RICHARDS: You say they amounted to, what do you mean, the deductions amounted to, or the gross?

A What was considered the irrigable area.

MR. C. C. RICHARDS: You are deducting the total amount from the 363; I don't understand the witness to mean that.

MR. WEDGEWOOD: That was to get the amount of Bostaph's comparison between Bostaph's.

MR. C. C. RICHARDS: I see.

A 315 -- I am giving it by blocks.

MR. C. C. RICHARDS: Is that the total on thirteen?

A No, I am giving it by blocks. I must add this up. 3.15; 3.20; 3.47; 3.17; 2.82; 2.84; 2.30; 2.84; 3.12; 3.10; 3.34; 3.24; 1.86.

MR. A. C. HATCH: Was that the survey made originally by you of the thirteen blocks?

A Yes sir.

Q That gave a reduction of 1.54 acres.

A The joint survey apparently gave a result of 1.51 acres greater than my original survey.

MR. C. C. RICHARDS: In how many blocks?

A In thirteen blocks.

Q Now, your survey that you made, the joint survey which showed 326.06 acres in the area of Mr. Bostaph's as originally surveyed? A. Yes sir.

Q So then that showed a reduction in his survey or a difference of 39.75 acres? A. Yes sir.

REDIRECT EXAMINATION by MR. C. C. Richards.

Q And that deduction includes the area that you excluded on account of the artesian wells, or because of artesian wells?

A Yes sir, includes that and others.

Q How much would that be of that amount?

A I have made careful estimate of the artesian well area within

the area examined by Mr. Bostaph, and placed it at 18.17 acres.

Q Now, is that a part of that 39.75? A. Yes sir.

Q And what part was allowed for the artesian wells in the portion examined by yourself?

A 4.87.

Q So that 23.04 acres of the 39.75 were deducted because of the presence of artesian wells upon the premises?

MR. A. C. HATCH: Pardon me, I didn't so understand it.

MR. C. C. RICHARDS: That is what I understand.

THE WITNESS: No sir, you don't get my answer; 18.17 are part of the 39.75, and the 4.87 are additional acres or should come out of my own area and not out of the Bostaph area.

Q Exactly, but that was deducted on account of artesian wells?

A Yes sir.

Q Now, are we to understand that the area as testified to by Mr. Bostaph was reduced 39.75 acres irrespective of any portion of your own? A. Yes sir.

Q And the survey as to your own was what amount, how does it compare with the joint survey with the other, is that the one that was 1.51?

A Yes sir, apparently there is an increase of 1.51 acres.

Q And in those thirteen acres can you tell what deduction you made for artesian wells that should be added if the wells are to be included?

MR. A. L. BOOTH: Do you mean thirteen acres or blocks?

MR. C. C. RICHARDS: Thirteen blocks.

Q In your calculation of the thirteen blocks in your joint measure, thirteen blocks that you examined there was no allowance -- or there was an allowance made for artesian wells, and deduction made on account of that, was there not?

A In my first examination of about--

the area examined by Mr. Bostaph, and placed it at 18.17 acres.

Q Now, is that a part of that 39.75? A. Yes sir.

Q And what part was allowed for the artesian wells in the portion examined by yourself?

A 4.87.

Q So that 23.04 acres of the 39.75 were deducted because of the presence of artesian wells upon the premises?

MR. A. C. HATCH: Pardon me, I didn't so understand it.

MR. C. C. RICHARDS: That is what I understand.

THE WITNESS: No sir, you don't get my answer; 18.17 are part of the 39.75, and the 4.87 are additional acres or should come out of my own area and not out of the Bostaph area.

Q Exactly, but that was deducted on account of artesian wells?

A Yes sir.

Q Now, are we to understand that the area as testified to by Mr. Bostaph was reduced 39.75 acres irrespective of any portion of your own? A. Yes sir.

Q And the survey as to your own was what amount, how does it compare with the joint survey with the other, is that the one that was 1.51?

A Yes sir, apparently there is an increase of 1.51 acres.

Q And in those thirteen acres can you tell what deduction you made for artesian wells that should be added if the wells are to be included?

MR. A. L. BOOTH: Do you mean thirteen acres or blocks?

MR. C. C. RICHARDS: Thirteen blocks.

Q In your calculation of the thirteen blocks in your joint measure, thirteen blocks that you examined there was no allowance -- or there was an allowance made for artesian wells, and deduction made on account of that, was there not?

A In my first examination of about--

- Q That is not the question I asked you, but I will take that answer.
- A I didn't understand your remark.
- Q I will take the one you have in mind. How much did you exclude for wells, if any, in your original survey?
- A 4.87 acres.
- Q When you did it alone?
- A 4.87 acres is the best estimate I could give.
- Q 4.87 acres ? A. Yes sir.
- Q And if the wells are to be disregarded your acreage then would be increased 4.87 acres?
- A Yes sir.
- Q And if deduction is to be made, you mark it at 4.87 acres?
- A Yes sir.
- Q That covers the entire-- how many did you say you had, fifty--
- A About fifty-eight blocks.
- Q Deduct 4.87. Now from the blocks, one hundred and thirty-six blocks Mr. Bostaph examined, you would make a deduction on the joint survey of 18.17 acres on account of artesian wells?
- A Yes sir, that is careful estimate.
- Q So that if the artesian wells are not to be considered as reducing the area entitled to irrigation the amount should be increased 18.17 acres, deducted from Mr. Bostaph, and 4.87 deducted by yourself, making a total of 23.04 acres?
- A Yes sir.
- Q That is right, is it? A. Yes sir.
- Q Now, another item. The figures you have given here do not include, as I understand it, any part of the acreage in the trees estimated by Mr. Bostaph for irrigation?
- A No sir, do not
- Q That is approximately twenty-four acres, something like that?
- A I am informed it is 24.54 acres.
- Q Simply as a general proposition-- I will get that from him--

Mr. Stewart, I want to ask you with a view of getting at your individual judgment about it, what is your individual judgment today as to the accuracy or the real amount of land that is irrigated in the lands, blocks that you inspected independently of Mr. Bostaph, not his blocks, but those that you inspected yourself; is it the joint estimate or figure that you reached with the parties you were examining with, or your original estimate individually?

A I am willing to stand on my original estimate.

Q As being near the right and proper thing?

A Yes sir. However, the other area has been arrived at by process of give and take from both sides, and I do not object to using it. It gives Provo City a greater acreage than my individual work gave Provo City. I am willing to accept it.

MR. A. C. HATCH: That didn't answer the question.

MR. C. C. RICHARDS: I think probably we can get the answer nearer.

Q Why did you count roads, walks and other items that you answered Judge Hatch-- I believe it was the Judge, one of the counsel here -- were they included as irrigable?

A Read the question.

Q He asked you if you included hen coops, land occupied by hen coops, and walks around the house and roadways.

MR. A. C. HATCH: I don't like to object.

MR. C. C. RICHARDS: I think you said chicken runs.

MR. A. C. HATCH: I don't like to object but it takes time. The words used are such as makes it ambiguous. You used the word irrigable. Now, all of the lands within Provo City practically are irrigable, but whether or not they have been irrigated--

MR. C. C. RICHARDS: I thought we had threshed the definition of that term out in the beginning.

MR. A. C. HATCH: No, we did not, it was subject to

irrigation but now it is irrigable.

Q Why did you deduct the walks around the house and roadways, rights of way where people traveled with their wagons, and, I think the Judge referred to chicken runs, in your computation of the amount of land that was subject to irrigation, or did you include them or exclude them?

A A compromise was made in each one of those areas, and they were in a great many instances excluded, in most instances excluded. In some instances they were not excluded. As to why I did it, why, it was done-- I will answer this that it would have been impossible under the instructions, I believe, that we had to make a joint survey had I not yielded on certain points and asked them to yield on certain points, and that happened in very many instances throughout the survey.

Q How many approximately separate tracts did you examine in your survey independently of Mr. Bostaph in fifty-eight blocks?

A Possible four hundred.

Q Now, you estimated six to ten per cent of the 188 acres reported by you had not been, or did not appear to have been irrigated continuously, as I understood you. What do you mean by that, Mr. Stewart?

A I mean by that that it is not served today with water, and is not served regularly every year. It may have had intermittent service within the last few years. It may not have had service for ten years.

Q Some used this year and walk changed next year, or roadway and outbuildings changed from place to place?

A Certainly.

Q So that any of it may be used next year or any particular part of it might not be, is that the idea?

A Yes sir.

Q Now, speaking about your estimates being only estimates and stepping off; how long would it have taken you if you had made an actual survey with a tape line or chain to have surveyed

these eighteen or nineteen hundred tracts of land?

MR. JACOB EVANS: Object to that as immaterial.

MR. C. C. RICHARDS: I think not. It is intended to go to the weight of this evidence, and I submit the way we have handled it is the only way he could have done it.

THE COURT: I think the objection should be sustained. The court knows what you had to do.

MR. C. C. RICHARDS: Give you the very best thing we could, but not something we had to guess at. I saw no object in the question unless it was to discredit the testimony and I wanted to show the court the best we could within the time.

Q Now, there was some part of that that was not examined by you and by representatives of the company together?

A Yes sir.

Q Has not been to this day?

A Has not been to this day.

Q Referring to the Farnsworth land, there was a flowing well on that, was there not? A. Yes sir.

Q Was that the reason that was excluded? A. Yes sir.

Q How much was that land?

A The total area of the land was forty-seven hundredths acres.

Q Forty-seven one hundredths?

A Yes sir, about fifteen square rods was covered by permanent buildings.

Q What figure did the artesian well cut in that consideration?

A Sixty square rods or thirty-seven and a half hundredths -- .375.

THE COURT: Mr. Stewart, see if I have these corrections in mind. As shown by your joint survey, that is, the survey made by yourself in connection with some representative of the plaintiff you had the 595.73?

A 363 acres.

THE COURT: And then by yourself 143.73?

A Yes sir.

THE COURT: Making 505.73?

A Yes sir.

THE COURT: That is the total of your independent survey and the joint survey?

A Yes sir.

Q That has no reference to any survey by Mr. Bostaph?

A No, the joint survey covers all his work.

MR. A. C. HATCH: Then the 30.30 was the six per cent deducted.

THE COURT: I have that computation, I wanted to see if I had the source of these figures. Is that all the cross examination.

Q Now, Mr. Stewart, in your figures there of 505.73 which have been spoken of as the joint survey, is it intended by you to deduct 30.30 from that?

A Not intended by me, and the joint survey did not make any such deduction.

Q That is a suggestion made here in the court room?

A Yes sir.

Q And not considered by you or the representative of the company while making the survey as being appropriately deducted?

A No sir.

Q Your net figure then was 505.73? A. Yes sir.

Q I understood you to say, but I am not certain I have it right, that you did not agree with the plaintiff's representatives that five hundred acres only was irrigated; is that right?

A Your understanding is correct, I did not agree.

THE COURT: Did not agree to what?

MR. C. C. RICHARDS: That there were but five hundred acres irrigated.

Q And I also understood you to say these figures given by you of 505.73 do not include 18.17 acres excluded from Mr. Bostaph's on account of artesian wells, 4.87 excluded from your investiga-

tion because of artesian wells, making 23.04 acres and about twenty-four acres for trees in the streets that were irrigated; neither of those items are included in the 505.73?

A Neither of those are included in the 505.73.

WILLIAM M. BOSTAPH recalled.

DIRECT EXAMINATION by Mr. C. C. Richards.

Q Mr. Bostaph, I overlooked asking you about some shade trees in the streets that I think you examined and listed as requiring water from the irrigation system of the city for irrigation of them?

A. Yes sir.

Q Now, you may state how many acres there were that you allowed for that, and what they were?

A I allowed 24.54 acres for that, and they included all lines of trees and all the streets for which a special ditch was made.

Q Now, were those trees irrigated at the time or from the same waters that were used for irrigation of other gardens and other properties, or did the water have to be run independently to them?

A No sir, the water would have to be conducted independently to them.

Q Unless it was so conducted the trees would get no water for irrigation?

A I didn't hear.

Q Unless the water was so conducted independently they would get no water for irrigation?

A Yes sir, they could not be watered from the ditches that were in existence for other purposes.

Q In your opinion was water necessary for their growth and development?

A. Yes sir.

Q State by what method you arrive at the conclusion there were

24.54 acres so irrigated?

A I went over all the streets of the city and looked at every line of trees that were not along a permanent ditch, and for which ditches had been constructed specially, and I counted a strip of ground eight and one quarter feet in width for the entire length of the trees as we found them.

Q In your opinion was that width necessary and would the water be required to irrigate that distance?

A Yes sir.

Q And quantity of land for the purpose of irrigating those trees?

A That is the narrowest possible limit, or the narrowest probable limit to which that ought to be reduced, half a rod in width.

CROSS EXAMINATION by Mr. A. C. Hatch.

Q Do you know whether the trees had ever been irrigated to a greater extent?

A I couldn't hear.

Q Than just by turning the water into the ditch?

MR. C. C. RICHARDS: You will have to speak a little louder.

Q Do you know whether or not there had ever been eight feet wide irrigated?

A In most cases, yes.

Q Did you in any place see where the water had been diverted out of the ditch to surround these trees, or did it flow just along the ditch that was built for irrigating?

A In most cases it was a depression where the tree grows and the water spread out eight or ten feet in width along the trees when it was turned it would irrigate them.

Q Then it was not a ditch built for the purpose of irrigating the trees?

A Some of them were, yes.

Q And those depressions that you refer to were made by grading

the streets, were they not?

A I don't know how they were made, the depressions were there, and the water was in many cases turned in them when I was along.

Q They were not irrigating ditches then in many places, just depressions in the street with the water standing in them?

A No, in a good many cases there were ditches built expressly for them, or apparently for them, and in nearly all cases ditches appeared on one part or the other of the line of trees, but in many cases the ditch had broken and spread out, and the water was standing all around the trees.

Q But that was invariably to one side or the street side of the tree, and in no instance did you find that depression on the sidewalk side of the trees, did you?

A Well, the trees in many cases stood in low ground where the water was around the roots. There was more on the street side generally than there was on the sidewalk side.

Q But where there was indications of a ditch the tree stood on the sidewalk side of the ditch, didn't it?

A The tree stood on the sidewalk side of the ditch, yes.

Q So that if they were ever irrigated by a ditch it would be only on one side of the tree?

A Not entirely. Generally, as I say, the trees were standing in low ground.

Q I am asking you about places where they were irrigated by a ditch?

A Then water would be turned in, but in most cases, larger part of the cases I saw ditch was broken out, and water simply spread around the trees.

Q In larger portion of the cases there was no ditch, as a matter of fact?

A In some of them there was no real ditch.

Q There was simply a low place made there by grading the street in that particular place?

A Yes sir, and where the water was turned in.

Q Do you know whether that water was turned into the irrigating ditch or whether it was an overflow from the irrigation of the lots?

A In some cases I observed it was an overflow; in other cases I observed it had been turned in.

Q About what portion of it was overflow of the area that you examined?

A The overflow was very small part, was the smaller part, I don't know, I couldn't state the proportion, but the overflow where I saw the water turned in, or where the water had flowed in, overflow was comparatively small part of the total.

Q These depressions in many instances are a rod wide, weren't they?

A Some cases, yes sir.

Q And ponds of water standing in the street?

A Yes sir.

Q But all on the street side of the tree?

A No.

Q The pond was wholly on the street side of the tree?

A Where there was any material excess of water standing, excess in width, it was generally on the street side of the tree.

Q Can you mention any one place where you saw the water standing on the sidewalk side of the tree?

A I cannot point out the place, but I know several places I waded across on the sidewalk side.

Q Do you think you could find a place now and report it later?

A I don't know whether I could or not, I don't remember.

Q Are you willing to try and report results within an hour?

A No, I wouldn't undertake to look at it. I was over the whole town, and I don't know where it was, I can't recall.

Q Have you any data of this estimate made by you taken upon the ground of the area necessary to irrigate the trees?

A Yes sir.

Q What is the length in miles?

A I haven't got it in miles, I have it in rods.

Q What is the length in rods?

A 7,746 rods.

Q That is the whole total number of rods?

A Yes sir.

MR. A. L. BOOTH: You gave a half a rod width, didn't you?

A Yes.

MR. A. L. BOOTH: Wouldn't that take a mile for an acre?

A I don't know, I have got 33,873 square rods, I just took the total length and divided into for square rods, then divided it by 160.

MR. A. L. BOOTH: I say a mile is 320 rods, isn't it?

A For a lineal mile, yes.

MR. A. L. BOOTH: If you take a strip half a rod wide and mile long get an acre?

A It is 33,873 lineal rods.

MR. A. L. BOOTH: As I figure it out half a rod wide and mile long is exactly an acre.

MR. WEDGEWOOD: Sure.

MR. A. L. BOOTH: Then it would be 24.54 miles?

A That is what I figure, 24.54.

THE COURT: Be 24 miles.

THE WITNESS: There is an error there of 108 rods that is not included. I see on the next page I have 108 rods. 7,854 is the total number of lineal rods.

Q Now, could you tell us where you found these trees, on what street you found those trees, whether the streets ran east and west or north and south?

A Both, some east and west, and some north and south.

Q Can you give us the streets.

A Yes sir; shall I give all of them?

Q Yes.

A On 7th North east of Academy Avenue, on the north side of the

street I have from 1st to 2nd Street, 2nd East, from 2nd to 3rd East, 3rd to 4th East and from 4th to 5th East.

Now, between Academy Avenue and First East, I have twenty-four rods. Between 1st and 2nd East on the north side, twenty-four rods, on the south side twelve rods. Between 2nd and 3rd East, north side, twenty-four rods, south side eight rods. Between 3rd and 4th East, north side twenty-four rods, south side ten rods.

Q Just there a moment. Was there no irrigation ditch running on either side of that street?

A I couldn't hear you.

Q Was there no irrigation ditch running on either side of that street?

A No permanent irrigating ditch. Well, I have ten rods given, the other fourteen rods would have an irrigating ditch. I only took those where there was no ditch, no permanent ditch.

Q What do you mean by a permanent irrigation ditch?

A I mean a ditch that was built there for the purpose of irrigating other property.

Q What property?

A Irrigating other property. If the ditch was built for the purpose of irrigating those trees only and ran to those trees I covered it. Where the ditch was built and was used for irrigating other property I did not cover it.

Q You may proceed.

MR. C. C. RICHARDS: That is, I understand you the ditches to those trees were specially made for the trees?

A Where there were ditches specially made for the trees I took them.

MR. C. C. RICHARDS: That is area, what you have testified?

A Yes, that is what I counted.

Q You may proceed, Mr. Bostaph

MR. C. C. RICHARDS: I beg your pardon, I misunder-

stood you.

A Read the balance of my record, you mean?

Q yes.

A Between 4th and 5th East, north side twenty-four rods, south side eight rods. On 6th North, between 5th and 6th East, on the north side twenty-four rods, south side twelve rods. Between 4th and 5th east, on the north side sixteen rods, south side twelve rods.

Q I will just ask one question further, Mr. Bostaph. Were there trees actually growing on all of these distances that you took?

A There were some trees along the line, not always the entire distance. Sometimes there was a skip of a space between where there was a tree at one end and series of trees at the other end. Sometimes there were trees planted along the entire distance, sometimes there were old trees. I took the streets wherever the trees occurred along the entire distance either at one end or the other I took the entire length.

Q So that if there was a tree at each corner you would take the entire block?

A No, oh no, not where there was a tree at each corner only. There must be more than that, there must be a row of trees, that is, part of a row at one end and part of a row at the other end, or perhaps part of a row in the middle. Then I took the block.

Q That is all, we don't care for going into the detail of the entire survey.

CROSS EXAMINATION by Mr. Wedgewood.

Q Before the recess I would like to ask one question. Now, Mr. Bostaph, turning to this rude representation on the board here, there has been an attempt to grade all the streets in Provo, has there not?

A What?

Q An attempt to turnpike or grade all the streets?

A Yes sir, there has been some grading done on all the streets, I believe.

Q And they all have a shape that somewhat resembles what I put on the board here?

A Generally have a shape something like that, yes.

Q That was the attempt of the design. Now, where there are trees there are two rows, are there not?

A Generally, yes sir.

Q The lower part of the turnpike of the road, the road proper, terminates on the road side of the tree row?

A Generally.

Q Now, will you say that there is anywhere in the city that the road side of the tree row is not the lower part of the turnpike where it meets the abrupt grade?

A That sometimes is true.

Q There are no ditches built for the trees themselves, that is true ?

A There are some.

Q Now then give me one place within this city where there is a ditch, where I have marked the arrow for the irrigation of trees?

A I cannot recall any on the outside.

Q All right, now give me three places within the city so that I can look at them while I am out at recess where there is a ditch made on the sidewalk side for the irrigation of trees?

A I could not undertake to do that, but you would have no trouble finding them.

Q Will you give me one place?

A Yes, there are many places.

Q Give me one?

A I cannot give you any, because I don't recollect where they are.

Q I want to find one I can go and see.

A You can find them by going and looking, they are all over town.

Q How wide is any ditch there on the sidewalk side of the tree row?

A They are usually --

Q Give me the width of one?

A I measured none.

Q You measured none?

A They are a foot to foot and a half apparently plow furrow originally and been washed since.

Q Almost universally the sidewalk is graded up above the ditch in the road?

A No, the rule is the reverse.

Q The rule is the sidewalk is lower than the road?

A No, the street is graded up, but the sidewalk is not graded up.

Q I just invite your attention to this rule diagram here wherever the street has been turnpiked, wherever I put the cross, isn't that the lowest place on that side of the street?

A Generally that is true, yes.

Q That was the intent of doing the grading, was it not?

A Yes, where the streets are graded that may occur, but if the ground happens to raise from the street toward the lot then it would not be true. There are places where the ground is not level.

Q There are places where the road is graded above the sidewalk?

A Yes, and some places where the road is lower than the sidewalk.

Q Whatever that fact may be there is a depression between the sidewalk and road such as illustrated by the perpendicular line?

A I think that is generally true.

Q Otherwise the sidewalk would be flooded. Now, if there is a ditch where I have marked the arrow A anywhere you say that is a ditch a foot wide or so?

A Oh yes, small ditch.

Q Do you know, can you give me the depth of any one of them?

A No sir, they are from four inches to a foot in depth, they

vary, some probably deeper than others.

Q Can you give me one place I can go and see?

A Oh no.

Q And can you tell me any one place actually how far that ditch is from the tree?

A No sir, that varies.

Q If it was two feet from the tree why then all the water that would get on the tree would be on the tree itself, would be whenever excavation was made around the tree for the water to get in, would it not?

A No, that is not generally so. The ditch filled with water as a rule overflowed and filled the gutter outside here. Here is where the water would be mostly standing that I saw and where the ground was low.

Q I understand if water is turned into the road you said to Judge Hatch it would accumulate in the gutter, and the gutter, you said was on the ditch on the road side of the tree. Now, I am asking you about the ditch on the sidewalk side of the tree, whether or not if any water flowed down any one of those ditches it would not simply flow down there and that was the end of it?

A It would flow down along the tree.

Q And whatever water the tree got would get from soaking in the ditch, side of the ditch?

A Where the water was confined to the ditch along, yes.

Q And now your own observation did you see anybody taking water out of that ditch onto the tree itself?

A No, I didn't see anybody take it out, but I saw water running along in those ditches that had been turned in.

Q Water was running in the ditches?

A Yes.

Q I am talking about diverting with a shovel or hoe or anything?

A I saw water running in several places, good many places.

Q Did you see anybody with a hoe or shovel there irrigating a tree?

A I don't recollect I did.

Q You saw water running down the side of the sidewalk in the ditch?

A Yes, and several times I have went and looked to see where it was turned in.

Q And that water simply flowed down the ditch ?

A Yes.

Q Now, all the water that got out of that ditch was the water that seeped down into the ground from the ditch after it went over the sidewalk?

A Except where it overflowed.

Q Overflowed the sidewalk? A. Yes.

MR. A. C. HATCH: Or overflowed the street?

MR. WEDGEWOOD: Yes, or overflowed the street?

THOMAS C. THOMPSON, recalled.

DIRECT EXAMINATION By Mr. C. C. Richards.

Q You are the City Commissioner, one of the City Commissioners?

A Yes sir.

Q You have heard the testimony relating to the trees growing on the sidewalk or in the street that water is being claimed for to irrigate? A. Yes sir.

Q I will ask you if there are trees in considerable number so situated in the streets of the city that demand water for irrigation? A. Yes sir.

Q Independently of instances where the water is passed by the trees to go to other property?

A Yes, quite a number.

Q And were you out with Mr. Bostaph when he was making an examination and survey and listing the property for the trees?

A Yes sir.

Q Did you help him make the estimate?

A I did.

Q As to the acreage? A. Yes sir.

Q What do you say as to that acreage of 24.54 acres being substantially correct?

A It is correct, as near as we could possibly get by counting the blocks twenty-four rods.

Q And do you say that the water is necessary for the irrigation of those trees to produce their growth and life?

A Yes sir.

Q And that the water is independent of the water that is being used by others for the irrigation of their properties?

A Yes sir.

CROSS EXAMINATION by Mr. Wedgewood.

Q Mr. Thompson, take it up in the section of town, name the streets where there are ditches for the purpose of watering trees and where they have been watered by turning water into them? A. Yes sir.

Q Give us the streets?

A All 3rd East on the west side take it for a block.

Q 3rd East?

A Yes sir, from 8th North, from 6th to 4th South. All of 4th East from 8th North to 5th South.

Q Any other place? A. Yes.

Q Give it to us ?.

A On 5th East from four and a half North to Center Street. On 3rd North from 4th East to 5th East. irrigates both ways. I live there and have to take it from the east to the west, and my neighbor irrigates from the west to the east in our tree row.

Q Has the city had a man on any time to do that irrigation?

A No, the city doesn't, the property owner takes care of it.

Q And the property owner, the only person that pays any attention to the irrigation of trees is the property owner?

A The city made the ditches for them for their tree row.

Q The only person that pays any attention to the irrigation is the property owner, is it not?

A Has been as a rule. I have taken some care of it myself.

Q And he irrigates the trees whenever he sees fit when he irrigates his land, does he not?

A If he has the water.

Q If he has the water? A. Yes sir.

Q If he hasn't the water of course he don't irrigate anything?

A He can't get it.

Q Now, when did the city make one ditch?

A I made it myself.

Q Where?

A On 3rd East.

Q Where?

A Clear through from 8th North down to 4th or 5th South.

Q When?

A Five years ago now.

Q Five years ago now?

A There was a ditch, but it had run out; it was too small and run out.

Q Was that ditch a ditch inside of the tree row, sidewalk side of the tree row?

A It is on the outside of the tree row right next to the tree row.

Q Is that within the 24 miles calculated by Mr. Bostaph?

A Yes sir, in that.

Q Now, is this block right out here continuing on east from the court house, is that within the 24 miles?

A I think not, I don't think we took anything where there was curb and gutter.

Q Did you take everything where there wasn't a curb and gutter?

A Pretty much all, yes sir.

Q Now, do you mean to say that every property owner, whenever he

irrigates irrigates his trees?

A As much as he can.

Q Does he do it?

A I always attend to mine or they would die.

Q Answer the question do you mean to say every irrigator, whenever he irrigates his land irrigates the trees you speak of?

A I cannot say.

Q You don't know?

A I know there is mine.

Q Mr. Evans suggests, but I think I asked him before, they simply irrigate these trees out of the water that is turned to them to irrigate their lots? A. Yes.

Q Now practically all of these trees that are of any size at all, no attention is paid to them by anybody as to irrigation, is there?

A There is somethat is by the city.

Q I say practically?

A Practically.

Q No attention paid to them, trees like those between here and the curb and other places between the curb and sidewalk where it is curb and cement, and where there is a sidewalk, and where the trees are large, no attention is paid to them at all?

A As a rule there ain't where they have nice lawn.

Q They irrigate the piece of lawn around them and that ends it?

A Yes.

Q Nine-tenths of all the trees within this city are large trees beyond the point of surface irrigation, are they not now?

A No, I wouldn't think that many. They are planting out a lot of young trees, and have been the last four or five years.

Q Along the streets? A. Yes.

MR. WEDGEWOOD: As far as I am concerned -- I don't know how my colleagues will agree with me, but I would like the court to take twenty minutes and ride around and look

at that situation. I would like to put testimony in, one observation, but I would like for the court to see the condition of these streets generally as to the twenty-four miles of irrigated land, one and one-fourths rods in width on the streets.

MR. C. C. RICHARDS: We will be glad to have the court make the view.

THE COURT: One-half rod.

MR. WEDGEWOOD: That would be eight and a quarter feet.

RECROSS EXAMINATION by MR. A. C. Hatch.

Q Can you say about how far the trees require irrigation?

A That depends on the age of the tree. If it is a young tree it needs it about twice a week, other trees wouldn't need it--

Q More than once or twice during the season?

A What?

Q More than once or twice during the season?

A I have to water my own at least every two weeks, they are maple.

Q What age are they?

A They are four year old now, they are maple.

Q That is once every two weeks? A. Yes sir.

Q As they grow older they require less irrigation?

A Yes, as they grow older they require less irrigation.

Q Until the majority of the trees in the city require not more than once a month?

A All the large trees they would not need it over once a month.

Q So that the same duty of water would not apply to this area of tree acreage that would be applied to the gardens and balance of the city lots within the city?

A How?

Q The same duty of water should not be applied to this tree area that is applied to the city lots that is used for gardens and cultivated generally?

A I would not hardly think they would need quite the same amount as the garden stuff. No, I would say no.

Q Now, is there any instance where in irrigating the city invites the public to flood a rod or more of the street during the irrigation of the trees, or is that carelessness on the part of the irrigator?

A That is carelessness on the part of the irrigator.

Q So all of the ponds we see in the streets about Provo City are evidences of negligence on the part of its irrigators, is that true?

A Yes, it is account of crossings being choked up, which happens sometimes within five minutes.

Q When Mr. Bostaph testified that the ponds were six or eight or ten feet wide, that was an indication of somebody wasting or being negligent with his use of the water in irrigating his trees?

A It might and might not. If a child or somebody has dropped a can into a crossing and water backs up in the night and fills up the side of the street, which happens hundreds of times during the season, why, it is not really--

Q It is not the intent on the part of the city anybody shall flood the street?

A I should say not.

Q For eight or ten^{feet} in these ponds or depressions that Mr. Bostaph testified to.

A I should say not.

Q So that the water required for the irrigation of trees would simply be such water as would run in the ditch by the side of the tree?

A That is all.

Q And the ditches are eight inches to a foot and a half in width?

A Yes, that would be all that would be necessary.

Q But they don't irrigate or flood that water more than the width of the ditch in irrigating the trees?

- A The trees, you know, absorb a great deal of moisture.
- Q True, but the actual area, surface area irrigated would only be that in the bottom of the ditch?
- A That would be all that would show on top without they would out around the tree.
- Q Of course water may soak for a hundred yards on either side of the ditch? A. Yes.
- Q Owing to the kind of soil? A. Yes.
- Q With pipes to it, it might flow clear outside of the city?
- A That is right.
- Q But the surface area irrigated is only the width of the ditch?
- A That is all, without there is places out around the trees like I had mine.
- Q Those are young trees, a little hoe furrow out around each tree to see that it gets its proper amount of nourishment?
- A Yes sir, that is what I mean.
- Q The young trees are the exception, aren't they?
- A Sure they are.
- Q So that instead of it being necessary to flood eight feet wide they only flood the width of a ditch whatever it may be?
- A That would be ample.
- Q So that instead of being fifty-four acres, or twenty-four acres and a half, it would be reduced by several feet at least?
- A Well, that ground and the ditch would absorb four feet on each side.
- Q It may absorb forty feet on each side, I am just getting to the surface area irrigated.
- A That would be all.
- Q Be just the width of the ditch?
- A Be just the width of the ditch.
- Q And how long do you run the water in this ditch to irrigate those trees?
- A That depends on the amount of water that a man has. Now, take it on Academy Avenue there is quite a strip. The city,

while I was watermaster took care of it and it took me two nights to run it from 6th North down here to 2nd North, it took two nights with a second foot of water.

Q The overflow water finds its way back into the irrigation system, doesn't it?

A How?

Q Any overflow water that there may be finds its way back into the irrigation system of the city? A. Yes sir.

Q Except it is run into these ponds by the wayside?

A Yes, we have always tried to cut a place so that it would drop right back into the ditch again.

Q So that if you run the water all the time there in these ditches there would be no waste any such as seeps into the ground?

A No, there should not be.

Q Now, with regard to irrigating or sprinkling grasses growing on the sidewalk, is that done from the irrigating ditches, or is it done from the hydrants from the sprinkling system?

A Why, the city allows the people to use the water out of the city water works system for their parking outside without charge.

Q That is for such sidewalk irrigation as there is?

A Yes.

Q The trees are on the sidewalk, are they not, or on the lawn between the sidewalk and the street?

A Yes.

Q So that any irrigation that may be applied to the sidewalk is in part an irrigation of the trees, is it not?

A Well, there is very few places there is park, just along the center.

Q Can you irrigate the sidewalks without irrigating these trees in the park?

A Irrigate the sidewalk ?

Q Can you sprinkle the sidewalks without furnishing irrigation

to the trees?

A I don't believe I understand the question, Judge.

Q The diagram on the board there made by General Wedgewood.

A Yes sir.

Q The sidewalk on that part of it next to you is to the left?

A Yes.

Q Now, can you sprinkle that sidewalk without furnishing some irrigation to the trees growing on the outer edge of it?

A Surely not.

Q So that the sprinkling system then if the sidewalks are sprinkled would furnish a part of the irrigation for this tree area?

A Well, there are so few places there is such a thing only right here in town, that it doesn't amount to anything.

Q But it is the privilege, I understood you, of everybody?

A That is correct, yes sir.

Q To do it?

A That is true.

Q And it is part of your claim for public water?

A Yes sir.

Q To irrigate these? A. Yes sir.

Q And it is upon that sprinkling of these sidewalks or the sidewalk area, that you base that claim?

A They must have the lawn, they must park it before they are entitled to that.

Q Whenever they choose to seed it to grass then they are entitled to water from the main stream?

A If they have their front parked with grass they are entitled to use the city main water on it.

Q When they do that you will need all the water that is conceded to you by the plaintiff in this case?

A Yes sir.

Q Until you do that you don't need it?

A Yes, we haven't got it to spare now, way we are fixed.

Q This is a short season right now, we are not questioning that,

but it is to get at what is your necessity, and don't want to deprive you of any necessity, the system you have, but you will have plenty ordinarily to sprinkle all the sidewalks from your pipe system?

A I don't know about that if the city keeps on growing like it has last year or two.

Q You say the city has granted to all the sidewalk owners, as soon as they shall seed it to grade?

A We could change that any time, that wouldn't take us long, to change that.

CROSS EXAMINATION by Mr. Jacob Evans.

Q Do you distribute any water at the present time for the irrigation of these trees? You don't distribute any water for the irrigation of the trees?

A That is from the city?

Q Yes.

A I understand there has not been this year. It was for two or three years while I was watermaster.

Q All the time that is given is given for the irrigation of lots?

A Yes sir.

Q And all of the tree irrigation that is done is done out of the time given for the irrigation of lots?

A Yes.

Q And that has been so this year, has it, and other years?

A Not other years altogether.

Q Has it been so this year? A. Yes.

Q And the trees are all growing and flourishing, are they not, that you now use the water for?

A Some of them is not flourishing very good.

Q But they are practically all alive?

A Oh yes, they are alive. There is a great deal of difference between a thing growing and its being alive, quite a difference.

Q Do you know, Mr. Thompson, whether or not the north side of

Main Street here was included as a part of the tree area that you seek water for?

A I hardly think it was, it might have been though.

Q You don't know whether it was or not?

A No, I am not certain.

Q Do you know whether the south side of Academy Avenue ?

A Mr. Bostaph kept a record of it.

Q You don't know?

A I don't know .

Q Do you know whether the north side of 2nd North Street, and 1st East was included within this tree area?

A Yes.

Q That was included ?

A Yes, that was included.

Q Clear through the city?

A How?

Q Clear through the city to the east?

A No, not clear through, I don't think. I think there is a block there that was not included.

Q Which block?

A Between 2nd and 3rd.

Q I wonder if Mr. Bostaph could give that.

A I think so, between 2nd and 3rd, there is a block that it run east a block and then --

Q Do you know whether the tree row along by the Roberts Hotel was included in this area requiring irrigation?

A Which way?

Q It would be the north side of 2nd South Street?

A You mean the one going west?

Q The one running east and west?

A Yes, that is included.

Q That is included? A. Yes.

Q Do you know how long it has been since any water was used there?

A No, but I do know this summer said he would either sue the city

for the trees, or for the water, I know that. He said the other fellow could make out.

Q You don't know whether water was used there or not?

A Yes, I know water was used, when Mr. King lived there, when he planted trees out first.

Q Do you know how long it has been since water was used there?

A No, I don't, I couldn't say for that.

RECROSS EXAMINATION by Mr. Wedgewood.

Q Do you know whether water was used when I lived there?

A No. Only thing I can remember was when King first put out the trees he had the water. I know Mr. Nixon this summer demanded water.

REDIRECT EXAMINATION by Mr. Richards.

Q Is it your purpose as Commissioner to try and keep those trees alive and cultivate the growth of the trees in the streets, beautify the city?

A How?

Q Is it your purpose, as a City Commissioner and of the City Commission, to cultivate or encourage the growth of trees and shrubbery in the streets to beautify the streets?

A Yes sir.

Q And rather than discourage and prevent the use of water, you are making an inducement to the citizens if they will plant the lawns so as to park along the sidewalks that you will furnish the water to them free? A. Yes sir.

Q For the beautification of the city?

A Yes sir.

Q Do you understand the water that would be used for the shallow sprinkling of grass and lawns would be sufficient to reach the roots of the trees and answer their purpose?

A No, it shows that right here, don't need to go further, two trees dying for want of water right across the street here.

Q Now, these streets you have named in answer to counsel have they been just off hand as they would occur to you, or did you have a list of them prepared?

A How?

Q Counsel asked you to name a number of streets.

A Yes.

Q Upon which these trees could be found?

A Yes.

Q Had you thought them out beforehand or given them off hand as they came to you?

A Just as they came to me.

Q Without premeditation. Now speaking about the duty of water to these streets, twenty-four acres of you have estimated, covering some twenty-four miles and a half?

A Yes.

Q Assuming that the duty is fifty acres to the foot, for a second foot, be about a half a second foot of water for that land, could you sprinkle or irrigate those trees with the same economy and get the same results from your half a foot of water that you could if it was in compact form as a farm, anything of that sort.

A You could not do it.

Q So that this entire controversy being over say half a second foot of water you have got to scatter it over twenty-four miles and a half.

MR. A. C. HATCH: Object to that as being a conclusion and not at all within the evidence,

MR. JACOB EVANS: It was running with other water.

MR. C. C. RICHARDS: You three of you have taken the liberty of cross examining, and I did not except to it.

THE COURT: I don't understand the evidence on that subject. I didn't understand the answer, what the answer to the last question was. Did you mean it to be used more economically this way than if it run with the other water in

221
the ditches? That was not the question.

MR. C. C. RICHARDS: This is a matter of irrigation. I was asking the witness if, in his opinion, the water could be used as economically having to carry this half a second foot over such a great distance and scatter it in different streets on these trees as it could be used if it were being used on twenty-four acres of land in compact form for irrigation of either an orchard or farming.

MR. A. C. HATCH: But, if the court please, our objection--

MR. C. C. RICHARDS: In other words, the court has reduced the duty of fifty acres and a half.

MR. A. C. HATCH: Our objection--

THE COURT: I think the objection should be sustained if that is the substance of the question, but whether the question is that is economically used under the system they have here for its use I will permit the witness to answer. Let us understand what the situation is and you can ask him then, but I don't understand there is anything to base a presumption or the hypothesis this half second foot of water has got to be so strung out to run twenty-four miles.

MR. C. C. RICHARDS: It appears by calculation of the trees they are scattered over a range of twenty-four miles.

THE COURT: Yes.

MR. RICHARDS: And it appears from the testimony separate ditches have to run to those trees, that water is not carried for other purposes to those trees. Now, if each ditch is a separate ditch and transportation be it block or two blocks added to the next brings the result-- I can see no other solution.

THE COURT: Objection sustained. I don't see the hypothesis at all.

MR. C. C. RICHARDS: Note an exception. I don't

understand from the testimony of the witness this water after it
is turned out from this corner here accompanies any other water
or is in a ditch with any other water running down this street.

THE COURT: I don't so understand it either.

MR. A. C. HATCH: Of course, we understand they
could put a foot or half a foot for the irrigation of the
trees as they wanted it.

THE COURT: I think the court would take judicial
notice of the fact half a second foot of water in a ditch
twenty-four miles long it won't reach the end. I think we
can take notice of that without any evidence.

MR. C. C. RICHARDS: I think I have accomplished all
we desire, and will call your Honor's attention to the very
small matter we are discussing here.

THE COURT: My recollection, gentlemen, I may be
wrong, my impression the city proved they needed more water
in the system because of the very uses you are proving now.

MR. C. C. RICHARDS: At the time the case was open?

MR. A. L. BOOTH: In the original case.

MR. C. C. RICHARDS: Everything was gone into then
that we have been going into since. Going into other things
after a while. I don't understand that precludes this inquiry.

THE COURT: The court is not suggesting that pre-
cludes it. I merely suggested it for what it might be worth.

Q Mr. Thompson, is this water that is being used for the irri-
gation of these trees, is it feasible to irrigate the trees
from the lawn sprinkling and from provision that is now made
for them?

A Not for lawn sprinkling.

Q Or from other hydrant service?

A If we have the water, yes.

Q Would it necessitate putting in an expensive system for the
purpose of irrigating by lines of hose if you should dispense
with the irrigation in the way you have been irrigating them?

- A Either have to pack it to them in buckets or dig a hole around each tree to fill it full of water.
- Q If you should resort to the irrigation of the trees through the hydrant system how could it be done, these same trees, as the system is at the present time?
- A You could hook the hose onto a fire hydrant wherever they are at and let an open hose run down by them.

CROSS EXAMINATION by MR. Jacob Evans.

- Q Mr. Thompson if this additional water is awarded for these trees it will be turned into the regular and usual irrigation ditches that are now used and the water distributed to the city lots just as you are now distributing it, will it not?
- A No, not necessarily, they have to have water.
- Q You wouldn't give extra tickets for these trees, would you?
- A How?
- Q You wouldn't give extra tickets for these trees and irrigation of the trees, would you?
- A No, I don't think so.
- Q In other words it would merely add whatever water the court would award for these trees, it would go into the irrigation ditches as now constructed?
- A The schedule we are making now gives every man fifteen minutes extra, so that he will have that for his trees or transfer.
- Q So that it would be distributed to the city lots just as it has heretofore been distributed?
- A Yes.
- Q And each man could put it on his lot or trees as he saw fit?
- A That is right.
- Q In other words, wouldn't make a schedule for trees and another schedule for lots?
- A No sir, we couldn't do it.
- Q Simply make one schedule? A. Yes.
- Q And in effect should the man see fit to use more water on his

city lot he could use it on his city lot and not on his trees, if he wanted to; that would be the effect of it?

A They get part of it.

Q And the fellow who had trees along his lot that required water would get exactly the same amount of time as the person who had no trees?

A What?

Q A person, we will say who owns a city lot with trees on would get only the same amount of time as a person who had a city lot without trees on it?

A I don't know about that, the way we are fixing our schedule now just taking into consideration the amount of land that is irrigated, which has not been before.

Q You take into consideration the lot that is irrigated, and based upon that lot you make up the schedule?

A Now, if he has trees to irrigate that will be added from now on, added onto his.

Q You have always in the past merely made up a schedule based upon the irrigated land, haven't you?

A Yes.

Q In the lot?

A Yes, that is, in the past.

Q That is in the past? A. Yes sir.

Q And you have never taken into consideration the question of the irrigation of the trees?

A Not in the past we have not.

Q And if any additional water is awarded to you it will go into the regular irrigation ditches and be distributed to the lots?

A Yes; but now we are taking into consideration-- we could not fix our schedule, we have started, have spent about a thousand dollars on a schedule already and could not until we got this settled, how much area was for each man and how much water he was to receive.

Q Do you propose then to fix your schedule in such a way as to

take into account every man who has trees and who has not?

A We will have to do it, that is, we will have to fix it where his trees is not along an irrigation ditch, where the water runs.

Q Then you would give a person a little more time where he had a row of trees than where he had no trees at all?

A Yes, under the system we are getting our schedule up.

Q Then if another year a large number of people should plant trees you would rearrange your schedule by giving them water from time to time?

A We would have to, we adjust it every year.

Q You have been doing that all along in the past?

A Not for trees, but have to adjust our schedule every year.

Q If a person owned a city lot, say six by twelve, you awarded him water for that whole lot in the past, didn't you?

A That is correct.

Q If he owned three by twelve, you awarded him water for that whole lot?

A We have in the past.

Q Irrespective of whether he had buildings or crops on it or what?

A That is correct.

Q Merely issued him time for the amount of ground he had?

A All but certain parts.

Q And never at any time took into consideration these trees and issued water to cover the trees?

A No, we have not, but we are now under the new schedule.

REDIRECT EXAMINATION by Mr. C. C. Richards.

Q Whenever a man had a lot or half a lot and went and built a garage, you didn't deduct that from his next year's water, did you?

A How?

Q If a man had a lot, half a lot or quarter of a lot, and con-

cluded to build a garage or conservatory, taking perhaps ten, fifteen or twenty feet of the land, you didn't deduct that from the water right next year? A. No.

Q And if he built a coal shed, you didn't take that off, did you?
A Yes.

THE COURT: I think that has all been gone into. Built any building whatever there was no deduction. If the whole lot was covered with buildings they were given just the same. That was gone into very fully.

MR. C. C. RICHARDS: I think so, I didn't know the court remembered it so correctly.

THE COURT: Tickets were issued for the lot irrespective of the buildings on it.

Q The reason you say there been no issuance of tickets, has that been because you had plenty of water to allow the owners to take and use up to this year?

A Why, the way we have always figured there would be enough waste water running off from the lot to irrigate the tree row.

RECROSS EXAMINATION by Mr. A. C. Hatch.

Q There has always been up to this year sufficient of this waste water to irrigate them, hasn't there?

A Yes, there has been certain years though it has been pretty scarce.

WILLIAM M. BOSTAPH, recalled.

CROSS EXAMINATION by Mr. Jacob Evans.

Q Mr. Bostaph, will you refer to your memorandum book and tell us whether or not the tree line on the north side of Main Street from 1st East Street continuing east, was included as a part of this twenty-four miles of streets?

A On Main Street?

Q Center Street.

A Between what streets?

Q Commencing on the north side of Center Street, at the intersection of Center and 1st East Street, and continuing east?

A Center Street east--

Q From this block out here?

A Academy Avenue?

Q Running past Uncle Jesse Knight's home and past Will Mangums?

A East of Academy Avenue, is it?

Q Yes.

MR. A. C. HATCH: I suggest you be excused to hunt up the reference and take it up later, we are taking up considerable time.

MR. JACOB EVANS: I have no objection to him being recalled. You may stand aside until you find that, and let the other witness go on.

LEROY DIXON recalled.

DIRECT EXAMINATION by Mr. C. C. Richards.

Q Mr. Mayor, you have heard the testimony here of the witnesses in regard to 24.54 acres of land on which we are claiming water right for trees? A. Yes sir.

Q And in the streets of the city are you familiar with the location of those trees in a general way?

A Yes sir.

Q And as to the conditions surrounding them?

A Yes sir.

Q Let me ask you if the fact those trees are requiring water for irrigation to preserve their lives?

A Yes sir, they are, yes sir.

Q And let me also ask you if the waters that are taken for those trees have to be conducted to them separately rather than used

as overflow water from adjoining lands; in other words, whether it has to be separate water?

A Water is usually taken out of the irrigation ditches that carries the water for irrigation purposes and conducted along the tree rows independent of the irrigation system.

Q For that express purpose? A. Yes sir.

Q Has it been the policy of the city, and is it now, to encourage the growth of trees in the streets of the city?

A Yes sir.

Q Is it your desire and purpose to continue the growth of those trees? A. Yes sir.

Q And do you need the water for the irrigation of them for that purpose?

A Yes sir, we do.

Q Anything further on that matter, Mr. Mayor, you desire to say?

A I think not particularly. There is one thing, if I may volunteer it.

Q You may do so.

A I feel the amount of water that is contended for, I have contended all the while is not sufficient to properly irrigate the trees, all the tree rows along every street. Many streets have irrigation ditches conveying water to the lots and lands of the city, and the trees are on those ditch lines and they use a great deal of the water that is being charged for actual measurement of lots or lands in the city lots, and that there has been no claim made for, or no question brought into the consideration, and just as this year especially we have found that unless the trees have been watered they are dying, or not in condition, not in a healthy condition. Those trees that have been neglected have been-- old trees are shedding their leaves, and are not what they should be.

CROSS EXAMINATION by Mr. A. C. Hatch.

Q How long has this been the system of carrying the water in in-

dependent ditches to the trees?

A Every since I have known anything of the city's affairs they have always taken the water from the regular irrigation ditch along the side of the streets, or wherever it is required to the trees.

Q Pardon me, Brother, but that doesn't tell me anything about how long it has been.

A I didn't hear you.

Q I say your answer does not tell me anything about the length of time it has been.

A Well, I might say with definite knowledge since I have been associated with the city administration, six years positively.

Q I think that is all.

WILLIAM M. BOSTAPH recalled.

CROSS EXAMINATION By Mr. Jacob Evans.

A I have those figures now.

Q You may give them.

A On Center Street between 2nd and 3rd East, on the north side I have eight rods; on Center Street between 3rd and 4th east, on the south side, I have twelve rods. Between 5th and 6th east on the north side, I have twenty-four rods, and on the south side twenty-four rods. That is all I have on Center Street east of Academy Avenue.

Q What have you got Center Street west of Academy Avenue?

A On Center street between 5th and 6th west on the south side, I have twenty-four rods. Between 6th and 7th West, on the north side, I have twenty-four rods, and on the south side eight rods. Between 7th and 8th west on the north side, I have twenty-four rods. Between 8th and 9th West on the north side, twenty-four rods. Between 9th and 10th West on the south side twelve rods. That is all I have on Center Street west of Academy Avenue.

BENJAMIN MORGAN ROBERTS, called by the defendant,
Provo City, being first duly sworn, testifies as follows:

DIRECT EXAMINATION by Mr. G. C. Richards.

Q State your full name?

A Benjamin Morgan Roberts.

Q Where do you live?

A Provo .

Q How long have you lived here?

A About sixty-one years, little over.

Q Whereabouts do you live in the city ?

A 1st South and 4th East.

Q How long have you lived there?

A About thirtytwo or three years.

Q Have you a flowing well on your premises?

A Yes sir.

Q How deep is it?

A One hundred and eighty-four feet.

Q How long has it been driven?

A About thirty-one years, I think.

Q What did it originally flow at the time it was driven?

A About forty gallons.

Q Per minute? A. Yes sir.

Q How long did that flow keep up continually?

A Well, I thinkabout ten years.

Q Then what did the well do?

A It keeps dropping down now.

Q Did it begin to fall about that time?

A Yes sir.

Q Has it been falling ever since?

A Comparatively speaking, yes.

Q And until it flows about how much at the present time?

A About three or four gallons, maybe.

Q A minute? A. Yes.

Q Do that within the last twenty years it has flowed from about thirty-five gallons a minute, about forty, to about three gallons a minute? A. Yes sir.

Q Do you know of any other flowing well in your vicinity?

A There was one on the lot right west.

Q Do you know what the history of that well was?

A Just a little seep now.

Q Do you know what it was when it was driven?

A It was pretty good well. I believe they run it into the house years ago.

Q How long ago was that?

A Oh, thirty-five years ago.

Q About how large a flow did it give at that time?

A Well, I didn't--

Q We don't ask you to be accurate, was it a large well or small flow? Good well or small well?

A I think it was a two inch pipe.

Q Approximately what size stream?

A It was a good stream when put down.

Q Did it continue at that rate? A. Yes.

Q How long?

A I wouldn't say, maybe ten years.

Q Then what became of the well?

A Just a little seep now.

Q Went until it is just a seepage? A. Yes sir.

CROSS EXAMINATION by Mr. A. C. Hatch.

Q Do you know whether other wells have been driven in the vicinity since these wells were driven?

A Yes, mine was one of the first.

Q Numerous wells have been driven in the vicinity since your's was driven?

A One right west since mine.

Q Others since that also, haven't there? A. Yes.

Q Has your pipe ever been cleaned in any way since the well was driven? A. No.

Q You don't know what is the cause of the--

A No, I don't.

Q Decreased flow? A. No.

Q You irrigate your entire lot from the city ditches, that is the part that is irrigated? A. Yes sir.

Q And don't depend at all upon the artesian flow for irrigation?

A I use that for my horses.

Q You fill the watering trough?

A Sir.

Q Just to fill the water trough? A. Yes.

ERNEST EKINS called by the defendant, Provo City, being first duly sworn, testifies as follows:

DIRECT EXAMINATION by MC. C. C. Richards.

Q Your name is Ernest Ekings? A. Yes sir.

Q You live in Provo? A. Yes sir.

Q How long have you lived here?

A Fifty-four years.

Q What part of the city do you live in?

A I live on Center Street now.

Q How long have you lived there?

A Four years.

Q Where did you live prior to that?

A On 2nd South and 3rd East.

Q How long were you living there?

A About fifty years.

Q Have you a flowing well? A. Yes sir.

Q Where is it driven?

A I have three, one is driven--

Q Have you one driven on Block 18, Plat D? A. Yes sir.

Q When was that driven?
A Twenty-seven years ago.
Q What depth?
A One hundred ninety-two feet.
Q How much water did the well flow at the time it was driven?
A Forty gallons.
Q How long did it continue about that rate?
A I should judge about five years.
Q Then what became of the stream?
A It gradually diminished.
Q Until what does it flow at the present time?
A I should judge not over five gallons.
Q A minute?
A Yes, a minute.
Q Now, where is your other well, either one of the others; have you one on Block 15, Plat B?
A Yes sir, two of them.
Q When was the first one driven?
A Thirty years ago.
Q And the other was driven about when?
A Three years ago.
Q How much did the first well flow when it was first driven?
A Had a small pipe about an inch and a quarter, about twenty gallons to the minute.
Q How long did it continue about that flow?
A About eight or ten years.
Q Then what became of the stream?
A It gradually dried up until nothing was left of it at all, just a dribble.
Q Is it practically dry now?
A Yes, don't use it at all, I drove another well.
Q And the second well, how about that?
A That is gradually drying it up, it runs probably two-thirds as much.
Q It was driven what depth?

A One hundred and ninety-two feet, I think, or one hundred and ninety-four.

Q How much did it flow at the time it was driven?

A I think about thirty gallons to the minute.

Q How long did it continue at that rate?

A Well, it seemed to be drying up from the time it was drove.

Q How much does it flow now?

A About twenty gallons to the minute.

Q How far apart are those two wells, one that is running and that is practically dry, and the other flowing about twenty gallons?

A About ten feet, eight or ten feet.

Q So that the one that was driven three years ago has diminished its flow from thirty to twenty gallons a minute?

A Yes sir.

Q Since driven? A. Yes sir.

CROSS EXAMINATION By MR. A. C. Hatch.

Q Are there any wells recently driven in that vicinity?

A None that I know of, not right lately.

Q Any of those wells testified by you the same well that is testified to by MR. Roberts? A. No sir.

Q Are they in the vicinity of the Roberts well?

A Beg pardon, I didn't hear it.

Q Vicinity of Ben Roberts Well?

A Well, they are around within two blocks of Ben Roberts.

Q How many wells are there within two blocks of you?

A I couldn't say how many wells there are, maybe half a dozen.

Q About how many?

A Sir?

Q About how many ?

A I don't know any that is running now. My neighbor had one across the fence, but that has dried up entirely.

Q Since you drove yours?

A No, not since, about the same time.

Q You say the one running five gallons a minute, how long has that been driven?

A Twenty-seven years.

Q Twenty-seven years? A. Yes sir.

Q Have you noticed that it has diminished any during the last year?

A Yes sir, gradually gets less.

Q But last year was it less than it was the year before?

A Well, I don't know it was enough less to notice, although it is getting less all the time.

Q You have not measured the flow recently, have you?

A Oh no, I don't measure it every year, but know it is getting less.

Q But you cannot say it will be just five gallons?

A Best of my judgment, I haven't measured it, but it won't water two rods of lawn, running constantly.

Q You say it won't? A. No sir.

Q Five gallons a minute would, wouldn't it, that would be three hundred gallons an hour? A. Yes sir.

Q Two rods of lawn wouldn't require three hundred gallons of water each hour?

A Depends on what kind of soil.

Q Any kind of soil?

A I can run it on one rod.

Q Provo Bench gravel bed it wouldn't require it, would it?

A To get over, yes.

Q Sir?

A Some places, yes. It might not run five gallon, I didn't measure it, but it don't run much.

Q And are you certain it runs one gallon per minute?

A I think I am reasonably certain on one gallon.

Q Now, do you mean by two rods of lawn two rods square, or two square rods of lawn?

A I mean two square rods.

Q Do you know of any other wells in Provo City that have diminished in flow equal with those wells you refer to as your's?

A Yes sir, there is one I remember right across the road east from me that has gone bone dry.

Q Do you know whose that is?

A Mrs. McCullough.

Q How long has that been dug?

A About thirty years, close to it.

Q Do you know anything about the cause for them going dry?

A No, I don't.

Q Do you know whether the pipe has ever been cleaned?

A I know mine has.

Q Sir?

A Yes sir, I know mine has and her's has once.

Q Once?

A Mine was cleaned twice and her's once.

Q Clear to the bottom? A. Yes sir.

Q By driving a rod down it and opening it up?

A Yes sir, I had the well driver clean it.

Q After that was done the flow increased, did it not?

A No sir.

Q Not at all?

A Not enough to speak of at all.

Q When you put down the new well did they drive it deeper than the old one?

A Where I drove the new well I didn't drive the old one. The old one was driven when I bought the place.

Q Do you know its depth?

A I don't know its depth exactly.

Q You don't know whether the new one was driven deeper or not?

A No sir.

Q You say there is one well right across the street from you that has gone wholly dry? A. Yes sir.

Q When did it go dry?

A I cannot say exactly, but it has been about ten years ago.

Q About ten years? A. Yes sir.

Q But you put down the well three years ago and got a flow of twenty gallons?

A About thirty gallons.

Q About thirty gallons, which is now twenty?

A Yes sir.

Q How far is this dry well from that well?

A Right diagonally across the street.

Q About how far?

A Oh, probably twelve rods.

REDIRECT EXAMINATION by MR. C. C. Richards.

Q You said the well you drove three years ago was flowing thirty gallons and now about twenty; is it gradually failing or a sudden drop?

A Gradually failing yes sir.

Q Getting less this year than last year?

A Yes sir.

W. K. FARRER, recalled.

DIRECT EXAMINATION by MR. C. C. Richards.

Q You have been sworn? A. Yes sir.

Q I will ask you, Mr. Farrer, if you are acquainted, or if you have any flowing wells on your premises?

A Yes sir.

Q Where do you live?

A I live on Block 51, Plat A., Provo City.

Q Where is that from here?

A That is in the western portion of Provo.

Q Have you a well on your place? A. Yes sir.

Q When was it driven?

A About twenty years ago, I believe, something like twenty years.

Q As you remember what was the flow at the time, right after it was driven?

A Somewhere around about thirty gallons, I suppose.

Q About how long did it continue at that flow?

A Just a few years, but I could not tell you how long. I have had it cleaned out three or four different times.

Q What is it flowing at the present time?

A I think it was flowing five or six gallons, maybe a little more somewhere right in there.

Q Has it been gradually diminishing in flow?

A Yes sir.

Q Flowing less this year than last year?

A Yes sir.

Q Less last year than the year before?

A Yes sir, as near as I can tell.

Q Have you any other well than that well?

A I drove a well about thirty years ago right straight south from here, something like thirty years ago.

Q What was the flow of that well at the time?

A That well was probably about twenty gallons, small pipe.

Q How long did it continue at that, about that flow?

A I suppose about eight or ten years, something like that.

Q Did the stream begin to diminish at that time?

A Yes sir, we have had that cleaned out quite a few times.

Q What is it flowing at the present time?

A Just enough to fill a water trough for horses.

Q Any value whatever for irrigation?

A No sir, none whatever.

Q Have you any other well?

A Not in Provo City.

Q Do you know of any other well in the vicinity of your home,

or throughout the city here on the city lots?

A Yes sir.

Q Which of them can you tell us of?

A I know of one a block south, on the second block south from where I live.

Q Whose well is that?

A That is Mary Vincent has a well drove.

Q About how long ago was that?

A I think that well was drove about twenty years ago.

Q What kind of a flow did she get?

A Fairly good flow, probably thirty-five or forty gallons.

Q You mean per minute? A. Yes sir.

Q How long did it continue to run in that way?

A I could not tell you just exactly how long it did, but here a number of years ago it went dry and it has been dry twice to my personal knowledge, and comes on again. Today it is running a small stream of water, I couldn't say how much.

Q Do you know whether the well has been cleaned?

A I think it has, but I couldn't say.

Q You say it has gone dry twice to your personal knowledge and today running a small stream? A. Yes.

Q What quantity?

A I couldn't say.

Q Enough for irrigation.

A No sir, I don't think so.

Q Do you know of any other wells?

A Yes sir, I know one on the same block I live on.

Q Whose well is that?

A Abram Holliday drove that.

Q When was that driven?

A That was driven, I think it was just prior to the time I drove mine, probably twenty-five years.

Q What kind of a flow did it have?

A Something about the same as mine.

Q How long did it so continue?

A For a number of years, probably eight or ten years.

Q Then what became of the stream?

A Stream is very small at the present time.

Q Has been failing until there is but little of it?

A Little of it.

Q Has it been so for some time, or is it a gradual failing.

A Gradual failing.

Q Do you know of any other wells that have been under your observation?

A I know of one other well.

Q Where is that?

A That is on 9th West between 1st and 2nd South.

Q Whose well is that?

A George T. Peay, Jr.

Q How far is that from your place?

A About three blocks west and one north.

Q When was that well driven?

A I couldn't say exactly when it was driven, it must be along about twenty years.

Q What kind of a stream did it flow at the beginning?

A When I first saw the well it was pretty good size stream, probably forty gallons.

Q Do you know how long it continued at that?

A No sir, I don't.

Q Do you know what it is flowing at the present time?

A I know it flows out of an inch and a half pipe, but doesn't flow over two or three inches, just bubbles over the top of the pipe.

Q What would you estimate the flow?

A I should say about eight or ten gallons.

Q Do you know how long it has been flowing at that rate?

A I pass by every summer quite often.

Q Has it been gradually diminishing, or has it been stationary?

A Been going down hill, my observation.

Q Do you know of any others? A. No sir.

CROSS EXAMINATION by Mr. A. C. Hatch.

Q Do you know of any new wells that have been driven in the vicinity on higher ground, near the mouth of the canyon?

A No sir, I don't.

Q Or nearer to the mountain east?

A No sir, I don't know of any.

Q Do you know the well of Dr. Pike's down here, former residence?

A No, I don't know that I do. I remember the fountain that run from it one time.

Q It come from the artesian well?

A I think it did first, but I believe they put the city water in later.

Q You know the Roberts house flowing well?

A No sir.

Q You know there is a flowing well there?

A No sir, I don't.

Q You have seen the fountain there?

A Yes sir, I have seen the fountain, but I didn't know where the water came from.

Q Are you acquainted with the well on the Farnsworth place on 1st North? A. No sir.

Q Or the Ben Backman place?

A No sir, I don't have occasion to go up there.

Q Are you acquainted with the well on the old Smoot double lot down here on 1st South, double house?

A No sir, I don't know anything about the wells.

Q Do you know of any well that has not decreased in its flow up to the present year ?

A No sir, I don't.

Q Within the city?

A My personal knowledge of the flowing well system is they are all a failure.

Q That is those that you have observed?

A Yes sir.

Q You don't know that the Roberts people sprinkle their lawn at their fountain and have for years from their flowing well?

A No, I don't.

Q And that the water runs quite a lot into the irrigation system whenever it is allowed to run from the pipe?

A No sir, I don't know of it.

Q Do you know the source of artesian water?

A Where it comes from?

Q Yes. A. Yes sir.

Q Where?

A Out of the ground.

Q Of course it originally comes from the clouds, I presume too?

A Well, it might do sometime, certainly.

Q But you have never made a study of artesian water system, have you? A. No sir.

Q And your experience has been on those few wells you have noticed in your immediate vicinity ?

A No sir, I have had other experience with wells.

Q Where, artesian wells.

A I have one on the farm.

Q Where is that?

A That is just north of the road that goes to the sugar factory, about two hundred rods.

Q What has been the condition as to that?

A That was a very large well one time, but today it is down probably one-third, or two-fifths of its natural flow.

Q How was it last year?

A Well, getting smaller all the time.

Q As compared with when it was first driven ?

A I would say it was more than a third less.

Q How long had it been since it was driven?

A Since it was drove?

- Q Yes.
- A Drove about twenty-five years ago.
- Q What does it flow now?
- A I never measured it.
- Q About, approximately.
- A I think it would flow twenty-five gallon now, and maybe better.
- Q Are you acquainted with the flowing well on the Will Clegg farm?
- A Craig?
- Q Clegg farm?
- A No sir, I am not.
- Q At Linden? A. No sir.
- Q Have you been along the drive by the sugar slicing plant through to Pleasant Grove on that lower county road?
- A Yes sir.
- Q And have you noticed a large flowing well, about a four inch pipe about five miles out?
- A I know there is two or three large wells on the Lake View road drove with five inch pipe.
- Q Have you noticed any increase or decrease in the flow of those wells?
- A No sir, I have not been over there this season.
- Q Do you know whether they were driven since you drove your well?
- A Yes, I think they were driven since I drove mine, but they are a long ways from it.
- Q Two or three miles away, aren't they?
- A Seven or eight.
- Q Did you ask me if it was seven or eight, or did you say it was seven or eight?
- A I said I thought it was seven or eight miles.
- Q That is what I understood you, but Mr. Booth understood you differently. I think that is all.
-

JOSEPH I. BULLOCK, called by the defendant, Provo City, being first duly sworn, testifies as follows:

DIRECT EXAMINATION by Mr. C. C. Richards.

- Q Your name is Joseph I. Bullock? A. Yes sir.
- Q You reside in Provo? A. Yes sir.
- Q Whereabouts in the city do you live?
- A On 3rd South and 5th East.
- Q Have you a flowing well on your place?
- A I did have one, time, ain't got none now.
- Q When did you have the well?
- A Last summer.
- Q When was it driven?
- A Drove eight years ago.
- Q By you? A. Yes sir.
- Q And what did it flow at the time it was driven?
- A Well, nearest estimate to it, some said seventy-five gallons, some said a hundred, big flow.
- Q Seventy-five to a hundred gallons?
- A Yes.
- Q How long did it continue to flow that quantity or approximately that?
- A It flowed for about two months, then it commenced to going dry.
- Q Did it go dry rapidly or gradually?
- A What?
- Q Did it go dry rapidly or gradually, did it fall rapidly or gradually?
- A Yes, it failed pretty rapidly.
- Q Is the well entirely dry now?
- A It ain't running at all now.
- Q It isn't running at all now?
- A Just along the top.
- Q When did it become dry?

A Last year it went dry. Quit dropping on the third day of January.

Q A year and a half ago? A. Yes.

Q And it was failing rapidly from the time it was driven until --
A Yes.

Q It did go dry?

A Went dry in December year it was drove. It was drove in October.

Q Now, have you any other wells?

A How?

Q Have you any other wells, flowing wells?

A Not there, I have some on my farm along west of it.

Q Where is that?

A Three miles west from there.

Q Do you know of any flowing wells near you, owned by your neighbors?
A. No.

CROSS EXAMINATION by MR. A. C. Hatch.

Q Where is your well situated?

A What is it?

Q Where is your flowing well situated, on your city lot?

A Right there at my house.

Q Do you know of any wells having been driven since your's was driven in that vicinity? A. No.

Q Or higher up toward the mountain? A. No.

Q Either north or south? A. No.

Q Or below your well in the bottoms?

A No, I don't know any that has been driven since I drove mine at all around in the neighborhood. Mine is the deepest well there is in the town, I guess.

Q How deep is your's?

A Four hundred and twenty feet.

Q And it was driven about eight years ago?

A How?

Q About eight years ago?

A Eight years ago this next winter.

Q What sized pipe was it?

A What size?

Q Yes.

A Two inch well.

Q You say it went dry last October, year ago?

A Went dry every winter since it was drove, then it comes up again.

Q It never has been a permanent flow since it was driven?

A No.

Q But during certain parts of the year it does flow?

A During the summer time it flowed like the dickens until this summer.

Q Until this summer it flowed equal to any other summer?

A Yes.

Q And this summer being an extraordinarily light snow fall--

A I don't know anything about that.

Q You know it is, don't you?

A It didn't flow anyhow.

Q You have heretofore had experience, have you not, in springs going dry?

A No, I have never had any experience.

Q I call your attention to Blue Mountain, Colorado?

A I never had no springs go dry.

Q You never owned any springs, did you?

A How?

Q You never owned any springs, did you? A. No.

Q But you do know of springs going dry, don't you?

A I have heard of them.

Q And you have actually seen it demonstrated where there was a living stream for a whole year, the next year was absolutely dry, haven't you?

A I don't know where.

Q I call your attention to Blue Mountain, Colorado. You are acquainted there, aren't you?

A I don't know where I ever seen them going dry.

Q Sir?

A I don't know where I have seen any of them going dry.

Q You have seen the water there flowing a constant stream one whole summer and the nextt summer an absolutely dry channel, haven't you?

A Where is that?

Q In Blue Mountain, Colorado?

A I never noticed it.

Q You have seen a lake there one year where a thousand head of cattle could be irrigated and the next year a dust bed, haven't you?

A I was never on Blue Mountain but one summer.

Q That accounts for it, you are not acquainted with those circumstances? A. No.

Q It was your brother John.

A John has been all over it.

REDIRECT EXAMINATION by Mr. C. C. Richards.

Q Now, I misunderstood you, I guess. You say your well has been flowing every year?

A Every summer, it comes up along about the 20th of May.

Q I misunderstood you then?

A Runs a good stream.

Q What kind of a flow have you been getting each summer?

A A good big flow.

Q How, compared with your first flow?

A I couldn't tell any difference.

Q Then you say it dries up?

A Dries up.

Q When?

A Along about December and January.

- Q That has been the case each year since the well was driven?
A Yes sir.
Q Until this year? A. Yes sir.
Q You say you have not water this year?
A No water to speak of only just for the chickens.
-

JOEL A. JOHNSON, called by the defendant Provo City, being first duly sworn, testifies as follows:

DIRECT EXAMINATION by MR. C. C. Richards.

- Q Mr. Johnson, where do you live?
A I live 337 North 7th West, between 3rd and 4th North.
Q In this city? A. Yes sir.
Q Your name is Joel A. Johnson?
A Joel A. Johnson.
Q Have you a flowing well on your property?
A Yes sir.
Q You live on Block 103, Plat A. do you ?
A Block 103, just about the center of the block.
Q How long since that well was driven?
A As near as I can recollect I drove it in 1895, summer.
Q You remember the depth of the well?
A Down 145 feet, piped all the way.
Q What kind of a stream did you get at the time you drove it?
A It went eighteen inches to two feet above the pipe when it was drove.
Q How long did it continue that flow?
A Between two and three years.
Q Then what change was in the stream, if any?
A It went down about three-quarters or more, maybe more.
Q How long did it continue that way?
A Well, it kept gradually going down and I had it drilled out the second time.

Q How long did it continue that way?

A Well, it come back after I had it drilled and lasted about a year and a half, two years.

Q Then what change?

A Then it went down again.

Q And until the present what is the size of the stream flowing?

A Well, time of the earthquake at Salt Lake, after the San Francisco quake it opened up and run for about six or eight months again pretty fair stream; then it has been diminishing from that time until now.

Q What size stream have you at the present time?

A I got a stream about the size of my thumb running from it now, I never measured it.

Q When the flow was the greatest how much land did you irrigated from it?

A Oh, maybe eighth of an acre.

Q Was it sufficient to irrigate any quantity at all?

A Sir.

Q Is the stream large enough now to do you any good at all?

A I could not run it across this room.

Q Do you know of any other wells in your immediate locality?

A Yes sir, there is two of them on the next block west of me, about nineteen rods from mine.

Q Whose wells are those?

A One of them is drove by Robert Lidyard, and the other Leroy Dixon, about twelve or thirteen rods apart.

Q Now speaking of Mr. Lidyard's well, about when was that driven, do you remember?

A It was driven just shortly after mine was driven.

Q What kind of a flow did he get there?

A He got a good, big, strong, flow, pretty near like mine.

Q How long did it continue?

A Oh, I guess couple, three years, then it went down. Then they went at it and drilled it out further and drove down

several feet. I don't recollect just how far, and they got another stream about as big as it was when they first drove it.

Q How long did it continue?

A I don't know exactly, but it has been going down lately.

Q Well what kind of a stream is it flowing at the present time?

A Very small stream. I saw it run across the lot the other day, and they could not run across eight rods.

Q Wasn't large enough to run across eight rods. Do you think it was of sufficient size to be of any assistance in irrigation?

A They claim they cannot irrigate anything with it at all.

Q How about the other well you speak of, Mayor Dixon?

A That was a good, big flow before it went totally dry, and cleaned it out, and been a little stream since. I have not been to it lately.

Q About when was it driven?

A That I couldn't tell you.

Q You remember seeing a large stream?

A Yes, I have,

Q And it disappeared?

A I seen it when it was first drove.

Q How much of a stream was it last you saw of it?

A Well, it was very small, it has been several years since I was right to the well.

WALTER COX called by the defendant Provo City, being first duly sworn, testifies as follows:

DIRECT EXAMINATION by Mr. C. C. Richards.

Q Your name is Walter Cox? A. Yes sir.

Q You live in Provo? A. Yes sir.

Q Whereabouts in the city do you live?

A West Center.

Q How long have you lived here?
A About forty-two years.
Q Have you any flowing wells? A. Yes.
Q Where?
A West Center.
Q And when was it driven?
A Fifteen years ago.
Q What flow did it have at the time it was driven?
A About thirty-five gallons a minute.
Q How long did it continue at that?
A Just as good now as it was then.
Q Been no change in it? A. No.
Q Do you know of any other wells in that immediate vicinity?
A Yes sir.
Q Who has them?
A My neighbor across the road, John Nelson, has one.
Q How far from your well is that, the one that is flowing the full stream?
A Oh, about two blocks.
Q Which well was driven first, your's or his?
A Mine.
Q His well was driven after your's was in? A. Yes.
Q And do you know what kind of a stream he gets?
A Yes, he has about twenty gallons, I think.
Q At the time it was driven? A. Yes.
Q How long did it continue at that?
A Not very long.
Q What time would you suggest?
A After a couple of years it begin to go down some.
Q How long did it continue to diminish?
A Until he cleaned it out.
Q Then did the stream return?
A Then the stream increased again for a while.
Q How long did it continue at increased flow?

A About two years, I would judge.

Q Then what became of the stream?

A Oh, she runs now about three or four gallons a minute, I guess is all.

Q That is John Nelson's well? A. Yes.

Q And how long has it been running at this diminished rate?

A What?

Q How long has it been running at this diminished rate?

A Why, a couple of years it has been running small stream.

Q Been gradually cutting off, has it? A. Yes.

Q Are there any other wells in your immediate vicinity you are acquainted with?

A There was one driven by my neighbor on my line between him and me.

Q Whose well was that?

A That was John W. Hoover drove a well, that is about probably fourteen years ago, twelve or fourteen years ago.

Q That is on the dividing line between you and Mr. Hoover?

A Yes.

Q Now, how much did it flow at that time?

A About twenty gallons, I would judge.

Q How much?

A About twenty gallons.

Q How long did it continue at that flow?

A About a couple years.

Q Then what change was there in the stream?

A Why, she died out.

Q Entirely?

A Yes, she died out entirely.

Q Hasn't been flowing any since? A. No.

Q Have you any other wells down there?

A No, my neighbors have not.

Q Have you any other wells?

A Yes, I drove a well at the north top end of my field.

Q In the same manner?

A Yes, about fourteen years ago.

Q How far was that from the well that has been flowing thirty-five
S gallons all this time?

A Be about thirty or forty rods north.

Q Which well was driven first?

A The one I drove first, the one that throwed thirty-five gallons
fifteen years ago.

Q The first well you drove is still flowing?

A Yes sir.

Q These others have all been driven since? A. Yes sir,

Q Don't seem to have affected that flow?

A Just as good as ever.

Q Now, tell us about the other well?

A It gradually went dry.

Q How long ago did you drive it?

A How long since I drove it?

Q Yes.

A Fourteen years.

Q How long did it continue with that flow?

A About two years.

Q How much of a stream did you get?

A Twenty gallons.

Q Continued for about two years, then what change came?

A Simply died away.

Q Entirely dry now?

A Dry now.

Q Are there any other wells down there in your immediate vicinity?

A I don't know of any.

Q What about Joseph Dunn's well?

A Who?

Q Joseph Dunn.

A In provo City here?

Q Yes.

A I drove a well Joseph Dunn owns now, thirty-five years ago.

Q That is on Block 60, Plat A?

A On 7th West and 1st South.

Q How much did it flow at that time?

A About thirty-five gallons.

Q A minute? A. Yes.

Q Do you know about how long it continued to flow at that rate?

A It continued that way for five years I lived there.

Q And then did the change come?

A I don't know as to when she came, but I saw it sometime ago, examined it, and looked to be running about eight or ten gallons a minute, the same old well.

Q Same old well, but you don't know when the change come, sometime between five years ago and short time ago?

A I don't know when.

Q Do you know of any others?

A Yes, I drove a well across the road in my other residence, about the same time.

Q Is that up town here, or by the other place?

A That is across the road from Mt. Dunn.

Q What kind of a well was that?

A That is just as good as the other one, about thirty-five gallons.

Q How long did it continue to run at that?

A All the time I lived there, that was probably ten years.

Q How long ago did you drive it?

A What she is running now, I don't know; I believe she is all right yet.

Q You don't know as to that?

A I have not been there to see, but I believe she is all right, I haven't heard.

Q You haven't heard one way or the other?

A No.

Q How far from the Dunn well was that?

A That is about six rods.

CROSS EXAMINATION by Mr. A. C. Hatch

Q Which was driven first, Dunn well or this one of your's just across the road?

A Sir?

Q Which was driven first, the Dunn well or your's just across the road?

A Mine first. They are both mine.

Q They were both yours? A. Yes.

Q Which one was driven first, one on the Dunn property or across the road?

A One on the east, and Dunn is on the west.

Q Which was the deeper of the two? A. Yes.

Q Which was the deeper of the two?

A Which was the deeper?

Q Yes.

A They are about the same, Judge.

Q Well, do you know? A. Yes.

Q Which was deeper?

A It is one hundred and eighty-five feet, something that neighborhood, both of them.

Q Do you know whether one of them is more or less than one hundred and eighty-five feet?

A No, I don't; but it is in that neighborhood.

Q You don't know which well is deeper than the other?

A No, I don't.

Q If there is any difference?

A No, I don't.

Q Is the surface ground about level, about the same?

A Yes, about the same.

Q Now, with regard to the wells you first testified to, are they within the Prove City limits? A. Yes.

Q Or on the farm west?

A Yes, they are in the city.

Q Within the city limits? A. Yes sir.

Q Within the lot area?

- A Sir?
- Q Is it within the lot area? or within the farm area?
- A Farm area.
- Q Is it watered from the Provo City ditches or from Little Dry Creek?
- A I cannot hear.
- Q Is it irrigated, that land, from Provo City, or from Little Dry Creek?
- A From Little Dry Creek.
- Q It is not within the Provo City? A. No sir.
- Q System? A. No sir.
- Q The Dunn lot and the other lot are within the Provo City?
- A Yes sir.
-

SCOTT P. STEWART, recalled.

CROSS EXAMINATION by MR. A. C. Hatch.

- Q Did you include within the area of irrigated land any of the lands of these parties having wells as testified, as being irrigated from the artesian water?
- A Some of these parties who have testified, some of the land of these parties, of some of these parties that have testified was deducted from the irrigation right and charged up to the artesian right, or does not appear in the acreage submitted.
- Q Which ones are they?
- A The Dunn, Joseph W. Dunn place, just testified to by Mr. Cox.
- Q How much. We will postpone it, the court will be in session in the morning?

THE COURT: No, I think we will finish this evening. I am going to finish tonight if we have to have a night session.

MR. C. C. RICHARDS: I think we can close before six o'clock, what we have.

MR. A. C. HATCH: You may leave the stand.

MR. WEDGEWOOD: I want to ask two or three questions.

CROSS EXAMINATION by Mr. Wedgewood.

Q Mr. Stewart, turn around a moment. Now, you, as I understood, said in your opinion there was six per cent of this acreage, 505.73 which was at present occupied by something that excludes present irrigation?

A I cannot say it is occupied by things that excludes it, because it might be a lane.

Q Cut it out now for a minute, please--

MR. C. C. RICHARDS: Let it in.

Q I will give you a chance, I only want a fair answer to my question.

MR. C. C. RICHARDS: He is giving it to you.

Q It is not at present irrigated?

A It is not at present irrigated.

Q Because something is being done with the land so that it could not be irrigated at the same time this is being done?

A It is not being irrigated.

Q And whether it will be irrigated in the future is a pure guess on your part? A. Yes sir.

Q Whether a greater per cent than six per cent will not be irrigated in the future is a pure guess?

A Yes sir.

Q Now then, just one question. I would like to make this witness my own witness, it is not proper cross examination.

MR. C. C. RICHARDS: Go ahead.

Q As Judge Hatch said there five gallons per minute would be three hundred gallons per hour, would it not?

A Yes sir.

Q That would be seven and a half gallons in a cubic foot, is there not? A. Yes sir.

Q So that would be substantially forty cubic feet per hour

flowing from the well, flowing five gallons per minute?

A No, I think not.

Q Seven and a half into three hundred goes forty-five.

THE COURT: That is palpable it would be forty-five.

Q And the area of two square rods would be substantially 544.4 square feet?

A Approximately.

Q And forty gallons per hour flowing twenty-four hours would be 960 gallons, would it not, 960 cubic feet?

A Approximately.

Q So then approximately five gallons per minute would cover two square rods substantially 1.8 feet deep every twenty-four hours, would it not? That is, 544.5 will go into 960 substantially 1.8?

A. Yes sir.

RE-CROSS EXAMINATION By Mr. A. C. Hatch.

Q Mr. Stewart, will you make a note of the different ones who testified as to having artesian wells, and whether or not any portion of the lots are irrigated from the artesian wells and what, if any portion, has been excluded by you in this 505.73 second feet by reason of the artesian wells, and we will call you later-- 505.73 acres, you understand the question?

A I believe I understand the question, but on the spur of the moment, be difficult for me to go into every one of these.

Q Don't do it now; I say we will excuse you while you look it up and will call you later on that subject?

THE COURT: Now Judge Booth.

MR. JOHN E. BOOTH: Your Honor please, it was expected the court would adjourn at five o'clock, and I find my witness has gone, and I will ask this matter of mine may go over until the next sitting.

MR. F. S. RICHARDS: It was stipulated between the plaintiff and Provo City the other day that 16½ second feet of water for the Factory race would be substituted for the 13.75

feet. We desire to offer evidence now to show that the 13.75 would not supply the demand or turn the machinery of the mills and that the $16\frac{1}{2}$ feet is essential for that purpose. There will be no cross examination, I assume, on this matter; won't take but a moment to do it.

WILLIAM M. BOSTAPH, recalled.

DIRECT EXAMINATION by Mr. C. C. Richards.

- Q You have examined the flow of the water in what is known as the Factory race? A. Yes sir.
- Q Being used by the mills and manufacturing down there?
- A Yes sir.
- Q And do you know whether 13.75 second feet will operate those mills?
- A Well no, 13.75 second feet will not.
- Q Will $16\frac{1}{2}$ second feet constant flow do it?
- A $16\frac{1}{2}$ second feet constant flow would for a time operate them.
- Q I am speaking now just $16\frac{1}{2}$?
- A No, $16\frac{1}{2}$ will not.
- Q That is what I am asking you? A. No.
- Q Now, assuming that the water, the equivalent of $16\frac{1}{2}$ of $13\frac{1}{2}$ constant feet, $13\frac{3}{4}$ constant feet, supplied to the wheels eleven hours a day for six days a week or any time equivalent of that, will that turn the wheels, 13.75?
- A It would give some power, but it would not operate those mills successfully.
- Q Would it require as much as $16\frac{1}{2}$ second feet constant flow, or the equivalent of that, and applied, say eleven hours a day for six days in a week to operate those mills successfully?
- A That would make a practical, effective operation, not to its maximum, but would operate the mill.
- Q To what percentage of the maximum or full running ability of

the mill would be produced by that $16\frac{1}{2}$ second feet, or the equivalent of that?

A It would be somewhere about two-thirds to three-fourths.

Q Of its full capacity?

A Of the maximum power.

SCOTT P. STEWART recalled.

DIRECT EXAMINATION by Mr. C. C. Richards.

Q You are acquainted with the Factory race?

A Yes sir.

Q Quantity of water flowing in it? A. Yes sir.

Q The character of the mills located along the stream?

A Yes sir.

Q Quantity of water they require to operate?

A Yes sir.

Q I will ask you if 13.75 feet of water flowing in the channel will operate the mill?

A I would say not.

Q Or $16\frac{1}{2}$ feet?

A Not necessarily.

Q I was just asking the constant stream.

A No sir.

Q Then will the equivalent of 13.75 feet flowing eleven hours a day for six days of the week operate the mills in your opinion?

A Not in my opinion.

Q Will any less than $16\frac{1}{2}$ second feet, that is, the equivalent of $16\frac{1}{2}$ second constant flow applied to the wheels eleven hours a day for six days in the week operate them successfully?

A I think not.

Q What percentage of the maximum power or full power of the machinery of those mills can be operated in your opinion with

267
the equivalent of 16½ second feet constant flow applied to the wheels eleven hours a day six days in the week?

A Some of the mills I think it would operate practically to full capacity. Other of the mills perhaps to 60 to 70 per cent capacity.

MR. F. S. RICHARDS: Your Honor please, I don't know whether the qualification of these two gentlemen as civil engineers to testify as experts has been established by the record.

THE COURT: It has been conceded.

MR. F. S. RICHARDS: If not I desire to have that admission.

MR. JACOB EVANS: It is admitted.

THE COURT: Mr. Stewart's qualification was shown early in the case, and Mr. Bostaph's was admitted today.

MR. F. S. RICHARDS: There is one other matter, your Honor please, we desire to introduce testimony upon, very brief indeed, but I think perhaps under the circumstances it might better be postponed until a future time, and that is the suggestion that has been made, or motion that has been made, to extent the time for the apportionment of the water instead of having it changed on the 20th of July, to have an extension until the first of September, first of August-- from the 20th of July until the first of August. I understand--

THE COURT: Change in the duty?

MR. F. S. RICHARDS: Yes, to have the same duty continue from the 20th of July until the first of August instead of changing the duty on the 20th. Now, I am advised, your Honor please, there are some other parties to the action who desire to join in that request, and we therefore suggest it might properly be deferred until some other time.

MR. A. C. HATCH: Mr. Ray is opposing that change.

MR. JACOB EVANS: And wants notice.

MR. A. C. HATCH: And wanted notice, and as I under-

stand, we will oppose that change.

MR. F. S. RICHARDS: I just desire to call the court's attention to it so that it won't be understood we waived that.

MR. A. C. HATCH: The grounds upon which it is based in the motion is that the crops are later in maturing in Provo City than in the area surrounding.

MR. F. S. RICHARDS: What we propose to show is between the 20th of July, as I am advised and first of August there is crops of grain have to be irrigated, and that it is not until about the first that the necessity for the use of the water diminishes. Now reserving that, if your Honor please, I think that we are through for the present.

MR. JACOB EVANS: If the court please, I didn't understand this matter was opened up for the purpose of determining that question, and I am satisfied that there will be a great deal of opposition on the part of the Provo Bench and all the Bench people. In other words, the contention will be made on the part of practically all the parties there is not any such difference, so far as the season is concerned in Provo as there is on the Bench, and if that is opened up, they seek to have the water turned to them at a different time than they want it turned to the other people, and it will open up new questions which will probably involve considerable evidence.

THE COURT: Is that correct, does it include that? Does it involve a change of the water at a different time?

MR. F. S. RICHARDS: Yes.

MR. JACOB EVANS: In other words, you want to put Provo City in a class by itself, as I understand it.

MR. C. C. RICHARDS: We are not asking that.

THE COURT: It is pretty near in a class by itself anyhow.

MR. F. S. RICHARDS: Your Honor please, we are not particularly-- don't desire to be in any class by ourselves.

We are simply stating so far as Provo City is concerned the duty should continue, same duty should continue from the 20th of July until the first of August. Now, we are advised there are some other parties to the action who take the same view of the matter. As to that, of course, we have nothing to say, and we are not speaking for the others.

MR. DAVID H. JONES: If your Honor pleases, Mr. Ray is not here, and Timpanogos Canal Company also asks the same thing, as our crops on the East Bench are a little later than they are on the other Bench. Now, the land on Provo Bench and around in that vicinity, mature at least ten days to two weeks sooner than ours does. And we ask the same duty continue to the first of August. Also in regard to the decision of the court we do not wish to take any part any further in the decision, as we are satisfied it is as good as we can get, and this controversy that is going on between the Power Plant and Provo Reservoir and Provo Bench Canal, why, we don't wish to take any part in that.

THE COURT: you mean with reference to the Blue Cliff right?

MR. JONES: Yes.

MR. A. C. HATCH: I understand Mr. Ray is no longer representing the Timpanogos Canal Company in this case.

MR. JONES: Mr. Ray was representing us until he made his final-- or when it came to the final argument before the court, and then he claimed that he was through with our case.

MR. A. C. HATCH: And you paid him?

MR. JONES: We paid him up until then.

MR. A. C. HATCH: And discharged him?

MR. JONES: Well, we claimed he was our attorney until the case closed, but he claims different.

MR. A. C. HATCH: That is why you are appearing here in your own behalf today?

MR. JONES: Yes sir.

MR. A. C. HATCH: That is a question, Mr. Ray took an exception today on behalf of the Timpanogos Irrigation Company, and I had understood he no longer represented that company. I would like to ask Mr. Stewart that question before we close.

SCOTT P. STEWART recalled.

CROSS EXAMINATION by Mr. A. C. Hatch.

A I can give some of those that have been mentioned, but not all.

Q Now, the Dunn, the Dunn property is wholly irrigated as yet from the artesian water, is it not?

A I would say no.

Q Did you exclude the whole of the property?

A No sir.

Q Just excluded that portion not now irrigated?

A Yes sir.

Q Do you know whether they have ever used any city water upon that property other than from the City mains or water system?

A I would say they have used other water.

Q Since the artesian well was dug?

A I think so.

Q How much did you exclude by reason of the artesian well?

A Excluded twenty-four rods or fifteen hundredths acres.

Q And the water flowing from the artesian well at the present time is ample to irrigate that?

A If handled continually I would say yes.

Q Was that the case as to all of these artesian wells that you excluded lands by reason of the wells being--

A If they had detailed attention I would say they would all irrigate the area charged to them.

REDIRECT EXAMINATION by Mr. C. C. Richards.

- Q You say the water would have to be used continuously to accomplish that?
- A On some of the tracts I would say yes it would have to be.
- Q Diverting continuously from one place and right along keep the water applied all the time?
- A I would say have to be a good deal of detail looking after in every instance.
- Q Far more so than if the water was taken from the irrigating ditches?
- A Far more attention.
- Q In other words, a reservoir or cistern, something would have to be supplied to retain the water?
- A I would say so.
- Q That is applicable to all of them?
- A Applicable to all.
- Q Where you have made allowance? A. Yes sir.
- Q Necessitate extra expense and irrigation?
- A Yes.
- Q Constant attention one weeks end to the other to go the rounds?
- A Yes sir.

RECROSS EXAMINATION by Mr. A. C. Hatch.

- Q Would it require any more attention than is necessary to be given to the sprinkling for the city mains?
- A In general it would.
- Q Change it from place to place?
- A In general it would require more attention than the city hose, because the pressure is not so great.
- Q It would have to be changed oftener? A. Yes sir.
- Q Or not so often, which?
- A It would have to be --
- Q Pressure not so great it would run longer in a place?
- A It would have to be changed oftener than a hose.

117
Q If the pressure was not so great it would run less water, wouldn't it? A. Yes sir.

Q In a given time? A. Yes sir.

Q Then it wouldn't need changing as often as where there was a greater quantity of water, would it?

A Not to use the water economically.

MR. JACOB EVANS: If the court please, as I understand it now, I am addressing Mr. Richards, the farm acreage will remain the same.

MR. C. C. RICHARDS: We are not proposing to offer testimony in regard to that.

MR. JACOB EVANS: No evidence will be offered concerning the acreage of the farm lots?

MR. C. C. RICHARDS: No, we are not proposing to offer evidence on that at all.

MR. JACOB EVANS: This evidence went only to the city lots.

MR. C. C. RICHARDS: We introduced no evidence as to that.

MR. JACOB EVANS: There will be no change asked as to the farm acreage by reason of the farm lots.

MR. A. C. HATCH: That is as to the duty. I didn't quite understand Mr. Evans's question. The matter, and only matter Mr. Richards said they proposed further to offer was the question of the change from July 20th to --

THE COURT: To August first.

MR. A. C. HATCH: From July 20th, as it now is, to July 20th, they ask that be changed from June 20th to August first.

THE COURT: Yes.

MR. A. C. HATCH: And they ask that only as to Provo City?

MR. C. C. RICHARDS: We are not representing anyone else.

MR. A. C. HATCH: Of course if that is gone into it

would really change the duty of the water, and I understood the court to say that would not be gone into at the time of the filing of their motion. That is why I wanted to be clear on it.

MR. C. C. RICHARDS: Our position, to state it again, is this: That down here we require the water to irrigate between the 20th of July and first of August, our last watering, we need it later than they do on the higher lands, and that is why we ask so far as we are concerned, to have the period extended until the first day of August before we drop the duty. Some understanding in one sense it is a change of duty, another it is not. It is simply extending the present fixed duty by the court ten days, pushing it on ten days until we can get the last water for our crops down here, which are ten days later than on the higher land.

THE COURT: I don't think I will open it up, I think I have gone to the limit opening this case up, and I can see that would be opening up a scope that might take a week or ten days.

MR. A. C. HATCH: Take a week or ten days in any event.

THE COURT: we spent so much time on the question of the duty of water, and that would ^{be} opening up the question of the duty of water. I don't think we ought to do it.

MR. F. S. RICHARDS: Your Honor please, our clients feel it is a very serious matter to them. I hesitate to say that-- of course, I don't want to argue the case after the court has decided, if the court has decided, but I do desire to say it is an exceedingly important matter, and it seems as though it would require a very short time to introduce the evidence and your Honor determine the question.

THE COURT: I feel this way about the matter of duty. If the court had given to the lands in Provo City under

the acreage that is shown, and the court found the duty all through the first part of the season the same as is fixed from the 20th of July on, the court has given a very liberal duty, because I feel ^{that} from the evidence, ~~***~~ it seems that is the situation; I have given here a duty to the water lower than I have ever known a duty to be given to water in this state, and I hardly feel justified in reopening the matter. Under the evidence as it stands I think the court would have been justified in giving a higher duty to the water than the court did give all the way through, but I give an exceptionally low duty to the water and it is exceptionally low from the July 20th period on. It is not as though the court had shut the water off from you that time; it merely changes the duty of the water.

MR. F. S. RICHARDS: Your Honor please, as I say, I don't want to discuss with the court after the court makes up its mind, but I want to impress upon the court the fact our clients feel it is a very serious question. If they could offer the testimony they think your Honor would modify your view with reference to that matter, and we ask ^{ed} to do it and still ask if the court has not finally settled the question.

THE COURT: I will not finally rule upon your application until the next session of the court, and give you the opportunity to again renew your request.

MR. F. S. RICHARDS: Thank your Honor.

THE COURT: I will not say at this time I will open it. My impressions are I will not.

MR. F. S. RICHARDS: Thank your Honor for leaving the matter open.

MR. WEDGEWOOD: While I have it in mind see if my friends agree with me if we put on testimony in relation to the acreage of Provo City it would show and two witnesses would swear, or three, as a result of their testimony, that fair survey of the acreage as was made would be 505.73, and

that there is at least 6 per cent which comes under the head as testified to by Mr. Stewart, 30 acres or more there that was not irrigated, was used at present for something that is incompatible with present irrigation and cultivation, and the question whether water should be awarded to that is a question for the court. Is that right, gentlemen?

MR. JACOB EVANS: Yes.

MR. F. S. RICHARDS: Will you state to what purpose--

MR. WEDGEWOOD: Instead of putting our witnesses on.

MR. F. S. RICHARDS: It is not evidence. Are you going to offer evidence on the subject?

MR. WEDGEWOOD: I said there, asked you to admit our witnesses would swear to that if put on, same as Mr. Stewart.

MR. F. S. RICHARDS: I didn't understand you to ask for any admission. I understood you to say if you put witnesses on they would so testify. Now, I don't know.

MR. WEDGEWOOD: It is exactly as Mr. Stewart testified.

MR. F. S. RICHARDS: No, Mr. Stewart testified that 30.3 acres ought not to be deducted.

THE COURT: The court will take a recess at this time until seven thirty.

MR. F. S. RICHARDS: If Mr. Stewart's testimony is in to that effect, as the General says, and we are through offering testimony here, why do you want more testimony; going to hand it to the court why not hand it on that testimony, why take the time for more, we are not offering more, we have nothing more to offer

JOSEPH R. MURDOCK, recalled by the plaintiff, testifies as follows:

DIRECT EXAMINATION by Mr. Wedgewood.

Q You have been sworn? A. Yes.

Q Did you go over the ground in this case with Provo City?

A What I didn't go over, I had gone over with and checked up with Mr. Stewart.

Q You checked up on it? A. Yes sir.

Q Is a proportion of this ground of 505 acres result of their checking that is not at present irrigated?

A Yes sir.

Q About what per cent is that?

A I judge there was ten per cent, but in talking with the representatives of the Provo Bench and West Union and others, they were willing to reduce their estimate, and so was I, to six per cent, the amount Mr. Stewart testified to.

Q And you say that is not at present irrigated?

A It is not irrigated, and does not have the appearance of being irrigated last ten years.

Q It is just a question then what the rights to that land are as a matter of law? A. Yes sir.

MR. WEDGEWOOD: I don't think there is anything in regard to the tree question we consider worth while to go into. If, during the progress of the argument, this question is raised either by brief or otherwise, and the court wants to take a look around the city and see the conditions I will be very glad. Otherwise it seems a simple proposition.

THE COURT: How do you desire these questions that have been gone into at this session of the court --

MR. A. C. HATCH: We are willing to submit them without argument.

THE COURT: Do you wish to be heard in argument?

MR. F. S. RICHARDS: Yes, your Honor, at the convenience

of the court. There is no hurry about that part of it.

MR. WEDGEWOOD: We will submit it without argument.

MR. F. S. RICHARDS: I think, your Honor please, we would like to be heard on the subject very briefly.

THE COURT: You want to be heard orally.

MR. F. S. RICHARDS: Yes.

THE COURT: I will fix a time I can come down and hear it soon, or hear it at the time the other matter is presented.

MR. WEDGEWOOD: Let us make it the time the other matter is presented.

THE COURT: Then the court will take an adjournment at this time until the issues are made up in the Blue Cliff right, and I will fix a time as soon as the issues are made up on that.

IN THE DISTRICT COURT OF UTAH COUNTY, UTAH.

PROVO RESERVOIR COMPANY,

Plaintiff,

v.

PROVO CITY, ET AL.,

Defendants.

April 11, 1919.

THE COURT: Gentlemen, I understand the matters to come before us is the appointment of the commissioner and arrange for a final hearing of the case. I understand that is all we have.

MR. A. C. HATCH: That is what we have understood. There is a matter though in connection with the appointment of the commissioner-- not the appointment of the commissioner, but as to the distribution of the water under the tentative decree that we wish to call the court's attention to.

THE COURT: Very well.

MR. JOHN E. BOOTH: If the court please, there is a thing I want to call attention to today. I was not aware of the meeting until within about half an hour. Some way I did not get notice. When Scott Stewart made a survey of the land up here for the Upper East Union and the East River Bottoms Water Company he included practically twenty acres and give credit to the Upper East Union of people who had no stock at all in the East Union, and whose land is in our district. It is evidently a mistake. The Upper East Union tell me they will not contest it. I desire to ask if it will be necessary to introduce testimony, or there is a stipulation to that effect, will that be sufficient?

THE COURT: I would think if it is stipulated by the parties in that matter. It is not a matter concern others.

MR. JOHN E. BOOTH: No sir, concern nobody but the two.

THE COURT: I do not think it will be necessary at all.

MR. JOHN E. BOOTH: We desire to prepare for the testimony if necessary.

THE COURT: I do not think it will be necessary.

MR. A. C. HATCH: If the court please, the plaintiff, as I now understand the situation, has agreed with everyone of the consumers of water, irrigators, as to their rights under this canal as claimed in its complaint, and they have all conceded to plaintiff the 50 second feet as stated in the tentative decree, that is 50 second feet including the spring waters. The Provo Bench Canal Company was at the last session of the court disputing the right in some manner, but they have now agreed with plaintiff ~~conceding~~ conceding the 50 second feet under the Blue Cliff Canal right, that is, 50 second feet including the springs and, as I understand, not fixing the measurement of the springs, but whatever they shall measure actually, the springs would be specifically decreed to plaintiff and the balance of the 50 second feet to be taken from the waters of the river proper, so that there is no dispute whatever as between the users of the water for irrigation purposes and the plaintiff as to the 50 second feet, and in none of our pleadings, so far as I have them in mind now, nor in the decree is there anything stated as to the point of diversion of this water, the 50 second feet, we have been unable to take it through our canal, that is, the Blue Cliff canal, the original diverting point, for a number of years, because of the Telluride Power Company having destroyed in a measure as we claim, our diverting canal, but as between the users of water for irrigation there being no dispute, we think that matter will be conceded to us in the decree, and that we are entitled to the use of that water during the period until the decree shall finally be made, and in connection with that the plaintiff

has conceded that it will not claim as Class A water right under its appropriation, that is, they will not claim as Class A the primary water right, anything in excess of what the court has fixed in its tentative decree, approximately 240 second feet as primary water. Mr. Ray could not be here this morning, I called him up at the instance, as I was informed by Mr. Murdock, of Ray's client, the Provo Bench Canal Company, and he could not be here because of a matter in the Federal Court set for argument this morning, and therefore they are not represented, but Mr. Stratton is here. That is a correct statement, is it not, Mr. Stratton?

MR. STRATTON: Yes sir.

MR. A. C. HATCH: And you are the president of the Provo Bench Canal Company?

MR. STRATTON: Yes.

MR. A. C. HATCH: Then a question arose with us as to the distribution of this water to us by the commissioner. Now, we have an interest in the Provo Bench Canal by which we can divert at the intake of the Provo Bench Canal a portion of this Blue Cliff water.

THE COURT: That would permit it to go through the power plant?

MR. A. C. HATCH: Through the power plant and to that extent if we could take it all through the Provo Bench Canal, and apply it upon the lands there would be no further dispute between us and the Utah Power & Light Company.

THE COURT: How much can you take?

MR. A. C. HATCH: We can take twenty to thirty second feet at that point and that would eliminate the dispute between us to a certain extent, between us and the Utah Power & Light Company.

THE COURT: To that extent, at least.

MR. A. C. HATCH: And we understand the situation to be simply a question between us and the power people

whether they shall pump up the other twenty feet and put it into our higher canal, or whether we shall pump it up, and that is really the question in dispute between the Utah Power & Light and us. Until such time as the matter is determined between the Utah Power & Light and us, we will probably pump it up, and we would like the right to take the water where it is so long as there is that quantity of water that we may get at that point, we would like the commissioner instructed to deliver it to us at such point as we can apply it, and we understand that it will interfere with no right.

THE COURT: You, for the present then are pumping it yourself?

MR. A. C. HATCH: We will have to do it if we get it into our upper canal.

THE COURT: I see.

MR. A. C. HATCH: And we would like when the commissioner is appointed that he-- that he classes us as a canyon right with the Utah Power & Light Company, and when the Utah Power & Light Company was short of water the amount decreed to it, he has cut us down to a portion. When there was water in excess under the primary right we think we should have had distributed to us at any point where it might be used by us. That is the only question in it.

THE COURT: Just a moment, Mr. MacLane just come in representing the Utah Power & Light Company, and I do not know whether he come in early enough to understand just what Judge Hatch is presenting, and possibly you had better briefly state for the benefit of Judge MacLane what you are asking for, because, as I see it, I do not see it affects the power company particularly.

MR. A. C. HATCH: I will say all the irrigators have by stipulation agreed to our Blue Cliff right of 50 second feet of primary water, that is, including the

springs which may measure three or four or six second feet, I do not have knowledge of the quantity, leaving the only question before the court now in dispute as the difference between the Utah Power & Light Company and the plaintiff, all the other matters I understand have been adjusted and agreed to. Now, we can use all that 50 second feet of water at a point below your tail race, approximately 30 second feet, between twenty and thirty second feet, then the dispute as between the Utah Power & Light and the plaintiff, as I understand it would be, first, whether or not we have a primary right as against you. The only question whether or not we have a primary right against you to the full 50 second feet. If we have, why, as I understand the matter, you will still through your flume use it, but it will have to be put back into the canal by which we can use it, and that would have to be done by pumping, and we have it conceded to us by the irrigators. If we use it we will have to pump it. If you have it and you use it through your plant, you would have to pump it. That is the statement I was making to the court, and the matter to be thrashed out hereafter before the court in this case will be the question as between the Utah Power & Light and the plaintiff only as to the primary rights.

MR. RICHARDS: May it please the court, I might say I have a message from Mr. Ray stating he had been detained by the Federal Court as Judge Hatch stated, and would be unable to get down, but the only matters coming before the court, he understood, was the appointment of the commissioner, to which he made no objection, and possible fixing of a date for the taking up of these other matters that are unfinished. Now, Mr. Thompson, who is a director of the Timpanogas Company requests me to say for him and for that company that Mr. Ray represents that

company, and that he does not understand that they have arranged as to the Blue Cliff right as the judge has stated in court.

THE COURT: I do not understand Judge Hatch is asking for any action confirming any arrangement of this kind.

MR. RICHARDS: He desires it understood they did not agree by consent in Mr. Ray's absence, because Mr. Ray, as the phone said, did not understand anything was coming up, and so told me.

THE COURT: I don't understand so either.

MR. A. C. HATCH: We are not asking it this time, any permanent or final order be made, we call the court's attention to the agreement, and Mr. Stratton has acquiesced in my statement. The president of the Timpanogas Canal Company in open court at the last session, in open court confirmed what I have stated to your Honor in so far as the Timpanogas Canal Company was concerned, at the last session of the court, that is, a man claiming to be the president of the Timpanogas Canal in open court conceded what I have stated, and no objection to the tentative decree has been filed by them up to this time so far as I now remember. Mr. Ray, when I called him up, said that he understood just as was stated by Brother Richards, and that he had talked with Mr. Wedgwood and Mr. Evans before engaging himself for today in the Federal Court. That, had he known this question would probably be brought to the attention of the court at this time he would have-- could have made other arrangements, but that he had advised, as I understand it, his clients in this agreement consented to enter into it. That is true, isn't it?

MR. STRATTON: Yes sir.

MR. A. C. HATCH: And, as I have stated to the court, there is no dispute now as to our 50 second feet, as

tail race, or divert it above.

THE COURT: If you divert it above they would be affected by it.

MR. A. C. HATCH: No, because it is only water that comes through their dam and inflow to the river below their dam.

THE COURT: What I was getting at is, as I understood your statement I wanted Judge MacLane to understand it. I didn't understand it affected their use of the water at all.

MR. A. C. HATCH: It will not in any manner at all, as I understand the water that they are now using at their dam, or diverting.

MR. MACLANE: As I understand it, your Honor, the situation then would be substantially this, that until the final determination of the relative rights of the Blue Cliff right and ourselves that the Utah Power & Light Company would not be required to prorate the amount of water allowed to it under the existing findings, which would be the basis of the commissioner's action with the Blue Cliff right. Of course, the Blue Cliff right take their 50 second feet or whatever quantity it may be, after the Utah Power & Light right has been satisfied.

THE COURT: After you have used it.

MR. A. C. HATCH: Yes, so far as the Utah Power & Light diversion of the water is concerned, yes. It won't affect the Utah Power & Light in any manner as we understand it, as the works now exist and as the conditions are.

THE COURT: And probably the situation would not be such it would affect them pending the hearing, because I expect to have a hearing before we reach the point of low water. I hope we can have it within the next thirty days or such a matter. That will come up so that you will understand.

MR. MACLANE: If I am correct as to that under-

standing there is no objection to that as a tentative arrangement.

THE COURT: That would be merely a direction to the commissioner how he shall distribute.

MR. A. C. HATCH: You will not be required to turn any water over your dam to make up any quantity of our Blue Cliff right, that is as I understand it.

THE COURT: That is all then to come before the court except the commissioner.

MR. A. C. HATCH: That is all we have.

MR. MACLANE: May I interrupt just a moment. If the court is going to consider about the time of setting the case for hearing or not.

THE COURT: Yes, I want to if I can fix a definite time, if the parties are all represented here so that we can determine the time when they can come. I would like to fix it now so that we can all make our arrangement with reference to it.

MR. MACLANE: It is largely a question between Judge Hatch and his associates and myself and associates in the case, as he has said. I would earnestly request the court fix this hearing sometime during the month of May, or the latter part of this month and not later than the latter part of May. I make that particularly for the reason we have a water litigation on the Bear River which is now set for hearing early in June, ~~xxx~~ and, so far as I know, May will be comparatively free, and any time during that month will be satisfactory to us.

MR. RICHARDS: Mr. Ray requested me to state any time from the first to the 15th of May will be satisfactory to him, and that will be satisfactory to us.

MR. A. C. HATCH: That will suit us, and the 14th of May-- the 14th of May is the regular term of our District Court at Heber, and if we could get through by then.

MR. RICHARDS: The Calendar shows the first Monday in May to be the 5th, how would it be to take it up then?

MR. A. C. HATCH: That would be very satisfactory to us so far as I am personally concerned, I do not know as to my associates, but I understand it will be all right with them.

THE COURT: I commence the trial of a case at Richfield on the 23rd of this month, April, and we expect to take about ten days.

MR. RICHARDS: To make it safer, hadn't we better day two or three days later?

THE COURT: I am inclined to think it would be better. How long do you take do you think? The only controversy, I understand, will be between the Utah Power & Light Company and the plaintiff.

MR. A. C. HATCH: That is the way I understand it.

THE COURT: How long do you ~~think~~ estimate it will take to introduce the testimony you have, Judge MacLane?

MR. MACLANE: Certainly not over two days, and I do not believe over one, so far as the direct testimony itself is concerned, three or four hours should do it. Cross examination may last couple hours or maybe take a day, I don't know.

MR. A. C. HATCH: We think we have introduced everything except possibly one witness, and ought^{not}/to take more than a day more. He is an engineer, and going into those questions we never know how long it will take to cross examine him. I think a day though will be ample time. We will have two witnesses we will want to offer.

THE COURT: If I set the case for Wednesday we can finish that week?

MR. A. C. HATCH: I think so.

THE COURT: That may be set for Wednesday, the 7th of May, and that will enable Judge Hatch to get away

for his Heber term, and enable me to get back here from Richfield, at ten o'clock, or as soon as the train gets in. Now, gentlemen, have you any suggestions with reference to the appointment of a commissioner?

MR. RICHARDS: Mr. Ray said he had no objections to the appointment of Mr. Wentz, and I am instructed to say that so far as Provo City is concerned we have none.

MR. A. C. HATCH: We have none.

MR. RICHARDS: And so far as the Timpanogas is concerned.

THE COURT: The court then will appoint Mr. Wentz to act as commissioner until the further order of the court, and that means during this year and until the court makes some change in the matter later, and I take it, gentlemen, the order may be in the same terms, some conditions may be included in the order that was in the last order made?

MR. A. C. HATCH: Yes.

THE COURT: And the compensation to the commissioner the same as provided last year.

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

MR. MACLANE: The order does not specifically cover the manner in which the commissioner shall make up the river, does it?

THE COURT: Does it, Mr. Wentz?

MR. WENTZ: No.

THE COURT: Would you make any suggestion with reference to that?

MR. MACLANE: No, I would rather leave it as it is, and if there is any question should arise, then we can submit it to the commissioner, and if we cannot agree, submit it to the court; I do not think it is advisable to put it in the order.

MR. A. C. HATCH: The only matter was the matter

I called to your Honor's attention.

THE COURT: That would be a matter of direction and I take it Mr. Wentz will make the distribution in accordance with the statement you made and understanding of the Utah Power & Light Company. It does not affect their use of the water. I will have them a copy of the order drawn off by the clerk, and sign it and file it, making the necessary changes of dates, just as the other order reads. Are there any other matters the court should consider at this time before we take a recess? If not, the court will stand adjourned until the 7th of May, Wednesday, the 7th of May, at ten o'clock.

IN THE DISTRICT COURT OF UTAH COUNTY, UTAH.

-----oOo-----

PROVO RESERVOIR COMPANY,
Plaintiff,
v.
PROVO CITY, ET AL,
Defendants,

May 7, 1919.

MR. JOHN E. BOOTH: Your Honor please, I suppose it is well to brush a little dust away before you commence the quarterly cleaning. I think I called your attention to a little stipulation between the plaintiff Provo Reservoir Company and Hyrum Heislet, I believe you have a copy of it, and copy is filed with the clerk. There is a stipulation in the matter. I referred your Honor to when you were here last between the East River Bottoms Water Company and Upper East Union Canal Company wherein the testimony of Scott P. Stewart with regard to the acreage, he included 17.52 acres of the East River Bottoms land that had never been watered from the Upper East Union, and that was a mistake, and we have a stipulation it may be corrected.

THE COURT: This is the original?

MR. JOHN E. BOOTH: Yes.

THE COURT: It should be filed with the clerk.

MR. JOHN E. BOOTH: I filed one with the clerk. ✓

THE COURT: Is there something else to be presented at this time?

✓

10:15 A.M., Recess to 2:00 P. M.

During the recess of the court the parties dictated to the reporter the following stipulation with request that it be preserved in his notes:

It is agreed between the plaintiff Provo Reservoir Company and defendant, Utah Power & Light Company, that the issues arising upon the amendments to the complaint of the Provo Reservoir Company pertaining to the so-called Blue Cliff right and the answer of the Utah Power & Light Company to the amendment and to the complaint as amended, shall be disposed of as between the plaintiff, Provo Reservoir Company and defendant, Utah Power & Light Company by a decision and decree under which the Provo Reservoir Company as successor in interest to the Blue Cliff Canal Company, shall have a primary right to 50 second feet of the waters of Provo River, which shall include Maple Springs, Pony Steele Springs and all other springs originally arising in or discharging their water into the Blue Cliff Canal.

It shall be provided by the decree to be entered herein that the point of diversion of all of said waters to be at the location of the present headgate of the present Provo Bench Canal, which is below the tail race of the Utah Power & Light Company present Olmstead hydro electric plant, or at such other point, or points, as will not interfere with the use of the river portion of said 50 second feet by the Utah Power & Light Company through its said Olmstead plant as at present located.

This stipulation includes the rights specified in paragraphs 14 and 24 of the present decision of the court heretofore filed in this cause and said decision shall be modified to conform hereto.

This stipulation is not intended to in any way affect any matters which have been heretofore submitted to and are under advisement by the court as to the quantity of water

to which the Utah Power & Light Company shall be entitled.

- - - - -

THE COURT: There has been handed me a stipulation signed by the parties, which, as I understand it, settles all the controversy relating to the Blue Cliff right, controversy between the Utah Power & Light Company and the plaintiff. Are there any other matters that are to be taken up? This disposes of that part of it. ✓

MR. A. C. HATCH: Disposes of the controversy between the Blue Cliff and Telluride Power Company of plaintiff's right under the Blue Cliff Canal, but all other matters between the two parties litigant have been presented, argued and submitted.

THE COURT: I understand.

MR. A. C. HATCH: There was a request made for a report from the Commissioner as to a curve of the river, covering a number of years, and we would like to have that presented to the court.

MR. STORY: Is there anything else--

MR. A. C. HATCH: You might be interested in that, the curve of the river, I think that is what they call it.

THE COURT: It is a hydrograph.

MR. A. C. HATCH: Covering the flow of the river from the period of time they have any official record, maximum and minimum flow for a certain number of years, and we ask for that. I don't know whether it has been prepared. If it has we would like to have that introduced as part of this case at this time.

MR. MacLane: We understand this stipulation will be shown as presented and received in open court.

THE COURT: The record may so show.

MR. A. C. HATCH: In regard to the statement made by me at the last session of the court as to the agreement between the plaintiff and Provo Bench Canal Company, Mr. Rawlins was here today representing the firm of Rawlins, Ray & Rawlins,

attorneys for the defendant canal company, and the day having been wholly occupied by this matter we could not take that up with him. He said he would prefer Mr. Ray-- consulting with Mr. Ray tonight, and either he or Mr. Ray would be down tomorrow morning, and we will then close with them, as I verily believe, they being the only parties who are protesting against the Blue Cliff award under the tentative finding.

MR. RAWLINS: If the court please, if there are no other matters in which our clients are interested at this time-- it seems this stipulation might be entered into, but it seems there are other controversies, at least one controversy, that might arise, so in view of the fact that could not possibly be decided tonight, we ask this question go over.

THE COURT: Have you heard anything of the situation of Mr. Ray's family?

MR. RAWLINS: I have not.

THE COURT: So you don't know whether he can come tomorrow?

MR. RAWLINS: I do not.

THE COURT: What is the situation, Mr. Richards, with reference to the city matters?

MR. F. S. RICHARDS: Your Honor please, we have presented some matters to the plaintiffs and they said they would consider the matter, and I am informed they have been so busily engaged in this other consultation it has not yet received attention, and so I think that by morning we will either have agreed upon something or be prepared to offer testimony.

THE COURT: Is there anything further that we can take up this evening? Did Mr. Wentz go for that report?

MR. JACOB EVANS: Just a minute and I will see if I can find him.

✓

T. F. WENTZ recalled.

DIRECT EXAMINATION by Mr. Wedgwood.

Q Mr. Wentz, have you made any compilations, hydrographs or illustrations in pursuance to the order of the court that have not been introduced in evidence, relating to the flow of Provo River for any period of years back?

A Yes.

Q Now, what do those, what have you made, you may state what you have made, as briefly as possible, and we will get to each one separately.

A I havemade a compilation of the Provo River of all the years of record as made by the United States Geological Survey, and also the observations made by the several Commissioners of the Court. The years have extended from 1886 to the present by measurements of the commissioners, and from 1889 up to and including 1918, made by the United States government. The river has been compiled as an average, typical and medium; and also in addition to this the weather data has been compiled. It is shown on hydrographs.

Q Now, I will ask you a question, you have shown that data diagrammatically by what is sometimes termed hydrographs?

A Yes.

Q Now, you may take what seems to you to be the first in order and present it to the reporter, if you will, and let him mark it and tell what it is, and then in the briefest language, tell what it shows; select your own order.

A There is one other part I have not got. I think it would well if you took a few minutes time and hung them all up.

Q It is not a matter so much for present information, but to get the record showing the fact so that it will be a part of the record. I don't know whether there is anything particularly before the court now that necessitates it.

A I will take them just as I come to them. The report, in-

cluding the maps, flume and box hydrographs is designated as Commissioner's special report 1918, case number 2888.

Q Now, refer to the reporter's number.

A Exhibit 500, which is plate No. 2, is a hydrograph of the natural flow of Provo River, 1905 to 1918, and 1889 to 1904. Each of the lines is marked as shown in the two periods.

Q What does it show in brief?

A It shows briefly the average Provo River in the Utah Valley in the two divisions I have designated, 1889 to 1904, and 1905 to 1918. They are both shown on the same map for the purposes of comparison.

Q Which is designated upon the plat?

A They are both designated, the full line is 1905 to 1918, and broken line 1889 to 1904.

Q Now, let me ask you this question, does that show the composite platting made up of average flows of the river?

A Yes, as for example, the first day of April, 1905 to 1918 is the average discharge of the first day of April for each of those years.

Q So on all the way through?

A So on through that. Now then the 1889 to 1904, we have no daily record in all the years of that time, but we have the mean discharge. Now on that I have taken the minimum, the average minimum, the average maximum and the mean, and have plated using those three points so that the line as shown, broken line on the plat is made up from those three readings, but the area in acre feet is exactly the mean. That is, there is the same area on the sheet above the mean as there is below the mean.

Exhibit 501 is the average actual Provo River, 1905 to 1918, and is also plate 1 of the report, and is the same curve as shown on Exhibit 500, except this one is shown alone by itself, and is used for a working curve.

Q Made up the same way?

A Made up the same way.

Exhibit 502 is plate 4 of the report, and is a hydrograph of the natural flow of Provo River 1898 and 1918.

Q Just the two years?

A Just the two years. In the first period 1889, the report is not complete, and I made this hydrograph--

MR. A. C. HATCH: 1889?

A 1889. The observations were begun on the 27th of July and the whole period-- I have no record of the whole period of the six months first shown--

THE COURT: Mr. Wentz; it is marked there 1898, isn't it?

A 1898.

THE COURT: You said 1889 when you referred to it.

A I meant to say the year 1889, the observations were not complete for the whole year. They began sometime in July. That is the low year of the first period. Now, 1898 is the next low year in the first period. In the second period, 1905 to 1918, 1905 is the low period and 1918 is the next to the low period, so I made a comparison of these two years, 1898 and 1918, because they correspond in magnitude to the two periods, and they are shown upon a map, upon a plat, the 1918 in the full line and the 1898 in the broken line. That is, this hydrograph is intended to show the difference of the low year at this time and the low year prior to 1905.

Q In other words, to show the change in character of the river?

A Yes.

MR. A. C. HATCH: We understand this is referring only in the Utah county part of it.

MR. WEDGWOOD: We will get to that.

THE WITNESS: Yes, that is true.

Exhibit 503 is plate 3 of the report, and is a mass diagram of the monthly mean of the average Provo River in the Utah Valley. This is the same data as is contained in the Exhibit 502, except the lines are shown as the mean for the

the month. The full line is the period 1905 to 1918, and the broken line 1889 to 1914, so that the lines, as for example, July, the discharge at the latter period is approximately 485 second feet, and in the first period a little less than 300 second feet.

This is intended to show the effect of the greater diversion of water on the upper river and the discharge that originally came to the river. There was a larger mass of high water approaching 1300 second feet. This has been transferred by the great diversion raising the river in the lower period with a lighter discharge in the upper period.

Q By lower period you mean July, August and September?

A Yes, although in the total for the river over the two periods there is but 9 second feet difference, but it shows a different distribution of the flow.

Q As to times of the year?

A Yes.

Exhibit 504 is plate 11 of the report, and is a hydrograph of the medium natural river, 1905 to 1918. The medium line of this river occupies the space on either side of which there is the same number of volumes higher as there are below. In this particular case we are considering fourteen years, and this is the average of the one that is the lowest of the seven high volumes and the highest of the seven small volumes.

Q Taking the average by date?

A Yes.

Exhibit 505 is plate 6 of the report. The printed blue line is the typical, natural Provo River. That is, it is the geometric mean between the product of the average continued minimum and the average that followed the heavy blue line that is printed in the map. The red line immediately under is the average continued minimum. This line takes out all the fluctuation of the flow, and is a smooth curve through^{out,} departing from the higher and hugging very closely to the line during the low water period. At the bottom of the map in orange

is shown the total of the awarded rights to the defendants, and superimposed upon that and above in yellow is 50 second feet of the Blue Cliff title as originally awarded in the decision.

Q Showing that it comes below the low water flow as smoothed out in a regular curve?

A Yes.

Q By how much as is shown by the plat?

A It is about 35 second feet.

MR. A. C. HATCH: Additional?

THE COURT: Below.

Q Below the low water line?

A Below the low water line.

Q That is to say, as appears from the diagram it shows below the low water level smoothed out there is 35 additional second feet?

A Yes.

Q After supplying those rights?

A Yes.

Q And that 35 additional would be additional in the extreme low water time?

A Yes.

Q As composite shows?

A Yes, that much between the line of awarded rights and the curve.

Exhibit 506 is plate 7 of the report. This is a tree-graph of the natural Provo River, August 25, 1915. On the left of the center line of the map in orange is shown the natural stream of the Provo River, and they are drawn to scale, with also the quantity in second feet marked as they enter from Snake Creek, Deer Creek, North Fork, South Fork, Lost Creek and Bridal Veil Falls. Also as we come down the map the total of these quantities at the point is shown, as, for example, Deer Creek, inflow of 12 second feet, making a total

of 40 second feet at this point. At the right in yellow is the inflow. That is the water that comes into the Provo River outside of natural channels, comes into the bed and from seepage along the course of the creek. On this particular day the Provo River was measured at a number of points, and also the discharge of the several canals. I have drawn this map showing the conditions with all the diversions closed. That is, imagined they were closed so as to get the total that comes down, and those quantities that were drawing is shown on the right of the map in their respective places down the course of this creek. This extends from the Wasatch dam where there was no natural flow passing and the miles are shown on the scale at the left extending from the Wasatch dam down to the Utah Valley. The total as shown on this map at the bottom is 89 second feet of natural flow from the streams, 239 second feet of inflow.

Q Added volume?

A Yes, of added volume, making a total of 328 second feet on this particular day.

Q Now, Mr. Wentz, I would like to ask one thing, may save confusion. All these plats are made upon what you might call section paper?

A Yes, all the large hydrographs are made upon cross section paper, and the smaller ones upon millimeter paper.

Q On those large hydrographs each larger square is divided into one hundred other squares or ten horizontal and ten vertical, is it?

A. Yes.

Q These plats which you have introduced there, those subdivisions represent a scale or volume of quantity?

A Yes.

Q Are they all the same up to date?

A All the same except the Exhibit 506 of the hydrographs, are on the same scale.

Q Now give that?

A On that the vertical scale is one inch to a hundred second

feet and the horizontal scale is one inch to five days, and they are all designated upon the map, both the day and the scale of second feet.

Q Well now having stated that will you state the scale of 506?

A Exhibit 506, the scale of miles on the left is one inch to the mile, and the scale of second feet, that is horizontally is one hundred second feet per inch.

Q Now if there is any difference in the scale of the other maps as you give them, all, ~~xxxx~~ then, give that scale?

A Exhibit 507 is plate 13 of the report. This exhibit is intended to show the character of the waters of the Provo River. At the top of the map is shown four divisions of Provo River. The first from Stewart ranch to the Murdock plant, second from the Murdock plant to the lower Midway dam; third from the lower Midway dam to the Wright ranch, and fourth Wright ranch to the Utah Lake. Also at the left of the map are the months May, June, July, August, September and October. This plat is not drawn to scale, but the colors as shown upon the map designate the different character of water. It is also assumed in this map that the waters applied upon land along the course of Provo River, that the seepage and waters returning by deep percolation return to the river in about one month's time. Now, I will follow just for example some water through the whole section. For example in May in the first section it is shown in blue. That is all natural river water applied. One month later in the second section the flow of the river is made up and is used by part of the seepage that was applied in May in the month before and part by natural river flow, which is shown in full and the seepage water in red. In the following month, July, the river in this valley is partly made up of natural flow from the creeks in Provo Canyon return seepage from the water applied in the month before and also shown in yellow the sum of the water that was originally applied in the first section in May, passes into the second section and was used and returned again and was used

in the third section. On the fourth section the Provo River in the ^{Utah} Valley is made up of some natural flow, some return from the-- that is, waters that have been used once before, some that have been used twice before and some that have been used three times before, and some water that was originally used in the second section in June.

THE COURT: That is in August.

Q Those are indicated by different colors?

A Those are indicated by different colors. This is in the month of August and for the fourth section. This is carried out all the way through the plat except in one instance I have left off one color on this plat in order not to confuse it, but it is shown in the tables in the volume.

MR. A. C. HATCH: In the report?

A In the report, yes.

Exhibit 508 is plate 12 of the report and is a white print or map of the Provo River system extending from Utah Lake to the head of the river. This is a topographic map, and I included it in the report by request of the Utah Power & Light Company.

Q Scale given on there?

A Scale is one half inch to the mile.

Exhibit 509 is plate 16 of the report, hydrograph of the natural flow of Provo River. The average typical and medium for the years 1911 to 1918 inclusive. I have prepared this hydrograph to show as nearly as possible the present existing conditions. Prior to 1911 there was a great deal of development upon the upper river. Since that time very little additional areas have been brought under cultivation, and this shows the river extending over these eight years, both in average typical and medium.

Q The scale, please?

A The scale is one inch per hundred second feet vertical and one inch per five days horizontal, as upon the other hydrographs.

Q And the average is indicated by the solid line?

A The average is indicated by the solid line, the typical by the broken line and the medium by the dotted line.

Exhibit 510 is plate 9 of the report. This shows the 1918 distribution. It is platted upon millimeter paper with the scales as shown upon the left of the map in second feet, and the dates as shown upon the bottom of the map.

Q In other words, the figures 50 represent 50 second feet, and going down respectively, 50, 100, 150, 200, 250?

A Yes.

Q And going from left to right the figure taken represents what?

A Tenth day.

Q No, connect it with the figure 4, that represents what?

A Fourth day of August, 9th, 14th and 29th are the days respectively of August. The 3rd and 8th are of September, and, beginning at the left, the 10, 15, 20, 25 and 30, are the days of July. Above the line marked zero on the left and up to the black line is 50 second feet. The portion of the map in yellow represents the amount of water drawn by the Provo Reservoir Company under their Blue Cliff right. The portion of the map in blue immediately above the yellow represents the deficiency from the award. The portion of the map in red and extending to the full line is the award to the defendants, and that below bounded by a broken red line and in yellow--

Q Looks more like brown than yellow, yellow or light brown.

A It is orange. The portion below bounded by a broken red line and shaded in Orange shows the amount of water drawn by the defendants until it intersects the heavy full line. Above that point and shown in blue, is the deficiency borne by the defendants in the season of 1918.

Q When the orange represents the excess they took over the weir?

A Yes.

Q The blue shows the deficiency they had over and above the award

of the decree.

A Yes. The red line marked with a dash and two dots and marked D, extending through the map shows the amount of water drawn by the Utah Power & Light Company through their flume, and the line marked F--

Q Wait a minute, from what line to the line you have just described represents the water drawn by the Utah Power & Light?

A From the line marked zero on the left of the map down to the line that I have just described shows the quantity of water drawn by the Utah Power & Light.

Q Taken through their flume?

A Yes, during the season of 1918.

Q As a matter of information some of that was water that was turned out of the reservoir and through the reservoir at the tunnel, was it?

A Yes, all these plats show the natural flow of Provo River, the reservoir water and tunnel water is taken out.

Q That is not shown here at all?

A That is not shown on the plats.

Exhibit 511 is Plate 10 of the report. This plat is divided into three sections, the 1918 Provo River, the average Provo River and the typical Provo River as shown upon the left, and the scale is shown upon the left in second feet ranging either way from the center line from zero above to 100 second feet, and below to the 100 and up to 140 second feet. This plat shows the percentage relation of awards available. The portion in yellow at the top of each section shows the Provo Canyon Class A rights, 100 per cent being up to the full line; and the portion in yellow bounded by a red line showing the per cent as available during the season of 1918.

Q Just a minute, you say shows the per cent of the full rights, you mean the rights as specified in the tentative decree?

A Yes.

Q And the same in regard to the Class A rights in Utah Valley?

A Yes. This idea is carried through on both the other sections

showing the average river and the typical river.

Q Now perhaps might just as well get at some questions here as anywhere, because they apply. Now where, that is, from measurements made at what points is Provo Class A rights determined as illustrated on the diagram?

A The Provo Canyon Class A rights are a total of all the water. This is the total of all the water above the mouth of Provo Canyon in the canyon. That is total Utah Power & Light Company flume water the total water in the Provo Reservoir canal and the water in the Timpanogos canal, all the water in the Provo Canyon the class A rights in the Utah Valley--

Q Wait a minute. You say all the water of the Power Company Provo Reservoir diversion and Timpanogos diversion?

A Yes.

Q Whatever other water there might be in the river not so diverted is shown in Class A in Utah Valley, is it?

A Well, I can explain that better in my own way.

Q You may do so.

A The water in the Provo Canyon, as I stated before, shown upon these plats is the total of that in the Utah Power & Light Company flume, in the Provo Reservoir canal and in the Timpanogos canal. During the distribution of last year when we came to a point below-- when the river went below the point these people were not drawing 100 per cent of their award the water was distributed to them pro rata, and they were all given their percentage of what was available. Now, as shown upon this plat, during the season after the 15th day of July, there was not enough water to supply these rights with their full amount. Part of this water, or the water that goes to the Utah Power & Light Company flume is thereafter used by the defendants below the mouth of the canyon. There is also some increase in the flow below the mouth of the canyon and the lower part of the section that is marked in orange and also designated Class A rights Utah Valley, shows the percentage that these people were drawing of the awards

in the tentative decree.

Q Now to make no mistake about it, the figures on the left of Exhibit 511 are percentages, not in units at all, percentages of the quantity stated in the tentative decree?

A Yes.

Exhibit 512 is plate 18 of the report. This is a hydrograph of the natural average of Provo River in the mouth of Provo Canyon 1905 to 1918 and also 1911 to 1918. This hydrograph extends for the whole year, January 1st to December 31st, and is shown upon the map with a high water period at either end; that is, beginning in June and ending in June. The 1905 to 1918 river is shown in the full printed line. The 1911 to the 1918 in the broken lines. Also upon the map is shown the average low water flow. This is superimposed upon the map in colors, 1905 to 1918 in red, and the 1911 to 1918 in yellow and the average being for the first period that is the 1905 to 1918, being 232 second feet, and from 1911 to 1918 being 223 second feet.

Q The scale?

A The scale is 1 inch per hundred second feet and one inch per five days of time.

Q What do you mean by normal river, as you express it upon this diagram?

A That is the river extending after the high water flow is over until the next high water flow, or it is the period that has no run off or flood water contribution.

Q A question with reference to Exhibit 512, you stated the low water flow as two hundred and odd, is that what you meant to say?

A No, the average low water flow 1905 to 1918 is 332 second feet and the 1911 to 1918 is 323 second feet.

Q You stated before--

A Yes, that was an error if I stated that.

Exhibit 513 is plate 14 of the report, and the precipitation record of Provo from 1889 to 1918, inclusive and of

Heber for 1893 to 1918. These are all the record available at these two stations. At the bottom of the map is shown the monthly precipitation, a month covering two tenths of an inch; and also at the bottom of the map the years extending from 1889 up to and including 1918.

Q What is the precipitation you say?

A As shown in the smaller diagram at the bottom of the map.

Q Two tenths of an inch, I understood you to say, two tenths of an inch horizontally for each month?

A For each month, yes.

Q What do the vertical spaces indicate as to quantity?

A The verticale scale is shown on the left of the map, depth in inches ranging from 1 to 20 and is one inch per inch.

Q And the same scale for the monthly as for the year?

A Yes, the same scale is carried throughout the map. The total yearly is shown in the top and body of the map, the total yearly precipitation.

Exhibit 514 is plate 15 of the report, and shows the average precipitation for Provo 1889 to 1918, at Heber 1893 to 1918, Heber being shown upon the left half of the map, and Provo upon the right half of the map. The scale in depth is shown upon the left and is one inch per inch. On the left of each section is shown the mean monthly precipitation for the two periods on the map, extending from 1893 to 1904 and 1905 to 1918. Near the center of the map is also shown the yearly precipitation showing the mean yearly for the period-- for Heber for 1893 to 1904 and also 1905 to 1918. On the extreme right of the map is shown the mean yearly precipitation for Provo from 1889 to 1904, and also 1905 to 1918. That is, the broken line on each of these totals the mean yearly precipitation as above the full line shows the increase in precipitation over the period since 1904 in each of the two stages.

Exhibit 515 is a box hydrograph of the Provo River. These are hydrographs upon the scale as shown upon each one of them,

showing the years of record of the Provo individually from 1889. Then beginning at 1905 and up to 1918 inclusive.

Q Are they all on the same scale?

A They are all on the same scale.

Q Shows the regularity or lack of regularity, and peaks or smoothing out of peaks in each year and each series of years?

A Yes.

Q I notice different colors there, what is the distinction as to colors, if any?

A On the edges of some of these hydrographs I have colors. The red colors show the average natural Provo River 1905 to 1918. The blue is a typical, natural Provo River, 1905 to 1918.

Q What do you mean by typical, so we will get it. We have got natural?

A This is a small hydrograph of the large hydrograph that I spoke of before.

Q Just define the word typical, you define natural, define typical?

A The typical river as used in this report, is the geometric mean between the average and average ten day minimum.

Q You might as well give your construction here of geometric mean, so if you are not here to testify we will know what it is.

A I have taken in compiling this report the ten days, say the first ten days of July. I have taken the minimum of each of those ten days for the fourteen years. That is one factor. Then I have taken as the other factor the average river on each of these particular days, say on the first. I multiply that with the average minimum and extracted the square root. It is a little less than the average between the two quantities, and this method cuts out all the sharp curves or stream contributions that come into the river, and leaves us a smooth river, that is, the body of the river without all storms and interferences shown upon it.

Q What is what you mean by geometric mean?

A Yes, that is the typical river.

Q Let me ask you again what is the scale? You say these are all on the same scale, what is the scale of this hydrograph 515?

A At the bottom of the map, the days, each day is two millimeters or two of the small spaces along the bottom of the map. Vertically ten millimeters equal 100 second feet.

Q Now then I will ask you where these hydrographs apply as to location, that is, where are they located, assuming that they represent some particular point or locality?

A They represent the water in Utah Valley, that is, the natural water without any tunnel or storage water as measured at the several rating stations of the several canals in this valley.

Q Now where are those rating stations?

A In most of the canals they are just above the first lateral.

Q And when you say Utah Valley, that goes how far up the river from the mouth of Provo Canyon, that is in-- I don't mean your tree hydrograph there, but the other.

A All these hydrographs represent the flow as measured in the Utah Valley at the several points of diversion, that is the total water available for use here in this valley.

Q I don't want to confuse valley and canyon if there is any question about that. I want to know how far up Provo Canyon these measurements go with the exception of your tree hydrographs?

A They don't go into the Provo Canyon at all. This is the discharge below the mouth of Provo Canyon.

MR. A. J. EVANS: Below the Timpanogos?

A Yes.

Q Below the Timpanogos?

A Yes.

Q And the tree hydrograph goes above?

A Yes, the treegraph goes above.

Q And Exhibit 511 goes up to the power plant diversion, does it not?

- A Yes.
- Q And also Exhibit 510 goes to the power plant diversion?
- A Yes.
- Q Now I will ask you if, to the best of your ability, these hydrographs represent the measurements, that is, measurements correctly transcribed on these hydrographs, as you have explained?
- A Yes.
- Q And where the hydrographs contain words and figures, are they correctly made as far as you understand them?
- A Yes.
- Q And whatever they xxxxx purport to indicate or convey to the mind in relation to the hydrographs, are they correctly expressed to the best of your ability as far as you understand them?
- A Yes.
- Q Now then, have you prepared a written report in connection with this?
- A Yes.
- Q Before I ask you what that report contains, I will ask you whether or not all the data you obtained yourself was correctly arrived at, to the best of your ability?
- A Yes.
- Q And where you went to the government or state data, or the data of commissioners of this court, was that correctly taken?
- A Yes.
- Q And correctly transferred into your work?
- A Yes.
- Q And in your computations and calculations were they correctly taken to the best of your knowledge?
- A Yes.
- Q And is the report you have presented here in writing correct, to the best of your understanding and ability, so far as the work done by you is concerned? And is it correct so far as a correct transcription or substitution into your record there other records?

- A Yes.
- Q Now, you may state in your own language what the report, written report contains?
- A Exhibit 516 is the written report. This report contains all the tables to make up the hydrographs and maps as before shown. Also includes all the records of observation made by the United States Geological Survey, and also all the records made by the water commissioners of the court.
- Q In what case, in relation to what streams?
- A In relation to Provo River and the commissions that have been appointed by the court since the Morse decision of 1902, and also the commissioners that were acting prior to 1902 from 1886 up to 1902 that were appointed or selected by the parties owning water on the Provo River.
- Q Now, those reports, the originals of those reports from which you took what is contained within Exhibit 516 are part of the files of the District Court of Utah County, and filed in connection with the cases?
- A Yes, some of them are on file. I will say this about those reports. I have recorded some of the commissioners' report prior to this report to the court, and in that case I have not put those in this report in detail, because I did not want to duplicate that matter, but I put an abridgement in of them, showing the totals.
- Q In this case?
- A Yes.
- Q In this court in this case?
- A This report also shows in detail the record of the stations of observation made by the United States Geological Survey, and it also contains a set of hydrographs of the Provo River discharge, same as shown in the box hydrograph, Exhibit 515. These blue prints in the volume are the same as those included in the box hydrograph. Also in the report is shown the mean inflow curve, that is the waters arising below the United States Geological Survey, and also an individual curve for each

of the years as we have them. Also shows the fluctuation of the Great Salt Lake and Utah Lake.

Q Those are taken from public records?

A Yes. There is also shown in the report in detail some of the commissioners' reports that have not heretofore been submitted to the court. The report also shows the correspondence that came to the office regarding this report during the time of its preparation, and before it was filed, and also a list of tables submitted in response to that correspondence, and also in each of the years of record is shown the blue prints of the discharge at the United States Geological Survey Stations.

Q Now, correspondence that came to what office?

A To my office as commissioner.

Q Now then have you expressed any opinions in writing in Exhibit 516?

A No.

Q There are no opinions expressed, either as an expert witness or as commissioner?

A No, there is no opinion in the report at all.

Q Now then, Mr. Wentz, what was the period that you have taken and illustrated and reported on dated from 1918 back, how many successive years, what years?

A Back to 1889.

Q I mean one continuous period-- 1905?

A Back to 1905. I included 1905, the year 1905 up to and including 1918.

Q Now then did you find in figures the normal low water flow of the river for that period at the mouth of Provo Canyon?

A Yes.

Q That is, that was distributable from the mouth of Provo Canyon?

A Yes.

Q How much?

A The average low water flow of Provo River in Utah Valley for

for the period 1905 to 1918, inclusive, was 328 second feet.

Q Now did you get that same flow for a period prior to that?

A No, the average flow of the Provo River in Utah Valley 1889 to 1904, inclusive, was 227 second feet.

Q Are they comparable, one with the other, except as to the years, that is, the character of the make up of those comparable?

A It is exactly the same.

Q What is the difference then between the two?

A The river since 1905 is 101 second feet greater as an average than prior to 1905 for the month of August.

Q Now, during what period of the year do those figures apply?

A I have given you this as for the month of August.

Q Month of August?

A Now, the month of September in the period since 1905 is 345 second feet; period before 1905 was 238 second feet, or 107 second feet less. July, since 1905, the average is 482 second feet; before 1905 was 331 second feet, or 151 second feet less.

Q You have stated in prior testimony to what you attributed the cause of the increased flow of the river?

A Yes.

Q Do you have the low water flow for 1905 to 1918 at the Utah Power & Light Company point of diversion, or near there?

A Yes, it is shown on page XVI of the report. The average for the month of August is not shown upon the report, but at the bottom of the report on the line marked mean, I insert under the column 1905 to 1918, 240 second feet, and under the column 1911 to 1918, 223 second feet. This is an average of the flow for the month of August at the United States Geological survey station a short distance above the diversion of the Utah Power & Light Company.

Q That is the average flow, is it?

A That is the average as I remember the average of these two columns.

Q Now have you got the low flow there for any year's time?

A The minimum in any year?

Q No, have you a minimum low flow?

A The minimum for 1905 to 1918 is 224 second feet, 1911 to 1918 is 208 second feet, and I have so marked that upon the page before referred to.

Q For what months?

A For the month of August.

Q What is the low flow there that you have?

A 208 second feet.

Q What is the low flow that you have in any year, any time, your lowest single flow?

THE COURT: Lowest point reached?

MR. WEDGWOOD: Yes.

A Do I understand you rightly you want the minimum that occurred any one time in this period?

Q Yes.

A The minimum shown upon the page occurs in 1911, is 123 second feet.

Q But the mean as you have given it there.

A Yes.

Q And that was a sporadic instance of a drop, or how was it?

A It occurs only upon two days.

Q Upon two days?

A Yes.

Q Now, you have given an extreme illustration and then you have given the low water flow for these different months at the Power Company's dam.

A Yes.

Q Now, so that there may be no confusion, I ask you this, whether or not those figures indicate that all of that water flowed into the Power Company's flume? or whether some of it went down the river, what was the condition there, I understand it is not in the record.

- A No, that doesn't indicate this quantity of water went into the Utah Power & Light Company's flume. This is the quantity of water, total water that was in the flume and in the river at that point.
- Q In the flume and in the river at that point?
- A Yes.
- Q I want to make this record complete, and I don't think it makes any difference -- Mr. Story is not here, I don't know that is applies to him, but I say this, if it is important of course, I don't mean to put it in surreptitiously, anything of that kind. Is the dam tight?
- A No.
- Q Has it ever been tight, your knowledge of the river?
- A No, I don't know of any time when there has not been some water passing there.
- Q Now, have you ever seen it when there was no water flowing over the dam?
- A Yes.
- Q Many times?
- A Yes sir, many times when there was no water over the flash board.
- Q What is the physical condition of the stream below the dam as to flow of water when there is no water flowing over the dam?
- A I have observed it particularly during the last year, and with one flash board on the dam the water about one inch below the top of the flash board my judgment of the quantity of water there, and I waded it three or four times, I think between thirty-five and forty second feet.
- Q What do you mean by the quantity of water there?
- A That is the quantity of water below the dam that is coming through the dam, and probably some under the dam, about two to three hundred feet below the dam is between 35 and 40 second feet.
- Q Regardless of quantity in units a short distance below the dam there was a substantial quantity of water flowing?

A Yes.

Q That has always been true when you have seen the dam and no water flowing over the top, is it?

A Yes, there has always been some water below the dam when there was no water going over the top.

Q And what is the character of construction of that dam?

A It is a timber cribbed dam, built of rock and faced on the upper side with lumber endways, stood on end.

Q And the crib is carried down, do you know, below the bed of the stream at all?

A I could not say how deep they are down into the creek.

Q But it is all rock and cribbing?

A Yes, it is a rock -cribbed dam.

THE COURT: Is there any cross examination?

MR. F. S. RICHARDS: Your Honor please, we will ask the matter might be left open until morning.

THE COURT: Then you need not offer these until morning, until the cross examination, if there is any.

5:55 P.M., Recess to 10:00 A.M., May 8, 1919.

MR. WEDGWOOD: Your Honor please, yesterday I produced the work of the commissioner, Mr. Wentz, and identified the same as he has put it upon paper both in writing and by diagrams. It is my purpose to offer those exhibits 500 to 516, inclusive. I have no choice as to whether I offer them now or whether there is any cross examination in the nature of voir dire goes on at the present time. If there is any counsel wants to make any examination in relation to voir dire I am perfectly willing. .

MR. RAY: I have had no opportunity at all to examine the hydrographs as presented by Mr. Wentz. As Mr. Hatch and Mr. Evans know the Provo Bench Company has entered into a stipulation with the plaintiffs in this case which, I

thought, put at rest the controversy between them. Not for the purpose of stating the stipulation now because I want that stated with more particularity later, but it was to the effect a decree might be drawn as between the plaintiff and defendant Provo Bench in conformity with your Honor's decision at the time of the submission of this case. That stipulation was entered into though not made of record yet upon certain assumptions as to the mean river in this case. During the progress of the case I had asked that Mr. Wentz prepare certain tables of river flow, or certain hydrographs. I understand those have been prepared. Of them I have never made a study at all, or of the data upon which Mr. Wentz bases his conclusion, because I have understood the case as to that question was closed, and the testimony would not be taken which would affect the amount of primary water in the river. If that is to be a question in this case it would involve very complete checking as to the data of Mr. Wentz and as to the value of his conclusions. In line with General Wedgwood's suggestion I have no objection to any data gathered by Mr. Wentz being preserved in the best way it can be preserved, but if that data is offered for the purpose of having the court find a different mean river than the river which the court found after a complete hearing upon this, so that it could be in any way construed as res gestae between the parties as to the amount of the normal flow of Provo River, we will ask for a continuance and ask to go into it and investigate it, if that is the purpose, because I can see very serious changes in the rights of the parties in this case if that were to be done, unless the conclusions reached by Mr. Wentz are the correct conclusions and we don't believe they are.

THE COURT: Do I understand, Mr. Ray, that you object to their being received?

MR. RAY: If it is for any purpose other than like a report of Mr. Wentz might be filed for the purpose of record, and not considered as testimony in the sense of inter party

controverted question. I don't object to the preservation of this record. It is suggested Mr. Wentz might move away and not be available, and everybody might want that record to see what conclusion he had arrived at. I do not object to the preservation of data here, but I do object to relitigating now the question of the size of Provo River available to the primary appropriators.

MR. A. C. HATCH: If the court please, the only purpose for which this could be introduced as I understand the rule, the only purpose for which he could introduce it at this time, would be in connection with the Utah Power & Light and the plaintiff, if it is admissible as evidence against them in view of our stipulation settling as to the Blue Cliff. That is the only matter, I understand, was before the court to be heard. All others have been presented and submitted, argued and submitted except as to our Blue Cliff,

MR. RAY: Do I understand then, Judge Hatch that I may get my mind clear on it, that you are offering this testimony in support of your stipulation with the Utah Power & Light Company?

MR. A. C. HATCH: No, we had a contest on with the Utah Light & Power as to our Blue Cliff right, we had a contest with the Provo Reservoir Company as to our Blue Cliff right only. That is, that was the only unsettled matter between us and all of the parties, the only question that had not been presented and argued and submitted, and that was raised by the Provo Bench Canal Company and by the Utah Light & Power Company testing our award to us under the claim of Blue Cliff.

MR. RAY: That was all obviated by our stipulation.

MR. A. C. HATCH: That was settled, as I understand it, by your stipulation. Now, we have settled with the Utah Power & Light as to this, but in a different way from what we

have settled with you. Our settlement with the Utah Power & Light only affects them.

MR. RAY: Now, Judge Hatch, I am going into this--

MR. A. C. HATCH: Our settlement with you, the stipulation with you will be as we have agreed and there is then no controversy, as I understand, between plaintiff and Provo Bench Canal, and there is now no controversy between plaintiff and the Utah Power & Light.

MR. RAY: Now, Judge Hatch, that is just what I thought about it, and I am not familiar with what went on yesterday, and this is what I want to get in mind. We were attempting to controvert your Blue Cliff right?

MR. A. C. HATCH: Yes.

MR. RAY: You were insisting that the size of the river, though the Blue Cliff was secondary in point of time to our appropriation, the increased size of the river gave that the standing of a primary appropriation. We said no, but finally arrived upon a stipulation which said we would recognize that as a primary, take the same drop as other primary rights. In support of that we have had contours prepared which would show a mean river of 240. You come along with contours which show a mean river of 340. We have come here and agreed to a stipulation obviating that whole thing as to Blue Cliff. Now what more right has the plaintiff in this case, or interest, has the plaintiff in this case to preserve the testimony upon which there would have been conflict in the absence of that stipulation than we have to come in here and present the moot question of all our contours because we are trying a question that is settled by the stipulation itself, settled by the stipulation itself, and the Blue Cliff right, so far as we are concerned, so far as Provo City is concerned, I understand, and so far as the Telluride Power Company is concerned within the limit of the issue presented recognized the Blue Cliff right. Now, this

need not be introduced in fortification of a right which is admitted here. It raises a question which is going to have an after math.

THE COURT: I have been trying to determine just from what you make that statement. Let me see if I understand the situation. When the court found the Blue Cliff right was a primary right by reason of the fact that the mean river had increased so as to make the primary flow of the water sufficient to include it, an objection was made by your clients and by the Power Company to the correctness of that situation. Now, I understand that that objection has in some way as between both of you, been removed so that it is agreed that so far as you are concerned the decree may be made recognizing the Blue Cliff as one of the primary rights. That is correct, isn't it? Now that would be res gestae as between you when such a decree is entered. What difference can it make to anyone then whether this evidence is introduced or not. The introduction of the evidence does not constitute the res gestae of the question, it merely preserves in the record this evidence. I don't understand what the objection is to it.

MR. RAY: I don't make myself clear then because I think there is a finesse in it. I want to know this, I want to know if having gotten the river up to 291 and thereby included the Blue Cliff right as the primary right they are now attempting to get the river up to 328 and include an additional 32 feet of their secondary appropriation as primary right.

THE COURT: I think, Mr. Ray, I can answer that, that so far no application has been made to the court to make any such change.

MR. RAY: I assume that, but assume they could let this go right to a decree and decree should find 328 second feet as the mean river, ^{then} they could apply, the court having

this under its jurisdiction--

THE COURT: Yes, but the court is not going to do that without giving you an opportunity to meet any claim of that kind.

MR. RAY: And we may meet this evidence at that time?

THE COURT: Yes.

MR. RAY: I want the record so clear on that my clients won't have any question.

THE COURT: Mr. Ray, you don't need any record. The court is not going to be so unfair to you as to make a finding upon an issue that is not presented, and no one has asked for, unless the court would give you an opportunity to meet it; although this evidence clearly on its face would indicate so far as the evidence, would indicate there is more water, but I don't understand the plaintiff or anyone else has asked the court to make any finding.

MR. WEDGWOOD: Your Honor, so far as I understand-- if I am not correct my associates will say to the contrary-- we stand upon the stipulation that was made, expect to, is that right? If there is any modification it is modification by stipulation of that agreement. This evidence was prepared at great cost of time and labor. It is material data, we are in the trial of this case, men die, accidents happen to them and other things. What I have done is to simply identify these and show what they are without going into the question any more than necessary to introduce them in evidence. Now, if you have any data that you want to introduce in evidence so that it may be perpetuated and become evidence for whatever it is worth, I have no objections to you introducing it the same as we are attempting to introduce this.

THE COURT: I think, Mr. Richards, you suggested last night you would probably like to cross examine Mr. Wentz.

MR. RICHARDS: My idea was to call Mr. Ray's attention to these matters, he was not here last night, and I wanted an opportunity to call attention to them because he is familiar with the entire subject, we are not, I mean except as far as gleaned from the record, and his familiarity with it made me think he ought to have an opportunity to examine.

THE COURT: I misunderstood, I thought possibly you wanted to cross examine on voir dire.

MR. RICHARDS: No, I had in mind he might want to cross examine.

THE COURT: Mr. Ray, I understood you to say you had not had an opportunity to examine these?

MR. RAY: No.

THE COURT: Would you like to postpone the question of the admission so that you may make a casual examination of them for the purpose of determin^{ing} whether you want to ask any questions?

MR. RAY: No, I think not. With the limitations on it, I think it is not evidence in the case, it is not to be used as evidence. According to General Wedgwood it is preservation of evidence that might become material in further consideration of the case.

MR. WEDGWOOD: In years to come.

THE COURT: I have not regarded it exactly in that light. I did not regard it was offered exactly with those limitations. I will state to the counsel my view of the effect of this evidence. The court came to a conclusion and so expressed it in the decision that was rendered, that the mean flow of the river during the primary or low water stages had reached a point for a period of years practically covered by this report which would constitute a sufficient flow to include the Blue Cliff right as one of the primary claimants to water, and that that water had the same standing as these earlier appropriators under the statute as it then stood and stands yet for a few days. Now, I regard this evidence that

was introduced, if it is admitted, as being important in support of that finding; not for the purpose of changing that finding, because that question is not before the court; but it was contended, and vigorously contended in the argument and in the briefs that were filed that the court was in error, that situation did not exist, that the increased flow of the river was not such as to properly include that quantity of water. Now, this is a resume of isolated pieces of evidence that was taken during the time we had the hearing in this case and covering quite a period, and I have regarded this evidence not merely as being the perpetuation of this data, but as supporting the conclusion and view the court arrived at. Now, I am not mistaken--

MR. WEDGWOOD: Not changing it in either the stipulation or the findings of the court.

THE COURT: No, that is as I understand it, and I did not want to take that view of it if the counsel were limiting it so that it could only be received as data. I had regarded it as of some importance in support of the conclusion the court had reached.

MR. RAY: Without having studied it at all, if it is to be received as evidence at all, there are a few questions I would like to ask.

THE COURT: I might suggest this, so you may want to cross examine on it. Mr. Wentz testified yesterday evening there was nothing contained in the report or diagram in the nature of opinions by him as to the situation at all, but merely the expression of the facts as he found them and the spacing on the diagram of those facts in a diagrammatical way. I thought I would suggest that.

MR. RAY: I have not seen those diagrams, but there are a few questions I would like to ask Mr. Wentz.

CROSS EXAMINATION by Mr. Ray.

Q What is the period covered, Mr. Wentz, by the hydrographs introduced yesterday, 500 to 516 inclusive?

A The months of April to September, inclusive, except in the one hydrograph showing the average low water flow. It is carried through for the whole year, and it is taken up in two periods from 1889 to 1904 and 1904 to 1918. Then I have added an additional showing the period 1911 to 1918.

Q You cover the period from April until September?

A Yes.

Q The actual low water period during a time when the use is extensive is during the months of July and August, is it not, Mr. Wentz?

A Yes, the low water period is-- it ranges from the 18th of August to the 26th of August, extreme low water flow.

Q Have you available so that you could give to the court now what the fact is, how many years since 1911, you actually measured to the users on the stream, or there was actually measured to the users of the water upon the stream a quantity equal to the mean river which you have portrayed upon your chart?

A As I understand you mean by the average river-- of course, I have shown the river--

Q Let us start with the year 1911, if you have it, Mr. Wentz, because that brings us down to a somewhat closer period.

MR. WEDGWOOD: Just state what you want so that it may be clear.

Q I want the record of distribution of water during July and August, 1911, showing how much the people in the primary rights were getting.

A I will explain that in a way, then we will understand it. Now, we have measurements made by the commissioners not regularly but at times through the period of these different years. We

also have the record at the U. S. Geological Survey station taken daily. Now, I have platted, as shown by the report, marked inflow curve the points as found by the commissioners and connecting these points I determine the inflow curve for each year. Then taking the amount of water at the U. S. Geological Survey station, I have arrived at the quantity on the days that were not measured by the commissioner.

Q I want the measured days, not the deduction, I want the measured days of the quantity of water delivered in the months of July and August, 1911.

A In the year 1911, there was but one measurement taken in the valley, that was on the 10th day of July. The quantity was 344.06 second feet.

Q Three hundred what?

A 44.06.

Q That was the only measurement in the valley during the irrigation season in the year 1911?

A Yes.

Q Now, what did the United States Geological Survey show for that day at its canyon station?

A 210 second feet.

Q Now, Mr. Wentz, the 10th of July would be a period when the water would be higher normally than it would any time thereafter during the months of July or August, would it not? There would be a considerable drop in the river after the 10th of July usually?

A Yes, generally that is true.

Q A very substantial drop. I wish you would go to the year 1912, Mr. Wentz, months of July and August.

A 1912 on the 8th day of July, that was on the 8th and 9th days of July, the total 330.04 second feet. On the 25th and 26th of July, 342.86 second feet.

Q Were those the only two measurements taken at that time?

A Yes, those are the only two in July, or in 1912.

Q Are they the only measurements which you have access to in

any way during the years 1911 and 1912?

A Yes.

Q Going to the year 1913, did you-- did you have an August measurement for 1912?

A No. July 12, 1913, 342.06 second feet. August 8, 1913, 322.65 second feet. August 28, 1913, 317.62 second feet; those are the only measurements.

Q What were the government measurements August 28, 1913, in the canyon?

A 245 second feet.

Q Now, Mr. Wentz, let me ask before I go on, when you take the measurements of 342 second feet for July 12, 1913, does that include the Telluride water, the Power Company water?

A Yes, these measurements I have give you the total water available for use in the Utah Valley for irrigation.

Q And they include the Telluride water?

A Yes, after it passes through the flume.

Q They measure in that quantity 342 second feet?

A Yes.

Q Then it is measured again as irrigation water?

A No, it is the same water, it is measured below the mouth of the canyon in the rating stations of the canals.

Q I know, but when you give me 342 second feet does that include a measurement of water used through the wheel of the Utah Power & Light. I don't mean the water I mean the measurement. Of course it includes the water.

A I have made a measurement of the Utah Power & Light, this is the actual total of water available.

Q I know, but available for what purpose?

A Now, to make myself clear, suppose there was 200 second feet in the Utah Power & Light, I would not measure the water below, but add that to it.

Q That is what I want to know, if that was done in these measurements, you didn't make them?

A No, this was the actual quantity of water measured in the Utah

Valley.

Q That is what I want to know.

MR. JACOB EVANS: Available for irrigation?

A Yes, available for irrigation and for the power and factory.

Q Give me 1914?

A These are for the year 1914, May 12th.

Q No, I want July and August.

A July 2nd, 312.22; July 8th, 317.35; July 15th, 315.23;
July 29th, 277.52; August 11th, 277.02; September 7th,
265.98 second feet.

Q Give me July, August and September for 1915?

A These last were for 1915.

Q Give me 1914 then?

A I haven't a copy of the measurements for 1914 in this report.

Q Do any of your hydrographs show anything about it?

MR. WEDGWOOD: You can get that, can't you, Mr.

Wentz?

Q Let us proceed with 1916 then.

A The year 1916, July 3rd, 457.85; July 5th, 442.80; July 10th,
424.19; July 25th, 390.91; August 2nd, 365.43; August 14th,
358.54; August 26th, 375.16; September 8th, 364.59; Sep-
tember 22nd, 391.91.

Q '17.

A The year 1917; July 16th, 519.26; July 19th, 472.71; July
23rd, 418.62; July 26th, 417.82; August 6th, 411.67;
August 9th, 394.32; August 15th, 400.29; August 22nd, 409.78;
August 29th, 419.87; September 15th, 452.44;

Q 1918.

A July 8th, 315.07; July 15th, 388.46; July 23rd, 336.49;
July 31st, 291.63; August 7th, 297.64; August 15th, 298.00;
August 23rd, 267.21; September 6th, 278.04; September 27th,
297.11.

Q Now, can you get me '14, Mr. Wentz?

A I think that sheet has been left out. No, I haven't a copy
of 1914 here.

Q Where would that be?

A It would be in the 1914 report. I have a copy at the office, I can make up a copy and insert.

Q It may just be put in the record there, the 1914 report is on file with the court?

A Yes.

Q And it shows those measurements?

A Yes.

Q Whatever they are?

A Yes.

MR. RAY: There is no use delaying the court to get that then, because we can get it when we want it. That is all, Mr. Wentz.

REDIRECT EXAMINATION by Mr. Wedgwood.

Q Now you have personal knowledge of the river for the year 1914?

A Yes.

Q You have personal knowledge of the report that was filed in 1914?

A Yes.

Q Have you a recollection which is sufficiently distinct so that you can say how '14 compares with these other years you have given in July and August?

A Yes, 1914 is what we would call a good year. I can show that better with the hydrograph of 1914. 1914 was approximately 50 second feet higher than the average river.

Q Well, during those months?

A Yes.

Q And higher than the other years you have given, the average of the other years you have given?

A Yes, higher than the average of the period 1905 to 1913.

Q Now, I assume, Mr. Wentz, and I ask this question to save any time, and yet at the same time not leave a gap here-- that you have testified in relation to the distribution of the water heretofore in this case?

A Yes.

Q And have testified where these measurements were made as you suggested to Mr. Ray at the point of diversion?

A No, at the rating station of the several canals, the rating stations are some distance below the point of diversion.

MR. RAY: That all shows in the report.

MR. WEDGWOOD: I just want to get it.

Q That is that the sum total of it is made up, as you have given the sum total here by actual quantity measured to the users as under the tentative decree?

A Yes.

Q For irrigation purpose?

A Irrigation purposes and the Factory race for power purposes.

Q And to make it clear there, what portion of this is measured for irrigation ?

A All of it except the waters to the Factory Race.

Q Now, you gave at Mr. Ray's request, two measurements at the government rating station that the record shows, and you have testified is above the power plant's point of diversion.

A Yes.

Q And whatever increase there is in the two years you mention, or in other years where you did not give specific measurement at the government measurement station is because of the added volume by reason of sub-surface and surface flow?

A Yes.

Q Below that point?

A Yes.

MR. WEDGWOOD: Now, your Honor please, I offer Exhibits 500 to 516 inclusive.

THE COURT: The Exhibits may be received.

MR. JOHN E. BOOTH: This is a motion on behalf of the defendant Hyrum Heislet. Comes now Hyrum Heislet, one of the defendants in the above entitled action, and moves this court for an order modifying the proposed decree so as to change the same from the tentative decree as presented by

the judge here in the following particulars for these reasons: That in the sixth paragraph of the said tentative decree the following-- Hyrum Heislet is the owner of the use of 33/1000 second feet of water to be taken from the river on his premises in Provo Canyon-- (Reading)

Now I will state it is a very small matter, your Honor please-- I have filed the originals-- but it has a material effect on the market value of this property by having that clause in there, and we see no reason for having it in. I don't know why it should be put in, nobody else is limited that way.

THE COURT: Any objection to that change?

MR. RAY: The order, I assume, don't intend it could be transferred from the lands in the absence of that without application to change the place of use.

MR. JOHN E. BOOTH: Oh no, of course, if he should undertake to do that he must follow the law, and any objection would have a right to be urged.

THE COURT: There is no objection, this may be stricken out. I don't remember just how it came to be in there.

Whereupon the court takes a recess, and during the recess the attorneys dictate to the reporter the following stipulation with the request that it be inserted in his notes:

It is agreed between the plaintiff Provo Reservoir Company and the defendant Provo Bench Canal & Irrigation Company, that the issues arising upon the amendment to the complaint of the Provo Reservoir Company pertaining to the so-called Blue Cliff right, and the answer of the Provo Bench Canal & Irrigation Company to the amendment and to the complaint as amended, shall be disposed of as between the plaintiff Provo Reservoir Company and the defendant Provo Bench Canal & Irrigation Company, by a decision and decree under which the Provo Reservoir Company as successor in interest to the Blue

Cliff Canal Company shall have a primary right to 50 second feet of the waters of Provo River which shall include the Maple Springs, Pony Steele Springs and all other springs originally arising in or discharging their waters into the Blue Cliff Canal.

It shall be provided by the decree to be entered herein that the point of diversion of all of said waters shall be at the location of the present headgate of the present Provo Bench Canal & Irrigation Company, or at such other point or points as will not interfere with the use of the river portion of said 50 second feet by the Utah Power & Light Company.

This stipulation includes the rights specified in paragraphs 14 and 24 of the present decision of the court heretofore filed in this cause and said decision shall be modified to conform thereto.

MR. RAY: In the matter of the stipulation between the Provo Bench Canal & Irrigation Company and the plaintiff in this action relative to the Blue Cliff right, I ask that the stipulation be filed and copied into the record.

MR. A. C. HATCH: We consent to that and join in the request.

THE COURT: It may be so ordered, and may be copied into the record. Have the city and the plaintiff reached an agreement? ✓

MR. RICHARDS: We wish to put in some evidence on the question of the extension of the period of duty on behalf of Provo City.

MR. RAY: The Timpanogos Canal Company desires to join in that application, and desires to have the benefit of that evidence.

THE COURT: I understand you have abandoned the idea of adjusting the matter?

MR. JACOB EVANS: If the court please, we have really

not conferred about it sufficiently to determine whether or not we will be able to get together, and it might be if an adjournment is taken and all parties get together and discuss it it may be some agreement could be reached without taking the time of the court in the introduction of evidence.

MR. C. C. RICHARDS: We understood we had reached that agreement last evening that the evidence was simply for a foundation for the court proforma, as we did on a previous agreement. That was my understanding.

MR. JACOB EVANS: There is no disposition on our part to make any opposition to it, but we understand there is some disposition on the part of some other people, and I think if the whole parties litigant could get together and discuss it there might be some agreement.

THE COURT: If all parties interested--

MR. JACOB EVANS: I don't understand it in any way changes the understanding.

MR. C. C. RICHARDS: It is simply a foundation for the court.

THE COURT: If all parties affected by it consent to it there will be no necessity of evidence, if not, I take it you should introduce evidence. The court will take a recess until one thirty.

12:00 Noon, Recess to 1:30 P.M.

K
THE COURT: Now, gentlemen, I am ready to hear anything further that is to be heard before we end this matter.

MR. C. C. RICHARDS. May it please the court, we desire at this time to offer evidence as to the necessity of the use of water by the defendant Provo City, and its users of water until the first day of August for the maturing of crops as we have from time to time indicated and we we have given notice of our desire to do. It is not for the

purpose of enlarging or extending, that is the quantity of water, except the period at which the first allowance runs from the 20th of July until the first day of August. The testimony which we propose to offer will show that our grain crops do not and will not mature unless we can have the water until that period of time, quantity allowed by the court. If we may do so, our witnesses are ready.

MR. A. C. HATCH: If the court please, so far as we were concerned, we had thought that as to Provo City, owing to the peculiar conditions as to us personally, that if Provo City alone was asking for this that we would not offer any objection to it, not because we believe that it was necessary for them to have the water, but as a matter ^{of} conciliation and to close the matter up and leave a pleasant feeling all around, but we find the condition is this that it will necessitate the opening up of the case as to crops by every litigant in this case using water in Utah County. It has gone to this extent now Provo City is asking and Mr. Ray for the Timpanogos and Provo Bench Canal is asking that they be joined as interveners in this matter. It will necessitate them going into the crops and the maturity of the crops and the water necessary to irrigate them as to Provo Bench and Timpanogos, and then it will open the case up for every user of water in Utah County to ask for this extension. Now, we have gone into that once quite fully and completely. It is simply raising the question of duty of water again, which the court said would not be permitted. It is a duty of water pure and simple, a necessity for use, and extended use or extended quantity for an extended time. If it were only one who was asking it the small quantity of water involved would not be worth while so far as we are concerned, contesting it, and we would rather waive than to take up the time and the expense necessary to go into it, but when it is opened up your Honor can readily see that it is opened up for one it will be opened

up for all, and it involves the taking of testimony if permitted, of every user of water in Utah County as to that particular period, from the 20th day of July until the first day of August. I had understood until stated by Mr. Richards now that it was from the 10th day of July to the 20th day of July that this extension was asked.

THE COURT: I think it was a later period.

MR. A. C. HATCH: I did not read the petition, but just hearing it discussed and talked of, and we shall object to the reopening of the case for the taking of any testimony, further testimony as to the duty of water upon these lands, and that is what we take this to be, simply a question of extended duty for that period of time, and it opens up the case as to every litigant. If Provo City shall be permitted to come in ~~xxx~~ at this time the court cannot well refuse to allow others to come in, particularly the Provo Bench Canal Company and the Timpanogos, who are here now and have joined these parties in their request, and it means, as I view it, another month for the taking of testimony upon this particular point, and we therefore object to the taking of any further testimony touching the duty of water in this case, as it has all been fully gone over/^{once}and submitted to the court after arguments and after the findings have been made by the court upon the testimony taken as to duty.

MR. RAY: May it please your Honor, I do not myself see why the hearing should take such scope as Judge Hatch suggests. So far as I remember the record, Mr. Wentz in his direct testimony said that he fixed the 20th day of July as the day for the change of duty upon the theory that about the 20th day of July was the last irrigation necessary for grain, and that testimony, I think, was the basis of his fixing it and the basis which the court assumed in making a change from the 63 to the 70 acre duty after July 20th to August 10th. Now upon that it is not a matter of every

irrigator or every user, it is a matter of the general period of the maturity of grain here if that was the basis of Mr. Wentz's testimony and of the judgment or decision of the court. Judge Hatch says they might have conceded it as to Provo City if no body else had wanted it. That would be a concession coming quite as much out of the rights of all the other litigants here as it would out of the rights of the Provo Reservoir Company so that it is not a matter of absence of protest. No such allowance or concession could be made unless it were with the consent of everybody. We stand in this ~~poix~~ position that we are willing to consent as they were, to the necessities of Provo City. We believe there are necessities, and certainly we ought not for the peace of the plaintiff consent to Provo City to have an extended right when the Timpanogos and Provo Bench stand in the same need of water as they do, and if it is a right of concession to them, it ought to be to us.

THE COURT: Are not all the other parties in the same situation?

MR. RAY: Yes, I think so, every party in the suit.

THE COURT: I think, gentlemen, I will be compelled to deny your application to go into this. It seems to me it is the opening up of the entire question of the duty of water that we spent practically a month on. I cannot see any escape from it. Let me ask you, Mr. Ray, what is your idea as to the limits that it would be confined to.

MR. RAY: So far as my clients are concerned, it would be a question of when the grains require the last irrigation, that would be the sole question. I understand that is the only evidence introduced in this record relative to the 20th day of July, that it should be taken as the date for the change of the duty of water.

THE COURT: I meant the general scope of the opening up of this matter. All other parties would be interested, I

take it, if it is opened up.

MR. RAY: That would be the only question if it were open for that question. It seems to me it ought not to consume a month or week, ought to be attended to very briefly.

MR. A. C. HATCH: I wish to state we never have conceded, or at all, the necessity existed for this extension of time as to Provo City. They were here asking, and it was not because we thought it was a matter of right, matter of justice or matter of necessity, but as a matter of conciliation only, if it weren't even that-- we did not say conceding it even then. Our position was we would not contest it and let them put in the proof, and if they could convince the court that the court had erred in fixing this duty we would not protest it as to Provo City alone, but if any others came in we would then be compelled to raise the question that we have now raised, and object to any further testimony being taken.

MR. C. C. RICHARDS: May it please the court, it seems to me that the question is a very small one, yet a vital one. The date fixed was simply to fix the period at which the water could be withdrawn from the grain, and diminished in quantity on that account. Now, if this date is the right date it should stand. If it is not, I take it from what the court has repeatedly said on other matters the court would be glad to ascertain that fact, and, in the many big questions and multiplicity of smaller questions that have been handled in this suit, it is not to be wondered at there may be just a little mistake in regard to that date as there has been as to acreage and other things; not that anyone can be blamed for it, because in handling so many big questions and so many little questions it is to be wondered at there are not more oversights than have taken place in this case. Now, if it be a question of how late irrigation is required to mature the grain, and that is our conception of it, and the only question here, as

far as we are concerned, our witnesses can be disposed of in an hour or hour and a half's time. Now that my brother may say here, if you are alone we would let you through as we agreed to do, but because others want to come in, why, we not only withhold our assent, but make an objection, that seems to me rather strange. We cannot say what others are doing, we are not appealing for anything for anybody else, simply for the citizens of Provo, and we cannot indicate what others will do in regard to the matter, but we feel that it is a matter that in this big suit need make but little difference to the plaintiff, but will make considerable difference to these users of water in Provo City who are raising grain and are dependent upon this water for it. It is simply a matter of extending the date from the 20th of July to the first of August, at which the periods change from one duty to the other.

THE COURT: Matter of 3.28 second feet difference in your duty of two thousand acres of land.

MR. RICHARDS: I presume that would be it, a small matter.

MR. A. C. HATCH: Small matter as to them.

MR. C. C. RICHARDS: Yet the people who raise the grain in these fields say that unless they can have the water so as to use it for that purpose until the first of August that they cannot get a properly matured crop there either in bushels, but also shrunken in quality so that they are materially damaged by it.

THE COURT: I would take it that would be apparent and probable as you state it, but I do not understand that is the situation.

MR. C. C. RICHARDS: That is exactly what we offer to prove by some of the best people, residents in this community.

THE COURT: But the court as it now stands, it

would not deprive you of that water, the decree, I mean, the tentative decree merely cuts it down three second feet.

MR. RICHARDS: And cutting it down ten days earlier than it should be cut for the grain purposes. We need the full standard for the grain until the first of August to get our grain properly matured so that it will be merchantable and usable and sufficient and proper in quantity. Now, those are the witnesses, we have half a dozen of them here, the best citizens of this community, and who are men of standing and experience, know these matters, and offer to prove that to the court.

MR. A. C. HATCH: We reply to Brother Richards, we had not consented they have this water at any time, as I understand it. We have simply said that we will be neutral if others don't come in and make the same kind of a claim to us. It would mean if it was taken from the entire volume of the water, it would mean about a fifth of a second foot, but I don't know, I have not computed it myself, but it would mean a small quantity taken from us, but if all come in, it means that the whole of it comes from the Provo Reservoir or the Blue Cliff right, and whatever would be necessary to irrigate all of these lands for ten days would be taken from the Blue Cliff right of fifty second feet which is now conceded to us, and what to us would be a critical period, if there is any critical period. The question that they propose to show was gone into fully, not only by experts, but by the different farmer witnesses put upon the stand in all of these-- by all of the different defendants. The time of the maturity of crops and kind of crops raised and the kind of soil that they were raised upon were gone into fully and wholly, and when the harvest came on. All of that wholly testified to. It was not a matter that was overlooked in the taking of testimony in the beginning, and it is simply burdening the record, as I take it, with additional testimony of practically the same class. Now, the city offers six or eight witnesses as stated

by him, in an hour and a half. Your Honor readily understands what that means with the cross examination and then the rebuttal. It will mean at least a couple days and probably the same thing would follow as to everyone who comes forward, and I have no doubt that every user of water in Utah County, from the Provo River in Utah County, would come forward and ask as Provo City asks. If Provo City were in a special class by itself it might be different, but I don't understand that it is as to the use of water, but I only wish to answer as to our having consented and then withdrawn the consent. We have not consented, we have simply said that if others did not object we would remain. If others did not claim we would remain neutral.

MR. RICHARDS: Judge, where was that statement made, you don't mean in court now, you mean out of court.

MR. A. C. HATCH: What?

MR. RICHARDS: Statement you said you consented.

MR. A. C. HATCH: You stated we had consented.

MR. RICHARDS: Where did this occur, in the court room or out of the court room?

MR. A. C. HATCH: Right here in the arguments, I understand you said you said you promise to do so and so if others did not come in. I say I never promised anything.

MR. RICHARDS: Will you grant a minute, I want to tell you what did occur. One of your associates and one of your officers stated to us last night that there would be no objection made by you people to our putting in this proof this morning, and there was no condition attached to it that others would consent, nor was there any condition attached to it that others should not make application. Those matters had nothing whatever to do with it. Now if you are going to state it, that is exactly what occurred last night.

MR. A. J. EVANS: I would like to answer that, if the court please.

THE COURT: Now, gentlemen, the court is not concerned with that/^{at}all, I think we ought to confine ourselves to the matters that the court has to do with.

MR. A. C. HATCH: I understand the court has ruled upon the matter he would not reopen the matter and Mr. Richards argued it further and I simply wish to reply.

THE COURT: The court is not concerned with the question of your attempted agreements outside of court.

MR. F. S. RICHARDS: Has the court decided it?

THE COURT: I merely suggested I did not see it was possible to open this up, but I have not decided it yet.

MR. F. S. RICHARDS: Just a word on this subject. When this whole thing is simmered down it seems to me the objection is based upon the ground that the time of this court is going to be taken up in consideration of this question. I submit that if it be true that this court has misapprehended the truth or facts, that is to say, if this date had been fixed under the assumption from the testimony that the grain did not need irrigation after that date, and if the truth is that grain does need irrigation after that date it is not a valid objection to the introduction of this evidence to come in here and say it would consume time to do it. I assume that this court, from my knowledge of the court, I would say that the court desires to do that which is right in relation to this matter, because it is a thing that will be for all time. Now, if it is just, and if it is in accordance with the facts that this change should be made on the 20th of July, then it should stand. If it is not in accordance with the fact, and if the change ought not to be made on the 20th of July and if a great wrong and hardship would be caused by reason of it being made on the 20th of July and the change should be made on the first of August in order to avoid that, then I say it is no objection, no valid objection to come in here and say it would require time to introduce the evidence and prove this fact.

THE COURT: No, I think you are exactly correct.

MR. F. S. RICHARDS: A case of this importance, everybody in this case is entitled to have this court know the truth in regard to every material fact in the case. Now, if we offer evidence-- I understand the proposition now is to exclude all evidence-- I don't know whether this offer has come in exactly the proper form, but ^{that} we ought not to have a witness here and offer the witness, but we want it understand we want to prove these things that have been stated by my associate. We have the witnesses in court and want to have all the binding force and effect upon the court as if the witness were on the stand and we were asking to have the witness sworn. Now it seems to us from the information we have from our client and these witnesses, this is an important question, a vital question, that a misapprehension has been had in regard to it, that a wrong decision has been reached, not through any fault of the court, perhaps not through any fault of anyone, but through some misapprehension a wrong conclusion has been reached, and now we ask for an opportunity to offer the evidence and convince the court, if we can, that a mistake has been made. If we fail to do that, of course that is the end of it. If we succeed in satisfying the court that a mistake has been made in regard to this matter, is there any question about the duty of the court and the willingness and desire of the court to rectify that mistake? I think not. From my knowledge of this court I should say emphatically not. That is all we are asking is for the opportunity to present this evidence and try to convince the court, if we can, that a mistake has been made here as to this.

THE COURT: Now assume, Mr. Richards, that the court should give you this privilege and put in your evidence, and the other side put in the evidence they have to contravene it and at the next session of the court when we meet to agree upon

the decree they make an application to put evidence in upon this same subject and make just the same appeal to the court you have made now, wouldn't it be just as strong as yours is and position be just as strong then. If the court should hear that evidence and determine the court had made a mistake, and you should come back with another appeal of this kind, wouldn't it just as strong as now. It seems to me the only thing the court can do is to say we have ended the matter, because it is just opening up something we spent a great deal of time on, and it is not as it was with your acreage. There was a palpable mistake, it was shown there was a mistake, but you don't even suggest that in this matter, because it could not be suggested. We went into the evidence and found the fact. I don't know, I don't understand just what your view is with reference to the final determination of this. I don't feel that the court ought to open this up so that it is going to be a long matter.

MR. F. S. RICHARDS: I will tell you what my view is in regard to the determination. Will your Honor excuse us a moment?

THE COURT: Yes.

MR. F. S. RICHARDS: Your Honor please, what I desire to say in answer to the court, when this case would terminate is this. When we made our motion to have this case reopened, which was many months ago, so long, I am not able to say just exactly when, but your Honor will remember this was one of the grounds we asked at the time, one of the grounds upon which we asked to have it reopened at every session since, we have been insisting upon having this matter come before the court. While the court has expressed a reluctance to reopen the case on the question of duty, the court has all the time said, and did say at the very last session, as appears from the record, that we might renew the application at this time. There has been no intimation by anybody else, except the Timpanogos people,

that they desired anything of the sort. At the last session of the court a representative of the Timpanogos Company, the attorney being absent at the time, did make a statement they desired to make the same application. Now, as I understand it, those people are here today, everybody in this case is here as a matter of legal contemplation. They have been notified to be here, every party, as I understand it. Am I correctly advised about that?

THE COURT: I don't know.

MR. F. S. RICHARDS: I am told the clerk sent a notice to every party to appear here on Wednesday for the purpose of disposing of such matters as--

MR. C. C. RICHARDS: At the last session the court gave the clerk orders to give parties notice.

THE COURT: I assume that was done.

MR. F. S. RICHARDS: If that has been done, in legal contemplation they are all here. They have been here. Nobody else has asked for any reopening, nobody else has asked to be heard on this matter, and I think if we were to be heard on the subject and the Timpanogos people were heard, and the matter was to be closed, there would be no ground for anyone to come here and ask for a reopening on that account. They have had notice of this, had an opportunity to be here, and had an opportunity to make their suggestion with relation to it, or make their application if they seen fit. Your Honor please, I say that in answer to your Honor's question.

THE COURT: I didn't make any reference to any of those parties at all. I said the plaintiff. I said suppose the plaintiff would ask for it and then after the court had decided that you should ask it again.

MR. A. C. HATCH: If the court please, it has been suggested to me, but I don't remember the person now, that since the filing of this, the bringing of this question before the court that we had a stipulation filed between us and Provo

City disposing of all this matter, and foreclosing them from going any further in the case. I don't know that is true.

MR. F. S. RICHARDS: If you will kindly point out such stipulation.

MR. A. C. HATCH.: It is suggested to me we settled all our differences in that stipulation.

THE COURT: If I could think for a moment you could introduce your evidence as you suggested in an hour or so, I would set aside the statement that I made right at the start that the court would not reopen this matter for the purpose of considering the duty of water, but it does not seem possible you could do it, that after the mass of evidence we have gone into now you could go into this matter and settle that question of duty in the course of an hour or two.

MR. C. C. RICHARDS: There are only about half a dozen questions we want to ask, and that is as to the lateness of the date the water is needed on grain. Of course, we could not control the cross examination.

THE COURT: If we assume you need water up to the first of August, the court would not change the ruling on that, because the court has awarded you water up to the first of August. We would not change it. If the court made a change the court would have to base it upon some competent evidence which affected the question of the duty of water during that period. The court has awarded you for that period for your -- this is the Provo acres, farm acres, 29.40 second feet at a duty of 70 covering that period. Now, the very fact you need water during that period would not be any indication to the court that the duty of 70 was not the proper duty.

MR. C. C. RICHARDS: I was a little short in my statement, of course, we need water, need the maximum quantity for the maturing of grain, and then stand on the record as it is.

MR. A. C. HATCH: That is a question of duty pure and simple.

THE COURT: I will permit you to introduce just that evidence if you say that is all you desire to introduce. I will permit you to ask your witnesses that particular question, but I will say to you, gentlemen, the court will not change this decree if that is the only evidence you have to introduce, because that is not sufficient in my judgment to justify a change.

MR. C. C. RICHARDS: May it be considered then we tender that evidence, and take a ruling of the court. It is no use going through that formality. I have the names of the witnesses here, which I will read. James E. Tanner, William K. Farrer, Ola H. Eddenburg, David Kling, Thomas J. Farrer, J. C. Thompson and H. J. Goddard. I offer to prove by them that they are residents of Provo and have been for many years last past., they are farmers, are familiar, and have been during all that period of time, with the irrigation of the lands covered by the waters which have been distributed by Provo City through the East Union, the City Race and Tanner Race for farming purposes, that they are familiar with the period of time and quantity of water necessary to irrigate and bring to maturity the crops of wheat, oats and barley that have been grown from the water flowing through those canals distributed by Provo City, and that the grain crops named require the maximum quantity of water for irrigation to procure the proper development and maturity until the first day of August of each year, and that, without having the maximum quantity for the irrigation of such crops until that date, and if it be diminished on the 20th of July, that the result will be a want of maturity in the crops and a shrinking of the grain that will make it unmerchantable and lighter in weight. And the witnesses will also testify that it has been the practise of the farmers and land owners, water users along

those canals, for many years past, to use the maximum quantity of water for the irrigation of their grain, up until and including the first of August. We offer to prove by these witnesses those facts.

THE COURT: Mr. Richards, I think you made a mistake in your dates, I think you possibly made a mistake in your date. To make it accurate the maximum quantity is reduced on the 20th of June instead of the 20th of August.

MR. C. C. RICHARDS: I meant the 20th of July.

THE COURT: I should say the 20th of June instead of 20th of July.

MR. C. C. RICHARDS: The date we were referring to there was the 20th of July. Possibly the word maximum should be changed to the word quantity, and that the quantity that is necessary for the maturity of those crops should be continued without diminution until the first day of August, and that the water not only has been used by them, but it has been necessarily used and beneficially used.

MR. A. C. HATCH: Now, I understand, if the court please, the offer as it now is, to to prove that the quantity should not be diminished from the 20th day of June until the first day of August. That is the way the record now shows his offer to be.

THE COURT: I don't know, Judge, the court doesn't understand it, because he has now eliminated the word maximum which referred necessarily to the duty prior to the 20th of June, from May 10th to the 20th of June.

MR. C. C. RICHARDS: I didn't have the paper before me.

THE COURT: Just a moment now. Striking out that word it does not leave, I think, the matter just in the form you desire it.

MR. C. C. RICHARDS: Will your Honor permit me to look at the dates.

MR. F. S. RICHARDS: I understand the offer is to show that it is the quantity of water that the court has decreed up to the 20th of July is necessary until the first of August.

THE COURT: I understood that thoroughly, but I merely suggested to Mr. Richards he had not made that plain in his offer.

MR. F. S. RICHARDS: Does that overcome the difficulty in your Honor's mind?

THE COURT: There is no difficulty in my mind.

MR. F. S. RICHARDS: I mean as to the clearness of the statement.

THE COURT: No, there is no difficulty in my mind what is offered.

MR. A. C. HATCH: Our objection to the offer is, and we do object that it opens up the whole question of duty of water upon the lands of the clients.

THE COURT: I am inclined to think it does, gentlemen. Your offer is ever so much broader than your statement what you would show by these men when I made the reply I would permit you to do it.

MR. A. C. HATCH: And further objection everyone of the witnesses except probably Eddenburg, testified to those matters during the hearing of this case. They all testified as to the duty of water, the maturity of crops, kind of land and amount of water necessary to mature the crops. Every one of them, as I have it, but I may be mistaken, except Mr. Eddenburg, and he probably testified upon these same matters that counsel now offers to give additional testimony supplemental to what they have already testified to, but upon the same subject and the same subject matter. It would open it up in rebuttal for the introduction of additional expert testimony.

THE COURT: I am of the opinion that that is true, gentlemen. Now, this is the situation of this case with

reference to this particular subject. Early in the trial of the case Mr. Wentz was placed upon the witness stand, and he made what was all during the case referred to as the blackboard schedule. In other words, there was a large blackboard placed upon the wall, and upon that Mr. Wentz made a schedule and, if I am not mistaken with reference to this particular award, the award has been made exactly according to that schedule. That schedule remained facing the parties during this entire trial, and the evidence when the defendants came to their evidence, was directed particularly to that schedule. In other words, this matter that you are now challenging was the subject of the investigation of the court during almost that entire trial, and the witnesses on behalf of each one of the defendants, the Provo Bench and the Timpanogos and the City all had their attention directed to this schedule that was upon the blackboard during the entire hearing. Now, there does not appear to the court to be any reason why we should open this matter up and attack again this schedule that was worked out. The basis of it was testified to and reasons for it were given, and the witnesses on the other side had ample opportunity, and did go into their reasons why it should not be adopted. It does not seem to the court it should be opened up now and all of the parties to this litigation should be put to the expense of having a hearing upon this when the amount to Provo City for the irrigation of two thousand and thirty-eight acres is 3.28 second feet different for a period of ten days. Now, the court has some little knowledge of the situation of irrigation, and that land during that period of time, while it is a substantial amount, yet, I do not think it is of that importance that the court ought to again open this matter up and set aside all the rules for submission of cases, that when they are submitted, and fairly submitted and there seems to be no inadvertence or mistake, that the court should regard it as

closed. I feel that way, gentlemen, and I think the objection should be sustained on the ground this matter has been completely gone into and closed; and I made that suggestion, as I remember it, the very first appearance Messrs. Richards & Richards made in court, that I would not, if I remember the language, I would not under any circumstances go into again the question of the duty of water, but as to your acreage, if there had been a mistake, I would go into, as to the question of inadvertence or mistake, as to the spring water, I would go into that, but as to duty, I did not think I ought to do it, and feel the same way yet. Gentlemen, I do not think there is anything presented that appeals to the court to justify the court to go into this question of duty of water.

MR. C. C. RICHARDS: May we be allowed an exception?

THE COURT: Certainly.

MR. RAY: We join in the exception, and in connection with that exception I think it not improper to call attention to this fact, prior to the entrance of the final decree. I have heard it several times that the only question which would justify a change of duty was the change of maturity of grain crops. Mr. Wentz' testimony upon that is that the last watering of grain, average last watering, was the 20th of July. I think perhaps upon cross examination by Judge Hatch, several of our witnesses for the Provo Bench testified the last watering was between the 20th of July and first of August, and this is not addressed to your Honor's ruling, but as argument upon the record. Your Honor will remember there is some fifteen or twenty thousand acres of land involved in this controversy. That it is an utter impossibility each of those irrigators could apply his water to the land on the 20th of July. It would mean that the last irrigation for a large portion of the lands was, if it is a weekly rotation, and it is, I think the record shows, would be the 13th day of July, which is a date earlier than that of any of the wit-

nesses' testimony in this case when grain needs water for the last time, and I would like to suggest to your Honor this thought, that that date, the 20th of July being fixed, and I think being rather a proper date under all the testimony as it now stands, as the last irrigation, ought to give a sufficient period thereafter within which each grain crop in its rotation might have its irrigation on or after the 20th day of July whether it be three, four, five or six days, whatever the rotation is. That seems to me to be in line with the recent decision and with the logic of the situation there, in order that they all may have a rotation there and get the water as late as the 20th day of July.

THE COURT: Now, Mr. Ray, if that can be worked out, that appeals to the court upon the record as we have it, from the evidence as we have it in, that possibly some change ought to be made, some flexibility ought to be given to that change of the 20th, if that can be worked out without a confusion that we can avoid, and if the court can be satisfied that can be done, I am very much disposed to do it, but that is entirely different from the situation of introducing further evidence.

MR. RAY: That is why I have made no particular preparation, because the date of watering was founded, of course, somewhat upon my own witnesses.

THE COURT: I do not understand, Mr. Ray, or do you understand that where it is a weekly watering, and the last watering was on the 14th say, that the party doesn't get another watering on the 21st under this arrangement, because they do, I understand, but it is reduced by the proportion that water user would sustain in the case of Provo of the 3.28 second feet reduction which would be almost an inappreciable quantity.

MR. RAY: Yes, but on the entire system it is in the neighborhood of 20 second feet of water for application solely to grain for the last watering.

THE COURT: Taking the entire system of water, that is, I mean, all the parties it is 17.83 second feet difference in the entire system here.

MR. RAY: . About 17 or 18 second feet, and that would be applied solely to grain. That is, the difference is brought about in the duty because of its application to grain crops, harvesting of the grain crops. If the duty given by your Honor in the first instance of 63 is a necessary duty for the irrigation of grain then whenever that 17 second feet of water is thrown out of commission, that would mean throwing out immediately without any water of a thousand acres of grain under the system. That is how it would work, because it is taken off grain, and if the quantity given in the first instance was not excessive, either the grain would have to suffer or have to be withdrawn from irrigation, a thousand acres.

MR. JACOB EVANS: In all probability half of that grain had received the water in this time.

MR. RAY: I understand, Mr. Evans, there is nothing sacred about the 20th day of July when grain needs watering at the last time. I am not trying to argue with such particularity and all of our witnesses fixed it around there when grain needed water at the last time. I would not say that would not have been just as reasonable on the 18th, or I would not say it would not have been just as reasonable on the 22nd, but I should say if there could be some period, even if that extended to the 25th, the date which the witnesses for the defendants have fixed as the last necessary date for the irrigation of a full crop.

MR. A. J. EVANS: Is it not a fact it matures and half of it is in the shock?

MR. RAY: I don't know, I never put a bundle of wheat in the shock in my life, but that question is foreclosed by your own argument, and we cannot introduce any testimony on it, but that date is fixed about the 20th.

THE COURT: My recollection is there was a great mass of evidence along the line when the crops matured, and while my recollection is some of the witnesses put it later than the 20th, but that seemed to be about the average date.

MR. RAY: That is the record I am positive, that it needed this last irrigation, some said between the 20th and first of August, and along there, but under this rule the only man who will ^{get} his watering turn as late as the 20th of July on the duty given for grain will be the man whose turn comes on the 20th. All the balance of them will have missed that turn entirely.

THE COURT: They will run all the way from there back to the 13th.

MR. A. C. HATCH: He would have water to irrigate with diminished only one-tenth in quantity, and the testimony, if the court please, in the case here, is that the later irrigations always require less water. The first irrigation takes the great quantity of water; some of them testified they needed double or three times as much for the first irrigation as thereafter, and everytime it is irrigated it takes less quantity of water to cover the ground than it did the last time, and that would naturally have reduced the quantity, and this only reduces it one-tenth in volume, so that he is not deprived of water for his grain, he has his turn just the same after the 20th of July as he had before the 20th, but his quantity is diminished, not only as to the grain, but it applies to all of the crops that he has, his orchard, his vegetables, his fruit, applies to all of them. He has the same quantity of water for his entire cropage whether it be grain or fruit. Some of them are all fruit. Gets the same quantity of water reduced one-tenth. He has the same turn for the use of water reduced one-tenth in quantity.

MR. RAY: Then it cannot hurt anything.

MR. A. C. HATCH: The average farmer cannot tell

by examining the stream or looking at it that it is reduced one-tenth, he has to get an engineer to measure it for him to know whether or not he has enough water to cover the crop with. It means if ~~if~~^{they} all take it some seventeen or eighteen second feet of water from the Blue Cliff right.

MR. RAY: Pardon an interruption, you say from the Blue Cliff right, that is not correct. The Blue Cliff right participates as a secondary right, that is, a primary right.

MR. A. C. HATCH: No, it goes from our Blue Cliff right, because we are awarded 50 second feet, and we do not get that 50 second feet. When we begin to pro rate we pro rate with that 50 second feet.

MR. RAY: Judge, you get the benefit of this added duty on your Blue Cliff right.

MR. A. C. HATCH: No, we don't get anything added to our Blue Cliff, the water is not there.

THE COURT: Mr. Ray, would you make a concrete suggestion along the line of what you have stated.

MR. RAY: I will, your Honor, but if I may make a suggestion in reply to Judge Hatch. He contends that there is a diminished supply needed irrespective of the crops. That is not the evidence. The evidence is that the first two or three waterings puddle the lands and they are very excessive, but after that original puddling as the weather becomes hotter and dryer, the quantity required for irrigation does not decrease. That is the testimony in this case. It seems to me your Honor could instruct the court commissioner to fix a ~~xxxx~~ term consisting-- I don't know whether it would fall on the 20th or the 18th, but that all grain upon any one system should have one watering under the system after the 20th day of July.

MR. JACOB EVANS: Suppose a man has some water, and he would prefer to put his water on some other crop.

MR. RAY: You can turn it to him and he use it for

whatever he pleases.

MR. JACOB EVANS: Shall he water as the commissioner tells him?

THE COURT: Let me see if I understand your suggestion, Mr. Ray, that small grain, such as wheat, barley, oats, whatever it may be, should be permitted by the commissioner to have one watering on or after the 20th at the quantity fixed as the duty between the 10th and 20th, the 20th of June and 20th of July, and that the other crops should be reduced in quantity as fixed by this duty?

MR. RAY: I see a lot of difficulty to that.

THE COURT: You are getting too many complications.

MR. RAY: Too many mathematics. I suppose the only way would be to take the period of rotation and make it the 25th. That gives them two days before and five days after, period in which this must be done.

MR. A. C. HATCH: Why not according to your theory, why not make it the 23rd, that would be dividing it.

MR. RAY: Well, of course, that is some nicety about it, but the 20th is the date fixed and I think we might with reason ask for the 27th, and Judge Hatch knows I would be justified in asking for that date. We are asking for a five day period.

MR. A. C. HATCH: Which gives two or three days more time.

MR. RAY: If Judge Hatch's reasons were not captious I would say the 27th, because my whole argument would justify me asking the 27th, and Judge Hatch knows it. Those things don't happen with such certainty and I suggest it might be the 25th with propriety and then the duty upon which the water is fixed would be--

MR. A. C. HATCH: My belief is one-half of the grain is harvested before the first of August.

MR. RAY: I might have a contrary belief and they

might be equally wrong.

THE COURT: I think we have assumed a good part of it was harvested by the first of August. I think the 20th of July was the date discussed.

MR. A. C. HATCH: It is dried out at least a week after irrigation before it is cut.

MR. RAY: Yes, and that was the evidence, the last watering was July 20th, because they harvested about August 3rd, and wanted to dry out so that the harvester could go upon the ground. It matured from that last watering and filled.

MR. A. C. HATCH: We think the decree should stand as it is.

MR. WEDGWOOD: It seems to me that this is hypocritical, an extra nice proposition which simply leaves the result one thing, extending the duty of water for five days. Now, I believe that human beings gain their best results from experience. That intelligent experience leads us to knowledge of facts which do bring the best results. May be I am mistaken, may be my memory is at fault, but I think I am correct when I say that no such proposition as this has ever been advanced in any litigation of this kind. Neither has a period of water duty been advanced upon the theory now agitated. If the last watering of grain is shown by the evidence to be about the 20th, by no system that we can evolve can we arrive at the exact nicety, any more than we arrive at niceties in taxation. If we should attempt to evolve a theory upon which for a certain number of acres assumed or demonstrated to be in grain under each system in each year, I assert that the probabilities are just as great that the period would be extended when there was no grain to irrigate as the probability is now that some grain would not be irrigated before the 20th. It is throwing out a new line, to my mind, the conception has no substance, and the argument and premises upon which the request is made for such an extension to be

granted, I see nothing substantial in it.

THE COURT: If the reduction in the quantity of water amounting practically to one-tenth of the water is such a reduction as to injure the crop, it is a matter of some importance, because under the evidence, I am of the opinion and it has not been called to my attention before, that the 13th of July is too early a period for the last watering of those crops at the full amount of the water. That is, if the reduction of one-tenth is such a reduction as to render the necessary irrigation ineffectual to accomplish the object of the irrigation, that the 13th is too early a date to make the change, and where the rotation is once a week, the 13th would be the last watering at full amount that some particular irrigators would have. I am not impressed, however, that a reduction of one-tenth is of such great importance under the evidence as we had it, with reference to the necessities of those grain crops for water as has been indicated by the argument. I am disposed, however, to make some slight change in this so that the last watering at the duty of 63 may be a little later than the 13th for those who happen to fall upon that turn, I am inclined to fix it so that it would come between the 17th and 24th. I am quite confident under the evidence that would be late enough, the 24th, for the last watering, and I am disposed to make that change in this tentative decree, so that the earliest time at which the change could come to anyone would be the 17th, the latest time it would come would be the 24th under a week schedule.

Now, if any parties desire to make any suggestion to the court in relation to this proposed change that the court has suggested I will hear from you, because I want to get the views of anyone who feel that ought not to be done.

MR. WEDGWOOD: May I ask a question there?

THE COURT: Yes.

MR. WEDGWOOD: Preface it by saying that the duty

is low compared with other systems. That properly applies to what I said a moment ago. I don't know as I fully understand the court in this respect. Does it mean that the change would come for all of the system from 63 on the 24th?

THE COURT: Yes sir.

MR. WEDGWOOD: On the 24th.

THE COURT: Practically work out on a weekly distribution with some parties their last full watering would be on the 17th, because the next watering would be on the 25th.

MR. WEDGWOOD: This goes to the whole acreage awarded to all the parties?

THE COURT: It goes to change in duty.

MR. WEDGWOOD: That is what I cannot understand.

THE COURT: I do not undertake to make any distinction between various kinds of crops, because that would lead to too much confusion.

MR. A. C. HATCH: Our theory of this was practically half the grain was harvested before the first of August, and, that a duty of 63 to the acreage harvested and unharvested was more than was necessary. That that was the theory upon which the commissioner^{er} made his blackboard schedule, and that, as a matter of fact, that the quantity of water to be applied upon each acre was not reduced by reason of the harvesting of the crops; and that is a matter we are dealing now with corporations principally, and that is a matter that should be adjusted within the corporation itself as to its stockholders. They have the water, they may apply it under their rules and regulations to their several stockholders as the benefits or injuries appear to the officers of the corporation. The commissioner distributes it according to their need, according to the crops raised. He distributes the water to the head ditches of the several corporations. Now, if there is an injustice being worked by reason of the corporate distribution of the water to the several stockholders, and

they distribute to one to irrigate with who had his crops harvested, to irrigate wheat, and another is deprived of the use of his water that he needs to irrigate at the time when he needs to irrigate his wheat, that is a matter that could be adjudicated and remedied within the corporation itself, and the court should not attempt to try to regulate it by decree.

THE COURT: No, I am not undertaking, Judge Hatch, to do that.

MR. A. C. HATCH: And the last irrigation of a particular crop of wheat or grain -- now, it is suggested by Brother Wedgwood that the testimony is that all of the irrigation of grain was ended on the 20th day of July-- pardon me, I may have misunderstood, I don't have any recollection of it, stating the 20th day of July, but the court before making--

THE COURT: I think, Judge Hatch, there was some evidence to that effect, but I don't think the greater weight of the evidence was to that effect, that it was all harvested to that time.

MR. A. C. HATCH: Not harvested, but the irrigation ended that period, that practically all of it was harvested by August first.

MR. RAY: That is not the testimony, Judge Hatch. The testimony is that the harvesting is nearer August 10th, and some later than that.

MR. A. C. HATCH: I don't know anything about it down here, but I do know when harvesting is up in Wasatch County, and we are usually about two weeks later, two to three weeks later than here; but it is a matter I think the court should not finally determine in any event, without going through that testimony, as to whether or not it is the last watering of the grain on the 20th day of July.

THE COURT: I am inclined to make an examination of that record to see what that evidence is.

MR. A. C. HATCH: Whatever the testimony is as to that if the court shall, after examining it find, of course, it would be the duty of the court to make such change as he shall find the testimony would justify.

THE COURT: I have never considered the question from the viewpoint suggested by Mr. Ray, the fact of those weekly turns, and some person would have his last watering under the 63 acre duty seven days earlier than the period fixed for.

MR. A. C. HATCH: It is suggested this, many whole farms that have practically no grain at all, some who have none. This duty of water is applied to them just the same as to the grain crop. In that instance, if it is necessary, it would be a waste of water. I take it that the court would have in mind these minor matters might be regulated within the corporation itself, as to kinds of crops. In other words, if there is in their ditch sufficient to irrigate all the crops under that ditch, they should have no complaint to make to this court or other people by reason of some individual under the system not having sufficient quantity to irrigate the particular kind of crop. They use their water. Suppose it is turned to them with the intention of irrigating wheat, and they apply it upon carrots or turnips, whatever they may see fit.

THE COURT: My impression with reference to the matter is this, that the crops are so diversified, as has been suggested by Judge Hatch, that a change from 63 acre duty to a 70 acre duty, whether it may be one date or five or ten days later, is not of as much importance as would be indicated, according to the suggestions made to the court, yet, I am not going to take that into consideration, and I am going to try and fix that according to the evidence that is in. My view, gentlemen, is that a 70 acre duty is a very liberal duty, and a change from 63 to 70 is not a matter that is going to ruin

anybody, but I want to fix this so that the parties who have grain can have the benefit of the 63 acre duty for the last watering, and that will not be too early to prevent the maturity of their crop if a change from 63 to 70 would prevent the maturity of it, which I am not satisfied of at all, and I will go through the evidence, and if it will justify it, if the evidence will justify a change to the 24th so the last watering may be as late as the 17th or 18th for the earliest turn, I will make the change, but I find the evidence will not support it I will let it remain where it is.

Now, are there some other matters before I close this?

MR. F. S. RICHARDS: We desire to be heard, your Honor please, briefly, upon one or two points in the argument.

THE COURT: Are you prepared now?

MR. F. S. RICHARDS: Any time.

THE COURT: What are the matters?

MR. F. S. RICHARDS: With regard to the acreage in the lots, that is the point.

THE COURT: I had supposed that was agreed upon.

MR. JACOB EVANS: Didn't we stipulate with respect to that matter?

MR. F. S. RICHARDS: No sir, you didn't stipulate.

MR. C. C. RICHARDS: It is one thing the court wants to hear us upon.

THE COURT: What is your claim upon the acreage?

MR. C. C. RICHARDS: Our evidence is in as to a certain quantity, and some diminution on account of artesian wells and shade trees and other things.

THE COURT: What is your claim, what do you claim?

MR. F. S. RICHARDS: We claim, your Honor please, on account of the lots 505.73 acres plus 23.04 acres which were excluded for the reason it was claimed the owners had artesian wells, and we think the evidence shows that the artesian wells were so uncertain it ought not to be excluded.

That we would like to be heard upon and the further amount of 24.54 acres for shade trees. We are prepared to argue the evidence in regard to that matter. As to the other matters, the other claims of the city, the acreage and the farm lots are to stand, as I understand it, as they are in the decision of the court subject to this change if there should be a change made from the 20th to the 24th or to any other time. The court awarded to the Factory Race 13.75 and by stipulation 16.5 is to be substituted for the 13.75. We are to have all the waters of the springs claimed by the city and running into the water works system, except the Maple or Yellow Jacket spring.

THE COURT: Those matters are covered by stipulation.

MR. F. S. RICHARDS: Those matters are covered by stipulation, that and the 16.5. There were three matters of stipulation. One was in regard to 16.5, the other was in relation to the springs, and the third was we should waive objections to the Blue Cliff claim. It is suggested this matter in regard to the lots was covered by stipulation, but it was not. In order that it may be perfectly clear, if I may have a minute I will read the stipulation.

MR. A. C. HATCH: There were two or three stipulations between the plaintiff and Provo City. The last one was with regard to the springs.

MR. C. C. RICHARDS: What did you understand that the stipulation was as to the acreage of the lots, what did you understand it to be?

MR. WEDGWOOD: I understood everything was settled between Provo City and --

MR. F. S. RICHARDS: How many acres did you understand we were to have?

MR. WEDGWOOD: As it was stated in the decree.

MR. C. C. RICHARDS: No, we took our proof after that, after the stipulation.

MR. WEDGWOOD: Then we come into court with a stipulation settling all matters.

MR. F. S. RICHARDS: This is the stipulation:
"Mr. Jacob Evans: The following agreement has been entered into: It is stipulated by and between the plaintiff and defendant Provo City, as follows: First. That the court shall make and enter its findings and decree" (Reading).

After that we put on our proof in regard to the acreage.

MR. JACOB EVANS: Don't you find subsequent proceedings there in regard to the acreage of the city lots?

MR. F. S. RICHARDS: No. I wish we could agree. We are prepared to show the evidence entitles us to that.

THE COURT: Would you state again what you claim the evidence shows your lots, five hundred and what?

MR. F. S. RICHARDS: Five hundred and five. It was claimed there should be 6 per cent discount from that, and we think from the evidence there should be no discount. In addition to that there should be 23.04 because that amount was excluded.

THE COURT: I just wanted the total, what you claimed.

MR. F. S. RICHARDS: We claim 553.73. That is made up of 505.73, 23.04 and 24.54. Now, in regard to the argument, we called attention at the last session of the court we desired to be heard on this point.

THE COURT: Are you ready to proceed with the argument?

MR. WEDGWOOD: I would like five minutes to get my head straight with the other gentlemen before we start in. It will help out, I am sure.

THE COURT: The court will take a recess for ten minutes.

RECESS.

MR. F. S. RICHARDS: Your Honor please, we have the testimony here and can refer to any statement if you desire.

THE COURT: I have notes of what seemed to me at the time the substance of it.

MR. F. S. RICHARDS: First I call your Honor's attention to the artesian wells.

(ARGUMENT)

THE COURT: I will examine this evidence if there is nothing further the parties want to say on this subject. Now, are there any other subjects that are to receive any attention before I adjourn, because probably, gentlemen, this will be the last session of the court until a session merely for the purpose of designating someone to prepare the findings and decree of to make arrangements as to whom shall prepare them.

MR. C. C. RICHARDS: We have nothing further to offer, your Honor.

MR. WEDGWOOD: I suppose the court will advise us when he is ready to make such decisions as are now under advisement.

THE COURT: Yes. As I remember it, gentlemen, and I will be glad to have my memory refreshed if I have overlooked anything, there is nothing under advisement except the question of the quantity of water awarded to the Power Company originally. The further question whether the court shall make a slight modification in the change of duty of water from 63 to 70 acre duty with reference to the city and the bench and the acreage of Provo City lots. Now, if I remember correctly, those are the only matters undisposed of. Are there any other matters I have overlooked that are not disposed of?

MR. A. C. HATCHER I don't recall anything.

MR. RAY: Has your Honor considered the matter of preparation of the findings, conclusions and decree?

THE COURT: I had suggested when I had disposed of these matters I would probably notify the counsel, and at that time would either appoint someone, or the parties would agree upon some one who should prepare it.

MR. RAY: This idea ran through my mind. I haven't talked with counsel about it, but I think it is worthy of suggestion anyway. When your Honor shall have decided those three questions the case will then be in a position to prepare findings, conclusion and decree. If your Honor could suggest a method of doing that now, then whoever was appointed could commence to get together the record, files, and those things which are entirely apart from the matters now under advisement, and at the next meeting, whenever that was, could serve in the meantime copies of the findings, conclusion and decree, and avoid one meeting, and seems to me facilitate it.

THE COURT: I am inclined to think the suggestion is a good one. These matters are only three subjects that will not occupy very much space in the decree. In other words it is merely a matter of some figures and dates, and I am inclined to think we could with some profit accept the suggestion and have whoever is to prepare the decree commence upon the work.

MR. RAY: I suggest this in that respect, your Honor, for consideration of the court and counsel, that there ought to be appointed from Wasatch County some attorney who will have access there to the different irrigation companies and their files and contracts in Wasatch County, there ought to be appointed some one of the attorneys for the plaintiff, and someone representing litigants in Utah County, so that we may have those different interests represented, if that will not delay the matter of the preparation.

THE COURT: It is a matter, of course, of indiffer-

ence to the court who prepares it, except I will be glad to receive suggestions. I think the suggestion is a good one too, the fact that someone in Wasatch County should have charge of that part of the decree which is based upon the stipulation and Fulton decree.

MR. RAY: What is the practise as to compensation of counsel so appointed, and being charged as costs. I have in mind one or two cases in which that has been done. It involves a lot of work and it ought not to fall upon the clients whose particular counsel have been assigned to the work.

THE COURT: That has been true, and that has been done in some cases, and in some cases nothing has been suggested in relation to it, the decree has been prepared by counsel without referring to any compensation. I think in the Progress Case Judge Hiles and Judge Richards prepared that decree without compensation except as from their clients, but in the Sevier River case General Wedgwood was selected to prepare the decree and was awarded a small sum. I remember I thought at the time it was very inadequate compensation, but it was taxed as costs. I am inclined to think a reasonable compensation ought to be paid to whoever prepares the decree, and apportioned as other costs are apportioned. That would be my view of the justice of the situation.

Now, gentlemen, have you any suggestion as to the person or persons who shall draw the decree. I will glad if you can agree among yourselves who shall do this work and possibly agree among yourselves what the compensation ought to be.

MR. F. S. RICHARDS: I would suggest Mr. Ray as being familiar with Utah County and familiar with the entire litigation.

MR. RAY: I would very much prefer not to do that. Of course, I cannot decline, but would prefer not to do it.

THE COURT: I take it Mr. Wentz, the commissioner of

the court and the court as well, will be ready at any time to give such assistance to the committee who are to draw this decree as we can. I think Mr. Wentz can give invaluable assistance.

MR. RAY: We would suggest General Wedgwood from the plaintiff's counsel, it seems to be agreeable to them.

THE COURT: It is agreeable to the court.

MR. A. C. HATCH: And Mr. Ray of the defendants. I would suggest Mr. Wentz give such time as he can from his duties as commissioner to the assistance of the two parties in drawing the decree.

THE COURT: That is understood, I take it. Mr. Wentz will be available, because he has always been available to the court when I wanted information from him.

MR. A. C. HATCH: I think Provo City should have a representative if they will suggest some one.

THE COURT: Judge Richards, could you act?

MR. F. S. RICHARDS: If it is desired, either my brother or I. I am not prepared to say now which.

MR. A. C. HATCH: I will say in my experience no matter how many are appointed usually one does the work, that is, it is put to him to do it, and they counsel and advise with him from time to time, but the real labor devolves upon one of the committee of appointed parties. I think Provo City ought to be represented on this committee, either Mr. F.S. or C. C. Richards be one of the appointees.

THE COURT: That may be. Then the court will appoint General Wedgwood and Mr. Ray and one of the attorneys for the defendant Provo City, either Mr. F. S. or C. C. Richards to act upon this committee with the other two, and the commissioner of the court will render such assistance to this committee as he may be able to render.

I will say, gentlemen, that if there is no objection, I will within a very short time announce the decision as to these

particular matters, and will do it without coming to Provo, making the expense of a trip for that purpose, but will merely mail to the clerk and notify this committee of the decision upon these questions under advisement in a short time so you can proceed with the preparation of the decree.

MR. A. C. HATCH: If the court will ask the clerk to notify the several attorneys.

MR. RAY: Would it be proper to ask an order of the court that counsel relying upon stipulation in lieu of proof forward copies of those stipulations to the committee.

MR. WEDGWOOD: Any stipulations upon which they rely at all, so we won't overlook them.

THE COURT: I think that would be well. Probably it ought to be a little different from your suggestion. Many of those stipulations were read into the record, many of them were merely called to the court's attention, as this one today where the court struck out of the award to Mr. Heislet certain -- one line. Those matters all ought to be called to the attention of the counsel or they won't find them, and each attorney I think should check up the changes they have secured in the tentative decree, that is the decision, and also those matters which they have secured by stipulation, and furnish the committee with the substance of those changes and substance of those stipulations whether read into the record or filed as a separate paper.

MR. WEDGEWOOD: And an order on the clerk for the files.

THE COURT: The order may be the clerk shall deliver to this committee, whenever they deem it necessary, any and all papers connected with this case.

MR. A. C. HATCH: About the compensation.

MR. RAY: We can agree upon that after the work is done.

THE COURT: Yes, that might be left until you find

how much time it requires. That may be included in the order.

MR. JACOB EVANS: That a reasonable compensation may be paid when they find what the work consists of, and that may be taxed as other costs.

THE COURT: That may be the order, that the committee appointed to prepare the findings and decree shall be paid a reasonable compensation, to be determined when the decree is presented for signing, which is to be taxed as other costs in the case.

If there is nothing further, the court will take a recess until such time as the counsel may be notified that it is necessary to convene again.

Provo Res. Co. v. City of Provo
March 32
Court Mountain
MacLain
Chambers
IN THE DISTRICT COURT OF UTAH COUNTY, UTAH.

-----oOo-----

PROVO RESERVOIR COMPANY,

Plaintiff,

v.

PROVO CITY, ET AL,

Defendants.

)
At Salt Lake, June 16, 1919.
)

-----oOo-----

MR. WEDGWOOD: Your Honor please, the record may show that the Provo Reservoir Company at this time ask for instructions to the Commissioner, either tentative or as final as may be advisable under the conditions appearing at the hearing as to the distribution at the dam of the Utah Power & Light to the right to the use of certain waters which the plaintiff, the Provo Reservoir claims to be the owner to the right to the use, such as the water which it impounds in its reservoir, the water which it is the owner of the right to use from Shingle Creek, the Ontario water to which it is entitled, and the Wright water and the Dixon water; and that we appear before your Honor today by stipulation between the parties, there being no other parties interested except the Provo Reservoir Company and Utah Power & Light Company, and it is by them stipulated and agreed that the hearing may be had here to the same effect and with the same validity as if held at Provo.

MR. MacLain: It may be so stipulated.

Pg 23: macLain
says not Provo
stipulation

as follows:

DIRECT EXAMINATION by Mr. Wedgwood.

- Q Mr. Murdock, I desire to briefly as possible at present to state what brought about the request for this hearing that I heretofore mentioned in making the statement. Were you at the dam of the Utah Power & Light at any time last week?
- A Yes sir.
- Q When first?
- A Thursday morning.
- Q Did you observe the flow of water over the dam?
- A I did.
- Q After you had observed that flow of water, what did you do?
- A I will state that Mr. Jacob, our engineer was with me. We made an estimate--
- Q No, I am not asking about that now, I am asking what you did?
- A Well, we returned to Provo and tried to find Mr. Wentz.
- Q Did you find him?
- A We did not, not personally, but got him over the telephone.
- Q Did you have communication with him over the telephone?
- A I did, and read him a letter which I had prepared previous to reaching him over the telephone.
- Q See if that is a copy of that letter?
- A Yes sir.
- Q Which one is it?
- A This one.
- Q This you read to him over the phone?
- A Yes sir.
- Q At any time did you receive a reply thereto?
- A Shortly after I read the letter to Mr. Wentz over the phone, he telephoned an answer, which he said he would reduce to writing and file in the office.
- Q Did he reduce it to writing?
- A He did.

Q Have it with you, or a copy of it?

A This does not seem to be it. I sent you a copy, it is not here, it does not seem to be here either.

MR. MacLAIN: Can't he state what was in it?

MR. WEDGWOOD: Yes, I suppose so.

THE WITNESS: The copy of the letter is not here.

MR. WEDGWOOD: Your Honor please, I think that is all I want of Mr. Murdock for the present, and to get this in sections I will ask Mr. Murdock step aside and Mr. Wentz take the stand.

T. F. WENTZ, called and sworn, testifies as follows:

DIRECT EXAMINATION by Mr. Wedgwood.

Q Mr. Wentz, I hand you Exhibit 600, and ask you if you have seen that or a copy of it? A. Yes.

Q Was it communicated to you over the telephone, its contents?

A Yes.

Q And did you later receive a copy of it? A. Yes.

Q Did you answer it? A. Yes.

Q Over your signature in writing? A. Yes sir.

Q Can you tell what the substance of that was, yes or no?

A Yes.

MR. WEDGWOOD: I will read Exhibit 600.

"Provo, Utah, June 12, 1919. T. F. Wentz, Esq., Water Commissioner for Provo River, Provo, Utah. Dear Sir: The Provo Reservoir Company is the owner of the following water right in Provo River, to-wit: From the Ontario drain tunnel, 6 second feet, from the Wright estate 4.6 second feet, from the water decreed to John B. Dixon, 2.5 second feet, also whatever amount may be flowing in the Provo River from Shingle Creek, less such water from Shingle Creek as is decreed to the Sego Irrigation Company and Timpanogas Irrigation Company of Wasatch County by the tentative decree of his Honor C. W. Morse in civil action

number 2888. These amounts of water should be turned over the dam of the Utah Power & Light Company so that they will be available at the intake of the Provo Reservoir Company's canal at what is known as the Heislet dam. Please see that this is done. Very respectfully, Provo Reservoir Company, Joseph R. Murdock, President." I offer it in evidence.

THE COURT: It may be received.

Q Now, what answer did you make to that, Mr. Wentz, in substance?

A It was about as follows: "Provo, Utah, June 13, 1919. Provo Reservoir Company, Provo, Utah. Gentlemen: Confirming my phone of this A. M., you are advised this matter is properly determinable by the court, but I would advise you to take this matter up with Judge Morse and have an order of direction to the Commissioner issued. Very respectfully, T. F. Wentz, Commissioner."

Q In other words, you declined to take any action whatever in relation to the matter, did you?

A Yes.

Q Was that caused because you either understood ^{or} it had been conveyed to you that the Provo Reservoir Company claimed certain things and the Utah Power & Light claimed contrary of those certain things? A. Yes.

JOSEPH R. MURDOCK, recalled.

DIRECT EXAMINATION by Mr. Wedgwood.

Q Mr. Murdock, what was the condition of the water flowing over the dam of the Utah Power & Light Company on Thursday, at the time you say you were there?

A I was there twice on Thursday. In the morning of Thursday about nine o'clock in connection with Mr. Jacob, who was with me, we made a partial measurement of the quantity flowing over the dam which was not interrupted in any way, and estimated it to be not less than 15 nor more than 20 second feet.

Q How was that running over the dam, was there any particular place, or just distributed along the top of the dam its entire length.

A On the south side of the dam there was no board, and if there was a board on the south side it was very narrow and did not obstruct, and not so high as the rest of the boards across the dam, and it permitted the stream to pass over, probably fifteen or sixteen feet wide and probably three inches or four inches deep.

Q Now, by a board do you mean what is sometimes termed a flash board?

A Yes, big, heavy plank.

Q Put in on top of the dam? A. Yes sir.

Q And the second time you saw it what was the condition?

A On the second occasion in the afternoon about three o'clock, probably between two and three o'clock, I went to the dam to see if it was the same, and I found that it was in the same condition, but I noticed three men coming up, and I waited to see what they were coming for, presuming that they were--

Q Never mind now.

A All right. I waited to see what they were coming for.

Q Did they come to the dam?

A They came across the dam to that point I have previously described, and picked up a big plank, and commenced to put it in the river when I--

Q Just wait.

A All right.

Q What do you mean by a big plank?

A About three or four inches thick, and about eight or ten inches wide, about sixteen to twenty feet long.

Q You may tell what they did, and then I will ask you another question.

A They put that plank in and stopped that water from flowing over the dam.

Q Now then, did you have any conversation with them at the time they were doing this, or after they did it?

A Yes sir, at the time they were doing it.

Q Now, did they say, or did you ascertain from anything they said, or from any source as to who the individuals were-- not by name, but whether connected with the Utah Power & Light in any way?

A I did.

Q How did you ascertain?

A I asked them who authorized them to put that plank in and stop that water.

Q What did they say?

A They said the Power Company.

Q Now, you may state as near as you can all the conversation that was had between you and those three men, or either of them?

A I asked them if they had been authorized by Mr. Wentz to do it. They said no, repeating again the Power Company told them to do it. Then I forbade them from doing it.

Q Tell what you said as near as you can?

A I said, "That water belongs to us, we are turning that water from our own sources down the river, and you should not interfere with it, it is our water and I want you to let it alone".

Q What did they say?

A What did they say?

Q Yes.

A As near as I remember they said they would do as they damned pleased about it.

Q Well, did they go off?

A No sir, they completed stopping off the water and then went away.

Q What did you do?

A I followed them, went on up the canyon to the head of the river.

Q And then you communicated with Mr. Wentz, as you have stated?

A Yes sir, the next morning I had a talk with Mr. Wentz.

Q Now, at that time, or just previous to that time, do you know whether any water had been running in from Shingle Creek?

A Only by report of our engineer and Mr. Wentz.

- Q Do you know whether or not the Tunnel water was running in the river?
A. Yes.
- Q The Dixon water?
A. Yes sir.
- Q And the Wright water?
A. Yes sir.
- Q No water up to that time had been turned out from the reservoir, had there?
A. No sir.
- Q After they had put the board in, the plank as you call it, was there any water running over the dam?
- A But very little, probably two or three second feet, and that was not running over, but percolating between the cracks and running through, I should say seep.
- Q Answer my question literally, was there any water running over the dam?
- A I should say not over the top of the flash boards.
- Q That is what I want to get at. Now, at the time these men put this flash board in and stopped the flow over the top of the dam at that particular point, did they open up any other place in the dam?
- A They did not.
- Q Did they do anything to cause the same, or approximately the same, or any quantity of water additional to what was flowing through the dam as you suggested to flow through?
- A They did not.
- Q Do you know what the result as to where the water went that was flowing in this gap where they put in the flash board after they put in the flash board.
- A It went down the flume.
- Q Whose flume?
- A The Utah Power & Light Company's flume.
- Q And what was the result, if you know, as to the quantity of water flowing into the canal of the Provo Reservoir Company by reason of that act?
- A About 15 second feet was taken out of the Provo Reservoir Company canal, or prevented from flowing down to the dam.
- Q And you were deprived of it?
A. Yes sir.

Q Now, at that time was there a necessity by the parties entitled to water under and through and from the Provo Reservoir Company canal for this 15 second feet of water, or whatever quantity it might be?

A There was a great necessity for it.

Q Briefly in what way, irrigation of crops?

A The canal was reduced at that time more than a hundred second feet of water at the time this was taken out. There was approximately fifty second feet in the canal, probably there was fifty second feet, I couldn't say exactly, in the canal, at that time, instead of 175 which had been flowing in it during the previous part of the year.

Q What I want to get at is were men actually irrigating crops deprived of this 15 second feet of water, or whatever it might be, by reason of that act?

A A large number of irrigation streams were shut off entirely, no water distributed to them.

MR. WEDGWOOD: Mr. MacLain, I didn't ask about the quantity of water except Shingle Creek, because that is in the record. The Dixon water is in the record, and the tunnel water and the Wright water is stated, so I didn't ask those questions. You may cross examine.

CROSS EXAMINATION by Mr. MacLain.

Q Mr. Murdock, this occurrence that you have narrated took place last Thursday, you say? A. Yes sir.

Q Have you been to the dam since that time?

A I have not examined it since then.

Q You don't know whether the conditions are the same now as then or not?

A I know they are not.

Q By that you mean that the flash board has been taken down?

A No, that the stream at the Provo Reservoir dam is materially reduced.

Q But you don't know then whether the conditions at the dam have

changed or not?

A Only from the fact that the water is not available below the dam. I did not examine the dam, I have not examined the dam since that day.

Q You were above the dam on the 13th, or last Thursday, the 12th?

A I went, after my interview with the three men, I went to Heber City and stayed there that night.

Q Did you go up Shingle Creek to make any examination as to the quantity of water that was being discharged from Shingle Creek?

A Yes, I went up that after examining the river and canals in Wasatch County, I went up to Shingle Creek.

Q Did you measure the water flowing there to the river?

A No sir, I did not.

Q Did you see any water flowing from Shingle Creek?

A Yes.

Q You have no idea what the quantity was?

A No sir.

Q Now, if I understand correct, at this season of the year Shingle Creek is a dry stream, except as water is artificially conveyed from the Weber River water shed to Shingle Creek to Provo, is that correct?

A No sir, you probably have not a proper understanding of that, but Shingle Creek is a tributary which rises probably fifteen or twenty miles up the canyon, just at the head of Beaver Creek, and in years past formerly it flowed down all of it in the Provo River just past the head of what we call Beaver Creek. It was diverted twenty or thirty years ago from its natural channel and turned down Beaver Creek to water lands near Kamas, and so that it can be very easily diverted now from one source to the other.

Q But to what stream is it naturally a tributary?

A I would take it formerly it was tributary partially of Provo River, not complete.

Q But for the last fifteen years or so has been normally in such state the water is tributary to Weber River?

Q Yes sir.

Q Are you artificially diverting the waters from the Weber Water shed to the Provo water shed through Shingle Creek?

A We turn it so that it goes down over the Weber River water shed into the Provo River water shed.

Q And your gate, or other means by which you accomplish this diversion of the water was in operation at the time that you saw it there last Thursday, was it?

A Yes sir.

Q Have you made a filing on the waters of Shingle Creek?

A Yes sir.

Q Has that been decreed in this case? A. Yes sir.

Q Included in the list of the Provo Reservoir Company's rights?

A Yes sir.

Q What is the quantity decreed?

A I believe it is in acre feet, I am not certain.

Q Of course the decree speaks for itself, I realize that.

A About eight thousand acre feet.

Q You don't know, Mr. Murdock, what the quantity of water flowing out of Shingle Creek was at this time?

A I would not be positive as to the amount.

Q And you state that except for your diversion there would be no water flowing into the Provo River from Shingle Creek?

A I would say there would not be after these people put in the dam which stops it from coming our way. It can be easily diverted.

Q That is, you claim whatever water was flowing through Shingle Creek into Provo River at this time was water that you had placed there, is that it?

A Yes sir, would be there only when there is an excessive quantity, say 200 second feet in Shingle Creek then some possibly would overrun the channel, that is the artificial channel which those people made to convey the water down Beaver Creek. When there is an excess quantity, I would say from 150 to 200 second feet, some of it will slop over, but when it gets down to 150 second

feet it all goes down the other way.

REDIRECT EXAMINATION by Mr. Wedgwood.

Q Except when you turn it?

A Except when we turn it, it all goes the other way.

RECROSS EXAMINATION by Mr. MacLain.

Q Now, last Thursday when you were at the dam do you know what the total quantity of water flowing in the river above the Utah Power & Light dam was regardless of the source from which it came?

A Only from Mr. Wentz' report, which is not definite in my mind.

THE COURT: If you will pardon me, Judge MacLain, in paragraph 27 of the tentative decree, as I am informed by Mr. Tanner reference to this Shingle Creek water, though not by name, is made, under application number 994.

MR. A. C. HATCH: What is the amount?

THE COURT: 7500 acre feet.

Q Do you know, Mr. Murdock, what the total quantity of the water flowing in the river below the Utah Power & Light canal was at this time, either before or after the flash boards were put up?

MR. WEDGWOOD: I think I will object to it as not cross examination to save time. I will go into that with Mr. Wentz.

THE COURT: Objection overruled. I think he has gone into the situation sufficiently so that they ~~may~~ may ask for that situation, because you asked whether any water was passing over.

A It was only by observation and from the report of Mr. Wentz.

Q You did not measure the water yourself?

A No sir, nor examine the gauges.

Q Do you know the quantity of water that was flowing into Utah Power & Light flume?

A I do not.

Q Can you state from your observation, Mr. Murdock, whether there was in the Utah Power & Light flume or dam both before and after the flash boards were re-erected a substantial quantity of water flowing in the river immediately below the Utah Power & Light dam?

A I have not observed it since the flash boards were put in. I passed there last night in the dark, but could not observe.

Q But you were there at the time the flash boards were put in there?
A. Yes.

Q And remained a few minutes?
A. Yes sir.

Q And after the flash boards were put in there was a substantial quantity of water in the river below the dam, wasn't there?

A My judgment was he turned off about one-fourth of the water that was flowing over the dam, and that probably three-fourths was remaining in. That was just my best--

Q That is about three-fourths as much water in the river immediately below the dam, either from seepage or percolation through or under the dam as there was before the flash boards were put up?

A That would be my judgment.

Q Now, what quantity of water was the Provo Reservoir Company diverting at the Heislet dam on that day?

A I am not definite as to that, only by hearsay, which is not--

Q You didn't measure the water?

A No sir.

Q Neither before nor since the flash boards were put up?

A No sir.

REDIRECT EXAMINATION by Mr. Wedgwood.

Q You say you were at Shingle Creek after this time?

A Yes sir.

Q You say there was some water coming from Shingle Creek?

A Yes sir.

Q The amount you don't know?
A. No sir.

Q And the contention is whatever that amount might be you made your demand of Wentz that it should be turned over?

A Yes sir.

Q As well as the other waters I have mentioned, tunnel water and Dixon water? A. Yes sir.

Q And the Wright water? A. Yes sir.

RECORSS EXAMINATION by Mr. MacLain.

Q I take it, Mr. Murdock, those gentlemen putting the flash boards up did not acknowledge your jurisdiction?

A No, they didn't seem to care a damn for me.

Q Not in your ward?

A I felt though it was my duty to tell them it was our water so that they would understand that they were taking something that belonged to some other party, without any authority from the water commissioner, because I asked them specially whether Mr. Wentz had instructed them to take that water away from us, and they said they got their instructions from the company.

T. F. WENTZ recalled.

DIRECT EXAMINATION by Mr. A. C. Hatch.

Q Mr. Wentz, do you know the quantity of water that was flowing in Shingle Creek, from Shingle Creek into the Provo River on Thursday, the 12th? A. Yes.

Q What was it?

A Ten second feet.

Q Do you know whether that had been a continuous flow for some considerable time?

A Well, it has been more than that up to that day and for possibly an hour that day it was shut off entirely, and then by agreement with the people of Beaver Creek, 10 second feet was allowed to come this way.

Q So that only for an hour or two on Thursday the 12th was the water from Shingle Creek diverted from the Provo River, that is, ten second feet or more?

A Yes.

Q Do you know whether the tunnel water from the Ontario drain tunnel was coming into the Provo River?

A Yes.

Q And whether it was passing the Wasatch and the Midway dams above so as to flow on down to the dam of the Utah Power & Light Company?

A Yes, we had some water coming by the dam all the time.

Q Do you know approximately the quantity?

A Well, it has been receding quite rapidly. The latter part of last week we were down to about 30 second feet.

Q That 30 second feet is allowed to flow past those dams by reason of the rights of the Provo Reservoir Company and the Sego Company?

A Yes, we maintain those streams.

Q So that on Thursday last there would be approximately 30 second feet of this flow of water coming down to the Provo Reservoir Company past those dams?

A Yes, about 30 second feet coming by the dams.

Q Do you know whether or not the dam of the Utah Power & Light Company was tightened other than by putting in the flash boards after Thursday of last week?

A No, I don't.

Q Whether the cracks were filled with any substance to prevent the flow of water?

A No, I couldn't say whether there was any repairing on the dam done or not, after Thursday.

Q Do you know whether the Wright water was flowing into the river so as to reach the Provo Reservoir?

A Well, I couldn't say whether Mr. Whiting on the Wright ranch was diverting it or not.

CROSS EXAMINATION by Mr. MacLain.

Q Mr. Wentz, just to summarize and get this in my mind, you measured the Ontario drain water at that time? A. No.

Q Do you know how much contribution to the river was made from that drain water?

A No, all I know is we have a quantity of water passing those dams, and at the low stage of water we always maintain by those dams the quantity of water that is owned below.

Q How do you arrive at that quantity of water that you pass the dams if you don't know the quantity contributed by those sources to the river flow?

A As I say about 30 second feet going by the two dams in Wasatch County to the lower division.

Q That is, you distribute the waters of the two divisions separately, is that it? A. Yes.

Q And you take the total quantity that comes from the Wasatch division and record that as made up from these various sources?

A Yes.

Q Did you measure that quantity then at the point of division?

A I don't understand you.

Q Possibly I don't under the situation sufficiently to ask the question intelligently.

A I can probably explain it.

Q Let me ask my question this way. It is claimed by the Provo Reservoir Company there was some quantity of water from 23 to 30 second feet, whatever that amount may be eventually determined to be, which is contributed from sources controlled by them to the river, and which should therefore be passed by the Utah Power and Light dam, that is correct, is it not?

A Yes.

Q How do you arrive at that total quantity of water which is to be so delivered and which is as we might call it, artificial-make to the river?

A Well, we take their portion of the Ontario drain tunnel and amount that is coming from Shingle Creek to the Provo River and their other primary rights in the canyon, like the Dixon water and Wright estate water.

Q You do measure Shingle Creek then and the Ontario drain water?

A Yes.

Q And you ascertain the quantity which was actually flowing from those sources? A. Yes.

Q Now did you on last Thursday ascertain what those quantities were?

A Just the Shingle Creek. I had Mr. Knight, he is the assistant in that division, go to Shingle Creek and made that determination.

Q He measured 10 second foot discharge from Shingle Creek?

A 10 second feet coming to Provo River, yes.

Q How was the Ontario drain tunnel determined, the quantity?

A We have a measurement on the Ontario drain tunnel water.

Q That Ontario drain tunnel water passes through the Light Company's flume and taken by the Provo Reservoir Company below their tail race, is it not?

A Part of it, $5\frac{1}{2}$ second feet of it is taken by the Midway Irrigation Company and half of the balance to the Utah Power & Light Company, and the other half of the balance goes to the Provo Reservoir Company.

Q And do you know what the quantity contributed by the Ontario drain to the river was on last Thursday, or have you any means of knowing?

A Not by measurement, no, only by what the tunnel usually flows.

Q That is, you calculate the tunnel as substantially uniform discharge of a certain number of second feet?

A Yes.

Q What is that?

A It is about 18 second feet, runs as high as 20 and as low as 16.

Q What did you calculate it at on last Thursday, what did you assume for the Ontario drain tunnel?

A I have not made any assumption on that. As long as the quantity was passing the upper dams, that was entitled to go through, we never made any distribution.

Q What was the total quantity of water, Mr. Wentz, which was flowing in the river from all sources above the Utah Power &

Light Company's dam on last Thursday?

MR. HATCH: If the court please, I think the question is immaterial so far as the matter before the court at this time is concerned, and will object to it for that reason. All the water that is in dispute in this question is whether or not we have the right to flow over their dam the water that we contribute to the river by artificial means, or whether they may divert it so that we may not put it into our canal.

THE COURT: Now, Judge MacLain, what is the object of going into the flow in the river?

MR. MacLAIN: I want to show the total quantity which was flowing in the river above our dam, total quantity which was flowing in the river below our dam, both before and after the flash boards were up.

MR. HATCH: We think it is immaterial.

THE COURT: I think it is very material, the quantity flowing in the river immediately below the dam, but I hardly see the materiality of the quantity before the dam.

MR. MacLAIN: It might be a matter of comparison.

THE COURT: If you desire it for comparison he may answer the question.

MR. HATCH: If the court please, we think that it is wholly immaterial so far as the issues here are concerned as to what the quantity flowing in the river below the dam unless it is more than sufficient in our canal, for the reason that we made an appropriation of 150 second feet, that water was running to waste down the Provo River when we made that appropriation, and we are entitled, as we contend and shall continue to contend, to such water as ran through and under their dam by virtue of our appropriation of the 150 second feet. Without there was water there unused we would not have made an application to appropriate. Then in addition to such water as was then running through, under and around their dam, not over their dam, we acquired other rights by purchase of Ontario drain tunnel rights, by building the reservoirs, by the turning

of water in from Shingle Creek to add to the quantity in low water, particularly that we could get by reason of the unused unappropriated water that was flowing in the Provo River below their dam. Our contention is that they have no right in that water below the dam, and never have had, that is our water by virtue of our appropriation; and the addition,-- any addition that we may make to that by reservoiring water or by diverting water from other water systems, other river systems, into the Provo River is ours absolutely in addition to that which we acquired by appropriation under our application to appropriate 150 second feet of water at a point below their dam. Now, if we are not right our reservoirs so far as our upper ditch is concerned are absolutely worthless to us, and we have expended all the money we have expended on those reservoirs to acquire additional water to fill our canal, and if we turn it down they may divert it until we are down to just such water, the quantity in the Provo River, as we put into the river by artificial means. If that is the rule there can be absolutely no inducement to any person to build reservoirs or otherwise to add to any quantity of water that they may have appropriated below some other person's dam. That is our appropriation, in other words, is valueless as to the water that was passing their dam when we made the appropriation or application. We claim that it is a valuable right. It is water that they never had used and probably never will use, but they cannot claim that quantity of water acquired by us under our appropriation and take from us by reason of that, water that we supplied to the river from other sources. That is our position, as I understand it in plain terms.

THE COURT: The objection is overruled, he may answer the question, I am not deciding or determining your contention now.

MR. HATCH: I understand.

THE COURT: Mr. Wentz may give us the information.

A In answer to the question what is the total quantity of water at the Utah Power & Light dam in Provo Canyon, it was--

MR. HATCH: I think the judge held that was immaterial.

THE COURT: No, I asked as to the materiality, I didn't say it was immaterial or material, but would permit him to answer it for the purpose of comparison.

A On the 14th of June was 261.81 second feet.

MR. WEDGWOOD: Will you permit me to ask two questions which I think will open it up a little wider for you.

MR. MacLAIN: All right.

REDIRECT EXAMINATION by Mr. Wedgwood.

Q I don't think the judge asked these questions, perhaps he did, but I would like to ask there, which I think will facilitate the matter; do you know, Mr. Wentz, whether water has now been released from the Provo Reservoir Company?

A Yes.

Q How much has been released?

A 30 second feet.

Q Where is that water now?

A It will be in Heber tonight.

Q When will it be at the dam of the Utah Power & Light Company?

A Tomorrow.

Q Now, would the distribution of that water come under the same situation in your mind as this other water that has been spoken of?

A. Yes.

Q So that problem is present there when that water gets down, as it has been in the past when this question arose?

A Yes.

MR. WEDGWOOD: I thought that might aid you.

RECROSS EXAMINATION by Mr. MacLain.

Q Did you state there were 261 second feet in the river on the 14th?

A. Yes.

Q That was Saturday?

A. Yes.

Q How much was there on the 12th, Thursday?

A 315.81 second feet.

Q On last Thursday, the 12th?

A Yes.

Q And without any contribution from the Provo Reservoir Company's reservoirs?

A That is true.

Q Now, how do you make up that total?

A It is the total amount in the Olmstead flume and the amount by the dam.

Q Where do you measure that which goes by the dam?

A I measure part of it in the river bed, 200 feet below the dam, and part of it was diverted through Mr. Donan's flume.

Q Now how much of that 315 second feet was running in the Power Company's flume on the 12th?

A I have not the measurement on the 12th, my measurement is on the 14th.

Q How did you get your total measurement on the 12th of the quantity 315?

A By the gauge readings above. I have the gauge readings for each day, and I have the total for the 14th, and have calculated the amount in the river for the 12th.

Q What was the situation on the 14th then?-- you had what-- 261 second feet there?

A 261.81.

Q How much was running in the Power Company's flume that day?

A 228.9 second feet.

Q 228.9? A. Yes.

Q How much was running in Donan's flume?

A 7.40 second feet.

Q And how much in the Provo Reservoir Company's canal at the Heislet dam?

A 48.50 second feet.

Q There are no intakes or diversions between the Power Company dam and Heislet dam, are there?

MR. WEDGWOOD: Inflows or intakes?

Q Diversions, intakes. A. No.

Q I believe I neglected to ask you the total quantity flowing in the river on the 14th two hundred feet below the dam?

A It was 25.51 second feet.

Q And the Donan water had been returned, or was returned to the river little bit below your point of measurement?

A Yes.

Q So that at the Heislet dam there would be flowing of waters which pass the Utah Power and Light Company's dam the sum of those last two named quantities?

MR. WEDGWOOD: Object to it as an assumption which is pure conclusion, which gives the witness unless he analyzes the question from a technical standpoint a wrong impression. Counsel says, and there was passing the dam. Waters passing the dam technically was 7 second feet and a fraction which went into Donan's flume. In the river at two hundred feet or so below there was 25 second feet. Now, it cannot be said to be passing a dam as a fact. It may go under the dam, but the truth of it is, as is well known and has come out in this testimony, that Provo Canyon is a refilled canyon. It has a subsurface flow as well as a surface flow, and ~~xxxx~~ without going into the matter at length because I know the court appreciates these things as much as I do, and the mere statement of it is sufficient, it may be that that quantity of water 25 feet, or biggest part of it, never entered the Provo River for miles above until it entered at that place, and that would be true whether the dam was there or whether it was not there. In other words, if it is a subsurface that comes out there it may be, but if it goes underneath the dam either directly underneath or for the first two or three or four or five or ten feet of soil below the stream bed, it is not passing the dam in the sense Mr. MacLain uses it.

THE COURT: Objection is overruled. If Mr. Wentz has not sufficient information to answer the question; that is, if

he does not feel that he can give the court information upon that subject I take it he will say so, and if he has information that he can state to the court what quantity of water is passing the dam.

MR. WEDGWOOD: If he will state the situation I have no objection.

THE COURT: That is a very material inquiry in this proceeding, I take it now as to how that water gets there, how it comes-- there is water below the dam at a point some two hundred feet and measured by Mr. Wentz. Now, if that is water that is released by the Utah Power & Light Company to flow on down, why, that ought to be known. If it water that comes into the river from some source, the exact nature of which and course of which we don't know, that ought to be stated to the court.

MR. WEDGWOOD: I have no objection to the facts, but don't want a mere conclusion yes or no.

THE COURT: Objection is overruled.

(Question read.)

MR. WEDGWOOD: Can you answer it yes or no.

A Read the question again.

(Question read.)

A Yes, and some additional quantity that flows into the river between the Olmstead dam and Heislet dam.

MR. WEDGWOOD: I think we have the right to have him say what he means by passed the dam.

MR. MacLAIN: You have the right to re-examine.

MR. WEDGWOOD: Oh yes, take a little more time is all.

Q Now, Mr. Wentz, what sort of a structure is the Utah Power & Light Company's dam at this point?

MR. HATCH: That has been gone into time and again in the testimony already in the case.

MR. MacLAIN: I didn't have the benefit of sitting in

it, I would like him to state for my information.

MR. HATCH: I don't object, for that reason.

A The Olmstead dam is a rock-cribbed dam. That is, the cribs are built up of timbers, and inside filled with rock and the top is faced with two inch lumber double, stood on end.

Q In other words it is porous structure, isn't it?

A Yes.

Q A considerable quantity of water may be visibly seen to be flowing through that dam at practically all seasons of the year when water is in the river?

A Yes, there is some water flowing through the dam, especially on the south side.

Q And one would say a substantial quantity not from percolation?

A Yes, it is a flowing stream.

Q Now, are there any other visible sources of supply of the Provo River between Utah Power & Light dam and your point of measurement two hundred feet below the dam?

A No.

Q So that, so far as is evident by ocular inspection the water which is flowing two hundred feet below the dam and is there measured, is water which has flowed through and under the Utah Power & Light dam?

A No, I wouldn't say all of it, some of it of course comes through the dam. You can see quite a quantity. Probably great quantity coming through the lower part of the dam that you can't see, and probably a quantity that comes in the bottom of the river bed, as the whole river there is a cumulative channel.

Q I believe you stated a moment ago so far as any visible sources of supply were concerned, there were none between the dam and your point of measurement?

A That is true, there are no springs or any flow coming into the river on the surface.

Q Now, Mr. Wantz, what is the total again of these quantities of what I mean term made waters, made from sources under the control

of or acquired by the Provo Reservoir Company which ^{it} was contended by Mr. Murdock here should pass the Utah Power & Light dam and be available at their intake.

MR. HATCH: We contend that the quantity that we are entitled to should flow over their dam; that we are entitled to such as flows under their dam and within the river prior to our appropriation. We are entitled to that by appropriation in addition to the quantity-- and we are entitled to the quantity we have made to flow over the dam.

MR. MacLAIN: Let us see if I have these figures right then, may avoid arguments by asking the question in another form.

Q The total of these makes or contributions to the river which is in issue here, is 6 feet from the Ontario drain tunnel; 4.6 from the Wright estate; 2.45 from the John Dixon, is it?

A 2.50 that should be.

Q And 10 from Shingle Creek? A. Yes.

Q That makes a total of what?

A 23.10 second feet.

Q And on the 14th of the month the Provo Reservoir Company was receiving at its headgate at the Heislet dam 48.5 second feet?

A Yes.

REDIRECT EXAMINATION by Mr. Hatch.

Q What was the total measured just below their dam, including the Donnan right?

THE COURT: Which dam do you refer to?

Q That he measured just below the Utah Power & Light dam, the total there including the water in the Donan flume?

A That would be 32.91 second feet.

Q And 48?

A There was 48½ second feet in the Provo Reservoir Canal.

Q That would be about 16 second feet more increase in the quantity of water in the river between the point of your measurement and their dam?

A It would be greater quantity than that that passed by the Heislet

dam of the Provo Reservoir Company and quantity of water for the Timpanogas Canal Company.

Q What is that?

A They were running on this measurement the Timpanogas Canal had in 9.22 second feet, and by the Timpanogas dam at the mouth of the canyon was 0.20 second feet.

Q Giving a total of what?

A It is hard for me to say the exact quantity at the Heislet dam, because there is a small quantity raises in the river between the Heislet dam and Timpanogas dam at Olmstead.

Q Approximately 60 second feet of water in the river at the Heislet dam?

A. Yes.

Q On that day?

A. Yes.

DIRECT EXAMINATION by Mr. Wedgwood.

Q May I ask one question. Now, what is the fact as to whether or not in your judgment derived from your experience and your measurements as you have stated them, the river from a point 200 feet below the dam of the Utah Power & Light Company is a gaining river?

A Yes, it is a gaining river.

Q Any question about it?

A No, it is a gaining channel.

Q Do you know of any reason, or can you conceive of any reason why that condition is particular to a locality commencing 200 feet below the dam any more than it is continuing up the stream from that 200 feet below, as long as the canyon is substantially of the same character?

A No, that condition of cumulating channel is continuous through the canyon.

Q So that, if that be true, not only the water would be-- the stream would be a gaining stream at and above the Heislet dam and below in addition to the surface waters, visible and measurable at any particular point for the use of the people be--

low, not only for the Provo Reservoir Company, but also be just such a gaining stream for the use of the Utah Power & Light above that point?

A Yes, that is true.

Q So that, whatever that situation may be, it is equally applicable one to the other, as one section to the other on the river?

A Yes.

Q Now then, Mr. Wentz, assume that the same quantity of make-- I think that is the term Judge MacLain used-- continue and the reservoir water gets down there, then the Provo Reservoir Company would have an added volume of water, water turned in, water independent of the natural flow or make in the river how much?

A Additional quantity of --

Q What would the total be?

A 51.90 second feet.

THE COURT: I don't just understand that.

A Now, assume 10 second feet continues to flow out of Shingle Creek and the tunnel water 6 second feet and Wright water and Dixon water and reservoir water goes down, that would make a total of 51 second feet.

THE COURT: Make a total of more than that.

A I am allowing 4 per cent for transmission loss ^{on} ~~from~~ the 30 second feet, makes 28.80.

MR. HATCH: There is another element in that, the Timpanogas in Wasatch County takes part of that 30 second feet.

A No, this storage is diverted all to the Provo Reservoir Company. Timpanogas Canal Company are drawing no storage, Timpanogas Irrigation Company.

THE COURT: It would make 53.1 without the deduction. Then you deduct the 4 per cent of the 30 to reduce it.

A That is true.

Q Now then, just one more question. You testified at the last hearing, and as long as other questions have been asked, I will ask it here, now how long have you known with such a degree of intimacy as to give you in your judgment a knowledge of conditions,

this dam of the Utah Power & Light Company?

A Well, I have observed the dam for-- quite often ever since it was built.

Q Since 1895? A. Yes.

Q Now state whether or not the dam is of the same character and substantially the same condition, same construction now as it was when it was constructed?

A Yes, same dam.

Q And is there any difference in conditions so far as the water flow above and below the dam is concerned, physical conditions now from what there has been during all these times; any substantial difference?

A No.

Q Now then, is there in that dam, with the exception of the by-pass you speak of in regard to Donan, any means of turning out water except by flowing over the top?

A No, not at the dam.

Q Not at the dam?

A Well, there is a fish way there, but it is not very well -- not in very good shape to divert water. We can divert water through the fish way by the dam and when they have been turning storage water by years before we take it through, down a thousand feet through the flume and divert it from the by-pass at the sand gate, sluice way from the sand gate, .

Q What I want to get at, all these expedients amount to practically the same thing in turning it over the top of the dam?

A Yes.

RE-CROSS EXAMINATION by Mr. MacLain.

Q Mr. Wentz, referring to the character of the stream, you say that the bed of the stream is about the same from the Power Company dam down to the Heislet dam, did you?

A No, I said the physical conditions above the dam and below the dam were practically the same now as they have been for some time.

Q Yes, but in reference to the character of the bed of the stream as bearing upon the Provo River being a gaining river from subterranean sources, you said the character of the bed was approximately the same, both above and below that point of measurement which has been designated as 200 feet below the Power Company dam?

A No, I didn't say that, at least, I didn't want to convey that impression. The character of the stream below the Olmstead dam and the mouth of the canyon is a great deal different than the character above the Olmstead dam. It is a very rough, rocky stream, and has a greater accumulation per mile than the stretch of stream above the dam.

Q I don't think you get my question, Mr. Wentz. I thought that you stated to General Wedgwood or to Judge Hatch, I forget which, that the character of the stream bed at all points between the Utah Power & Light dam and the Heislet dam was substantially the same?

A No, I didn't intend to convey that impression.

Q Is there any radical difference in the two hundred feet which exists between the Utah Power & Light dam and the point at which you measure the water two hundred feet below that dam, and the character of the stream bed as it exists below that point of measurement down as far as the Heislet dam?

A Well naturally no, there isn't very much difference.

Q About the same?

A About the same, except for the pool immediately below the dam.

Q And you have established this point of measurement two hundred feet below the dam for the purpose of ascertaining as closely as you can the quantity of water which is flowing by, past, through over or under the dam?

A Yes.

Q How far is it from the Utah Power & Light Company to the Heislet dam; from Utah Power & Light dam to the Heislet dam?

A It is about three miles.

Q And on last Saturday, the 14th, the total make of the river

between the Utah Power & Light dam including that quantity of water which passed by the dam through the Donan flume, or under or through the dam and the accruals to the river below the dam was about 27 second feet, wasn't it, 60 less 33?

MR. HATCH: The question does not appear to me to be clear, including that that passes through the dam it would be 60 second feet, Judge, approximately 60 second feet, You have included that that passes by and under the dam.

MR. MacLAIN: Yes, I accept your correction, my question is wrong, I can get at it this way.

Q You said a few moments ago the total measurement of the water flowing through Donan's flume, 7.40 second feet, and at the point of measurement two hundred feet below the dam, 25.51 second feet?

A That makes a total of 32.91 second feet.

Q And there was a total in the river at the Heislet dam of 60 second feet?

A Approximately. That would be the $48\frac{1}{2}$ second feet of the Provo Reservoir plus the 9.40 to the Timpanogas and by the Timpanogas dam is 57.90 second feet.

Q 57.90. Then there accrued to the river between the point of discharge from the Donan flume and the point of measurement two hundred feet below the Power Company dam on the one end and the Heislet dam the difference between 57.91 and what?

A 57.90 and 32.91, a difference of 24.99 second feet.

Q So that in approximately three miles the river made about twenty-four and a fraction second feet?

A Yes, substantially 25 second feet.

Q Can you figure briefly how much that would be in two hundred feet-- I don't think it is necessary, we can compute that, I guess, and argue from it. That is all.-- This situation you describe on the 14th taking the same quantities of water as having been contributed from these various sources on the 14th as you stated were contributed on the 12th?

A Yes, the same condition.

MR. MacLain: So, General Wedgwood, there will be no contention between us as to the measurements on the 13th not being applicable to the 14th.

MR. WEDGWOOD: As I say, I think it is an abstract question. No concrete situation, any particular day has anything to do with it at all.

THE COURT: If you determine the relative rights of the parties you can determine then the situation any particular day.

12:10 P.M., Recess to 3:00 P. M.

MR. JACOB EVANS: If the court please, it seems that I have been chosen to make a few opening remarks, but I hardly know where to start on this matter. I think Judge Hatch very clearly lucidly set forth the contention of the plaintiff, Provo Reservoir Company in his statement this morning to the court. In this case it seems to be a concrete question, no dispute about the facts. This dam has been constructed there for twenty-five, thirty, or thirty-five years, and the seepage water going through it all the time. We have made an appropriation of this water and allowed to us, and acquired additional water, such as the Wright water, the reservoir water and Shingle Creek water, and all those things and turned them into the stream. Now if we cannot take those waters out that we acquired and turned in there is no use of anybody attempting to augment or supplement the natural stream of water, and it seems to me there is practically but one side to this case at all until we at least hear some argument of the other side. I suppose if this contention would go on to the extent that the power company could take through their flume all of the water we have acquired and added to the natural flow of the stream, and then the water below would get so low that it would require it all to supply Class A rights, why then the Provo Reservoir Company would not have any water, notwithstanding

the decree of the court, and notwithstanding the quantity of water which they have put in to supplement the river. Now, I don't know just what the contentions of the other parties are with respect to this, but it is clear this water is put in, it has been added to the supply already in the river. There is a statute which expressly permits commingling of water and taking out of water at a point below where it is put in and commingled. In this case a decree has been made allowing us a certain amount of water and deducting a certain amount for seepage and evaporation. This dam is confessedly in the same condition it has been in all the time. If ever the Utah Power & Light Company did acquire any right to all the water that was in the stream they have certainly abandoned that water long since under the statute, because they have failed to make the water run through their flume. They have permitted their dam to be leaky all these years, and while it has been leaky other people have appropriated water--

(ARGUMENT)

THE COURT: Let me ask to see if I understand the contention. It was stated when you commenced this hearing this morning, that no one was interested in this case or in this water, except the power company and the plaintiff. I take it from that that none of this water that appears in the river below the power company's dam and above your intake and the Heislet dam is necessary to supply any of those lower users below.

MR. WEDGWOOD: It may be, your Honor. What I meant to convey was the question of the right to shut off such water as we turned into the stream from Shingle Creek, the reservoirs, tunnel water and Dixon water was a question peculiarly within the power company and us. That is what I meant to convey.

~~MR. HATCH: If the court please, the water flowing~~

MR. HATCH: If the court please, the water flowing below the Utah Light & Power Company dam that we claim is a late appropriation.

THE COURT: I understand that.

MR. HATCH: And is Class B water or Class C. It would be Class B under the old decree.

THE COURT: Yes.

MR. HATCH: Be Class C water then if there is not sufficient to supply the people below. We cannot divert any of this water at our Heislet dam, would be privileged only to take made water, but it is Class A water as to the Utah Power & Light Company. As against them, if they were the only parties in this case, we would claim it as a prior right to them because it is excess water.

THE COURT: I understand your theory with reference to that. I understand your theory with reference to that is this water has never been appropriated by the Power Company.

MR. HATCH: Never was appropriated, never put to any use by the Power Company.

THE COURT: But I wanted to know if there were not some claims that would require it to go below, or some of it.

MR. HATCH: When there is not sufficient to furnish we could not take any of it the prior rights below, and don't claim the right to take any of it. Then we rely upon our made water, and as we say, and I understand their contention to be is they may take any water that is in the river, whether it is made water or otherwise, so long as there is sufficient in the river at our intake to supply us with the quantity of water that we contribute to the volume in the river and that we were entitled to nothing by virtue of our appropriation as against them, and we claim that as against them our appropriation and the water that has been for twenty-five years or twenty-four years flowing past their dam it is ours by right of priority and by right of appropriation as against them, and we would claim they had no right to

it over us; that they would not at this time be privileged to
tighten their dam there to stop that flow. We have been using
it for some ten years and we claim it as of right under our
appropriation.

(ARGUMENT CONTINUED.)

THE COURT: Would you permit just a suggestion from the court so that you may say something on it, if you care to, before Judge MacLain begins his argument?

MR. HATCH: Yes, I would be pleased to.

THE COURT: There is some difficulty suggested to the mind of the court. The court has rendered a tentative decree in this case, or decision, rather, by the terms of which there was awarded as a first class right to the Utah Power & Light Company the right to use 229 second feet of water from the river. As a right subsequent to that now without any limitation whatever the court has found that the plaintiff has an application approved and they have complied with the law up to this time with reference to it, of 150 second feet. I don't remember any place in the pleadings the questions raised that you have been discussing here that you are prior in time in that 150 second feet application and filing to the extent of the water that has been permitted to pass the dam of the Utah Power & Light Company to their right. Now, there is great force in the arguments that have been made here in relation to that, but the question in the mind of the court is, and I wanted to hear from you about it, whether it is in a position to be before the court at all on this application to direct a distribution of the water. Without any modification to the finding the court has made the Utah Power & Light Company would be entitled to take 229 second feet of water from the river whenever it was in the river at that point, and in order to do that would be entitled to correct all leaks in

their dam, re-erect their dam, or any other way they saw fit, unless that is modified by some modification, or limited by some limitation. Now, the facts may be such if they had been properly presented to the court that the court would not have been justified in awarding them 229 feet of water at all. The court might have been justified in awarding them 229 feet only when there was in the river that quantity of water which has been permitted to go down to you all these years. This^{is}/not an application to change the findings. This is an application merely for direction to the commissioner.

MR. WEDGWOOD: May I answer?

THE COURT: Yes, I want your views on that subject. Even if we assume now, for the purpose of this suggestion, that if we assume you are absolutely correct in every premise you have presented to the court in this argument that you would be entitled to that water under the facts would you be entitled to it now under the situation and the evidence you have introduced today?

MR. WEDGWOOD: In order to square myself with the idea presented by the court, I take it the court does not mean they are entitled to 229 second feet of any water except the natural flow of the Provo River.

THE COURT: That is true, their tunnel is in addition to it, but any other water they own is added to it.

MR. WEDGWOOD: I take it the question the court asks would be in no way related to our reservoir or these other waters we have spoken of.

THE COURT: Not a bit.

MR. WEDGWOOD: I will say as to the other, Judge MacLain-- I won't say has talked to me, but I have heard him say so, perhaps I can say it, that this question that the court raises now was a question for subsequent determination which we have not raised in this case, and was not for discussion in this case. Now, I am frank to say that in the light

the court puts the matter if that question is not settled in this case the Provo Reservoir Company might be stopped and it might be res adjudicata as to that. I am very frank to say that, and I think it is worthy of most earnest consideration upon our part right at this time, but it seems to me there that the question of whether or not Shingle Creek water, tunnel water, Wright water, Dixon water and reservoir water shall flow over the dam at the present time in addition to the water that flows can be raised tentatively at this time when it is a term of emergency.

THE COURT: Do I understand you to say the court is in a situation to settle that question without the other question being settled?

MR. WEDGWOOD: Certainly, they have not tightened their dam, the situation continues now as it has continued since 1905 or since 1908, when we made our appropriation, so by no act of theirs can they get any more of the waters of the natural flow of the stream now than they stop by their dam; so then the only question now as to the condition of turning water in there, or whether it shall go down below, is in relation to waters which we turn in there which are not natural waters of the stream. That is the situation which is acute to my mind right now, and these things should be settled and settled rightly, and settled on a basis that will do away with further litigation, but at the same time there sometimes arises a situation such as at present, which means a great deal to individuals more than a tentative decision, that might be raised. That is my views along the line the court has suggested.

MR. HATCH: In that connection I have understood that the decree of the court applies to the water at their dam as now constructed, and that, so long as the water in the river is sufficient to supply them with that quantity, 229 second feet the natural flow they are entitled to it regardless of

any appropriation made by us, but there is no one that would construe the tentative decree or the findings of the court, I take it, to mean that they could go up the river and compel the people above to turn the streams that they were using into the river in order to supply them that 229 second feet. Neither could they divert it in such a manner as to deprive any lower user of any right that he had. I have never read the decree under any other construction, but that the decree awarding to them the 229 second feet awarded it to them at the point where they now divert it of the natural flow of the waters of the river, subject all of the time to the pro rata diminution of the quantity used by other users who were within the area that supplies the water at the Utah Power & Light dam; for instance, all of the users up the canyon and farther up to where the division is made-- I have forgotten just how that is.

(ARGUMENT)

THE COURT: The court has awarded them 229 second feet of water as long as it is in the river. It may be based upon a wrong assumption presented to the court upon pleadings that did not present the true situation, but the court has awarded in this tentative decree, with the question left open whether 229 is the right quantity, and we will assume it is the right quantity; now, the court without any limitation says they are entitled to 229 second feet at this point. That means if it in the river they have the right to take it. If they have not had the right heretofore they are now given the right to take it. If the dam is not so it will take it out they have the right to make the dam-- I am speaking with reference to the language of this decision and the theory upon which the case was tried. Now, it appears there is some question whether that is correct or not. It appears there is a contention made and supported by very plausible argument, a strong contention they never did

appropriate all of the water at that point, no difference whether it was only 50 second feet, they did not appropriate it all, there was a quantity of water they never did apply to a beneficial use, consequently under the ruling of our court, and the logic of it that quantity of water they never did and never have appropriated but you come in and appropriate it and consequently you are ahead of them in the appropriation of that water which they permitted to go past. Now the court did not make any allowance of this, was not asked to limit the award made to the Utah Power & Light Company by deducting from their award as a prior right to them the quantity of water which year after year they have permitted to pass, unobstructed, their diverting works, but the court without any limitation said, whenever there is 229 second feet of water they have the right to take it all. That is the difficulty that presents itself to the court now.

MR. HATCH: Of course, if that was the intent of the court in making that tentative decree, I never so understood it.

THE COURT: That is the language of the decree. It doesn't make so much difference as to the intention, because the court said they would not go into it.

MR. HATCH: We are not here today contending they are not entitled to 229 second feet or double that quantity when there is sufficient in the river to supply that under their present construction.

MR. WEDGWOOD: May I suggest this to you. Now, assume under the pleadings as the Judge places it they are awarded without any question, absolutely flat footed 229 cubic feet per second and their dam is too low to turn 229 cubic feet. Presumption under that state of facts, as the judge put it, wouldn't they have the right to raise their dam to turn that 229 feet. If so wouldn't they have the right to lower their dam to take that 229 second feet?

THE COURT: Yes. Then following that, if that be true,

then following that if they have that right, the water belongs to them, they can stop it, they can take it out. This is merely an assumption if they have the right and don't take it and say to you, we will permit 15 or 20 second feet to go down the river to you, we will permit that and take out the water that comes to you, because this water belongs to you, we will permit that water to go down and take the 15 or 20 feet from you.

MR. HATCH: We put on proof as to the flow of water below their dam, and it was a continually making river, and we had appropriated all the unappropriated waters-that was as to our 150 second feet; and we put on proof of the quantity we got from time to time under that 150 second foot appropriation. At times we got our canal full and still there is water flowing into the Utah Lake. At other times we get practically none, but the proof was all there. Now, the theory that I had of the trial of this case was that the river, the surface water was wholly appropriated at different points along the course of the river; that in Wasatch County we have put tight dams, that is, as tight as they can make them under the present conditions.

THE COURT: And not going down to bed rock?

MR. HATCH: Yes, I think one of them goes to bed rock, the one at the lower Midway dam, and the upper one is practically at bed rock. It is quite a distance below the dam when they make it tight before there is any appreciable quantity of inflow. Now as to the Utah Power & Light, they put in such dam as they saw fit ~~xx~~ to put in, and appropriated all of the water they could for that dam, and in the flood season they got their flume as full as they chose to make it. In the low water season they appropriated a much less quantity because it was not there so that they could take it under the present construction, and our contention from the beginning has been that about 80 odd second feet-- 180 odd second feet,

was the maximum quantity they ever had applied to a beneficial use. That was our contention. Now, the court awarded them a greater quantity, and they are under the decree, as the court construes it, entitled to take it if it is there, but that does not permit them any control or right over our-- they can take it, they can take it if they want to, but so long as they don't take it it belongs to anybody who does take it below and apply it to a beneficial use, and they cannot say to somebody below there who has a right to made water, we will give you this that we cannot take and never have taken, and deprive us of taking our water where we please, the made water. Even under the theory of the court it is not their water unless they impound it or do something with it. They permit it to run to us at our gate. Now, suppose we do not choose to take our water at that particular point, our made water, but we choose to divert it and carry it in a ditch around the hillside, we are entitled to do that. Nothing that would prevent us from doing it.

Notes
(ARGUMENT)

THE COURT: Judge MacLain, let me ask a question. If we should assume that for the period since the construction of the Utah Power & Light Company's dam, which was referred to as being 1895 approximately, there has flown under, through and around it in some way 15 second feet of water-- merely as an assumption-- is it your contention that the Utah Power & Light Company has acquired a right in any way to that 15 second feet that has flown through there all that time? I will not ask you to commit yourself.

MR. MacLAIN: I don't wish to commit myself definitely, but I am perfectly willing to answer the question from my present view point.

THE COURT: That was a direct question. If we assume

that you would answer yes.

MR. MacLAIN: Yes.

THE COURT: Then wouldn't the application of the subsequent appropriator, and quite a considerable time subsequent so as to be Class D, we will say, as compared to your Class A, wouldn't their right to the use of that water be entirely unaffected by your right. In other words, wouldn't the only right that would interfere with them be someone below who had a prior right to them, and if that were the case would you be entitled to diminish that if the others did not object, by taking the water that they added to the stream. Those are the problems that present themselves to the mind of the court, if I made it plain.

MR. MacLAIN: I think it is reasonably plain. I would contend as to that water that had at all times passed the dam, that it had obviously not been appropriated by the user, that is, I will assume that.

THE COURT: Merely for the purpose of this question only.

Notice

MR. MacLAIN: Yes, and would assume further that it was natural waters of the stream subject to appropriation by any and all users below. That in fixing the quantity of water to which the party who passed this water by the dam was entitled to the court would not include that 15 second feet, or whatever other quantity it might be, and would fix his right at such a quantity as would not include that quantity of water that had not been diverted into his works; that it would therefore be subject to all appropriators below or appropriators above, for that matter, and whoever took it would be entitled to it subject to the priority and statute, whatever it might be.

Notice

MR. HATCH: Let me suggest there--

THE COURT: If I might before you make the suggestion, so that we may finish this up--if that be true, if the parties below were entitled to this water in proportion as their rights may appear and one of those parties turned water in from a

reservoir, would they not be entitled to have that water go down in addition to their appropriation of this lower water?

MR. MacLAIN: Yes.

THE COURT: That was what was in the mind of the court.

MR. HATCH: You suggested one above might appropriate it. Now, if it were shown that there were 15 or 20 second feet of water flowing in the river below your dam, that your dam was not sufficient to divert it, one above diverting it to the extent of the under flow would say, you have the quantity of water in the river flowing to your dam, and you cannot complain of my diverting this quantity above as an appropriator, because it is a quantity that has never been appropriated. According to your statement I would understand the rule to be that we could go above your dam and appropriate this water, or below your dam and appropriate it, so long as the quantity that you were entitled to by reason of your diversion was in the river, and the 20 second feet that you allowed to flow through your dam would be your loss.

MR. WEDGWOOD: As I understand the Judge's question, this settles the question.

MR. JACOB EVANS: The only point seems to me whether or not some form of application ought to be made to modify this decree in such a way as to say that the 229 second feet shall be taken from or at the point of their diversion, and as their dam is now constructed, something of that kind.

MR. WEDGWOOD: May I ask a question, Mr. Evans?

MR. EVANS: Yes.

MR. WEDGWOOD: Don't the complaint allege there was unappropriated water in the river at the time?

MR. EVANS: Yes, but Judge MacLain merely contends this decree is worked in such a way that the commissioner is doing his duty under the decree, we show a state of facts which entitles us to more water, but the decree don't say so.

MR. WEDGWOOD: Were any tentative findings of fact made?

MR. EVANS: No.

MR. WEDGWOOD: It seems to me if the complaint alleges unappropriated water in the river, tentative findings of fact might be drawn.

MR. HATCH: I think the pleadings are sufficient to cover all of the questions discussed here today.

THE COURT: Judge Hatch, let me suggest I probably set an example by interrupting Judge MacLain, but I don't think Judge MacLain is through.

MR. HATCH: Beg pardon, I did not intend to interrupt.

(ARGUMENT)

MR. MacLAIN: I do not wish to be considered technical in this matter, but it resolves itself in my judgment, into a question of whether we are going to adjudicate a substantive right, or whether we are going to enter an administrative order which may be good for this season or for four or five or six days, whatever it might be. I take it the evidence is not before the court, so far as I know it is not, outside of some very general statements made today, as to what the extent of this leakage through the dam has been in times past, and whether there was any water there subject to appropriation as a Class A right in addition to what has already been adjudicated as Class A rights in this suit. I will admit I am laboring under somewhat of a disadvantage in not having participated in the trial of the case as a whole in these statements which I make, but my understanding is that so far as this whole controversy between the Provo Reservoir Company and the Utah Power & Light Company was concerned, that on the pleadings, as they were framed in the first instance, there was no contention anywhere that the Provo Reservoir Company had any right co-

equal with that of the light company, except for the small quantity of water from certain springs and the Dixon ditch, and so forth; that that contention first appeared when the original tentative decree was framed and after that this matter being brought to light we had the proceedings which we are all familiar with with respect to the rights of the Power Company and Provo Reservoir Company.

MR. WEDGWOOD: May I interrupt to make a suggestion on that subject?

MR. MacLAIN: Yes.

MR. WEDGWOOD: After you left at the last hearing I said in open court, and the record will bear me out, I was going to put in evidence in regard to that fact, and I was sorry that you were not there, but you did not see fit to stay, and I felt as though I should put in the evidence, and the evidence that you say is not in there was put in by me at the last hearing, and is in the record. I don't know whether it was in before, but I know it was put in that time.

MR. MacLAIN: I will say it was rather unusual to put in evidence after we had stipulated the only apparent question between us, and I should hardly regard ourselves as being very heavily bound by such evidence. Now, if the court please, to conclude as briefly as I may, the point I am endeavoring to make is that not technically, but substantially the court has adjudicated certain rights here and there is no evidence submitted here that the waters of the river are being distributed in any other way than in accordance with those rights so awarded. Now, if a different classification of rights is established, this case, as I see it, has got to be reopened again. I am not suggesting this with the hope it will be done, but if Mr. Evans and I were right that this question was one which could not properly arise in this case, it would seem we were right in deferring it to sometime in the future, but apparently we were wrong, and the question has been very concretely presented now. Now if this question is to be gone into,

then it seems to me that the court must again consider and hold the testimony of the Utah Power & Light Company as well as the testimony of the other parties as to the quantities of water that the parties respectively are entitled to. Suppose the court had awarded us 250 second feet of water, this same question would have been presented here and they would have claimed by reason of the leakage in our dams we were entitled to so much less. Suppose the court had only awarded us 150 second feet of water, the same question would still have been raised, and it would have been contended we were entitled only to that portion which our dam would hold when the river was down to 150 feet. Now, going into the substantive aspects of this case for a moment, it would appear to me an appropriator would make a valid appropriation of 229 second feet of water, if you take that quantity, if he builds a dam which at normally anticipated river stages would hold 229 second feet of water, and that is all that he wanted to use and all that he could beneficially use, there would be no object in the world of his making a dam which would impound 500 second feet of water and pass 270 feet over the dam or to one side of the dam, and the question of the appropriation or quantity of his appropriation is not to be determined by the events of an unusually low water season.

THE COURT: I will say, Judge MacLain, if it will be of any advantage, that the court did not take into consideration the quantity of water that was passing the dam in determining the rights of the Power Company. Nothing was deducted for that, and the only feature, the only view of it would be that quantity that was not stopped-- only contention that could be made with reference to it was that quantity was not appropriated.

MR. MacLAIN: What quantity would that be?

THE COURT: I don't know.

MR. MacLAIN: I mean periodically. Supposing there was three hundred second feet of water in the river, perhaps the dam would carry 275.

THE COURT: Suppose it carried a hundred.

MR. MacLAIN: That is tight dam?

THE COURT: Yes, and three hundred in the river?

MR. MacLAIN: Three hundred in the river and dam would carry a hundred, obviously the extent of the appropriation could be a hundred or no more, whether the defect in the dam caused the water to pass through it, over it, or under it, and the point I make as to the merits is -- and I make this simply in anticipation of the question possibly being raised-- is this, that if the quantity of water taking our situation, that we desire to appropriate and beneficially use is only 229 second feet and we took 250 second feet of water from there to get 229 into our flume, with that character of dam there, so that thirty leaked through there, and if there was normally 250 second feet of water in the river so that it would carry that quantity into our intake, then we appropriated 229 second feet, notwithstanding the fact that if the river in an abnormally low season ran down to 229 second feet, we might only get 215.

THE COURT: That was the theory I looked at it.

MR. MACLAIN: Now, this question did not come up in the case, and could not come up for this reason, as I say, this whole matter of the claim of equal rights on the part of the Reservoir Company with the Power Company and conflict of interests between us first arose with the entry of the original tentative decree. For that reason there was no reason for the power company or the Provo Reservoir Company to introduce any evidence on this question, or go into it in any way whatsoever, and consequently, to go back to our proceeding here if we are going to refer back to the original proceedings and not to the decree as justification for this order to the watermaster, we don't have such justification in the proceedings at all, because the evidence is not before the court.

MR. WEDGWOOD: Mr. MacLain, it is before the court.

Both you and Mr. Story-- and since my connection with the case I have not been able to get you to stay there long enough to thresh out any issue, or to get to the end of the testimony, or see what was before the court and what the evidence was, and the cry has been just the same as it is now that you were not there. Now then, so far as the question of evidence in regard to that, I am the last man in the world to bind anybody to what I think is unfair or they think is unfair. Now if you are not satisfied that evidence was put in, if at that time that you had not a fair consideration in that regard, I want you to have it to the limit, and I believe the court will give you a chance to have it to the limit, and I want you to have it.

THE COURT: I do not want to give anyone a chance to prolong this case very much, yet I can see there are some questions there. My view about it is everything connected with those water rights has been settled in this case, or will be, when this decree is entered. I am inclined to think that is true. I think every feature of every water user's right is adjudicated in this case, because I believe the pleadings are broad enough to include it, but there has not been presented to the court any question with reference to the plaintiff's claim of a right equal or prior to the Utah Power & Light Company's right by virtue of their application which has been classed Class D. I don't think that has ever been suggested before, before this hearing.

W. J. Story
I am disposed to do this in this matter. I am disposed where the Provo Reservoir Company sends any water that is clearly outside of any of this other water, to permit them to take it out at their intake; and I do that with this suggestion to all of you gentlemen; if there is any controversy now as to the right to the use of that water that goes through, under or around that dam now is the time to settle it, and we ought to settle it at once, and if the Utah Power & Light Company are entitled to that water to the extent they may either stop it

or send it down to replace other water that is put in, that ought to be established. If they have no right to it and the Provo Reservoir Company are entitled to it as a primary right that ought to be established, and I think, gentlemen, the court ought to give you the time to do that, to establish that issue. The order will be now until some further hearing that whatever water the Provo Reservoir Company puts into the stream above, deducting the losses, shall be delivered to them where they want to take it out, and that the question of giving credit by reason of some right that the Utah Power & Light Company has by virtue of this decree, that ought to be adjudicated and fixed in the decree itself.

MR. WEDGWOOD: May I ask one question?

MR. HATCH: Do I understand the court that will be in addition to any water that is flowing through or under their dam?

THE COURT: I am not taking into consideration that at all.

MR. HATCH: Then we will be in this position, if you will pardon me. We have 30 second feet of water now turned in day before yesterday from our reservoir. We will gain nothing if the quantity is the same today.

THE COURT: Certainly, the court has directed now it be added to the quantity in the river. Then the question whether there is to be any deduction by reason of the fact that the Utah Power & Light Company have the right to tighten up their dam should be taken up and disposed of, I think, because, my opinion, gentlemen, I think is we have adjudicated that when we sign this decree and my view of it is we have adjudicated them the right to tighten up that dam to take 229 second feet, if that shall be the final figure, at any time and under all circumstances, unless it is necessary to go down to some one who has a prior right below, or equal right.

MR. JACOB EVANS: It seems to me in view of that

there ought to be another hearing concerning this matter that we might go into the details of that matter and each side have an opportunity to present the evidence, so that when the findings of fact are made those findings can go into--

THE COURT: It is possible you have the evidence in, I don't know. Possibly upon reading the transcript it might be found you have got enough evidence to settle the question before the court when the decision has not settled anything of the kind.

MR. WEDGWOOD: Mr. Evans, let me ask a question. Does the court think that might be properly presented at the time findings are presented?

THE COURT: Yes, unless, of course, I don't want to make this order against the contention of the Utah Power & Light Company and say to them gentlemen, I will not give you a hearing until such time as the findings are presented.

MR. WEDGWOOD: Unless they want to bring it up before.

THE COURT: If it is of such importance they want a hearing sooner or almost immediately, the court ought to grant it. I will say at any time. That will be a very appropriate time unless there is some reason--

MR. MacLANE: I take it the burden of showing some reason for change in the language of the decree is on the party who proposes to make such change, and that that might be made on the basis of evidence already in the record or other evidence to be introduced.

THE COURT: That will be true, I do not care how it is presented.

MR. MacLANE: I don't know myself what the evidence is, but I can very readily conceive that additional evidence might be desired to that that is already in the record.

MR. JACOB EVANS: I will call Judge MacLane's attention to the evidence introduced at the last hearing.

MR. WEDGWOOD: He don't want to be bound by that,

he went away.

MR. JACOB EVANS: I understand, but it is in the record. Now if they want to introduce some other evidence in addition to what was already in, he should know what is in the record and determine whether he desires to introduce other evidence which might conflict with the evidence that went into the record at the last hearing. It is very short, if you care to hear it.

MR. MacLANE: I will be very glad to read it.

MR. JACOB EVANS: It is found here on page 29.

THE COURT: What is the desire now of the parties with reference to any subsequent proceeding of the matter?

MR. HATCH: If there is a question in the mind of the court as to our right to this water as against those people--
we don't claim it as a prior right in the river as against those who are below us and who had used it. It is only a D Class right as to them, as I understand, but as against the Power people,
I will say it is our position, with the opening virtually of this case, that we claim it as against them as a surplus water, and that it comes under our 150 foot appropriation.

THE COURT: Your argument and the argument made by General Wedgwood and also by Mr. Evans was very pertinent in support of the proposition that it is a right prior to the rights of the Utah Power & Light Company for that quantity of water that was permitted to go through their dam and under their dam or around it through all these years, your argument was very strong argument in favor of that proposition.

MR. HATCH: Pardon me, just here, if the court please, and at the intake of our canal it was surplus and unappropriated water, whatever it was, but as to their 229 second feet, or whatever quantity may be awarded to them as having been used by them at their dam our claim is not-- that is, we could not require them to turn over their dams to make up whatever quantity was flowing at our place if it did not flow there. That was my

theory. But they could not tighten up their dam so as to interfere with its flow.

THE COURT: Then if they could not tighten up their dam you can require them to let that much come down all the time.

MR. WEDGWOOD: We will raise the question at the time the findings are presented unless presented before.

MR. HATCH: We raised the question at the last session of the court, or next to the last session of the court.

MR. WEDGWOOD: But the court has decided this question, let it go until then.

MR. HATCH: Whether or not that water should be turned to us over their dam or distributed to us and not pro rated, and I understand then this matter that is now before the court was virtually settled at the last session of the court.

THE COURT: I don't remember.

MR. HATCH: The court said in making his direction that he would cover that matter. I specially called attention of the court to what the Commissioner had done last year, and treated our right as a canyon right and pro rated it. That was as to the Blue Cliff.

THE COURT: That is what I understood, it was the Blue Cliff entirely.

MR. HATCH: You are right, your Honor, I am mistaken.

THE COURT: Of course, I might have been mistaken, but I did not understand this matter was before the court at all.

MR. MacLANE: I think if this matter is to be gone into there is really no way to satisfactorily determine it except upon a definite hearing at which evidence may be introduced, because the brief statement that was made the other day, very general in its terms, we would not be willing to be bound by it. We want an opportunity to cross examine the witness and we would wish to put on evidence ourselves.

MR. WEDGWOOD: We concede it to you.

MR. MacLANE: Furthermore, we would probably wish to

put in evidence as to the quantity of water flowing in our flume at various stages of the river so as to show the capacity of our works as a whole relative to the stages of the river with the view of the court fixing for us a definite proportion of water, which we thought we were getting in this decree, dissatisfied as we were with the amount, we, nevertheless, whatever the amount would be, want a definite decree for it, definite quantity of water; because it may be, irrespective of this question, necessary to replace that dam by another type of construction at some time in the future. If so, we want to know how much water we have to pass down the river and over, as well as under.

THE COURT: I can see at once it is one of the most important questions to you.

MR. MACLANE: It is a question which has never been tendered by the issues in the case.

THE COURT: I had never understood it as being tendered it may have been there concealed or covered up or lost sight of.

MR. MACLANE: As soon as we may have a full hearing on the question--

THE COURT: Judge MacLane, with that idea in view and that view of the matter, which, I take it, is a reasonable one, you would not want to defer the presentation of that matter until the decree was presented to the court for consideration of its details, would you?

MR. MacLANE: No, I think we should have an earlier hearing, and that should be considered in connection with the other matters and concrete finding made upon it before the final decree is prepared.

MR. EVANS: I might suggest this in regard to one of the suggestions made by Judge MacLane, that is, that measurements of the water that went through their flume would be another matter that should be gone into in addition to the quantity of water that spilled through or arose below their

dam. I might say that matter was gone into very fairly on both sides. We introduced a large number of measurements and you folks introduced a large number of measurements.

THE COURT: There never has been before the court-- I don't know what was in the mind of others-- there never was before the court that the award that was being made to any of these parties, and especially to the Utah Power & Light Company, was subject to any deduction by reason of the fact that someone else had a right to require a quantity of water to go down past them unless it would be the first class rights that would require pro rating at low seasons, but there never was in the mind of the court at all, and never presented to the court, as I view it, that the plaintiff under the D. Class right had a right that was equal to the Utah Power & Light Company's right, and that would be such as to require a quantity of water to pass their dam all the time for the satisfaction of that right. Now that appears to be the situation today as reasonably deduced from your argument. That being the case, the court does not want to determine the matter until the Utah Power & Light Company should have an opportunity to meet it with any evidence or suggestions they might desire to make, because assume there is 20 second feet, 15 to 20 I think was what Mr. Wentz said, was going down there-- or possibly it was Mr. Murdock-- but assume there was 15 second feet had passed there all the time and you were contending under your appropriation you are entitled to that as against the Utah Power & Light Company when the water gets down so that there is only 200 second feet available at that point for all purposes, they would get 185 second feet and you would have the 15, they must let it go, they cannot get their full quantity because your right is equal to their's. Now, with that idea in view the court does not want to have prepared the final findings and decree until that matter is settled, and the parties affected by it have a full opportunity to go into it.

MR. HATCH: The court has not as yet finally fixed the quantity to which the Utah Power & Light is entitled.

THE COURT: No, I have referred to 229 as being the amount solely because it was fixed in this decree. I have not announced a decision upon this rehearing at all.

MR. A. J. EVANS: Couldn't we fix a time for that rehearing now?

MR. HATCH: It will be immaterial to us, only that it is heard before the final finding is made.

THE COURT: May we have some determination as to when this matter, whatever is to come before the court, shall be heard again?

MR. WEDGWOOD: I would like to say one thing in regard to this matter. It has always been my understanding, and I took it the same thing was in Judge MacLane's mind, that we tried this case on the physical conditions existing and the awards were awarded under the physical conditions existing. That has been my theory, that is why I made the suggestion.

THE COURT: Yes, but General Wegewood, there is in the mind of the court a question whether under the theory you adopted of your pleadings you did try it on the theory of the physical conditions. I am inclined to think you did not, that is, that the case was not tried from the beginning upon the theory of the physical conditions. That is, you did not construe the issues raised by the pleadings in that way as they are construed now; but by that as it may, I will hear this matter on the 8th day of July, and give all the time is necessary at Provo, at ten A.M.

MR. HATCH: We understand the ruling of the court today to be that the Commissioner is instructed to turn to us such water as we contribute to the river supply in addition to such water as may be flowing-- the natural flow.

THE COURT: Not required or claimed by any of those users below there. I don't remember-- I think Timpanogas is

the only one, isn't it?

MR. HATCH: Only one.

THE COURT: Or in order to supply the needs below. There might be part of that in addition to what goes out of the tail race, but all of those rights must be supplied.

MR. HATCH: So far as the Power Company is concerned it shall not be charged to us as a part of our water.

THE COURT: No, not until some further hearing of the court to determine that. The court will adjourn until the 8th of July.

IN THE DISTRICT COURT OF UTAH COUNTY, UTAH.

PROVO RESERVOIR COMPANY,

Plaintiff,

vs.

PROVO CITY, ET AL,

Defendants.)

October 8, 1919.

THE COURT: Gentlemen, I am ready to take up anything that is to be presented in this case.

MR. JOHN E. BOOTH: If your Honor please, I understand your Honor to say in behalf of the plaintiff first, or ready for anybody?

THE COURT: I did not indicate, Judge Booth, I said I did not know just was to come before the court.

MR. JOHN E. BOOTH: There is a small matter, if I may present it to the court.

THE COURT: You may.

MR. BOOTH: I think you will find it in the tentative decree on the third page, the East River Bottom Waters Company, and, pardon me, I mean on the west side of the river, - West Union Canal Company, Smith ditch people and the Carter are put there together, they all take it out of the same point of diversion, and this year there has arisen a difficulty about the Carter people. While it is put together now, we are willing on behalf of the West Union and I ask for it on behalf of the Carter people representing both, to avoid future difficulty that (inaudible).

When the Carter people put in their testimony they put in for seventy-six acres, but the commissioner Wentz has made the survey more accurate, and he said it was eighty acres, and I think that is what your Honor finally allowed. We consent to that, and I will say rightfully the Carter people are entitled to the same duty of water as others on the river bottom, which is a trifle higher than the

West Union, and I think the Carter people should be allowed for eighty acres, and at the same duty as the other river bottoms people, which is a little higher than we are awarded in the East Union, and if that is taken out it will not interfere with anybody at all. If that can be done I am certain it will save much difficulty.

THE COURT: As I understand it you represent all the parties to be affected at all by this change?

MR. JOHN E. BOOTH: Yes, by this change,

THE COURT: And they are all agreeable to this change being made?

MR. JOHN E. BOOTH: I think it is right it should be. The Carter people prefer it should not, but I think it is right it should be done, and certainly I recommend it and ask for it on behalf of all of them.

THE COURT: With that understanding, none of the other parties are interested in the change, and I see no affect it would have on any of the other parties.

MR. WEDGWOOD: May I say in that regard, if Judge Booth will put that on paper appearing for those parties so that we may have it.

THE COURT: The committee that has been appointed to draft the findings and decree may not overlook it.

MR. JOHN E. BOOTH: You suggest I file something.

MR. WEDGWOOD: If you will draw it out as you want it in the decree.

MR. JOHN E. BOOTH: And submit it to the committee?

MR. WEDGWOOD: Yes, with the court's approval. We have asked the attorneys to submit who they represent, and we are receiving some answers. Then later and shortly we propose to ask the respective attorneys all the modifications they suggest they think they are entitled to in the decree, and on what ground and then it will get in there.

MR. MCDONALD: I would like to suggest, your Honor, in copying the names in the decision he-retofore rendered by the court the name of Edward Dillon or Ed Dillon was left out, and I presume that the decision so far as names and description are concerned would be the basis for the decree, and it may be inserted.

THE COURT: Is he one of the parties that had water awarded?

MR. MCDONALD: He had water awarded under the Fulton decree, thirty acre water right in the first class.

THE COURT: Probably overlooked.

MR. MCDONALD: It is only a clerical error, I wrote your Honor about it, there was trouble about it this summer, Mr. Wentz let him have water, but there was no record of it.

MR. WILLIS: May it please the court, in going over the decision of the court--

MR. WEDGWOOD: Mr. Willis, before you get to that, because these things come up to the committee-- how will we get that? Will you take the responsibility, ask you what modifications we have in the decree and see we get it.

MR. MCDONALD: I will be glad to do it, I have already provided the record to the Judge and called his attention to the specific thing.

MR. WILLIS: May it please the court, in going over the decision of the court I find an item or two that seems to me should be corrected and made more specific. In the decision the court finds Joseph Hatch for his two lots and Emma Wherritt for her one lot should not have the water decreed to them for the reason it is counted in on the acreage that is allowed to the Wasatch Irrigation Company. The testimony before the court shows that in awarding to the Wasatch Irrigation Company its acreage and the amount of water that these lots were actually counted in there,

but unless the court shall decree to them that water and state that it is to be taken from this acreage, I take it they get no rights at all here for the reason that they are not stockholders within the corporation, and I think the findings, conclusion and decree shall specify they shall be entitled to that water, and it is to come from the acreage, or it is computed in the acreage and also in the amount of water awarded to the Wasatch Irrigation Company, and the testimony of John H. Clegg, president of the Wasatch Irrigation Company, if your Honor will remember, so testified it was counted in that.

MR. WEDGWOOD: May I ask a question, Wasatch Irrigation Company is a corporation?

MR. WILLIS: Yes.

MR. WEDGWOOD: Are they in the corporation?

MR. WILLIS: They are not stockholders, but their acreage is counted in with it. We do think it should specifically decree to them that water.

Then the court omitted to award the Joseph Hatch--

THE COURT: Before we leave this matter of these lots, is there anything in the evidence upon which may be based the quantity of water they should receive for these lots, what part of the water, and how much to the Wasatch Irrigation Company?

MR. WILLIS: On the same duty as is awarded to the Wasatch Irrigation Company. There will be no question as to that part of it so long as we have decreed to us those rights which we think should be.

Then in the decision the court overlooked awarding to Joseph Hatch water for one twenty acre tract. It was pleaded and stipulated that he was entitled to water for that. It was undoubtedly an oversight on the part of the court, and I wrote to Colonel Wedgwood in answer to a letter from him, and told him then that I would call the court's attention, and

get the court's sanction to these matters, and then later would see that it was properly put before the committee.

THE COURT: This is a twenty acre water right of Joseph Hatch?

MR. WILLIS: Yes, the other water rights are to be found on page 29 of the court's decision, and the twenty acre tract was omitted and the lots omitted purposely because the court refers to that there.

MR. WEDGWOOD: You take the responsibilities of drawing up the provisions, will you?

MR. WILLIS: Yes, I will.

And then in the Timpanogas Irrigation Company there was evidence introduced before your Honor as to certain rights to Shingle and Beaver Creeks. Your Honor omitted evidently through an oversight to award to them that water right that was filed. We introduce testimony showing they had made appropriations and were entitled to a certain proportion of certain applications and your Honor awards to the Wasatch Irrigation-- no, to the Provo Reservoir Company their rights under those applications, and it was admitted that the Timpanogas was entitled to certain rights under those same applications but they were overlooked in the decision of your Honor.

THE COURT: Those applications were owned jointly by the plaintiff and Timpanogas.

MR. WILLIS: Yes, and they admitted before the court certain interests belonged to the Timpanogas Irrigation Company of those applications and appropriations.

Then in the Utah Light & Power plant--

MR. WEDGWOOD: Now, pardon me just a minute, because we are interested in this as it goes along. Now, does that make any addition to the quantity of water awarded?

MR. WILLIS: No, it is simply an oversight, Colonel, in awarding to the Timpanogas Irrigation Company their rights

under those applications is all.

THE COURT: Application to store water, reservoir application. I remember the fact they had an interest.

MR. WILLIS: I think it was an oversight clearly, your Honor, and I will take great pleasure in calling the committee's attention to these various things, with the consent of the court.

Then under the Heber Light & Power plant there is nothing at all designated as to the time they are entitled to water.

We think the final decree shall show their right shall be from the first day of January to the thirty-first day of December of each year.

Then also various parties named in the decision on pages from 26 to 30, inclusive, it was there awarded to the various owners that the quantity of water delivered or decreed to them or given to them under the decision, should be at their land under certain conditions. There is no mention made of that in your Honor's decision. We think that should also be specifically set forth in the decree.

I think that is all along that line, your Honor. A little later on, your Honor, I want to ask for the privilege of filing a complaint in intervention for some rights, and I will be pleased to take it up a little later when these other matters are disposed of.

MR. WEDGWOOD: Mr. Willis, isn't the matter to which you call the court's attention that the water should be delivered to them at their land a matter that is covered by the generalization in the decree?

MR. WILLIS: I looked over it and did not see it, Colonel. If it is, it is all right.

MR. WEDGWOOD: You will agree matters of that kind should be covered by a generalization, because to specify by each one will make work galore.

MR. WILLIS: I do want to call the court's attention

for the purpose of having a right to take it up with the committee and will do so in the regular way.

MR. WEDGWOOD: The committee will take up anything, don't make any difference what it is.

IN THE DISTRICT COURT OF UTAH COUNTY, UTAH.

-----000-----

PROVO RESERVOIR COMPANY,)
Plaintiff,)
v.)
PROVO CITY, ET AL,)
Defendants.)

-----000-----

October 8, 1919.

MR. WEDGWOOD: If your Honor please, there are several matters in connection with the decree and the rights of the parties which I think challenge the attention of the court, and I doubt if I, at the present time, see all of them. There will be nothing gained by going over them, but I will suggest one, suggest that it be taken up. As I read the tentative decree, and as I understand it, and as Mr. Wentz, the Commissioner, understands, and upon such understanding has acted, the two divisions of the river, Provo division and the Wasatch division are in no wise tied together or connected. While this year, it will be admitted by all, I think, has been a phenomenal and exceptional year, nevertheless, those things do occur, and when they do occur there is no good reason why parties, who, as a matter of time and right, are entitled to have the advantage of a fortuitous set of circumstances-- of course, that that condition occurred this year is a matter of fact, and it is contended by some of the parties that it did occur. If such a situation may occur under the decree, if it did occur, and if it can be properly guarded against, I am ready to take up that matter, if there is no objection. I think all parties are to a measure, at least, interested.

MR. RAY: May it please your Honor, in connection with the suggestion as to the fact that the water rights,

as provided in the Wasatch division are not determined relative to the rights in the Utah county district, I have just one or two observations to make, and in that connection will say to your Honor that I desire to present the subject on behalf of the Wasatch County users. Your Honor will remember that at the outset of the case we first met here and took a great deal of testimony, and then went to Wasatch county. The rights were determined there largely in connection with old decrees and by stipulation for the clients whom I represented here. I did not even go to Wasatch county. There seemed to be a feeling that the use in Wasatch county added such benefits to the river generally that within certain limits there would be no objection to them, but we find now that after the entire matter has been threshed out, while there is established a priority between the different users in Wasatch and a priority between the different users in Utah County, there is no priority as between the two counties. I do not know what resistance there will be made to carrying out the suggestion made during all of the early part of the case, that those rights up there would be recognized as primary rights within a certain limit, and that their use would be a use which would not be interfered with as to the priorities in Utah county. If we should proceed to establish as between Wasatch and Utah counties the actual priorities, of course, it would require a re-trial of the case, I assume, because those priorities have fallen in at different times irrespective of the location of the lands upon which the water is used. Your Honor will remember that there were many stipulations, and that we permitted stipulations to be entered and were parties to them, granting a use in Wasatch county, Utah, at certain seasons-- one season of the year, as high as a 40 acre duty. That is, when there were flood waters. No objection was urged to it at all. I assume that it is not the purpose of the Wasatch county users to now ask any of the appropriators to permit them to have a 40 acre duty upon their lands, except at a time when the

primary users and all of the users in this county are supplied with their decreed rights.

MR. WEDGWOOD: Mr. Ray, may I put something in there. Don't that stipulation provide for in May?

MR. RAY: Yes, that, however, may not be self limiting, because your Honor will remember that two years ago in May we met a situation, about the 10th of May, where the primary users of the lower division were not able to get the quantity of water decreed to them, so that we then immediately met the question as to whether or not users in Wasatch county should have a 40 acre or a flood right duty at a time when there was not a sufficient quantity of water in this county to supply the primary interests.

MR. WEDGWOOD: Mr. Ray, not to interrupt you, but, may I ask a question to bring up the situation I have in mind. Isn't it a fact, or, do you know whether or not it is a fact, that some of your old users in Wasatch county this year were on above a 70 acre duty, when the last man in Wasatch county, and others above these men were working, taking all the water they wanted; you know that?

MR. RAY: I do not, and I assume, your Honor, that is something which is already regulated by the decree, and the stipulations, that question of duties, and that we will be controlled in the drafting of the decree by this stipulation and your Honor's tentative decree.

MR. WEDGWOOD: May I add another word, so you will understand the position?

MR. RAY: Yes, indeed.

MR. WEDGWOOD: The fact, as I take it-- very brief evidence will show it, the statement I make is the fact, and that Mr. Wentz takes the position that he may take, that, that is Wasatch county is entirely separate and distinct, and that under the conditions as they exist as he deems them-- not saying he did not do right, that his mind is not all right, be-

cause I am strong for Mr. Wentz, but the situation was so under the decree as it stands with his interpretation, those things did happen, so that the question of the decree as it stands now on my statement that there is no connection between the two, treating it as two independent rivers, is not touched by what you are saying.

MR. RAY: Perhaps I do not make myself clear on what General Wedgwood now suggests. What I want to get before the court and respective attorneys is this, that we cannot depend upon the judgment of anybody in this decree. The decree must fix the relative rights there, and to the extent it does not fix it, I want to now bring the question to the attention of the attorneys, to know whether or not the users in Utah county resist the decree being so amended as to make the rights in Wasatch county fixed rights relative to the Utah county rights in such way, that up to the question of the flood right as fixed by the stipulation, which would not precede the interests of Utah county, that may be regarded as all primary water up there, and if that may be done, it would save a very great deal of controversy here, and if it may not, it may reopen the case as to a very protracted hearing, and I do not want to open it unless there is resistance.

MR. JOHN E. BOOTH: If the court please, as that question has now been raised, I would like to be heard very briefly. I think the relative rights between the two counties ought to be fixed in this decree. I represent a number of very early appropriators of water here. We have had very little difficulty with either our co-defendants or the plaintiff in the settlement of our rights, but we find a condition has existed this year that seems to have never been anticipated by the court or the parties to this suit, in this, that the tentative decree provides that they shall at this period have a certain amount of water for their several acres and in their several divisions so long as there was sufficient water in the

river to supply them. We have been accepting that decree, but the difficulty occurs with us this year having-- I think the Lake Bottom people having a second right on Provo River-- that when the water in the river decreased so very big, and then we had to be cut down from the award made in the decree to the actual condition that we found it in the river of the water, and then to divide that among all these later people, we found out it would about ruin us. Now, I don't know whether there is a remedy for that or not. It certainly is a wrong.

MR. RAY: Judge Booth, may I ask a question that may clarify this. You will remember, Judge, after we returned from Wasatch county here, there were entered into in open court, certain stipulations relative to the uses in Wasatch county. Those stipulations were entered into by the plaintiff company, by the Timpanogos Company, by the Provo Bench, and, I think, by all of the irrigators who had counsel actively in court, permitting the specific use of the water in Wasatch county. You remember those stipulations, do you?

MR. JOHN E. BOOTH: I don't think I was in court at the time. I took very little part in the trial, because of our stipulations with the people here. I don't think we had any other stipulations.

MR. WEDGWOOD: I suggest, Mr. Booth, the record shows you were.

MR. JOHN E. BOOTH: If you do still insist I was, I am not trying to go back on anything I have done, but I want to call the court's attention to it now. Whether it can be remedied or not I don't know, but the fact is it may be through natural reasons that the waters actually failed, as I take it they did this year, and it may be through-- I can see where it could occur through Wasatch County taking a 40 acre duty up there, and that would so reduce the waters in this vicinity, that we would not have what was awarded to

us under the decree. Now, when that falls below the minimum as considered in your Honor's decree, then everybody it appears suffers accordingly, and when it comes to that some one of these old rights-- I don't represent all of them-- I speak for myself--

MR. RAY: May I suggest another question on that. You will remember that was all threshed out at the time we entered into those stipulations, and while it was admitted that the use granted in Wasatch County might create a temporary shortage during the period of that use in the early year, that the return water guaranteed to us by putting that on the land was more than a compensation for it.

MR. JOHN E. BOOTH: I remember all that.

MR. RAY: As a result of that we entered into the stipulation.

MR. JOHN E. BOOTH: I remember all of that, but that does not go to the effect if the tentative decree provides the lowest division of the river shall be at 200 second feet and that is awarded to all the water users here, and the water in the river runs down to a hundred second feet, then we cannot have that 60 acre duty, can we, that is awarded to us, or a 75 acre duty. It reduces us down to a 120 acre duty, and we dry up, that is all there is about it, but whether it may be too late, whether we cannot do that now--I readily concede that after all these years of the water being up, never getting below a certain point, that your Honor felt justified in taking that as the minimum, and, while I concede I think all the powers to the court that anybody will, but the court cannot increase the water to 200 second feet when there is only a hundred second feet in the river. Now then whether there should be some provisions for the very early appropriators, appropriated the first rights in the river, whether it is too late, or whether that should be done, or whether it is at all feasible to do that or not, I am not

determining, but I do feel like I ought to call the court's attention --

MR. RAY: May I make a suggestion so Judge Booth can answer it now. You will remember the statement made by Judge Hatch and others to the effect that for many, many years, irrespective of the flow of the river, the Wasatch users had maintained a certain number of tight dams in the river, and independent of the Utah county interests they had put those dams in and maintained them to the extent of the water there. What I am suggesting to you and the other counsel here that the decree be so defined here that to the extent of their stipulated and decreed interests they continue to have the right to do that.

MR. JOHN E. BOOTH: I understand that.

MR. RAY: Now, your suggestion would do just this. If the stipulations were to be set aside and the decree in that respect neglected, you would proceed here and take the rights in Wasatch county and the rights in Utah county which have been fixed as between themselves, and you would say, for instance, your Big Field ditch down here was in 1888 and a certain Timpanogos Ditch in Wasatch county was 1889, then fix those again in order and that would require the entire forgetting of the stipulations we have and the retrial of the case upon a much broader basis than it ever has been tried, it seems to me, and what I want to know is whether you are suggesting that to the court to such an extent that it may be necessary for us to present to the court the evidence as it now exists and your stipulations as they exist.

MR. JOHN E. BOOTH: No, I am not asking to take any evidence.

MR. WEDGWOOD: May I add a word. In my suggestion I want to say absolutely, and have it understood, that I did not contemplate for one minute in any way varying the decision on the general issues, or in any way questioning the stipula-

tions. The tentative decree does not contain all the stipulations it should contain, but it contains the matters which I take to be binding, and which I concede to be binding on all of us. That don't touch the question I raise at all.

MR. JOHN E. BOOTH: I think I understand it. In fact, I have given this water question a good deal of attention last forty years, and think I understand it about as well as most people. I will say this, if this trial had been started so that it would have been tried this year under the present conditions as it has been this year, instead of when it was tried, I am inclined to think then there would have been a great deal of difference. Now then, whether it is too late to consider that under the testimony already in, because the rights have been testified to and the dates of their appropriation, and I do not think it is necessary, even under my theory, to consider any further testimony than already before the court, but whether there should be a contingent provision in case the river dropped down one-half practically, as it has this year, in favor of the original appropriator, whether that should be done in justice to these people-- of course, they think ^{it} ought to, and I submit the matter to the court, because it is one of great importance, and as I made the remark once before I do not believe either the policy of the law or intention of the court is to destroy the usefulness of ground worth four hundred dollars an acre for the purpose of putting in other ground that when it is done will be worth a hundred dollars an acre. I don't believe that is the theory on which the court ~~is~~ has acted.

MR. WEDGWOOD: I am ready to show the situation to the court by a little testimony.

MR. McDONALD: If your Honor please, relative to Mr. Wedgwood's question, I represent numerous people in Utah County, and some in Wasatch county, and I went to Wasatch county at the time that we were to have taken evidence there,

and, your Honor will remember, that the court remained there for several days for the parties to undertake to adjust this matter, and everything was finally adjusted by way of a stipulation, the rights of the parties fixed.

MR. WEDGWOOD: Nobody except Judge Booth makes any suggestion of any change.

MR. McDONALD: What I was trying to get at was this: As I understand it the decision at the present time fixes the rights.

MR. WEDGWOOD: Sure.

MR. McDONALD: Then what is the further question?

MR. WEDGWOOD: Because water has been used under a 20 acre duty when old rights down here were not getting what they were entitled to.

MR. McDONALD: Then it is conceded, as I understand,-- in other words, there is no question about the decision as it stands fixing those rights, that is, a certain quantity of water in Wasatch county, and certain quantity of water in Utah county.

MR. WEDGWOOD: Let us get at the facts. There is no use talking about anything nobody has any contention with.

MR. McDONALD: What I was going to say is, as I understand the matter is already settled as to those rights by the testimony, and, so far as I am concerned representing the people of Utah County that I do represent, as well as the ones in Wasatch county, I am willing it should remain as it is.

MR. WEDGWOOD: So are we. They want something more in the decree or decision of the court than is there now.

JOSEPH R. MURDOCK, recalled

DIRECT EXAMINATION by Mr. Wedgwood.

Q Mr. Murdock, were you familiar with the actual use of water from the Provo River during the past irrigation season?

A Yes sir.

Q Do you know whether or not at times during the irrigation season of the past year in Wasatch county, they used, regardless of how they got it, a greater quantity of water than they were awarded in the decree?

MR. RAY: We object to that as irrelevant and immaterial. That raises the question of the administration of the tentative decree prior to its signing.

THE COURT: What is the object of it, General Wedgwood-- some parties took more water than the decree awarded them?

MR. WEDGWOOD: No, I cannot understand Mr. Ray's position. It is absolutely non-understandable to me. I do not want to take up any time here, it is the last thing I want to do, but the attorneys talked hour after hour in regard to nothing.

MR. RAY: General Wedgwood, I have not controverted your statement to this court about the uncertainty of the decree. I suppose nobody is going to controvert it, and why take testimony on it. Nobody is controverting your statement on it, why take sworn testimony.

MR. WEDGWOOD: So that the record may show what is the fact, and the court may know what is the fact. As I say, there is nothing in this decree that connects up these two parties, and the Commission^{er} has one idea of construction of what there is in there. I am not saying he is not justified by what is in the decree, in fact, I would not say he was not, not by any means, but, if he is, the decree ought to be so that he would be. It will take about five minutes or ten to establish the situation.

THE COURT: Very well, I think you may proceed.

MR. McDONALD: Your Honor please, we object to the introduction of this evidence upon the further ground there is no issue before the court; that no notice has been given of any issue to be tried out at this time. We are prepared with some testimony here to show probably a different and geometrically opposite set of circumstances from that which the witness will testify. I don't know.

THE COURT: I understand this is merely evidence how Mr. Wentz has administered this tentative decree or decision.

MR. WEDGWOOD: And to show something written into the decree.

THE COURT: Do you expect to show he did not distribute the water as General Wedgwood shows he did?

MR. McDONALD: If he did not distribute the water in accordance with the decree, I have no objection, but, if it is to go to the relative rights of the parties--

MR. WEDGWOOD: Pardon me, I have disclaimed time and again.

MR. A. C. HATCH: The decree is interpreted different ways by different persons. Mr. Wentz interpreted it one way, and some other parties another way. Mr. Wentz, as I understand, treats the river from the Wasatch dam up as a separate and distinct river from the Wasatch dam down, is that right?

MR. F. S. RICHARDS: I understand this testimony is offered for the purpose of showing the construction Mr. Wentz places upon the decision.

MR. WEDGWOOD: I go a little bit farther than that. There is so much water in the river, and if there is water enough everybody is entitled to their decreed rights, and when there is a full stream there they should have their decreed rights all along the river. There is nothing in the decree to connect up the two rivers so as to enforce the fact of their getting their decreed rights, whatever they

may be, and it affects both units of the river at the same time. That is what I am trying to get out.

MR. McDONALD: I shall not say anything further at this time, but our contention is that the tentative decree does fix the relative rights, and we spent days and days and days fixing those rights and those rights were all agreed to, set forth in the stipulation, and the tentative decree based on the stipulation, they are fixed and determined.

MR. JOHN E. BOOTH: Nobody is questioning it.

MR. McDONALD: Yes.

MR. JOHN E. BOOTH: No, if I understand it. Perhaps I am unfortunate in this that I take my cases by the job and not by the day, so you see there is no object in me using any time, but as I understand it, and I have only learned it since this court opened this morning, that Mr. Wentz claims there are two distinct divisions in his construction of the decree; consequently if Wasatch county wants the whole of Provo River at the highest stage of the water, that they have the right to take it, and whatever is left we have down here. I do not understand that is the sense of the decree at all.

MR. WEDGWOOD: I do.

MR. JOHN E. BOOTH: We are entitled to high water rights down here as well as they up there.

THE COURT: General, do I understand the situation as you understand it?

MR. WEDGWOOD: We can spend hours discussing the effect of the decree. If you want to do that, I am perfectly willing to do it. I ask something be put into the decree that shows a connection between these two rivers all along the game, not to change the stipulation or change the rights in any way.

THE COURT: Is that resisted by anyone?

MR. WEDGWOOD: I don't know-- we have talked here--

MR. RAY: Nobody resists it I know of, your Honor. I think everybody wants it.

MR. WEDGWOOD: What shall it be then?

MR. RAY: I am willing to make a suggestion what it be to the court, and it will be very brief, and then every attorney here may take it up with his client, but I will state it to the court, and if they want it reduced to writing later, we may do it. No use reducing it to writing unless we are in some accord.

THE COURT: The reason I asked General Wedgwood what he expects to claim for this evidence was it appeared to me that a decree based upon the decision rendered would be based upon the evidence that has already been taken, and in the record, and that that evidence was sufficient. The question that is suggested now, and before the court, did not enter the mind of the court at all at the time the decision was rendered, and I doubt whether it entered the mind of any of the counsel, at least, it was not suggested when we met after the decision. I see the importance of it. I see the importance of placing it in the decree, such language as will make definite and certain just what the situation is with reference to the relation between the upper and lower rivers, and, at the same time, this can all be adjusted by suggestions based upon what we already have in the record. If, after in the discussion, it becomes necessary to make explanation sometimes of detail then will be time to take the evidence.

MR. WEDGWOOD: I thought we could help it by showing how the situation arose, which is an extraordinary situation. I want to save all the time. I am working by the day, but still, at the same time, I am ready to quit anytime time I get through with my work, and, as Mr. Ray has made the suggestion, of course, I want the thing in writing, it will not take very long, will be very glad to defer to him and let him make the suggestion, and be very glad to consider it.

MR. RAY: If I may have Mr. Davis at the typewriter for three minutes I will be glad to put my suggestion down,

and they may consider it.

MR. WEDGWOOD: Go ahead.

(RECESS)

MR. RAY: I will read the stipulation as I have prepared it here, and then if counsel want to consider it further, the court no doubt will permit it. "It is hereby stipulated by and between the parties to this action that all rights to the use of water in the Wasatch division as decreed shall be primary to the use decreed in the Provo division. And further, no use in the Wasatch division in excess of the decreed rights shall be allowed until all rights decreed in the Provo division are fully satisfied." That is the suggestion I tried to make.

MR. RICHARDS: Your Honor please, Mr. Ray, I understand, offers this stipulation. I would like to know before we consider it whether it covers the ground that General Wedgwood was contending for.

MR. WEDGWOOD: It is right along the line, and practically--

THE COURT: It bears upon that question.

MR. RAY: I would be willing to discuss that during the recess with Mr. Richards, because I was all through it.

THE COURT: Do you think we would make time by an adjournment?

MR. RICHARDS: What I was trying to get at was this, if we agreed to this stipulation would it settle this question?

MR. WEDGWOOD: Yes, it would.

MR. RICHARDS: Then I suggest we have a recess or adjournment to find out whether we can agree on it.

MR. STORY: I would like to ask one question in the meantime.

MR. SOULE: If the court please, in the discussion

here reference has been made to Utah and Wasatch county.

MR. RAY: That includes Summit.

THE COURT: Wasatch division, I take it, is meant all the time.

MR. SOULIE: My clients are all in Summit county.

MR. WEDGWOOD: I want to make one suggestion before we adjourn. It brings up the difference between Mr. Ray and myself. I have a paragraph which I wrote yesterday covering this question. I do not think this ought to be in the form of a stipulation, because everybody is not here. There is no necessity for a stipulation. I think, as the court suggested, the evidence that warrants a provision in the decree of the character which may be stipulated here is all in.

MR. RAY: That is my contention. The stipulation was those dams have been maintained for thirty years.

THE COURT: What your suggestion is this be treated as a suggestion what should go in the decree rather than a stipulation.

MR. WEDGWOOD: Yes, with that suggestion that is all I have to say.

MR. RAY: That is satisfactory to me.

MR. STORY: What is the object of the last clause of the stipulation if you give the primary-- give the Wasatch division the primary rights, what is the object of adding the last clause?

MR. RAY: Just this. The Commissioner, and that has been the basis of the trouble, has regarded it as separate, and he has maintained his dams at the time when he has let them take a quantity of water in excess of decreed rights, and distributed it on a duty lower than the duty provided. The contention is that excess water should come down to this division.

MR. STORY: I cannot conceive of any possible con-

struction of the present decree--

MR. RAY: There has been.

MR. WEDGWOOD: The man is in jail whether proven there or not.

MR. STORY: When they are simply given a primary right, of course, they would receive the water in the order of their priority. Now, it may be necessary, as a construction of the decree for the water commissioner-- I see that-- but from a standpoint of the adjudication of the rights themselves I am wondering where it is necessary or what the effect of it may be.

MR. WEDGWOOD: Nothing in the decree to guide him, to compel him, from one end to the other.

MR. STORY: There is in the decree an absolute prohibition against using the water in excess of the amount decreed to the detriment of any other appropriator whose rights are adjudicated in the action. I do not see why that does not cover it. I am not suggesting or insisting that shall be eliminated, anything of that kind, but I am very anxious to know just exactly what the necessity is for it, and what it means.

THE COURT: I supposed the object of asking for a little adjournment was that it might be discussed between yourselves, and such questions as you have suggested may be explained.

MR. STORY: There may be a very serious question just occurred to me as between the Provo Reservoir Company and ourselves, if their impounding right which is included as a Class A right, as I remember, for certain seasons of the year would be given a preference over our power right in Utah county. Of course, that I could not consent to.

MR. RAY: Mr. Story, I suggest this, some of those matters I can give you my attitude on much more easily during the recess than take the time of the court now, and if the stipulation is not perfectly clear on it now is the time to

make it clear.

MR. STORY: I am rather inclined to agree with your position that it is not necessary to have a stipulation because the court can determine those matters without.

11:35 A.M., Recess to 2:00 P.M.

MR. WEDGWOOD: In the matter that we had before the adjournment I will just say that some of the claimed water this summer differed from the decree. It has been suggested that there was no need of taking up this matter at this time, maybe it could go to later, it being the fact that now nobody claims anything but what is in the decree, and maybe the whole matter could go until the decree as submitted by the committee comes up for discussion, but as long as there is nothing in the decree directly, and nothing in their stipulation which were not fully incorporated in the decree as fully as they will be, to show the two branches of the river are not separate branches but are connected together, that is the two stretches, I ask that an order be entered at this time that the decree, when drawn, shall contain a provision covering that question. Mr. Ray has got at the core of the matter in what he submitted to the court this morning. It seems to me, however, it would be as well not to have anything in the form of a stipulation, because the whole question is a matter of evidence and before the court, and in Mr. Ray's suggestion he says at the last, "And further, that no use in the Wasatch division in excess of the decreed rights shall be allowed until all rights of the Provo division are fully supplied." To my mind there is no necessity, neither is it advisable to suggest anything in regard to the use of an excess in Wasatch county. While, maybe nobody would be bound, still nothing is gained by it, to say the least, and a discussion as to rights outside of the decree would be idle in

this matter; and in line with what I have said, I suggest the following, the substance to be adopted when the decree is finally settled of a provision like the following; that while the lower reach of said river has been designated as the Provo division and the upper reach as the Wasatch division, the rights of the users in said divisions are not separate and distinct one from the other, and the waters thereof are to be regulated, controlled and distributed so far as may be, so that each and all of the parties hereto shall receive the quantity of water awarded them respectively by this decree. The decreed rights to the Wasatch division to be first supplied.

Now, in placing the matter before the court I desire to put in the record, that counsel for the respective parties may be fully advised, that, of course, the use of the water by Wasatch county, according to their decreed rights, of course, means according to their decreed rights, as the decree ultimately and finally provides, and, that in making this suggestion at this time and by nothing else can it be said, is there any warrant for anybody, either client or counsel in this case, to assume in any way that the stipulations, the basis of the tentative decree, are in any way modified or changed. They stand absolutely, and I desire to further add that as far as all parties are concerned, that the decree, when finally written, must, I think, of necessity to be complete, lucid and explicit, contain more of the text of the stipulation than is now contained.

THE COURT: More than this decision.

MR. WEDGWOOD: The tentative decree does not incorporate-- oh, very much more than that.

THE COURT: Has there been any tentative decree prepared?

MR. WEDGWOOD: No, the tentative decree of your Honor.

THE COURT: You refer merely to the decision?

MR. WEDGWOOD: I refer merely to the decision.

MR. RICHARDS: I didn't just understand the General's statement, whether we are supposed to assent to all that he has said here if we do not object to it or express a dissent, bound by anything you have said here.

MR. WEDGWOOD: No, no.

MR. RICHARDS: Now, I refrained from ^{anything} saying about this matter, your Honor, because I was not in the case in the early stage of the trial, in fact, during the principal trial, as you know, but I have tried to inform myself by consultation with my clients and also with different counsel in the case, and this is the way this matter presents itself to my mind. Everybody agrees, as far as I have been able to discern from the remarks made here as to what the spirit of the decree should be. Mr. Ray makes a suggestion in the form of a stipulation and Colonel Wedgwood in the form of a suggestion as to what shall go into the decree. Now, it seems to me at this present time impossible for us to formulate any clause to be entered in the decree, because when we come to draw the decree it may not be appropriate, it may be necessary to change the language of it. As I understand it, we all agree upon what the decree should be in the main. That being so, a committee has been appointed to formulate this decree. When that committee acts it will, of course, present its product to the court, the court will go into the matter, examine it, and make such changes as may be considered desirable, and finally, when it appears to be satisfactory, or when it appears to the court that the findings and decree prepared express the judgment ~~of~~ the court ~~is~~ prepared to render, or the decree that the court is prepared to render in the case, then we will all be served with a copy of it, and we will have an opportunity to come in and, if there has been any omission, to have that omission supplied, and state

specifically what they think has been omitted and ought to be supplied. If there is anything in the decree we think is not in accordance with the testimony, stipulations and what the decree should be, then we will suggest specifically the change we think ought to be made as to that particular finding, or that particular part of the decree, and in that way we will get along and accomplish something, but I don't see how we can now do anything that will facilitate the matter. As I understand it now-- I may be mistaken about it, I don't know whether my -- I want the General and Mr. Ray to hear this, because they are members of the committee, and will probably do the work-- if I understand it, and I may be mistaken about it, but I assume the committee has large powers; as I understand it, the very purpose and object of appointing this committee is for the committee to incorporate in the findings and the decree all that is necessary to carry it into effect.

MR. WEDGWOOD: May I ask one question?

MR. RICHARDS: And then, of course, that is subject to the approval of the court and counsel.

MR. WEDGWOOD: Just one question, from the decree or anything that has been said to me, I don't know whether the court desired and intended these two separate divisions should be considered as independent, or whether they should be considered together.

MR. RICHARDS: From all that has been said here today, it seems to me the unanimous opinion how they should be considered, and I take it if the findings and decree are formulated on that theory, and they are objectionable to the court, we will find it out, but, I think the only way to get somewhere is to do something, and my idea is we are just shooting in the air, not doing anything, or accomplishing anything. If there was a diversity of opinion upon a vital point, then it would be profitable to discuss that and see if we can reach a conclusion, but if there is a difference

of opinion I have not been able to discover it.

MR. RAY: May it please your Honor, in connection with the suggestion of Mr. Richards it seems to me that Mr. Richards falls into a very vital error, because he assumes we, as attorneys, may make some decision in this, predicating it upon the record and stipulations, but that is not our function at all. It is our function to follow your Honor, as we have differed as to a most vital situation in this case, and we want the judgment of the court on it, and it seems to me there is no opportunity in the history of this case so opportune to get that as now.

As to General Wedgwood's observations, naturally we are inclined to prefer our own language, and, in my suggestion to your Honor, I do prefer my own very much to the one General Wedgwood has suggested. The only criticism which is made of the language I use I think is it provides for the use on the upper river of waters in excess of the decreed rights whenever all other rights below are met and satisfied. Now, General Wedgwood says that that is immaterial. Your Honor has tried this case upon the theory that since the old adjudications there has been an increased flow of the waters of the river, and the whole spirit of your Honor's decision is to enjoin upon the Commissioner the making of a bigger river. That is specifically contained in Section 19 of the stipulation to which all the parties have assented. I think I am right when I say Section 19. It may be Section 19. Section 18 of the Heber City stipulation provides: "That whenever a party to this stipulation in Wasatch or Summit County, by mishap or accident to canal or ditch, or by conditions that cannot be controlled, is deprived of its quantity of water and is in danger of sustaining material loss, and for immediate use for a period of one rotation, needs a quantity of water greater than its proportion of the volume of flow, and such additional quantity can be given to such party

without material injury to the other parties to this stipulation, then it shall be the duty of the water commissioner to supply said additional quantity from the waters in excess of the first to sixteenth classes, inclusive, before specified.

The water commissioner shall use due diligence and discretion to give the parties hereto the maintenance and development of the Provo River and shall use his discretionary authority to maintain and develop such river and to advance and maintain the crop production that is dependent upon said river."

Now, it was in line with that, your Honor, that I suggested when all the decreed rights here in Utah county were met-- and no one can be injured by it, because we are all interested in a late and large river-- that the commissioner should be authorized to permit the turning and use of a quantity in excess of the limited and decreed rights.

Now, that that was the spirit in which the stipulation as to Wasatch county was entered into is more amply evident by reference to Sections 14 and 33 of the stipulation, in which the plaintiff and the defendants created a 17th class of water right for the purpose of permitting a 40 acre duty, even during the very midst of the irrigation season. We have created a 40 acre duty there. For what? For the sole and exclusive purpose of building up a river. We have done other things in that line. For instance, having created these large duties, we have taken and protected ourselves by Section 25 of the stipulation that those duties and this water is appurtenant to the land and for use in Wasatch county. My clients thought it not worth while, even, to attend the sessions in Heber City, stating to your Honor we were anxious the largest possible quantity of water be used there for the purpose of creating for us a river, and it is out of that very situation the plaintiff in this case has been able to realize a right on the Blue Cliff, that the right has been

built up. It cannot be offensive to the plaintiff here that we permit the use, and in this stipulation the commissioner be not charged with any waiver of Section 18. It is his positive duty to build up that river. For that reason I prefer the suggestion contained in the form of recital submitted to your Honor.

MR. RICHARDS: Just one word in reply to Brother Ray where he says the committee is bound by the decision of the court. There is no question about that, but the decision is the paper upon which is to be built the body of the decree which shall constitute the final determination of this question by the court, and we are not to follow in every respect the language of the decision. It is expected we will put it in proper form, the committee will, and anything that is essential that has developed here in testimony, either in the way of a stipulation or in any other language to give ^{vitality} ~~stability~~ and life to this decree and give it the spirit it is entitled to and ought to have, it seems to me it is the duty of the committee, if it understands the fact, to insert that into the decree.

MR. WEDGWOOD: In regard to Mr. Ray's observation-- I will be very brief-- still, to my mind his explanation don't explain. I would not object at all that after the decreed rights of all parties are satisfied then the excess flow of said river shall be handled and applied by the commissioner so far as he may do so do as to increase the flow of the river.

MR. RAY: That is the only purpose of my suggestion.

THE COURT: I doubt whether the court can by any language limit the use or direct what use shall be made of the waters in excess of those decreed in this case. I do not think it will have any effect, because those waters that are not decreed in this case are possibly subject to appropriation. I had assumed that we had, or will have, by this

decree provided all the waters of the river that have been appropriated and to which there is a claim of right to use in this case. I appreciate the fact of a direction to the commissioner that the water should be so used as to constitute its conservation for later use in the summer. I do not regard it material or necessary that the court adopt the language of either of these suggestions. This discussion is largely a matter of suggestion to the committee with the approval of the court, of course.

MR. WEDGWOOD: The question presented has settled one thing, and that is that nobody claims in excess of the rights stated in the tentative decree, which fact we did not know before we came into court.

MR. RAY: One matter that I was particularly interested in, and I appreciate your Honor's suggestion of the decreeing of unappropriated waters, and that is how the decree should be drawn relative to priority between these two counties as suggested in both General Wedgwood's and my memorandum.

THE COURT: Both of them, I think, reached the same result and coincide with the view the court has.

MR. RAY: And that may be embodied in the decree in appropriate language.

THE COURT: Unless there is some suggestion to the contrary and I have not heard any.

MR. STORY: I am not entirely satisfied, your Honor, yet as to what effect such language as that which has been suggested would have on priorities as between the Reservoir Company and the Power Company in respect to storage rights which are decreed in the Wasatch division of the decree at the present time, and while I am not at the present time, and would not be without further consultation with my associates in the matter, prepared to say that such language as has been suggested would be agreeable to us, I am not, on the other

hand prepared at the present time to combat it. I merely wish to leave the question open so that we may still be in a position--

THE COURT: I was going to suggest your announcement will be taken as an announcement you have not acquiesced, and reserve the right to object to it later, if you care to.

MR. WEDGWOOD: And if the committee does, as it probably will, enter that in the decree, you are not bound by anything that occurs here.

MR. SOULE: We will all have an opportunity to see this decree and raise any objection we have.

THE COURT: I think so.

MR. STORY: The point with us is we have an all year right, and I want to remind the court once more that the findings as now prepared do not specifically set forth it is an all year right instead of just a seasonal right, you might say.

MR. RICHARDS: Before leaving this subject, I understand we all, whenever the decree comes before the court, will have an opportunity to propose amendments to it.

THE COURT: Why, certainly.

MR. RICHARDS: Even a member of the committee who may participate in its preparation.

MR. WEDGWOOD: We won't agree in the committee, no question about that.

MR. A. C. HATCH: If the court please, with regard to the complaint in intervention presented by Judge Willis, I think this complaint was presented and he had asked to be allowed to file it, and I was going to call attention it will necessitate bringing in new parties if he claims water from the Ontario drain tunnel.

MR. WILLIS: I ask to present it and then you can present your objections.

MR. A. C. HATCH: That matter has been determined

in the Federal Court at Salt Lake as between him and the Daly Company, and if you are claiming water from that source, it will necessitate bringing them in.

(MR. WILLIS: If there is nothing further, your Honor, I ask at this time with the indulgence of the court and counsel, to be permitted to introduce a complaint or file a complaint by Orson H. Lee of intervention in this proceeding, by which Mr. Lee seeks to have the court determine certain water rights to his farm or his ranch lying about ten miles north of Heber. In this he asks or sets forth that he has used water from the drain tunnel hollow, Ross hollow, Sage hollow, and the springs located upon the Cluff ranch, claiming a primary right to the use of that water, but not direct from those streams coming to him as seepage and drainage off from what was formerly the Henry Cluff rights lying above the Lee ranch, and now owned by George Fisher. There is at no time, as I understand it, more than about a second foot of water all told from that source, except in the very first flood waters of the spring, and that is before any use. However, he asks also in there that he be permitted to use from the Ontario Drain Tunnel a quantity of water during the period when the Provo River is above in its flow that which is required to furnish all parties their claims, their rights to the use of the Provo river. I take it that that really would not be giving him any water right from the Ontario tunnel, really, but using the Ontario water in connection with the flow of the Provo river at the high water period when there was more than sufficient to satisfy all other claims, then that he might be permitted to use from the Ontario drain tunnel certain waters to water his land, and I ask if the court please, to be permitted at this time to file this complaint in intervention and to offer testimony in support of it in case it is conceded.

THE COURT: Are the owners of the land from which

this water seeps and flows parties to this action?

MR. WILLIS: There is only one place.

THE COURT: I understood you to say you did not use any of this water direct from those sources of supply, but it all came as seepage?

MR. WILLIS: It comes from the sources named, your Honor, but he claims after it has flown or been used upon the Fisher ranch, and it comes to him as drainage after it has served its purpose upon those lands.

MR. WEDGWOOD: Does it go into any creek?

MR. WILLIS: No.

MR. RAY: Isn't it a fact Mr. Fisher claims the water himself?

MR. WILLIS: He could not claim it because we claim only the right after it has left his place. Of course, if he would claim the right to take that away to some other source, then we would contest it, otherwise, I cannot see that there would be any controversy between Mr. Lee and Mr. Fisher. He has used that water for a period of thirty or thirtyfive years, he and his predecessors in ownership.

MR. WEDGWOOD: Does your complaint in intervention state the facts as you have stated?

MR. WILLIS: Yes.

MR. WEDGWOOD: I object to it, your Honor please, for the reason it does not state facts sufficient to constitute a cause of action.

MR. A. C. HATCH: I call attention to the fact that in the Daly Mining Company, against Wasatch Irrigation Company et al, decided in the Federal Court by Judge Marshall several years ago, Mr. Lee was a party, and in that action he was enjoined from in any manner claiming or setting up a claim to any of this Ontario drain tunnel water, as I understand it.

THE COURT: Mr. Willis, I have not read your

complaint. What allegations do you make with reference to the ownership of Mr. Lee?

MR. WILLIS: We simply claim for a number of years we have been using water from the Ontario Drain tunnel during the period when there was a flow of water in the Provo river, in excess of the rights of anyone to that, and that ^(no) one has interfered with that right during that period of time until the present year. That this year-- and not only in regard to the tunnel water, but, as I understand it, this year the water commissioner went and told Mr. Lee to turn all of that water down. That is as I understand the facts.

MR. STORY: Are you claiming a prescriptive right in the Ontario tunnel water?

MR. WILLIS: No, we are not. We are claiming prescriptive right as to the other sources, but not the other.

MR. WEDGWOOD: Prescriptive right to the other water?

MR. WILLIS: Yes.

MR. STORY: Then I don't understand how he claims the Ontario tunnel claim could be made the basis of litigation in this suit.

MR. WILLIS: It may be possible that is beyond this court to adjudicate as to that Ontario water. It may be possible that we would have to go to the Provo river and make application, but we desire to have the matter brought here at least, and we do think that as to our rights in the other water, and we think our complaint states a cause of action or right that it should be determined even though at this late day, for the reason that we are one of the earliest users of that water, and that we ought not to be compelled to go into a court on a separate and independent suit to adjudicate these matters. If we were to do it, there is no question in my mind but what we can obtain a decree to that water by use sufficient that it

will become a prior right from the sources which I have mentioned there, but as seepage and drainage water, however.

THE COURT: I understand the owner of the land from which this water seeps and drains is not a party to this action.

MR. WILLIS: I don't know whether he is or not.

MR. RAY: George Fisher, I think not.

MR. MCDONALD: No, he is not.

THE COURT: He is the only one that would be interested in this proposition or question, I take it. I think you would have to bring him in, possibly bring a direct action against him if he was interfering with the use of it.

MR. STORY: If this water returned to the river and augmented the natural flow, we would be interested in it.

MR. WILLIS: It is not.

THE COURT: It is not.

MR. STORY: Then I think the case of Garns v. Rawlins would be conclusive against Mr. Willis' application.

MR. WEIGWOOD: You are right. If the complaint states what Mr. Willis says, there is no cause of action.

MR. STORY: For adjudication in favor of his clients. I think that is the holding of the garns case.

THE COURT: I would like to have the matter made a matter of record in such a way as you would save all rights by presenting it. I am of the opinion from your statement if you prove all the facts you have stated, the court would be powerless to grant you any relief, and if that is the case, your complaint does not state a cause of action.

MR. WILLIS: As I remember that is the combination. I will have to amend that matter.

THE COURT: As now presented the application to intervene on the part of Mr. Lee and file a complaint in to intervention will be denied with, however, leave again

present whatever amended petition he cares to before the court closes.

MR. A. C. HATCH: May I ask, don't you claim the water directly from the tunnel?

MR. WILLIS: Yes, we do have some direct from the tunnel, that no one uses, however, I will amend that, your Honor.

MR. A. C. HATCH: That water becomes part of the Provo river water when you are not using it?

MR. WILLIS: All of it does when we are not using it.

MR. WEDGEWOOD: Your Honor please, in the matter of the use of the Blue Cliff right by the Provo Reservoir.

MR. RICHARDS: General, before you go into that matter, I just call attention to one thing, If your Honor please, at the proper time we simply desire to remind your Honor you have under advisement one matter that is undecided yet with reference to the use of Provo City.

THE COURT: The acreage, yes.

MR. WILLIS: If the court please, in order to make this record complete I ask for an exception to the court's refusal to permit Mr. Lee to file his complaint in intervention; the court basing his decision upon the ground it does not state a cause of action, because that is not a proper manner of raising the question.

THE COURT: You may have an exception.)

MR. WEDGEWOOD: In the matter of the use and place of use of the waters under the Blue Cliff right by the Provo Reservoir Company. The matter has been settled by stipulation between Provo City and the Blue Cliff Company, between the Power Company and the Blue Cliff Company, I mean the Provo Reservoir Company, between the Provo Bench Canal and the

be here.

MR. WEDGWOOD: I shall put in no evidence as to amount of water in the river at all, no evidence in regard to the amount except in the stipulation. If I remember the stipulation it was we would not claim any portion of the Blue Cliff water at the Heislet dam, except under certain conditions which are in the stipulation. If your Honor please, it seems the witness is not comeatable, and, as long as the record shows that I have raised the question here-- I say I have not the witnesses I had in mind, one is not just now available, and one of them possibly not during this session, and, as I have raised the question and asked for objections in open court to a decree in pursuance of those stipulations and proof we already have in, and no objection appears, and nobody appears to contest the proposition, I will rest upon that record.

MR. CLUFF: If the court please, just a little matter I would like to call the court's attention to this morning in relation to the class A rights in the Provo division above the dam of the Telluride Power Company. As I understand the decree at present the parties, for instance, up the South Fork of Provo Canyon and others in the Provo division, the decree as it stands at present would require them to pro rate with the Telluride Power Company as the water decreases in the river. Now, I think there should be a provision in the decree providing ~~those~~ those class A rights above the Power Company and in the Provo division should not be required to pro rate, because, as the record shows, they are prior rights, date back to 1880, prior to that even, so that the Class A rights that are acquired there in Provo Canyon in the Provo division are long prior to the Telluride Power Company, and I do not think they should be required to pro rate with them, and I think a provision should be in the decree to the effect they should not be required to pro rate.

MR. STORY: As I remarked before in the trial of this case, your Honor, I have very grave question as to the right of the court to compel any user whose rights accrued or were acquired prior to the enactment of the priority statute, to pro rate with any other user; and assuming that there is such power, I certainly know of no further power of the court to say that any two rights, or any three rights should pro rate, and all of the rights in the same class may not be called upon to pro rate, in other words, to discriminate between users in that manner. The question was whether if you were going to have a pro rating, whether it would include all of that class, and include also the rights which were taken out of the river below the Power Company's tail race; and in the discussions, of course, it was shown, as a matter of

fact the up river rights and those which were below the points of diversion, between the head gate and tail race of the Power Company, are the only ones who can, because of physical facts be called upon to pro rate, and it was the argument we advanced here why there should be any pro rating at all, unless it applied to all. You will remember it was rather an involved question. Certainly I don't know of any justification at all for the court to require a pro rating just among some when such pro rating, because of physical conditions, might apply to others. Certainly we would object to any such classification.

MR. JACOB EVANS: If the court please, we are interested in that matter, and we think there is a good deal of force in Mr. Cluff's argument. This is the situation. The people in the South Fork and the old users of water above the dam of the Telluride or the Utah Power & Light Company were long prior to the time that the Utah Power & Light Company entered upon the river. If the Utah Power & Light Company is put in Class A on the pro rating basis, the result of that would be those people above the dam will be required to turn down a portion of their water, merely that it might be used by the Utah Power & Light Company and turned on below to the users below, who already have all or more than their Class A water right. In other words, the pro rating, by reason of the physical condition of the river there and the points of diversion means that persons in Class A above their dam would not get the quantity of water they were entitled to, while people below would probably be getting more, because as soon as the water is turned down on the pro rate basis or plan to the Utah Power & Light Company, then that same water goes to the users below, and they get a greater quantity than they would be entitled to; so that it does not bring into proper play the principle of pro rating. The principal of pro rating is when the water gets below a given

point, then that all persons in the same class shall take in proportion, but the way this works out, it takes away from one class of people in the same class and gives it to another class of people of identically the same class. Now then, it seems to us, to meet this condition as it exists here would be to change the Utah Power & Light Company from its Class A, and make an exception respecting that particular matter. That would avoid and obviate the question of pro rating with certain people of a certain class, and not with other people of the same class. In other words, the Utah Power & Light Company can be put into a separate class in so far as these people are concerned, and in that way, it will make the decree in perfect harmony with what the facts are. We say it would be unjust, as far as we are concerned with our right in the Dixon, which is long prior to the Light Company, to compel us to turn that water down to them, and the same with the South Fork people, to turn it down, that they may take it through their flume merely to turn it to the older users below.

THE COURT: I understand then it is impossible for all parties to pro rate on a shortage of water.

MR. JACOB EVANS: Yes, then that is impossible.

THE COURT: I suppose we cannot do it if it is impossible.

MR. JACOB EVANS: It is impossible for them to pro rate and get their proportion of the water, but it can be arranged in such a way.

THE COURT: If it can, that should be done. Can you suggest how.

MR. JACOB EVANS: Yes.

THE COURT: The intention of the court was all parties who were awarded water in Class A should pro rate in all shortage. Now, if it is impossible to accomplish that, of course, we cannot accomplish it.

MR. JACOB EVANS: I think it can be very easy by simply putting the Utah Power & Light Company in a different class, and making a special provision in the decree because of the physical conditions, meeting this particular question.

THE COURT: Then, I understand, it is impossible to pro rate with all of them?

MR. JACOB EVANS: I say it is impossible to pro-rate, if we put them all in the same class.

THE COURT: They are all in the same class.

MR. JACOB EVANS: The thing we think should be done is to put those people above the Power Company in a class where they would not be required to pro rate.

THE COURT: They would have to pro rate with the people below, they do not stand in a class where they would be exempted from pro rating.

MR. JACOB EVANS: But they would not have to pro rate for the purpose of supplying the Utah Power & Light Company, if the Utah Power & Light Company was put in a different class.

THE COURT: If it results in such an inequality as you suggest, I will see if we can devise some method-- if you can suggest some.

MR. JACOB EVANS: I suggest the Utah Power & Light Company be put in a different class.

MR. STORY: Suggest we be made the goat, in other words.

MR. A. C. HATCH: I suggest this, the Utah Power & Light could be decreed as against all the parties a certain quantity of water of a certain quantity of water in the river as against all of them, not have them in a class at all, make a special class to their right. There is a reason for it too. They are a power people and use the water for a different purpose than what all these others use it, and they have a right which these users might, if a necessity arose, condemn

all of their water, and if wronged in any way, make it right--
to be made right in a money way, if that question should
arise; but my idea really from the beginning has been that
the mill rights should be in a class by themselves, and should
be decreed their water when there was a certain quantity
in the river. Now, in the Press^{ed} Brick, the decision or decree
to the Press^{ed} Brick Company is all the water, Class A water,
that is used by people using water below their plant. Now,
that is all, I understand it, the Telluride people have ever
had, is the water that was used below their plant in a Class
A water, and I do not see why the same rule would not apply
to the Telluride.

THE COURT: In time of shortage that is all they can
get.

MR. A. C. HATCH: That is all they can get, and these
people above may use such as they are entitled to without
pro rating, and avoid this pro rating.

THE COURT: The people above must pro rate, Judge
Hatch.

MR. A. C. HATCH: They must pro rate with the
users below, but if they pro rate with the Telluride Power
Company with their 250 second feet, there is the difficulty.
It is required to turn down the water. Suppose they pro
rate with the Telluride Power Company on its 250 second feet,
as I see it-- I may not see it clearly-- it adds to the
quantity of the people below.

THE COURT: I don't know.

MR. A. C. HATCH: Yes, it does, to pro rate with the
Telluride Power Company they use all the people below use.

MR. WEDGWOOD: In other words, they might be pro
rating with the Power Company and not be pro rating with the
people below.

MR. A. C. HATCH: Certainly increasing the supply
to the people below. That is the way I understand it works

out in fact.

MR. JACOB EVANS: It actually deprives the people above.

THE COURT: I understand thoroughly your position, but I am not prepared to say that-- I don't know, I want some information on that subject. The pro ration must affect all parties, and must not be in such a way as the people below get an advantage from the pro rating.

MR. JACOB EVANS: I think it would be possible to get the facts freely from the Commissioner here to show just the exact situation.

THE COURT: I am not going to decide this until the Commissioner gives me some information on it. I will say that. Now, I don't care for argument, because what I want are the facts; I want some basis upon which I can make this decree when it is finally made a just one, so that all parties interested in the water will pro rate.

MR. STORY: I just want to make a few observations on that question of facts.

THE COURT: I don't want to make any provision in the decree which will exempt all the people below from pro rating and put all the pro rating on the Power Company and people above, don't want to do that.

MR. STORY: As I understand it, there has really not been any pro rating between the Power Company and these upper users, but they were called upon to pro rate with the consuming users-- that is, the consuming uses between the upper end of the Provo division and the tail race of the Power Company. Now, of course, it is quite obvious what the object of this is. The Provo Reservoir Company have acquired the water from the Wright estate, which was formerly used above our reservoir, and also the Dixon water, and, as shown by the testimony of Mr. Wentz in this case, practically 50 per cent of that water when it was used above, immediately returned

to the stream, and was available for the next appropriators. There is no conflict in the testimony on that point. Nevertheless, as I pointed out to you, in my objection which I made to the decree, they have been awarded the right to take the full amount of their appropriation down past our head gate and divert it at the Heislet dam. Now what they are trying to get, I say is not only the full amount of that right, but a hundred per cent of it at all times, so that they would not be compelled, for instance, to pro rate with the Timpanogos and others, that take their water between the upper-- between our head gate and our tail race. Now, because of the physical condition it is true that when our right is satisfied there is enough water going down through our flume to perhaps satisfy the lower rights. That is those which are diverted below our tail race, to a greater percentage than those who would take their water between our headgate and our tail race, such as the Blue Cliff right, when it was diverted before at the Heislet dam, or, we might say, this Dixon and the Wright water, belonging to the Provo Reservoir Company, but that is a physical condition that we cannot avoid, and there is certainly no reason in the world to say because these lower people get an advantage of the physical condition which cannot be overcome, that we should be made the goat and suffer a cut, so as to give the other people a hundred per cent of their right.

MR. A. C. HATCH: I don't understand that is the condition.

THE COURT: You are making an argument on the matter now?

MR. STORY: Yes, I think I did.

THE COURT: I have suggested I would prefer to hear the argument after knowledge of the facts from the Commissioners.

MR. STORY: I thought the facts had all been before your Honor at the time we discussed this question of pro rating, which we went into very fully, you remember. We thought we

were not being treated fairly, and had a hearing before the court, and the Commissioner gave testimony just exactly what was being done. I thought it was all before your Honor, and in the record.

THE COURT: Gentlemen, proceed as rapidly as possible, I desire to finish today what we have.

MR. STORY: I think I can make a further statement what I understand to be the facts how it was handled this year.

MR. CLUFF: Brother Story, I was going to suggest we put the Commissioner on and let him state the facts.

MR. WEDGWOOD: Everybody is waiting for someone to do it.

THE COURT: I don't care so much about this year. The court wants to know from the Commissioner his theory what can be done to obviate the difficulty presented by the suggestion made by Mr. Cluff and joined in by the plaintiff and you on the other side, to see whether there is any method by which it can be worked out, and all parties be required to pro rate, and not put the burden on one.

MR. CLUFF: I would like to call Mr. Wentz then.

T. F. WENTZ - - - - -

DIRECT EXAMINATION by Mr. Cluff.

Q Mr. Wentz, you have heard the statement here relative to the rights of the parties in Provo Canyon above the intake of the Telluride Power Company, and in the Provo division such as the South Fork?

A Yes.

Q And the manner in which the decree as it is tentatively proposed would work out with reference to them pro rating. Will you explain to the court just how that can be obviated, or

how it can be arranged so that they will not be cut down, but that they will pro rate equally with the water users of water down below the tail race?

A Well, that is the system I have been using this year, a total of all the rights in this division, in the Provo division, and keeping them all on the same percentage. We first dropped to 85 then 70 and down as low as 55. Those rights above the Olmstead dam were kept on the same percentage of the rights as the rights in the Utah Valley. That is the total we passed over the dam, was the Dixon water of two and a half second feet, passing that over the dam. At fifty-five per cent. we only passed over fifty-five per cent of the two and a half, making the canyon rights and Utah Valley rights all on the same ratio, and that does not in any way conflict with the Utah Power & Light.

Q So that can be worked out then?

A Yes, it works out all right, and the sheets of distribution as made during the summer will show that. I haven't one with me.

Q You have not then been following exactly the terms of the decree this year in relation to that, have you?

A Yes, pro rating in the whole division all the consuming rights.

MR. A. C. HATCH: But the power rights have you pro rated-- just taken the power right by itself-- pardon me-- and pro rated it with the people above?

A No, the power right does not interfere in any way with the pro rating.

MR. A. C. HATCH: You have not pro rated with the Power Company, or treated it as one who are entitled to pro rate?

A No, it is not necessary, doesn't enter into the pro rating provision.

MR. A. H. HATCH: Assume that it has its full 250 second feet, would it necessitate then reducing the people above when it fell a little below the 250 feet?

A No, then all the rights below the tail race of the Olmstead plant would be a hundred per cent, and the people above would be held at a hundred per cent.

CROSS EXAMINATION by Mr. MacLane.

Q Mr. Wentz, as a matter of fact, some of the rights below the tail race of the Olmstead plant is in excess, that is, some of the class A rights is in excess of the right at present accorded the Power Company by the tentative decree, isn't it?

A No, the present right of the Power Company when it is at a hundred percent is in excess of the rights below the tail race.

Q That is exclusive of the Blue Cliff right, however, as now agreed upon?

A Yes.

Q But if you include the Blue Cliff right as now agreed upon, the statement is correct, isn't it?

A Yes, I would say yes with this reservation. Now, there is a great deal of inflow below the tail race, amounts to 40 or 50 second feet. Your statement would be right at some seasons of the year and be wrong in the later season.

Q In the low water stage it is correct, isn't it?

A That depends on the season. Our inflow below there is different different seasons, but usually I think your statement is right, generally speaking.

Q And consequently, of course, when you prorate on the basis of the consuming uses between the users both above and below, or above the dam and below the tail race, the Power Company suffers its cut in the same way that the consuming users suffer theirs?

A Yes, though not in the same ratio.

CROSS EXAMINATION by Mr. Story.

Q In other words, you prorate between the consuming uses and let go down through the Power Company's flume such an amount of water as the lower users of water were entitled to under

the prorating, did you not?

A Yes.

Q We automatically suffer a cut which the others suffer?

A Yes.

REDIRECT EXAMINATION by Mr. Cluff.

Q As a matter of fact you did not prorate the Power Company at all?

A No, I didn't keep them on the same ratio. In fact, I didn't keep any record of their flow at all through the flume this year. It is not necessary, it does not interfere in any way with the other rights.

CROSS EXAMINATION by Mr. A. C. Hatch.

Q Then, if you didn't keep any record, how can you tell whether they were prorated, or whether they were not, according to the water?

A Well, they were always a hundred per cent. I said they were not prorated on the same ratio.

Q Now, if they were prorated on the same ratio with the people above, what would be the result, if you can tell. If you can take that under consideration and answer the question after awhile, Mr. Wentz-- I don't think anyone could do it off hand.

A That is, taking a division in the Canyon and prorating it?

Q Taking a division in the Canyon at the Telluride dam and prorating it, and what effect would it have on the users of water below and above; that is, whether they would be operating upon the same basis if you prorated the Telluride Power Company according to its award in the decree with the rights above?

A Well, they would not be--

Q What I mean is this, to make it plain, that when you do that you cut down the rights above much more than you cut down the rights below, that is my theory of it?

A No, I think you are wrong about that.

Q I may be.

A I think it will work the opposite to that.

Q I wish you would figure it out.

A I will get that.

Q And give us the mathematical demonstration of it some time during the day.

CROSS EXAMINATION by Mr. Jacob Evans.

Q I would like to ask one question. Mr. Wentz, assuming that all the Class A water rights, including the Power Company, and the rights above the dam of the Power Company and the rights below the Power Company were prorated on the same basis, is there at any time any condition of the river using the prorating basis whereby the rights above the dam would be required to prorate a portion of their water with the Power Company to make up their rights which would in effect deprive the person using water above the dam of the same prorata quantity of water, and add some quantity of water to the rights of the irrigators below the dam?

A No.

Q Is there any condition of the river that would cause that condition?

A No, I think not.

MR. WEDGWOOD: You are referring to the Provo division exclusively?

A Yes.

THE COURT: Now, Mr. Cluff, do you make some objection to the way this has been prorated during the season?

MR. CLUFF: No, I just had the idea, if the court please, that by prorating with the Power people-- I understood that he had not been doing it this year.

THE COURT: He has not been prorating with them on the strict basis of proration. Of course, they have suffered a loss by reason of the fact that the water that goes below has been reduced.

MR. CLUFF: I understand that.

THE COURT: That is the suggestion I understood Judge Hatch to make a moment ago.

MR. A. C. HATCH: Yes.

THE COURT: It has been done this year just as you contended it should be done.

MR. A. C. HATCH: As it should be.

THE COURT: Have you anything to say about this?

MR. MACLANE: No, we think we are not satisfied with the quantity of water we got this year, of course, but there are other questions, but we think so far as the acts of the Water Commissioner are concerned, and as explained by him that he has done the proper thing.

THE COURT: So far as the element of proration is concerned?

MR. MACLANE: Yes.

THE COURT: I do not see there is anything to do with that.

MR. JACOB EVANS: His explanation is perfectly satisfactory to all parties all around, method of prorating this year.

MR. A. C. HATCH: Then, if it is satisfactory, the decree ought to be worded somewhat definitely, and say the water should be prorated as between the consumers--

THE COURT: Consuming users. O.K.

MR. A. C. HATCH: And awarding to the Telluride people the rights of the users that the decree now provides, the users below.

MR. STORY: We cannot agree to that.

THE COURT: I would not want to make that change in the terms of the decree, but I think your first suggestion, the proration in times of scarcity should be made among the consuming users, and, of course, that means that it has certain effects upon the Power Company.

MR. MACLANE: On the consuming users as decreed by the decree.

THE COURT: Certainly, but I don't think I ought to limit the rights of the parties any further than that. Now, does that dispose of this matter for the present?

MR. MACLANE: Yes.

MR. WEDGWOOD: I suppose you desire us to take the burden or initiative.

MR. STORY: We would like to know what your position is, your claim is?

MR. WEDGWOOD: I have stated it a hundred times indirectly and inferentially. We claim there is a large flow of water down below where we placed our intake, our 150 foot appropriation number 1828, at the time we made the appropriation and ever has been since, and that water we are entitled to against you.

THE COURT: You are entitled to that under your application you would be entitled to it as against everybody, Captain Wedgwood.

MR. WEDGWOOD: No, not as against--

THE COURT: I didn't understand your limitation as against you.

MR. WEDGWOOD: As against the Power Company. That is, it would not give a priority against the consuming users below for the reason that the water flowed down to them before we made the appropriation, and whatever was unappropriated by them, why, of course, we appropriated.

THE COURT: It will develop later, but I did not understand how water could be regarded as unappropriated water subject to your appropriation if you say that it was not appropriated by one party it was by another. You would not acquire rights against a party that had not appropriated it unless it was unappropriated entirely.

MR. WEDGWOOD: I make the proposition perhaps a little bit clearer-- now, whatever water flows down the river either in its natural stream below the dam, or through the tail race of the Power Company went to the users below.

MR. A. C. HATCH: Or went to waste.

MR. WEDGWOOD: Or went to waste, one of the two. It went to the users below. Now, the Power Company came along and it built a dam. By the building of that it in no way changed that situation I am speaking of, the water going to the users below. Either went to them through the flume or went down the river. Now, we come and we find a condition of water flowing down the natural bed of this creek beyond our point of diversion, which was a part of the continuous flow of the river, which was not interfered with by the dam of the Power Company. In other words, they did not appropriate all of the flow of the river. Now, that question, I say, don't affect the users below in this sense, when there is water enough to supply them, the Telluride could not make a more perfect diversion than they ever did as against us, and turn the water down through their flume and tail race instead of letting it flow down the river. In other words, while they put a dam in the river there was, nevertheless, a quantity of water flowing down the natural channel of the river which we appropriated. Have I made myself clear now?

THE COURT: I think so, and I thought I understood it before, but what caused the question in the mind of the court was the limitation you made you were entitled to that water as against-- that you had appropriated it as against them. I had assumed when you appropriated you appropriated against everybody.

MR. WEDGWOOD: Yes, we did appropriate it as against everyone, but as to the total flow of the river, we were, of course, secondary to prior--

THE COURT: Yes, in other words, if this water was appropriated and had been used by parties below, it was not subject to appropriation, and you got no right against anyone, of course, could not have.

MR. WEDGWOOD: Certainly not.

THE COURT: But if it was water that was not appropriated and subject to appropriation at that time, you would get a right against everyone, possibly subject to certain priorities.

MR. WEDGWOOD. Certainly.

MR. A. C. HATCH: Our position, to make it plain, it was surplus water as against the people below, and never had been appropriated by the Telluride people.

THE COURT: I understand the situation, your contention is not having directed it, taken it into their conduit or flume, they had not appropriated it. I understand that is your contention.

MR. WEDGWOOD: Now, there is testimony in the record, some of which we can refer to, but we can certainly save time by putting on testimony in regard to this matter right straight. Mr. Murdock--

MR. MACLANE: Just a moment, before Mr. Murdock testifies, in order that I may be perfectly clear about this. I have a somewhat different idea of this situation than has been presented. My idea, which was gained entirely at the occasion of the hearing in Salt Lake to which I refer was that the structures of the Power Company were claimed to be insufficient to divert the quantity of water which the court had found was diverted, and there was always a certain amount which went through those structures, and that the court, in determining the quantity of water to which the Power Company was entitled, should take into consideration the leakage through the dam and apply what I termed at the time -- a coined expression-- coefficient of leakage to the quantity of determination of the Power Company's rights, thus resulting in a cutting down of that right. Now, this theory does not seem to be that theory, and I want to be sure what the theory we are trying is. If the theory is as discussed or mentioned by General Wedgwood, I simply want to call attention to the fact that there is no issue of that kind tendered by the plead-

ings here in any way, and it seems to me that it is rather difficult to try an issue that is not accurately defined. Now, of course, the pleadings do define and claim a right of the Provo Reservoir Company for 150 second feet of water under application 1828.

THE COURT: In priority as of that date.

MR. MACLANE: In priority as of that date, and the pleadings on behalf of the Power Company also raise the question of the quantum of the Power Company's rights, which is expressly tendered or stipulated to be tendered by the plaintiff, but is there here a tender in the record and by the pleadings any issue as to the existence in the river of water specifically wasted by the Power Company past its dam, which was specifically appropriated as against the Power Company and as against all other users? Now that is one question. Of course, the Provo Reservoir Company under this 150 second feet, I think was awarded a Class B right. Now, I assume that was what was claimed in the pleadings, and I want to know whether it is proposed to advance some part of that right, determined by the amount of this leakage, to a Class A right, or even a preferential right in advance of Class A right, and I think we should be definitely advised as to just exactly what this issue tendered is to be. Just one word more. When ^{we} were here last spring we assumed that all questions in issue in this case between the Provo Reservoir Company and the Power Company were settled by the stipulation. Now, that stipulation accorded the Provo Reservoir Company a Class A right for its so-called Blue Cliff right, which the Power Company did not contest-- it was not entitled to, upon condition as follows: "It shall be provided by the decree to be entered herein that the point of diversion of all of such waters shall be at the location of the present headgate of the present Provo Bench canal, which is below the tail race of the Utah Power & Light Company's present Olmstead

hydro electric plant, or at such other point or points as will not interfere with the use of the river portion of said 50 second feet by the Utah Power & Light Company through its said Olmstead plant as at present located." Of course, the Utah Power & Light Company ^{could} get at this plant only the river portion of the water, that is, the water flowing in the river. Now, what benefit did the Power Company get from that stipulation, and why did we enter into the stipulation? What did we think we were getting. Obviously we thought we were getting the sum of the river primary rights of the Reservoir Company through our Olmstead flume to augment the flow at the power plant, and it seems to me, that if this stipulation is to be recognized and enforced by the decree to be entered here, as I assume it will be, that there can be no substantial difference on this question which is now presented.

THE COURT: Will you read that again. Does that include anything except the Blue Cliff?

MR. MACLANE: No.

THE COURT: It did not include any of the water they might have under application 1828?

MR. MACLANE: No, didn't mention that at all, but I am saying there was at that time no issue, no question had been raised as to a decree in these other respects and the application number 1828 was decreed as in Class B right, and it was in the light of the decree as entered on all subjects other than that which was immediately in dispute between us, namely the Blue Cliff right, that the stipulation settling the Blue Cliff right was arrived at and consequently it was understood and assumed that all issues between us, arising between us in this action, were settled and disposed of except this one question-- "This stipulation is not intended in any way to affect any matters which may have been heretofore submitted to and are under advisement by the court, as to the quantity of water to which the Utah Power & Light Company shall be

that diverting system would divert the amount the court awarded to them, they were entitled to that amount of water, but whatever water was not diverted by that diverting system, as it existed when we made our appropriation and before and ever since, that was in the river at the point of our diversion, was water that they never had appropriated and they had no power to appropriate then or take as against us, and, that they could not, by changing their system of appropriation, take water which they had never taken before and which we had appropriated. Every time that the question of water down there has come up, the record will bear me out in this statement, that I have called out evidence to show that at all times during the history of this case there has been and was a quantity of water flowing by the dam that the Power Company had never diverted by its means of diversion which it has adopted and maintained, and not having taken all of the water, if they could have taken it, whatever they did not take they never had appropriated, and we have appropriated, and now they cannot change their manner of diversion, their diversion works, in other words, so as to deprive us of that water. Now, have I made myself clear?

THE COURT: : Yes, I get your position clearly.

MR. A. C. HATCH: In other words, the same as if it were a spring coming in on the side below their dam.

MR. WEDGWOOD: Absolutely.

THE COURT: The court in the tentative decree awarded to the Utah Power & Light Company 229 second feet of water, and when there is that much water flowing in the river at the point immediately above the intake, under that decree, would they not have the right to take 229 second feet?

MR. A. A. BOOTH: Yes.

THE COURT: By any means that was necessary to divert it from the river.

MR. WEDGWOOD: No.

THE COURT: Now, why do you make that statement? I

want to get your position. In other words, it seems to me the court must change the award if the court adopts your theory, or expressing it in another way, the court must make a limitation upon the 229 second feet, or whatever the amount is, decreed to mean that they are not entitled to take 229 second feet, but entitled to take it up to the point when there is in the river that quantity of water, together with the quantity that has been permitted to go through their dam.

MR. WEDGWOOD: I don't think there is any question about that, that is absolutely my idea.

THE COURT: Now, the award is in absolute and direct contradiction to that situation, the award as it has been made.

MR. WEDGWOOD: I don't think so. That is, it don't seem to me that way. I think that every person connected with this side of the case, and I think probably everybody connected with the other side of the case until the court made a certain suggestion in Salt Lake there, carried the idea that they were to divert as they had diverted, and take the river as they had taken it, and not adopt an entirely new diversion-- method of diversion, which cut out from use water which they had never used before. That is the effect of it. Now, of course, if they are awarded so much water without any limitation whatever, they might raise their dam, sink it, tighten it, or anything else. If they are awarded so much water as the court just suggested, as they had theretofore used it, that is, when it was in the stream and could be diverted by them by their means of diversion which they had always used. Now, it seems plain to me-- I may be mistaken about it, but it seems plain to me that after a person's appropriation is complete, and certainly, as we have discussed before, their appropriation became complete sometime before this date, then that by a change of the means of diversion, the character of the means of diversion, that it would be a gross

injustice and a gross wrong to permit them to cause thereby waters which all these years and at the time their appropriation was complete, had went in the stream and had been appropriated, and on the basis of which appropriation large amounts of money had been spent, by changing their manner of diversion; and on the strength of the fact that they were entitled to 229 cubic feet per second of water when there was that much water in the river that could be diverted by means of their diversion.

THE COURT: You may introduce your evidence.

MR. JACOB EVANS: May I make one slight observation in addition to what has been said with respect to the diversion of this water by the Utah Power & Light Company, and in the same manner that they have diverted it in the past. That is, a decree should provide for 229 second feet as a primary water right or any other number of second feet without any limitations upon it at all, putting them in the same class that they put the Timpanogos Canal, then they could lower their dam or they could do anything, they could tighten it, they could do anything they saw fit to do to take that quantity of water. Now, the very seepage water that has been running through the dam all these years, a portion of it at least and probably almost all of the water, has gone to supply the Timpanogos Canal below. Now, if they can take that water out, and there is no limitation in the decree as to their taking it out under their present construction, then they can take it out and run it clear around the Timpanogos Canal, which is admitted by everybody prior to them.

THE COURT: Certainly they could, and there is no question, provided the Timpanogos got their water, the Timpanogos would not care whether they did or not, provided they got their water.

MR. JACOB EVANS: Certainly, and nobody else would care if they got their water. If these people want to tighten their outlet and take it back and pump it back somewhere to

other people, we have no objection.

THE COURT: You may introduce your evidence.

MR. A. C. HATCH: If the court will permit me--

THE COURT: I think, gentlemen, it will not be of advantage to the court to go further in discussion. I think all parties will want to discuss the matter after the evidence is in. We are getting away into the forenoon, and all anxious to finish today. Let us take the evidence now, and I will be glad to hear you, Judge Hatch, as to your views after we have the evidence.

JOSEPH R. MURDOCK, called by the plaintiff, testifies as follows:

DIRECT EXAMINATION by Mr. Wedgwood.

Q Mr. Murdock, you are concerned with making the appropriation number 1828, were you?

A Yes sir.

Q Did you have any knowledge of the river at the time you made it?

A Yes sir.

Q At the point of diversion named in that application?

A Yes sir.

Q The Telluride Power was in existence then, was it?

A It was.

Q How long had you been familiar with the river after the building of the Telluride dam before you made the appropriation?

A I would say since they built their dam up to 1908, at the time we made that appropriation; that would be about fifteen years.

Q Did you have opportunities to observe the flow of the river at the point of diversion named in this application?

A Yes sir.

Q Did you observe it?

A Yes sir.

Q During those years?

A Yes sir.

Q Do you know whether or not during the irrigation season, and in fact all seasons of the years, there was water flowing down Provo River in the natural channel below the dam of the Telluride Company at the point of diversion named in this application?

A Yes sir.

MR. STORY: Your Honor, I think in order to preserve the record, I move to strike out the last answer of the witness on the ground it is incompetent and irrelevant under the issues in this case.

THE COURT: Motion is denied.

MR. STORY: There is no issue whatever of abandonment or prescriptive rights.

THE COURT: Motion is denied. You may have an exception.

Q Now you built, or the company, the Provo Reservoir Company, built a point of diversion?

A Yes sir.

Q About when?

A About 1899, I should say, pardon me, about 1909.

Q Has that been maintained ever since?

A Yes sir.

Q Has water flowed through it?

A Yes sir.

Q At all seasons of the year during the irrigation season?

A Yes.

Q And what water was it, that is, as related to water that you had seen flowing past that point of diversion before?

MR. STORY: May I have the same objection, your Honor.

THE COURT: Yes.

MR. STORY: Exception.

A I hardly understand the nature of your question. If you will

repeat it.

Q Perhaps it is awkward. What water did you take into that?

A The quantity?

Q No, what water?

A The waters of the Provo River arising at the Utah Power & Light Company's dam, or then called the Telluride and the inflow between those two dams, their dam and the one that we made.

Q The water that was in the river at your point of diversion?

A Yes sir.

Q And whether the same as the water that was there before you diverted it?

A Yes.

Q Has that been true every year?

A Yes sir, excepting this year, I might say.

Q And that water has been disposed of or used in what way?

A For irrigation purposes.

Q When was the diversion first made?

A As near as I remember about 1909-- 1908 or 9, I am not quite certain.

Q Has it continued ever since?

A Yes sir.

Q Now then, do you know whether or not during the years you have spoken of there were times when there was none, or little, or small quantity of water flowing over the top of the dam of the Power Company.

MR. STORY: Of course, your Honor, I would like to have my objection go to all this testimony, without repeating it.

THE COURT: I take it all of essentially the same character.

MR. STORY: That is what I mean.

A During the flood water season--

Q No, that is not the question. Will you read it to him.

(Question read)

A Yes sir, during the low water period almost invariably.

Q And during different years?

A Yes sir; almost, I would say, every year, might have been one exception.

Q Now, at that time what was the condition as to whether or not there was a flow of water down to the point of intake of the Provo Reservoir Company?

A The flow of water at the intake of the Provo Reservoir Company was practically the same during each year during the period.

Q There was a flow there?

A Yes.

Q Regardless whether there was none or little or small quantity flowing over the top of the dam?

A Yes sir, always.

Q And that quantity, or such of it as was not required by users below, was it diverted in your system?

A It was.

Q During all these years?

A Yes sir.

Q And used?

A Yes sir.

CROSS EXAMINATION by Mr. Story.

Q Mr. Murdock, did the amount of water passing your head gate vary in these years during the summer season?

A In the low water period?

Q Yes.

A No sir.

Q No variation at all?

A Not to speak of, slight variation. We allowed enough to go by only to supply the Timpanogos Irrigation Company below us.

Q Was the amount of water which came down to your head gate variable?

A Very slightly.

Q And was it the same amount as that which appeared immediately below the dam?

A Below the Utah Power & Light Company dam?

Q Below the Utah Power & Light Company dam?

A It was an increasing stream from the dam of the Utah Power & Light Company down to our dam.

Q But you took all there was, did you?

A Except what we permitted to go by for the use of the Timpanogos Irrigation Company.

Q Isn't it a fact that for a number of years the Power Company had a pump installed at the Bridal Veil Falls, by means of which they pumped the water back from the river up into the flume?

A That occurred, my best recollection, once or twice, possibly two years.

Q During that time you did not get the water, did you?

A We were short correspondingly.

Q What I am getting at is you did not get that water during that time, did you?

A That which they pumped up we didn't get.

Q Do you remember what years that was?

A I don't. It was in the interim, I can't tell the exact year.

Q You made no measurements to determine whether the water was the same each year, did you?

A The engineers did.

Q I am asking you yourself?

A No, I did not, only I observed it from my viewpoint as an irrigator and user of water for many years.

Q After 1912 you were releasing storage, weren't you?

A You say we were what?

Q Releasing storage from your reservoir?

A Yes sir.

Q That water flowed over the dam, didn't it?

A Over your dam?

Q Yes, or through it?

A Most of the years it went over and through it.

Q Or through it during the low season, didn't it?

A I couldn't say that it went over every year.

Q That was the general condition, was it not?

A It did, as a rule.

Q And you, as a rule, you were letting the water down during the summer season from your reservoirs, and diverting it through your Provo Reservoir flume which has its point of diversion at the Heislet dam, did you not?

A To the extent what we turned down it did.

Q And that water mingled with the other waters of the stream, didn't it?

A Yes sir.

Q Included in that water was also the Ontario Drain Tunnel waters, and Dixon and Wright waters, which you claim?

A Did you want to know how I know?

Q No, I am asking you this question first.

A Yes, those waters were included.

Q Then how did you determine the increment of those waters which came from the make of the river below the Power Company's dam and above the head gate, above the Heislet dam?

A By deducting the quantity that came from the reservoir and Ontario tunnel water.

Q Did you do that yourself?

A It was done under my observations and instructions.

Q Did you make any measurement yourself?

A I didn't handle the pole nor tape.

Q What do you know of your own knowledge as to the amount of water that was made in the river between the Power Company's dam and Heislet dam during those years?

A To my best knowledge there was about 46 second feet at our dam available in addition to the tunnel waters and the water that came from the reservoir, with one or two exceptions every year from the time we started until this year.

Q That is your guess, is it not, I am asking you for your own personal knowledge, what you know about it?

A I will say my knowledge is by what I observed and seen, and

having been in the irrigation business, and having particularly helped to bring a hundred thousand acres of land under cultivation, I have to depend a little upon my own judgment.

Q You mean to tell me you could look at a stream the size of 40 second feet and determine how much of that water is made of the river?

A Yes sir.

Q Between that dam and the other?

A Yes sir, I have done it in hundreds of cases.

Q Just answer my question, please.

A I am trying to answer so you will understand me.

Q I am asking for an answer to the question and not a digression from it.

A You will have to repeat it.

Q Just read the question.

(Question read)

A I say yes to a very close approximate, having seen it measured time and again in our canal, and gauges fixed in the canal which I observed from week to week, sometimes daily.

Q Where did this large amount of water arise in the river, this increment you are speaking of?

A It began, as near as I could estimate, about twenty to twenty-five second feet just below your dam, and continued to increase about fifteen to twenty second feet from there down to our dam, making a total of about 40 second feet.

Q When you made that observation how much water was going over the dam?

A None.

Q None at all?

A No sir. That was the condition when your dam appeared to be dry upon the surface.

Q And there was no water flowing down, that is, no storage water flowing past?

A Yes sir, there was storage water at certain periods of the time coming past in addition to the water that was--

Q That was the general condition, wasn't it?

A That was the natural condition of the river.

Q I am talking about the general condition from 1912 all during the summer season, was, that the storage water flowing over the dam and mingling with the waters of the stream below, wasn't it?

A At periods of the year there was.

Q I am asking you if that was not the general condition during the low water season of the summer?

A I don't know I understand your question, you will have to read it to me.

Q Read it to him.

(Question read)

Q Strike the question out. The general condition during the low water season in the summer since 1912 has been for the storage water to be flowing down the river and over the dam, and mingling with the waters below the dam, hasn't it?

A A portion of the time, not all the time.

Q Just tell me when you observed it when that condition did not prevail?

A I have observed it under most conditions when the reservoir water was in and when it was out. It was a material question to us to know whether we had the reservoir water and tunnel water maintained to about 30 second feet, and this other water maintained to about forty, whether we had 70 second feet in or 40, or whatever the conditions were.

Q Just name some definite times when you made these observations and just let me get the definite figures as to the amount of water flowing over the dam and amount of water flowing into your head gate; can you give me any definite time and figures?

A I have no exact date, I didn't keep the dates, that wasn't my business.

Q Tell me as closely as you can, and tell me the exact amount you observed, so that we can check them up?

A I am not prepared to give you detailed information as to the days when the reservoir water was in and when it was out so that I could not do that.

Q Can't you tell me about when you made any particular observation and what that particular observation was?

A No, I made it almost continuously, I was going to say, or frequently, every year during that period of time, but I kept no dates, but there is a record, however, which will show that information.

MR. STORY: Then I move to strike out the testimony of the witness, your Honor, in regard to the amount of water that was flowing for the reason it appears it is not the best evidence, and that the testimony given by the witness on the subject is merely hearsay.

THE COURT: The objection is overruled. I think he has done nothing except give his judgment from observations as to the quantity.

MR. STORY: Save an exception.

MR. WEDGWOOD: And counsel himself brought out the amount of water, or quantity.

THE COURT: On direct examination I didn't remember he testified to the quantity at all.

MR. MACLANE: May I ask two or three questions?

MR. WEDGWOOD: Yes, certainly.

CROSS EXAMINATION by Mr. MacLane.

Q Mr. Murdock, this river has been under regulation, hasn't it, since 1913?

A Yes, there has been a Commissioner on the river.

Q And he has distributed the water flowing in the various canals during those years?

A Yes sir.

Q And, of course, has set the head gates of the Provo Reservoir Company at the Heislet dam as well as the head gates of other users?

A Under his direction it was done.

Q Now, has the water Commissioner during this period from 1913 to 1919, inclusive, ever made any distribution, so far as you know, to the Provo Reservoir Company based upon this inflow to the river that you are speaking of, which accrues in addition to your right of Dixon and other rights of that nature?

MR. WEIGWOOD: I object to it as absolutely incompetent. What the Commissioner has done in no way estops or binds or should be persuasive upon the court as to the question at issue. Now, like all men who are worth while, the commissioner perhaps ~~and~~ may have strong opinions of his own sometimes that might differ from someone else. We are not bound by his opinions or by his judgment.

THE COURT: What do you claim for it, Mr. MacLane, any weight whatever?

MR. MACLANE: Whether there has ever been any use of this water as the witness has testified to, for the last six years, at least.

THE COURT: Is it entitled to any weight, the use or disposition of the water that has been made since it is under the commissioner?

MR. MACLANE: Yes, it seems to me.

THE COURT: Suppose it was brought out that the plaintiff had used the water continuously during that time, would it support any claim of any kind?

MR. MACLANE: I wouldn't concede that it would; that is, I do not accept in participating in the discussion, I do not accept the plaintiff's view of this situation, but, if we assume in the first instance, here was water which was specifically subject to appropriation by this party and no one else may have been allowed to interfere, or, here is water which the Utah Power & Light Company did not use and somebody else did appropriate, it seems to me the fact that for six or seven years, if it should be a fact this water has not in fact been used by this party, and that during that entire

period it has not been claimed by this party, no motion, objection, or anything of that kind has been presented to the court, is certainly pertinent evidence on the question whether or not there has been an appropriation.

THE COURT: That might be, but the fact that the party during those years claimed the water, might have some--

MR. MACLANE: I was going to follow this question by the other.

THE COURT: If that is the object, the objection is overruled. However, it is not of any particular weight one way or the other, because a party during the litigation has a right to rely upon the fact that no use of the water by others, or his failure to make claim would in any way affect or prejudice him after the suit is commenced, and water commissioner appointed; no acts of any of the parties can change the situation then, of course.

MR. WEDGWOOD: I intended to say the water commissioner is not our agent in any sense.

THE COURT: Merely as a preliminary question the court will permit this question to be answered.

MR. WEDGWOOD: WE WILL not save any exception to it, I just wanted to raise the question, is all.

THE COURT: Answer the question if you know whether the commissioner has ever apportioned that water to you in this case?

A I do.

THE COURT: Did he do so?

A He did.

Q You mean by that, Mr. Murdock, that the commissioner in addition to the Wright and Dixon and released storage water from your reservoir and the Blue Cliff right which you claim has also added to the quantity which you would be entitled to under those claims another quantity of water, or additional quantity of water for this increment below the dam?

- A If I understand your question, and I think I do, I would say yes. I can tell you on what I base my judgment for your benefit, if you wish to know.
- Q I would be glad to know whether you know or whether you don't know the Commissioner has made any such assumption or determination in the distribution of this water?
- A In 1918 the Commissioner found a sufficient water running below their dam of the Utah Power to justify him to restrain us from using reservoir water on the theory that there was sufficient water there equivalent to the reservoir water for that whole season of 1918, which was below the normal flow, to supply the 20 second feet of reservoir that we were entitled to, and none of that reservoir water was distributed to us under that theory that there was enough water seepage coming under, around and through the dam to supply that 20 second feet, according to his report, which I take my view from.
- Q And that experience during 1918, as you have just related it, is the basis of your statement that the Commissioner has regarded the tributary inflow below the dam, or through its dam as a distinct right to be apportioned to you?
- A During that one year only, as I remember, from his reports. Never before, never since.
- Q And at no other occasion has the commissioner added anything to the rights which you claim from these other sources which I enumerated as the basis of distribution to you?
- A Not that I could observe from his reports and from my best information.
- Q Now, Mr. Murdock, has the Provo Reservoir Company ever made any motion in court here, or any claim or representation that it was being discriminated against in this manner, and was not receiving any of this water which it claimed to be entitled to?
- A Whenever the question of the maintenance of the Utah Power & Light Company's dam came up it was invariably referred to by our attorneys as the question which would have to be deter-

mined at some time during the trial, or in a case following. It was an uncertain, unsettled question, as Mr. Wedgwood stated here before.

MR. WEDGWOOD: Pardon me, but I wish I might be allowed to ask the witness to pay attention and sense Judge MacLane's question, because they are both talking at cross purposes absolutely, and have been here for the last ten minutes.

MR. MACLANE: I am inclined to agree with you, General.

MR. A. C. HATCH: Let me suggest also it will take some considerable time to explain some of the answers of this witness. He could not have understood the question, I think, or his answer would not have been as he has given it. He has not paid attention.

THE COURT: Now, you desire Mr. Murdock to be admonished to heed the question?

MR. WEDGWOOD: I do. He is testifying on something ^{out} in his mind with/regard to what he is asked.

THE COURT: Let me suggest, Mr. Murdock, if you are in doubt, whether you fully understand the question, indicate that, and Judge MacLane will make it plain in the question. If you don't fully understand the question don't attempt to answer it.

THE WITNESS: I may have misunderstood the question, I will try not to.

Q Now, Mr. Murdock, prior to the time this suit was started, which, I think, was 1914-- I am not absolutely sure-- 1914-- did the same condition prevail as prevailed subsequent to that time with respect to the distribution of waters at the Heislet dam?

A As near as I can remember, and as I know.

Q Was the water under regulation by prior decree of court at that time, was it being distributed by a commissioner?

A Yes, by city commissioners.

Q And at all times since 1908?

A I wouldn't say, I am not certain as to that.

Q Well, as far back as you were getting any water at the Heislet dam has the water there been distributed by a water commissioner?

A Yes, there was a commissioner in charge.

Q How long has Mr. Wentz been commissioner?

A About four years, I think.

Q Who was commissioner before him?

A A city commissioner under an old decree.

MR. WEDGWOOD: Deming.

Q And those two gentlemen have been the commissioners throughout this period last ten years?

A No, preceding Deming there was a city commissioner.

Q Now, during any of these periods did any of these commissioners ever distribute to you in determining your rights in seasons of scarcity any quantity of water based upon the leakage through the Utah Power & Light Company dam, and in excess of the rights which you have specifically claimed? as Class A rights and which have been awarded you by the tentative decree here?

A That is a very long question for me to answer, if you will make three or four questions out of it I probably could get the answer more definite.

Q I am aware that some of my questions may not be very clear, but I think that one was an exception to the rule, and so I will ask the reporter to read it.

MR. WEDGWOOD: I am going to object to it, because, to save time, he has asked a question which requires the witness to tell what was in the commissioner's mind, or express^{ed} to the commissioner in some way, and it is incompetent.

THE COURT: I think the court will make the same ruling the court has made with reference to previous questions of this character. If it is merely a preliminary question for the purpose of asking the witness in the event he says they did not turn any water to him as to any complaint they made

when they failed to turn water, the objection may be overruled, because I think it will be proper to ask whether a complaint was made upon the refusal to turn water now that a claim is made to that water, but I do not see any materiality in it at all if the witness should answer there was such diversion made.

MR. WEDGWOOD: The point of the question is, as I see it if I was on the stand, did they distribute any water to you by reason of leakage through this dam.

MR. MACLANE: That is what you are claiming, isn't it?

MR. WEDGWOOD: It requires the witness to incorporate--

THE COURT: The objection goes to the fact this witness is unable to testify to the motive actuating the commissioner in distributing a certain quantity of water. The substance of the question is whether an additional quantity was turned down in excess of the rights claimed under the various claims that have been awarded in the tentative decree.

THE WITNESS: You will have to read the question, I don't think I can answer.

Q Possibly I could make it a little simpler, I will try to. Under previous commissioners and prior to the inception of this suit, was any water awarded to you during the seasons of scarcity, when the waters of the river were under regulation, in addition to the waters which were awarded on the basis of the Class A rights which have been tentatively decreed to you here?

A I would say yes.

Q In addition to that and to your storage?

A Yes.

Q How much?

A It varied as the season varied, beginning with all-- with the capacity of our ditch and being reduced as long as there was any surplus water in the river in excess of the decreed rights of the old decree.

Q But, when the surplus water in the river was so reduced and the season of scarcity was reached then there was no distribution in

excess of these specific rights I have mentioned, was there?

A Nothing in excess of previous decreed rights above that, that is, agricultural rights down here.

Q Now, did you make any complaint of the method of distribution adopted?

A No sir.

REDIRECT EXAMINATION by Mr. Wedgwood.

Q Did you have any reason to make any complaint except one year?

A No, I don't know that we did, until the suit began. We contemplated bringing of the suit several years before we brought it, and, in view of handling all the questions at one time.

Q Now, kindly turn to me and let us get just a few questions. Now, did you mean to be understood that the commissioner every year took from you or distributed to you just what reservoir water you had?

A No sir, I do not wish that to be understood.

Q Now, at any time, and if so what years, did the commissioner distribute to you a quantity of water equal to your reservoir rights, and no more?

A At no time. We always had excess water above the reservoir rights.

Q You spoke about 1918?

A Yes.

Q Now, in that ^{year} you said that the commissioner when there was the equivalent, same quantity of water as your reservoir rights, turned down the river in the river at the Heislet dam, he did not turn it below the Heislet dam to you?

A That is the way I understand his report, that was his theory during that year.

Q Was that done more than one year?

A Never done but the one year.

Q Of course, the record disclosed that the next year you applied for the water to the commissioner?

A Yes sir.

Q Now, prior to that time what is the fact as to whether or not there was diverted each and every year into the canal of the Provo Reservoir Company all of the water that was at its point of diversion not required by prior users below?

A That condition continued from the time we built our dam until this year.

Q Up to last year?

A Yes, 1919.

Q And what is the fact as to whether or not during all of those years, less possibly some quantity for evaporation and seepage, you diverted more water at your point of diversion than your reservoir water and the rights?

A Yes sir, we did.

Q And what was that quantity of water in excess of those that you diverted, not in second feet, but what water was it?

A It was the seepage water arising between their dam and our dam.

Q Water that came into the stream below?

A Yes sir.

T. F. WENTZ, recalled.

DIRECT EXAMINATION by Mr. A. L. Booth.

Q You are the water commissioner in this suit?

A Yes.

Q As such water commissioner, have you made any observations in relation to the flow of water immediately below the dam of the Utah Power & Light Company?

A Yes.

Q When have those observations been made?

A Well, I have seen the flow in each of the years since 1913. I did not make any special observations except in 1918 and 1919.

Q What observations did you make in 1918 and 1919, especially?

THE COURT: Let me ask counsel for the Power Company, do you expect to controvert the fact that there has been approximately the quantity of water flowing either through, under or past the dam that has been heretofore testified to, 13, 14 and 15 second feet?

MR. STORY: Most emphatically.

THE COURT: You don't expect to controvert the fact?

MR. STORY: Yes, we shall controvert the fact as to quantity.

THE COURT: What do you claim as to the quantity?

MR. MACLANE: Run down not to exceed a second foot.

THE COURT: Then you may proceed, because I took it from most of the argument it was based on the hypothesis there was that much.

A 1918 the flow below the dam was between 35 and 40 second feet approximately. I made no measurement, just looking it over and checking it up with measurements below.

Q Was that immediately below the dam, or what point?

A Yes, just below the dam.

Q How far below?

A Between one and two hundred feet below the dam, about two hundred feet below the dam.

Q What was the condition as to the water flowing over the dam or not?

A Well, the water during 1918, over the dam, was up to about an inch or inch and a quarter from the top of the first flashboard.

Q How much in second feet would that make approximately flowing over the dam?

A Wouldn't be any flowing over the dam.

Q Then, as I understand you, your answer, when there was no water flowing over the top of the dam immediately below, there was in the river approximately 35 second feet?

A Yes.

Q Was it your judgment that came through the dam or under or around the dam from the mainflow of the river?

A Yes, come through and around the dam.

Q This was in 1918?

A Yes.

Q What time of the year?

A During August.

Q Now, in 1919 what was your observation?

A In 1919, on the 14th of June, or when the water was on the first flashboard, the discharge two hundred feet below the dam was 25.51 second feet. On the 18th of June at the same point there was approximately 10 second feet;

July 3, 6.96

July 23, 3.80

July 31, 1.35

August 7, 2.52

August 15, 2.52

August 20, .96

August 22, .66

August 26, .59

September 11, .78

September 24, .71.

Q From your observations and visits to the dam during the years between 1913 and 1918, what would you say as to the amount coming through the dam, or around it by seepage, as compared with the year 1918?

A Well, in one year, 1915, it was very much lower. I think it was down to about 20 second feet.

Q Outside of that year you say it would run-- have you the information for those years year by year?

A Only as I take them from other notes, the measurements below, they are not direct at the dam.

Q How did you arrive at the information?

A Well, I would take the total flow in the Provo Reservoir Canal and Timpanogos Canal and amount by the Timpanogos dam, and subtract the inflow ^{in the river} from that, to get the leakage through the dam.

Q From that information can you determine the seepage past the dam?

A In some instances I can. There are a few instances I cannot.

Q Those that you can I wish you would give, if you have the information?

A I haven't the information made up on that. That would take some time to go through those years and make those deductions.

Q Have you any of them with you?

A No.

Q Do you know independently of the notes substantially what that amount would be?

A As I say, it would range, except in the spring of 1915, I think between 30 and 40 second feet.

Q And in 1915 it was largely over 20 second feet?

A Yes sir.

Q Has there ever been a time when you have observed this seepage that you know of, that it would be less than 20 second feet, except in 1919?

A No, I don't know of any instance.

Q How do you account for the small amount of seepage in 1919 and continuously diminishing from June until August?

A There were some repairs made on the dam and faced with dirt.

Q Were those repairs different from what they had ever been before, so far as you know?

A Well, there has been one year they made some repairs on there that I observed, but I don't remember what year that was. They have done some work other years, possibly every year, but not so thoroughly as has been done this year.

MR. STORY: May I object, your Honor, at this particular time, and move to strike the answer of the witness, and also object to further testimony on this line for the reason it is irrelevant and immaterial under the issues in this case. In other words, there is no issue of abandonment or an adverse use because of the condition of the dam in this case, which

would prevent us from making the kind of repairs anybody else makes.

THE COURT: The objection is overruled, not passing upon that question at all. I am not passing on the question whether you are entitled to make those repairs.

MR. STORY: I merely wish to make the objection to preserve the record.

THE COURT: Yes.

MR. STORY: Save an exception.

MR. A. C. HATCH: One cannot abandon that which he has never held.

Q What was the character of the repairs or improvements to the dam in 1919, if you know?

A The dam was faced with dirt.

Q Describe it, will you?

A Well, the upper face of the dam was -- quantity of dirt and material was covered over that to stop the water passing through the dam.

Q Very much larger quantity than ever had been done before to your knowledge?

A Yes, I only have knowledge of the one instance before, but I have never paid very much attention to that part of it.

Q I will ask you whether or not you observed that not only in the face of the dam, but for a distance of a hundred feet or more, puddling was done of the river bank this year, which never had been done before to your knowledge?

MR. STORY: I would suggest that is somewhat leading.

MR. A. L. BOOTH: I am giving it in the alternative.

MR. STORY: I think he should state what he knows what has been done in the past.

MR. A. L. BOOTH: This is to call his attention especially.

THE COURT: He may answer the question, there has been no objection to it.

A There was some work done along the side of the bank, above the

dam this year, but also been some work done those particular places years before, I have observed short piece above the dam, possibly 50 to 75 feet above the face of the dam.

Q As I understand you, however, in effect the result has been in 1919 to shut off practically 19½ second feet more of seepage than has ever been shut off before, to your knowledge?

A Yes, it has been very much tighter than ever before I know of.

Q As an observer of the river, and as a commissioner of this court, have you any other explanation for this decrease than that work has been done more extensively and more thoroughly in the puddling of the dam and the puddling of the river in 1919 than it was ever done before?

A No.

CROSS EXAMINATION by Mr. MacLane.

Q Mr. Wentz, this dam, as has been testified in this case, is a rock filled crib dam, isn't it?

A Yes.

Q And not impervious entirely?

A No.

Q You speak of a certain quantity of water which you estimated had gone through this dam in previous years, that was merely an estimate on your part?

A Yes, I never paid any particular attention to it until last year and this year.

Q And last year and this year have been the only years that you have been called upon to pay any particular attention to that point?

A Yes.

Q Has the question of that leakage through the dam in your distribution of the waters been called to your attention by claims of anybody previous to this year?

A No.

Q Specifically has the Provo Reservoir Company ever made any demand or claim of you to distribute to them any quantity of

water as Class A rights in excess of those which have been tentatively decreed in this case to it as such?

A No.

Q Mr. Wentz, have you in making your distribution to the Provo Reservoir Company ever made any distribution to them during seasons of scarcity when only the Class A rights were satisfied, in excess of those class A rights which have been tentatively decreed here?

A No.

Q Now, the Timpanogos, Mr. Wentz, takes out water below the Utah Power & Light Company dam?

A Yes sir.

Q And the Timpanogos has a right which either by stipulation in this case, or otherwise, is satisfied prior to the Power Company's right?

A Yes.

Q Water is passed by the Power Company dam, or through it, to satisfy that right?

A Well, it has never been necessary in the last seven years to take any water from the dam to supply that right, always been sufficient water in the canal for them.

Q But the Power Company, by a stipulation in the case, is required, if necessary, to pass enough water for that right?

A Yes.

Q And that amounts to how many second feet, do you know?

A The Timpanogos runs from 11 second feet up to 14.

Q Now, in your estimate of quantity of water flowing in the river, 30 to 40 second feet below the dam, you included, of course, water from all sources that were in the river at that point, that is, you are giving the gross flow recorded at the point of observation?

A Yes.

MR. A. L. BOOTH: Just a moment, I don't quite understand that question. Will you permit it to be read.

MR. WEDGWOOD: Gross flow in the river at the Heislet

dam.

MR. MACLANE: No, didn't say that.

MR. A. L. BOOTH: I didn't understand him to say it was thirty to forty feet. That is the reason I asked. I understood him to say there was 35 feet coming through the dam besides this inflow.

MR. MACLANE: I am examining the witness now, if I may be permitted.

Q You understood my question, Mr. Wentz?

A Yes.

Q Was any such an amount of water flowing in the river as you observed it prior to those years you were giving the gross flow at the point of observation?

A Yes.

Q And that gross flow, of course, included any waters that may have been released from storage by the Provo Reservoir Company, also a proportion of the Ontario Tunnel waters, to which they were entitled, and also the Wright and Dixon water?

A I don't like the form of that question. It is separating the quantities of water in the river, when we don't pay any attention to this. I can probably answer the question, supplied the Provo Reservoir Company with the quantity of water they are entitled to under all the rights which have been awarded to them. Now, when that quantity is not sufficient--

Q That is Class A rights?

A Yes, when we are down to Class A rights. When the quantity of water at their heading is not sufficient turn enough from the flume through the same gate or at Nunn's, to make up that deficiency.

Q I don't know that you quite get my question. I say the gross flow of the river at the time you made these observations below the dam included whatever water was left in the river or placed in the river above the dam from the Provo Reservoir Company's storage from the Ontario tunnel and from the Wright

and Dixon rights?

A That water came through the dam was delivered to them as part of the storage and Wright and Dixon water, part of the delivery, of course.

Q And that water was in the river, whatever the quantity might have been from those sources when you made these observations?

A Yes.

Q And is included in the gross figures which you gave?

A I don't like to answer the question that way, it is separating kinds of water, tunnel water and storage water and putting that through the dam, and the other going through the flume. I don't like to answer it that way. I will answer it best I can. When the water was not at their heading sufficient to make their right, enough went around the flume to make up their rights.

Q That is a total of how many second feet?

A Whatever they were entitled to under their primary rights any particular day during the deason.

Q Do you recall any occasion what that quantity was? Just for illustrative purposes, and what was present at their head gate and what you had to divert around the flume?

A August 7, 1918, Provo Reservoir Company canal had in 65.16. This may be a little off, 2 or 3 second feet, but I think for your purposes it will probably serve all right. Timpanogos Canal, 10.50. Now, on this day there was two second feet being diverted from the flume, and as I remember-- I am not positive about it-- we were drawing 20 second feet of storage for the Provo Reservoir.

Q And the balance of the storage was going through the dam?

MR. WEIGWOOD: I object to the question as trying to ram into this witness there by a question, balance of the storage was going through the dam, matter of that kind, it is improper question.

Q A quantity of water equal to the balance of the storage was going through the dam?

A I don't like to answer that question that way, I am willing to answer any information I have.

Q Well, I certainly, Mr. Wentz, am not trying to confuse you, or mislead you by the form of the question, and if there is any objection to the form, and can be specified either by you or your attorney, I will be glad to amend the question, and it is my distinctly lay mind, because I am not at all familiar with distribution of water. That sounds like a very simple question.

MR. WEDGWOOD: I don't. If he will ask him how much was going through the dam, that will answer the question without trying to classify it.

A I will explain the reason why I don't like to answer the question that way. Suppose they did not have any storage coming down, practically without any change on the dam the same quantity going to the Provo Reservoir, I turn 20 second feet of storage down, the storage in that case would go through the flume.

MR. WEDGWOOD: That is, you turn it through the flume?

A Yes, put 20 feet more in the river that would go through the flume, and same amount through the dam.

Q That is, might turn it out through the Utah Power & Light Company's flume and spill it?

A No, it would not be spilling it. This particular day we were only spilling 2 second feet from the Olmstead flume, yet drawing 20 second feet of storage, so that is why I don't want to say the storage water is going either place.

12:10 P.M., Recess to 1:30 P.M.

T. F. WENTZ - - - - -

CROSS EXAMINATION by Mr. MacLane continued.

Q Mr. Wentz, just three or four more questions I want to ask you, and they are perhaps in a more different way of getting at what

I was trying to get at this morning in the questions which you thought you could not answer, as asked. Suppose that the Power Company had maintained during these years of 1913 to 1918, to which you testified, a tight dam, would it not have been necessary for it to pass over the dam a quantity of water equal to that permitted to leak through the dam to satisfy these rights of the Provo Reservoir Company which you were distributing to it as Class A rights?

MR. WEDGWOOD: I object to it as calling for a pure conclusion of the witness, and not any foundation-- a conclusion of law too.

THE COURT: If I understand the substance of the question it would not be either a conclusion of law or fact. The substance of it is whether there would be sufficient water in the stream below if they had a tight dam to supply those quantities of water that had been necessary.

MR. MACLANE: I would suggest the question be read. I don't believe the court understands it.

THE COURT: Possibly not.

(Question read.)

THE COURT: That is as I understood it, I may not have made myself plain in stating what I understood to be the question.

MR. WEDGWOOD: I think I will withdraw the objection and he can answer it, because this is before the court, and let us get at it.

A If there had been a tight dam if the Olmstead dam had been tight, it would have been necessary to pass from the flume a quantity of water in addition to what was passed that leaked through the dam.

Q In other words, the leakage through the dam was not at any time greater in quantity than was required to make up with the increment to the river below the dam the sum of the Provo Reservoir Company's Class A rights, and any reservoir that it was releasing, and Ontario drain water?

A Yes, that is true, it was never in excess of that.

Q Did you, in satisfying the Class A rights of the Provo Reservoir Company and its storage and Ontario drain waters at the Heislet dam use this make of the river below the dam, or the flow through the dam so far as the same was available, to make up that quantity of water to which they were entitled?

A Yes.

Q And if there was a deficiency, how did you supply that deficiency?

A Turned the water from the flume.

Q That is, from the Utah Power & Light Company's flume?

A Yes.

Q During the periods of scarcity prevailing during the low water season, did the amount of the flow below the Utah Power & Light Company's dam exceed the sum of the Provo Reservoir Company's Class A rights, as fixed by the tentative decree plus their storage and Ontario water, to which it was entitled?

MR. A. C. HATCH: That question as put, as the case now stands, includes the 50 second feet of Blue Cliff water, as I understand it, and on the face of it 40 second feet is all they had at that particular time. The question to me is misleading to a certain extent, and that is the reason I have made the statement I have. If the question is to include all of the Class A rights 50 second feet of the Blue Cliff Canal, and the storage and Wright water and Dixon water, witness ought to understand what is covered before attempting to answer.

Q Do you understand the question?

A No, I don't, I hardly understand what you mean at the latter part of the question by saying plus the storage and tunnel water.

Q I mean, did the sum or the total flow below the Utah Power & Light Company's dam and at the Heislet dam exceed the Class A rights which you were distributing to the Provo Reservoir Company, plus any release which the Provo Reservoir Company was then making from storage, and also plus anything it was

entitled to from the Ontario drain water, that is, the sum of all the rights the Provo Reservoir Company was then entitled to?

A No, I don't know the instance when the quantity in the canyon there was sufficient to supply the primary rights of the Provo Reservoir and Timpanogos. They practically all the time diverted some flow from the dam. It has been very small quantity many times, but during low flow there has been some from the flume all the time.

Q Then the Power Company was not passing any more water through leakage through the dam than it would have been required to pass had it had a tight dam?

MR. WEIGWOOD: I object to it as calling for a conclusion of the witness, he is asking a legal conclusion as to the whole matter.

THE COURT: I think the objection will be sustained, not particularly because of that, but because of the repetition he don't need to make.

MR. MACLANE: I think that is true.

THE COURT: Merely a summary of what he has testified to before by putting it in another form.

Q Has the condition of the Utah Power & Light dam from 1913 to 1918 as it has prevailed during the low water season, prevented it from obtaining the water to which it was entitled at its flume under the basis of distribution used under the orders that the commissioner was operating under, after passing around or through the dam sufficient water to satisfy these above mentioned rights?

A No, they received the same quantity. They would have received the same quantity.

Q Now, referring to your distribution of last summer, there was not enough water leaking through the dam and made below-- that is, through the Power Company's dam and made below that dam and above the Heislet dam, to satisfy the rights of the Provo Reservoir as above defined, and these Blue Cliff rights, was

there?

A No.

Q And to make up the deficiency you spilled water out of the Power Company's flume?

A Yes sir.

Q Did you remove the flashboard off the top of the dam last year during 1918, I mean?

A No-- no, we took the water through the Nunn spillway during 1918.

DIRECT EXAMINATION by Mr. Wedgwood.

Q Mr. Wentz, this tightening up of the dam, Olmstead dam, that you spoke of on direct examination when the flow began to decrease was subsequent and after the hearing we had in Salt Lake on the application to have you do certain things?

A Yes

Q Before that time do you know how much water had been flowing down below the dam?

A Well, the one measurement that I gave 25.51 second feet.

Q Now, did that include any reservoir water turned over the dam?

A No.

Q Did it include any tunnel water turned over the dam?

A Well, I couldn't say for this reason. We were dropping from the low water, or from our high water to the low water at that stage.

Q To get it plain, was there a time then before that order was issued of last summer when there was no water flowing over the Olmstead dam, and there was no reservoir water flowing down?

A Yes.

Q There was a time?

A Yes.

Q There was no reservoir water flowing down, so of course, none flowing over the dam?

A No.

Q The tunnel water was flowing down there?

A Yes sir.

Q But that was not flowing over the dam?

A No.

Q You were not giving that to the Provo Reservoir Company, that is, that water that flowed down the river, you were not giving it to the Provo Reservoir?

A Yes, that was going to the Provo Reservoir Company.

Q It couldn't go, pardon me. Now, I would like to get straight with you, if I can on this subject, except as you considered that it leaked through or around the dam, you were not giving it to them?

A No, that is true.

Q And the same is true in regard to the Wright water?

A Yes.

Q And the same is true in regard to the Dixon water?

A Yes.

Q Now, after that order was issued there then you turned over the dam for a while the reservoir water when they turned it down?

A Yes,

Q And the tunnel water?

A Yes.

Q And the Dixon water?

A Yes.

Q And the Wright water?

A Yes.

Q And later, by an understanding, instead of turning it below the dam, you turned that water out of the flume?

A Yes.

Q Above the point of diversion?

A Yes,.

Q So, in accordance with the order issued you made a change last year?

A Yes sir.

Q Or this year?

A This year.

Q This last irrigation season; and immediately or about the time you made that change they began to tighten up the dam?

A Yes.

Q And they not only tightened the dam, but they went up along the sides of the river and put in puddles?

A Yes.

Q Had you ever seen that done before?

A Yes, one instance, one year, I don't remember the year, they tightned above the dam.

Q How far up?

A Well, between fifty and seventy-five feet above the dam.

Q Continuously from the dam up?

A Well, I couldn't say continuously. What we call the whirlpool above the dam, and they run a plank out over the river, run it out on wheelbarrows and dumped into the river.

Q Have you sufficient knowledge of their work to say whether they done more work to a greater extent, more comprehensive as to the physical conditions this year than before?

A Oh, they made it very much tighter this year.

Q Work was very much more comprehensive?

A Yes, than I have ever seen it before.

Q Now then, I will ask you whether or not the quantity of water prior to 1919 that arose in the river below the dam was dependent upon the volume of flow of the river in any way? which was above the dam?

A Do you mean by that the water passing through the dam?

Q I don't care where it passes, the water that comes up below the dam, is that dependent upon the quantity of water flowing in the river, and, I would add to my former question, when the flow is not sufficient to flow over the top of the dam?

A Well, I think it is dependent on the height of the water in the forebay at the dam. I have never observed, never noted the water in the forebay drawed down below the-- down through the

crest of the dam near the bottom of the first flash-board.

It has^{been} maintained usually up to near the top of the first flash-board. This year it was drawn down to the bottom of the first flash-board.

Q Let us get at it a little different way. Is it a fact, as I judge it to be from your testimony, that the flow of water at what you term the point of observation below the Olmstead dam is greater in volume in every season than the volume flowing at the Olmstead dam, regardless of the stage of the river.

THE COURT: The point you refer to is that point approximately 200 feet below?

MR. WEDGWOOD: I was going to ask that question next. I said point of observation because that is the point.

THE WITNESS: I don't understand the question.

Q There is a certain flow of water at the Olmstead dam in volume, is there not?

A Yes sir.

Q There is a certain flow at your point of observation?

A Yes sir.

Q Now, is that volume the same, or is it different to your knowledge?

A It is different according to the height of the forebay.

Q Very well, it is different?

A Yes.

Q Is it greater at the Olmstead dam than it is at the point of observation, or less at the Olmstead dam than at the point of observation, the volume?

A That depends upon the height of the water in the forebay. If it is up like it was last year, I said between 35 and 40 second feet up to the top of the first flash-board down to the crest of the dam, about 25 second feet.

Q Then it is greater, that is, before 1919, it has been greater at the point of observation from 25 to 40 second feet than at the Olmstead dam?

THE COURT: I don't understand the situation exactly.

I don't just understand the relative location of these places.

MR. WEDGWOOD: We will try and get at it.

MR. A. C. HATCH: It seems to me the question is plain, the seepage around or through the dam greater right at the dam, or greater at the point of observation.

Q Where is the point of observation as you used that term?

A About two hundred feet below the dam.

Q What dam?

A Olmstead dam.

Q Below the Olmstead dam. Now, what I want to get at, if I can, separately from any other question, any other consideration, is whether you have any knowledge as to whether or not when there is 25 feet coming up there, or 40 feet coming up there, there is any added volume that was not in the river above the dam?

A Well, it would be very little, very little.

Q It would be very little?

A Yes.

Q Now, you have had a knowledge of this stream for how long?

A Oh, a great many years.

Q Great many years?

A Yes.

Q You have a knowledge of it ever since the building of the Olmstead dam, have you not?

A Yes sir.

Q And, if I understand you, the same condition of water appearing at the point of observation below the Olmstead dam has existed all the time you have known it?

A Yes.

Q As far back as the first power line of the Telluride Company?

A Yes.

Q So then the fact is, is it not, that from the time that dam was built, Olmstead dam, practically continuously up to 1919, as the dam was constructed there, there was from 20 to 40 second feet flowing in the river at the point of observation?

A Yes.

Q And that quantity of water the Telluride Company, or the present Power Company never did use, did they?

A Well, they used for sometime for pumping it back below, but I don't know just when that was.

Q Except when they pumped?

A Yes.

Q And that quantity was there when there was no water flowing over the dam?

A Yes, that is true.

Q Now then, I want to get back again to where I started from. Assume, for instance, that there is nothing flowing over the dam, and assume that there is 30 feet turned out of the reservoir and that flows down over the dam, have you a judgment as to whether the amount that got below the dam at the point of observation when the water was not high enough to flow over would be increased any by this 20 second feet coming down?

A No, it doesn't depend on the quantity of water in the river, it depends on how they control their gates there.

Q That would not make any substantial difference?

A No, if they had a low flow in the flume down to 180 and the water at the same height turn 30 second feet more in, they could take 30 feet more through the flume, and not disturb the balance of the river.

Q But the fact the Provo Reservoir Company turned down 30 second feet of reservoir water and 30 feet of tunnel water and the Wright water, hundred second feet, whatever it is, and Dixon water, that has not had any physical influence so as to change the flow of water below the Olmstead dam from what it was, if they don't send that water down?

A No.

Q So then xxx the conditions existing at the time of 1910, or thereabouts, at the time the Provo Reservoir Company first got the water, have not been changed by the turning of the water, acquiring it, or the Wright water, or tunnel water or Dixon water?

A No, it has not changed.

Q Now, you did, in 1918, refuse, or, in fact, you didn't recognize that the Provo Reservoir Company had a right to have the reservoir water turned over the dam, that is right, isn't it?

A Well, I didn't refuse, there was no request made for it, it was not turned over the dam only enough to make up their rights below.

Q I don't like that. The question of making up their rights below, that is a question what were their rights. Our contention is their rights were to all of this water that has arisen in all these years, plus the reservoir water. Now, in any other year did you do the same thing?

A That system has been followed every year until this year.

Q Every year until this year?

A Yes.

Q Now, what is every year?

A Well, each year I have been on.

Q What is that year?

A Since 1913 up to 1918, inclusive.

Q Including 1913?

A Yes.

Q Now, in 1913 Deming was commissioner then?

A Deming was commissioner in 1914.

Q In 1914?

A Yes.

Q Were you in 1913?

A I was in 1913 and 1914 on the lower division. Mr. Deming was general commissioner over the river.

Q Now, at any time in 1913 there was there a shortage of water in the Provo Reservoir Company's canal?

A Yes.

Q What time of the year?

A On August 1, 1913, turned five second feet over the dam.

Q Was that after the reservoir water was exhausted?

A No, that is while the reservoir water was running.

Q You did permit them to have five second feet over the dam?

A Yes.

Q Of the reservoir water?

A Yes.

Q And was there any such condition in 1914?

A I have no record of any water being diverted from the flume in 1914.

Q Just to get your idea, your idea was there take it from illustration, that the Provo Reservoir Company might be entitled under its appropriation 1828 to say 20 second feet that was flowing down, and if they turned their reservoir water down of just even 20 second feet, they were not entitled to any more?

A Yes, they would be entitled to more.

Q Not on what you did, as you have just said?

A That would increase the flow of the river if they were entitled to 20 second feet.

Q Your idea is they would just get that pro rate of that increase?

A No, they would get all of it.

Q They would get all of it?

A If the river stood at the same stage.

Q I must say that is too much for me.

A I will explain that.

Q I don't think it worth while, because I think it is not understandable between us. Now, in 1915 was there any such condition?

A On July 7th, turned 8 to 10 second feet from the Olmstead flume.

Q Now, was that reservoir water, or rather, was the reservoir water being turned down at that time?

A Yes, the reservoir water was just reaching the Provo division at that time, turned from the lakes on the 4th of July.

Q And was that 8 second feet all the water that was reaching there or the reservoir water that was reaching there?

A No.

Q There was more of it?

A No.

Q But you didn't give them then all the reservoir water they were

turning down?

A Didn't give it to them over the dam.

Q How did this reservoir water get below the dam, if it didn't go over it?

A Well, figure up the quantity that--

Q That is a physical question, there didn't any reservoir water get below the dam, did there?

A Part of it was turned over the dam, and part through the dam.

Q You just told me a short time ago that the quantity of water turned in above, the reservoir water and Dixon water, don't affect the amount of water that would arise under the dam; you told me that?

A Yes, that is true.

Q Now then, when they turned this water down out of the reservoir and you didn't give them all of it there, then over the dam or through the flume, then they did not get the reservoir water did they?

MR. STORY: I think that will be a conclusion for the court to determine.

MR. WEDGWOOD: Yes, I think so too. As I say it is plain imposition almost.

Q Now, in 1916 was there any such condition?

A I haven't any record of any water being turned over the Olmstead dam.

Q In 1917?

A No, in 1917 it was a very high river until the first of August, and the flume was out for the balance of the year.

Q So that there are four years since 1913, four out of the seven there, when there was no question arose whatever in regard to the reservoir water and the amount flowing below?

A Yes.

Q Now then, when you are taking reservoir water and giving it to the Power & Light Company, did you tell Mr. Murdock, or anybody else, what you were doing?

MR. STORY: I object on the ground it assumes a

condition, assumes a fact which does not appear in the evidence. He says when you took this reservoir water and turned it to the Power Company did you tell the Reservoir Company you had done so. Now, the assumption is he took water of the Reservoir Company and turned it to the Power Company. There is nothing in the evidence to show anything of that kind.

MR. A. C. HATCH: It is shown that evidently this witness did turn all the reservoir water to their use, and no part of that was permitted, as far as he was concerned, to reach the reservoir company's intake.

THE COURT: I do not understand the assumption in this question is with the intent to commit Mr. Wentz, the witness, to the fact that he turned reservoir water to the Power Company, but I understand the substance of the question is whether he informed the Provo Reservoir Company of what he was doing.

MR. WEDGWOOD: Yes.

THE COURT: As he has heretofore explained.

MR. WEDGWOOD: Yes, the water was not going down the river to them, it was going down the flume to somebody else.

A Yes, I informed them.

Q When?

A Gave them daily sheets of the distribution showing the conditions on the river and the distribution made.

Q Did you ever have any conversation about it?

A Yes, I talked with them some about it last winter.

Q Before that time?

A Well, not along that particular line, no.

Q Not before last winter, and you don't know whether they appreciated just what the situation was until after the season of 1918, do you?

A No, I don't know that.

Q And you do know they remonstrated as emphatically as they could when they seemed to sense the situation?

A Yes.

MR. STORY: I think, your Honor, this has^{got} to be a

very leading form of examination of their own witness.

Q You made no direct statement to them, or what information they had in regard to what you were doing in that regard, if they sensed it, they had to sense it from the sheets you were sending out?

A Yes.

Q And in those sheets did you show what was flowing over the dam?

A Some of them, and some of them don't show what was flowing over the dam.

Q Mr. Wentz, can you tell us the year that you referred to when they made their next best effort to the '19 effort to tighten up the dam?

A I am not sure, but I think it was the year 1912.

Q 1912?

A Yes, same year that the concrete section was placed in at the head of the flume.

RE-CROSS EXAMINATION by Mr. MacLane.

Q Mr. Wentz, just one question. Prior to 1913 you had no particular interest in the distribution of water at the dam, or what was flowing there, did you?

A No.

Q And any testimony that you have given as to the conditions prior to that time was merely your recollection of casual observations?

A Yes, I didn't take any direct interest in it. I did some work for the irrigation companies, and so on.

Q And the same would be true, of course, as to any repairs to the dam, or tightening it, prior to that time?

A Yes.

REDIRECT EXAMINATION by Mr. Wedgwood.

Q But your business is engineer, Mr. Wentz?

A Yes.

Q And part of it was irrigation engineering?

A Yes.

Q And part of it was on this river?

A Yes, I did some work on the river, and was in Provo Canyon a great deal of the time from 1905 to 1913.

Q And your information was such as you got as an engineer?

A Yes.

Q Not as a layman?

A Yes.

MR. A. C. HATCH: There is one question I would like to ask. Were you acting as commissioner at any time before the commencement of this action?

A Yes, acting in 1913.

THE COURT: Mr. Richards indicated he wished to go home early this afternoon, and I will, at this time, announce the conclusion I have arrived at in reference to the acreage of the Provo City town lots as a result of the hearing we had at two or three different times when the matter was before the court, so that Mr. Richards may, if he cares to, go home before we finish this. I find from that evidence that there are 475 acres. I think it figures a fraction of an acre less than that, but 475 acres is the amount I find is entitled to irrigation as these town lots, instead of 300 as originally found, based upon Mr. Stuart's evidence originally. I have deducted nothing from the quantity I find on account of artesian wells or sources of supply of that kind, but I have deducted from the total survey six per cent, as testified to by-- I think it was Mr. Stuart and Mr. Murdock-- for the buildings that are located upon the ground included in the survey-- chicken houses and chicken runs is what they described.

MR. RICHARDS: Deducted six percent from the ⁵⁰⁵~~500~~ acres?

THE COURT: Yes sir, leaving 475 acres that you are entitled to for irrigation, and I have changed my copy which would give you 9.5 second feet, instead of 6 on the 50 acre duty, and 6.78 on the 70 acre duty. That change may be made

in the decree.

MR. RICHARDS: Will your Honor give me those figures again.

THE COURT: On a duty of 50 acres be $9\frac{1}{2}$, as I figure it, and 70 acres be 6.78.

MR. RICHARDS: Did your Honor take into consideration the shade trees?

THE COURT: Yes, I took into consideration everything, I think, testified to in relation to them. I think that gives the full quantity of land that they ought to be entitled to under these town lots, without making any deduction for the irrigation by artesian wells.

Now, there was another matter my notation shows that was continued to be taken up some other time. I don't remember whether anything further was presented, I don't think so-- that was an application made on behalf of the irrigators on the farm acres, I think it is, to have changed the date when a change of duty should occur. Now, my notation is that matter went over for some further consideration or presentation. That is the last note I have got on my note book. I thought I would call attention to that, see whether it was left that way.

MR. RICHARDS: My recollection is, your Honor please, you changed that date five or six days.

THE COURT: Possibly I made no notation of it. That was attended to, was it?

MR. RICHARDS: Yes, I think probably the record will show that.

MR. A. J. EVANS: Mr. Murdock says he doesn't think it was changed.

THE COURT: I know my impression at the time was it ought to be changed somewhat, but not to the extent asked for.

MR. RICHARDS: My recollection was it was over in the club that we were contending for ten days, as I remember,

and I think, if your Honor please, you split the difference, I don't remember whether five or six; that is my recollection you made that statement that time.

THE COURT: We will examine the record and see if the record does not show that. I will make an announcement later with reference to that.

MR. A. L. BOOTH: In addition to the testimony of Mr. Murdock and Mr. Wentz on this point as to the amount of water going over the dam, we call the court's attention to the testimony already in the record. We don't want to repeat it again, that is, of Frank Dusenberry, found on page 2503 of the transcript, 2508 of the transcript, 2521 and 2522 of the transcript, and also of the testimony of Mr. Ivie on page 2517 and 2518 of the transcript.

MR. WEDGWOOD: We can transcribe that and send it to the court, that will be shorter than trying to read it into the record again. I think that is all we have, your Honor please, that is, of course, with the evidence that is in.

FRANK DUSENBERRY called by the defendant Utah Power & Light Company, testifies as follows:

DIRECT EXAMINATION by Mr. Story.

Q You testified before as a witness in this case?

A Yes sir.

Q And, I believe, you also testified that you were in charge of the Provo flume, rather the flume and dam of the old Telluride Power Company now owned by the Utah Power & Light Company, since 1909, and previous years?

A Yes sir.

Q Did you not?

A Yes sir.

Q Are you familiar, Mr. Dusenberry, with what, if anything was done by the Telluride Power Company in the way of tightening this dam in the Provo River?

A Yes sir.

Q I will ask you to please tell the court what the custom of the company was in that respect during the low season of the year-- strike that question-- I will ask a preliminary question.

MR. WEDGWOOD: May I ask one question before you start?

MR. STORY: Yes.

MR. WEDGWOOD: Do you intend to bring out something new from Mr. Dusenberry in addition to his testimony already given?

MR. STORY: I may bring out a great deal that is new, I don't remember all the testimony that is in the record, but I intend to bring out the facts, whatever they may be.

MR. WEDGWOOD: That is, repeat the testimony?

MR. STORY: I don't know whether I will repeat the testimony, or give something else. If I should repeat the testimony, I will not be the first one that has offended in that manner in this case.

MR. WEDGWOOD: The witness has already testified. If you don't intend to bring out anything new, and don't know--

THE COURT: You may proceed, I assume it will be different from the evidence already given.

MR. STORY: I haven't any objection staying here like other counsel may have.

Q What effect, Mr. Dusenberry, did the high water in the spring have upon the dam?

A During high water we had to take our flash-boards out from the dam that we had in there for tightening the dam up during low water season. As a rule it tended to wash out considerable puddles, and we had some sink holes immediately above the dam, twenty or thirty feet above the fish way.

Q And what was the custom of the company, as you knew it in effect

to tighten the dam during the low water season of the year?

A During the low water season of the year for several years it has been our custom to fill those places, First shoot them, then fill them with dirt, puddle with dirt and tighten them up to get the necessary water to go through our flume, and not allow any more down the river than what was necessary.

Q Where is the point to which you refer as the one where you would shoot?

A About 20 feet above the intake of the fish way.

Q Is that what is known generally as the whirlpool up there?

A Yes sir.

Q And your custom was to put a shot in there and stir up the rocks, whatever it might be?

A Yes sir.

Q And then what did you do?

A Built a platform and hauled dirt in that place and other places.

Q Did you do anything in the way of distributing dirt over other sections of the dam or reservoir surface?

A Yes sir.

Q Just tell the court what you did?

A From the fish way up, including the whirlpool hole and one smaller sink hole above that several feet; then several years we have put dirt across the dam in front of the flash-boards of the dam, and around the fish ways to stop the leakage through the dam.

Q Did you tighten the dam in high water years when you were getting enough water to satisfy the demands of the power plant?

A No sir, there was two or three years we didn't do much work on it.

Q Then was it-- was the amount of the tightening which you did dependent more or less upon the condition of the river?

A Yes sir.

Q Was the dam ever made a thoroughly tight dam prior to 1919-- strike that out, please-- are you familiar with the condition

of the dam in 1919?

A For two or three days, yes sir.

Q Were you familiar with the condition of the dam in July of this year-- when did you see it?

A July when I was there, yes sir.

Q About what time?

A If I am not mistaken, I think along about the 18th or 19th, something like that.

Q Had any work been done in the way of tightening the dam this season, prior to your observation of it?

A Very little.

Q Had you in these previous years that you mentioned tightened the dam to such an extent as that the stream bed below the dam was dry or nearly so?

A Yes sir, not dry, but very small amount of water going through.

Q When you speak about a very small amount of water, what do you mean?

A Two or three second feet, I would say.

Q Do you remember the time when the company operated a pumping plant below the dam?

A Yes sir.

Q To catch any water that might seep through it or appear in the river bed immediately below it?

A Yes sir.

Q During what years was that?

A 1910, '11 and '12, I think a portion of 1913. It was done previous to that, previous to me arriving there, the pump was installed, I think, in 1907 and '08.

Q That was near the Bridal Veil Falls?

A Yes sir.

Q Just below the confluence of Bridal Veil Falls creek?and the Provo River, wasn't it?

A Yes sir.

Q Do you know what kind of a dam they had across the Provo River

at that point?

A At the intake of the flume?

Q Where they pumped, yes.

Q Yes sir, during low water season they put in a log dam with the face pasted with canvas.

Q Was it a tight dam?

A Tight as we could get it, yes sir. It wasn't tight.

Q How much water got by if any? Was there much water got by?

A There was some, yes sir, I wouldn't say just how much.

Q Was there any considerable amount?

A Yes sir, that is, by the pump dam?

Q Yes.

A No sir, very little water went by the dam.

Q That is what I had reference to, and the inflow into the river above that dam included Upper Falls Creek, and Bridal Veil, didn't it?

A Bridal Veil at that time ran through the pipe line.

Q Well was that emptied into the river above the dam?

A No sir, it emptied into what is known as the sump.

Q That is from what you were pumping, wasn't it?

A Yes sir,

Q And this sump included then the inflow from Bridal Veil?

A Yes sir.

Q The inflow from Upper Falls Creek?

A Yes sir.

Q And also whatever water was percolating through the dam, didn't it?

A Yes sir.

Q. Now, what was the maximum amount you know of being pumped from that point up into the Utah Power & Light Company flume?

A The highest amount that we pumped through the pump was 21 second feet.

Q That included all the water I have mentioned, did it?

A Yes sir.

Q During the course of your administration of the flume, you

remember having been called upon by the Timpanogos Canal Company to let water down or out of the flume, in order to satisfy its right of approximately 14 or 15 second feet?

A Yes sir.

Q Tell the court what your experience has been in that respect?

A In 1910 or '11 started the pump up, took practically all the water in the river, and M. C. Newall, Thomas Thompson, David Jones, and I don't know, I don't just remember, there was two or three more in the party, came up to the pumphouse, wanted to know what we were doing, and I told them getting all the water we could, all the water we could from Upper Falls and seepage water, and pumping it into the flume.

Q Then at times you were obliged to pass water down from the flume in order to satisfy that Timpanogos right, were you?

A Yes sir, we got orders a few days after that to let some go by.

Q Did you do that on more than one occasion?

A Yes sir.

Q In various years?

A Yes sir.

MR. WEDGWOOD: Mr. Story, will you mind asking him the question so I may have it, what was this lift of this pump?

Q Do you remember what the lift was from the pump, or rather the sump at Bridal Veil Falls up to the flume?

A I don't know exactly, no sir.

Q Do you approximately how many feet?

A I will say forty feet, might be less than that, might be more.

CROSS EXAMINATION by Mr. Jacob Evans.

Q Mr. Dusenberry, don't you know that the water was pumped from the Bridal Veil Falls and also run from the South Fork into the flume for the purpose of melting the mush ice in the flume in the winter time?

A No sir, not during my time there.

Q What do you say?

A Never any water run from the South Fork during my time.

Q Was water run from the Bridal Veil Falls and put in the flume for the purpose of melting the mush ice?

A No sir, because the pump house was run in July and August.

Q Didn't it run in the winter time?

A No sir, not during my time.

Q When was your time there?

A I came there in November, 1909.

Q How long did you remain there?

A Up until '17, '18-- no, '17.

Q When did they cease to use this pump?

A '13 or '14.

Q Never been used since then, has it?

A Only at short times, two or three days at a time.

Q Is the pump still there installed?

A Yes sir.

Q But it has never been used only two or three days at a time?

A No sir.

Q Now, do you remember about the time it has only been used two or three days at a time during recent years?

A Yes.

Q All told it has only been used a few days then during any of the years since 1913?

A No, 1914.

Q '14?

A Yes sir.

Q Just a few days?

A Yes sir.

Q How many days would you say all told that pump had been used since '14 for pumping water?

A Now, I wouldn't be able to state that, might be six or seven days, or only two or three.

Q Do you remember about the time that Myron Newall and those people came up there to turn more water down when you were pumping, did they have a brush dam in at the intake of the Timpanogos Canal?

A No, I don't.

Q Don't you recollect they had thrown in there cottonwoods, rocks, and what would be known as a loose brush dam?

A I don't know, I am sure.

Q Do you know whether or not the Telluride Company or the Utah Power & Light Company actually did construct a cement dam in there for the use and benefit of the Timpanogos Canal?

A I don't know who constructed it, no.

Q You know it is there now?

A I know one has been put in there.

Q You know the bottom of the canal of the Timpanogos Canal Company is a considerable distance above the bottom of the river at the point of their intake?

A I don't know that, no opportunity to know it.

Q No opportunity?

A No sir.

Q You don't know whether or not there was a controversy at that time between the Utah Power & Light Company, or the Telluride Company, its predecessor in interest, that so long as there was sufficient water in the river, that it was up to the Timpanogos Canal Company to get it out?

A I don't know that, no sir.

Q And that they finally agreed between the Timpanogos Canal Company and the Power Company that the Power Company would furnish the cement and material and that the Irrigating Company would furnish the labor, and they did actually put in that dam so as to raise the water up so those people could get it out?

A No sir, I don't know what was entered into by either company.

Q Do you know whether or not at the time Mr. Newall, Thompson, Jones and others came up there and made a protest, whether it was before or after this cement dam was put in?

A Long before.

Q Long before the cement dam was put in?

A Yes sir.

Q Been no complaint or protest on their part since the cement dam was put in?

A Not to me, there was before that.

Q Do you know whether or not the Power Company furnished the pipe to put in the river to carry the water to the Timpanogos Canal?

A No sir, I don't.

Q Do you know whether they do carry their water through a pipeline into their canal from the river?

A No sir, I don't know that.

Q You don't know that?

A No sir.

Q Now, as I remember your statement, you said that there were certain holes in the river above, short distance above the Power Company's dam, that were shot, sink holes you called them.

A Yes sir.

Q And you would put shots in those sink holes?

A Yes sir.

Q What was the purpose of that?

A Large rock, cracking those rocks, shooting down in the rock, disarrange those rocks, or break them up so that the dirt would tend to hang to the small particles of rock and not allow that much opening.

Q And you say it was the early or flood waters, I understand, which would wash out the sediment around those rocks?

A Yes sir.

Q Now, isn't it a fact above that dam the water was pretty reasonably dead and still and held there in a reservoir or pond?

A Certain times of the year, yes sir.

Q Wasn't it at all times of the year?

A Indeed not, not during high water.

Q Didn't that dam itself cause a tendency for that water to stand still?

A No sir.

Q It didn't?

A The bottom of the river above the dam is practically on the same elevation as the crest of the dam.

Q And isn't it a fact that during the earlier or high water period that the water in the river is very, very muddy and full of sediment?

A During high water?

Q Yes.

A Yes sir.

Q Wouldn't that sediment stay above that dam?

A That is what filled it up to the crest of the dam. It would not in high water. The force of the water, flow of the water, was so great be pressure through the top there.

Q There was practically no flow, was there, above the dam, that is, no current of flow?

A Above the dam?

Q It was stopped by the dam itself?

A No sir, the crest of the dam is practically the same elevation as the bottom of the river, very little difference in it. Take immediately in front of the dam I would say there wasn't over ten inches to a foot or foot and a half.

Q What was it, say back fifty feet, or a hundred feet?

A Well, in a place or two above the dam-- immediately above the dam it is practically the same as the crest of the dam.

Q Isn't there some places there where the bottom of the river is deeper than the crest of the dam?

A Yes sir, two or three hundred feet above the river.

Q Where is your intake?

A About 160 feet above the crest of the dam. That is up stream?

Q Yes sir.

A 110 feet.

Q Bottom of the intake I take it then must be lower than the crest of the dam, is it not?

A Yes sir.

Q How much lower?

A I think it is twelve feet, ten feet.

Q Twelve feet lower?

A Yes sir, ten feet lower.

Q And the bottom of the river, you say, for about 110 feet up is about even with the crest of the dam?

A Yes sir, within a foot.

Q And the intake of the flume is about a hundred feet, did you say, above the --

A Something like that.

Q -- crest of the dam?

A Yes sir.

Q And it is twelve feet below the crest of the dam?

A The intake probably, I think, is twelve feet. Now, the height of the water is not that deep. The intake was made twelve feet in depth.

Q If the bottom of the river is not more than two feet below the crest of the dam, and the intake is twelve feet below the crest of the dam--

A Yes sir.

Q The intake of your canal must be about ten feet below the bottom of the river, isn't it?

A Something like that, yes sir.

Q Do you mean to say then that there is no opening from the river down to the bottom of your intake of your flume?

A Opening, yes sir.

Q To the bottom of the river?

A Channel, yes sir.

Q There is a channel through which it runs?

A Yes sir.

Q Then there is some place in the river -- this channel is in the river, isn't it?

A Yes sir, running from the river into the intake.

Q And it is as deep, is it not, as the intake of your flume?

A Not from the dam up to this intake.

Q I mean through this channel it runs in the river, isn't the

bottom of the channel as deep as the bottom of your flume?

A No sir.

Q What is the difference in elevation?

A I will say there is five feet, better, six feet.

Q You say you put in these shots to stir up the rocks?

A Yes sir.

Q Where would you do that?

A In this one whirl hole particularly, immediately above the fish way.

Q How far above the crest of the dam up channel, or up stream?

A Forty-five feet.

Q Where was the other one?

A There was one just immediately above that that was not exactly a whirl hole, that is, it went more into the bank.

Q How far above the one that was forty-five foot above the fish way?

A Ten feet.

Q Were there any other holes there you put shots in?

A No sir, I only put shots in the one hole.

Q Did you put those shots in more than once?

A Yes sir.

Q What years did you put them in?

A If I remember rightly, I shot one, put one shot in 1911 and '13 or '14.

Q How did you put them in?

A Put two or three sticks of powder on a stick, cleaned the hole out and put them down between these two rocks at the crack,

Q Did you get down into the water/

A Yes sir.

Q To make any hole into the earth down there, would ~~you~~ you merely put them down on a stick?

A Put it down on a stick and in a crevice between the two rocks.

Q Did you or not actually do any digging for the purpose of getting down in there?

A It wasn't necessary.

Q That is what I am saying, and these were the only two places that you did any shooting, or that you put any dirt in to stop the water from flowing around or under or through the dam, is it?

A No sir, we put it across the flash-board.

Q Across the flash-board?

A Yes sir.

Q The flash-boards are boards that extend across the top of the crest of the dam, are they not?

A Yes sir.

Q And rest on the crest of the dam?

A On the crest of the dam, yes sir.

Q And whatever material you put in there was merely enough to stop the cracks between the bottom of the crest of the dam and the flash-board, and the cracks between the different flash-boards that you might put on there?

A Yes sir.

Q And the stopping of these two holes, one 45 feet above the dam and the other one about ten feet above that, which would be fifty-five feet above, you wheeled some dirt and put in there?

A Yes sir.

Q And that was all that was done by way of making the dam tight?

A We put dirt in the fishery and intake of the up end of the fish way, and around the side of the fish way.

Q That would be the fish way was on the right hand side?

A On the north side of the railroad track and the river.

Q And the fish way was a little lower than the crest of the dam, wasn't it?

A Yes sir.

Q It was made lower so that the water could run through the fish way so that fish could get over the dam when the flash-boards were in, and no water was running over the dam?

A As a rule when the flash-boards were in it was not necessary to have any water go through the fish way, because no fish were running.

Q It was lower than the crest of the dam, wasn't it?

A Yes sir.

Q When the fish was running you could put your flash-boards on and that would stop all water from running over the dam except such portion of the water as would find its way through the fish way and through the cracks in the flash-boards?

A Yes sir.

Q Now then, what you did then was when the water was running around the fish way you would put in loose dirt, merely to prevent it from running around the fish way to force the water through the fish way?

A No, we stopped the fish way off absolutely dry.

Q All right, the fishway, the bottom of the fishway being lower than the dam--

A Yes sir.

Q You then put flash-boards in the fish way, didn't you?

A We had a gate to the fish way.

Q All right, you had a gate, and that gate was not perfectly tight?

A Yes sir.

Q And you put dirt or earth in there to prevent the water from running through the leaky gate you had in the fish way?

A Yes sir.

Q That was all you did then by way of making the dam tight, was it not?

A Yes sir.

Q These shots you put in, or dirt you put in the two holes above, and the little earth you put around the flash-boards on top of the crest of the dam, and the same amount of dirt, or the dirt that you would put on the flash-boards that are on the gate, in the headgate--

A Yes sir.

Q In the fish way?

A Yes sir.

Q That is all that was done?

A Yes sir.

Q During any of the years you were there?

A Yes sir.

Q That was always done, I take it, during every year, except one or two high water years when there was plenty of water and water running over the crest of the dam, wasn't there?

A Done every year that the water was low, yes sir.

Q Whenever the water was low you would put in these flash-boards, and you would put in a little earth around the flash-boards to prevent the water from leaking under or between the flash-boards?

A And through the dam, yes sir.

Q And through the dam?

A Yes sir.

Q And these shots you say you would put in, did you put them in every year?

A No sir.

Q How many years did you put those in?

A Two or three years, until we got it down so that it would take a puddle of dirt.

Q Do you remember what years they were?

MR. STORY: I call the court's attention to the fact he has testified to that.

Q Now, during the year 1919, last year, were you up at the dam last year?

A Yes sir.

Q Was it your duty to look after the dam during the entire year of 1919?

A Not any more than it is the rest of the dams and waterways.

Q I mean your duty was here in the canyon, and not elsewhere?

A My duty was here in the canyon at the time I was here.

Q Now, you say along about 18th or 19th, I think, that some work was done up there on the dam?

A I am not certain as to dates, about that time.

Q What was done by the company at that time?

A How was that?

Q What was done by the company to tighten the dam at that time?

A We put in dirt, same as other years, in front of the fish way and across the crest of the flash-board of the dam, around the fishway.

Q What else did you do?

A That is all I done.

Q How much dirt did you put in there?

A Well, we filled the large sink hole above the fishway.

Q Is that one of the fish holes you speak of you shot?

A Sink holes, yes sir.

Q How much dirt did you put in that hole?

A Well now, I don't know as to the amount.

Q How many men did you have there working?

A Had three or four men.

Q Were you in charge of them?

A Yes sir, for the few days I was there.

Q How many days did they stay there?

A They were there three days when I was there.

Q Did they put in any dirt immediately above the dam and below the flash-boards?

A Yes sir.

Q All along and clear across there, didn't they, they wheeled dirt across the crest of the dam and dumped it in immediately above the dam, didn't they?

A Above the flash-boards, yes sir.

Q And below the flash-boards and on the upper face of the dam all the way down?

A That is, on the bottom of the flash-boards on the upper face.

Q Below the bottom of the flash-board, and on the upper face of the dam dirt was put in there to the extent of a foot or two thick, wasn't it, this year?

A I think so-- not during my time.

Q This was the first year they had ever done that to your knowledge, wasn't it?

A No sir, indeed not.

Q That they had wheeled dirt and filled it in to the extent of foot or foot and a half thick?

A I don't know if it was a foot or foot and a half. It has been done several years.

Q You testified a few moments ago all that you ever knew that you had ever done prior to '19, was a little dirt they had put in above and around the flash-boards and headgate at the fishway to stop the leakage at that point?

A And the sink holes.

Q Yes, and the sink holes, and that is all that was done, wasn't it?

A In other years, yes sir.

Q In other years?

A And that is all we did this year.

Q You did more than that this year?

A Not me.

Q Other people did?

A I don't know what other people did.

Q Do you know other people have done something?

A I don't know.

Q Was anybody else in charge besides you?

A Not when I was there, no sir.

Q When you were not there?

A Johnny Carter, my foreman, was in charge.

Q What?

A Have a foreman in charge of that crew there.

Q You don't mean to say then you know there was no work done there this year except what you saw done?

A I don't know, no sir.

Q There may have been a great deal of work done you didn't see?

A There may have been, yes sir, because I have not been there.

Q You were there then this year only three days, I understand it?

A At the dam, I was there three days.

Q And men were at work at that time?

A Yes sir.

Q With wheelbarrows?

A Yes sir.

Q And hauling dirt in, dumping it off above the dam?

A Yes sir.

Q And on the upper part of the dam?

A Yes sir.

Q And that dirt would go down to the bottom of the river, would it not?

A Yes sir.

Q Now, in regard to this pumping plant, where do you say that was located?

A Located at immediately above the wagon bridge, or the old Thayer house, or, three hundred feet I would say-- now, it is only a guess--below where the old Bridal Veils ran into the river down the canyon.

Q Now, was the Bridal Veil Falls at that time piped across the river, entered the flume without entering the river?

A No sir.-- previous to that time, you say, or that time?

Q At that time?

A No sir.

Q Had been prior to that time?

A Yes sir.

Q They did lay a pipeline clear up to nearly the crest of that fall, didn't they, and take that water into the pipeline, carry it clear across the river and empty it into your flume?

A Yes sir, in early days.

Q You say you made a dam at one time in the river out of logs and brush and canvas, and pumped water from that dam?

A Yes sir.

Q Where was that dam placed in the river?

A They had a flume put in from the pump house up to about 325 or 30 feet. The dam was put in at the intake of the flume, pump house flume.

Q Where was that with respect to the dam of the Power Company,

crossed the river how far below?

A A mile I should say.

Q About a mile below?

A Yes sir.

Q And it was merely a log dam, you say?

A Well, we put in two logs, put sticks down this way, and put a canvas along there to make it tight.

Q And there was a good deal of leakage through that, I take it, was there not?

A There was some, yes sir.

Q How much leakage would you say?

A Well, I wouldn't say as to that. We got all the water we wanted for the pump.

Q What season of the year was it that that was put in there?

A We put the pump in for four years in 1909, put in along in August.

Q Along in August, what years?

A Say '10, '11 and '12.

Q Are you testifying concerning this from your recollection as to years, or from any data that you have which you have refreshed your recollection from?

A Well, I think that I have in some of my books the data.

Q Have you looked it up recently to determine?

A No sir.

Q You are testifying then from your recollection as to the years?

A Yes sir.

Q And you don't know how much water was going below this log dam you have spoken of?

A No sir, I wouldn't know exactly.

Q There was considerable water going below?

A There was some water, yes.

Q What was the pump run by, water power or electric power?

A Water power.

Q How much water would it take, if you know, over the wheel to

pump 21 second feet of water 40 feet high?

MR. STORY: Object, your Honor, as improper cross examination, this witness has not pretended to qualify as a hydraulic engineer.

THE COURT: I think that is true, I don't think he has given any expert testimony to the capacity of wheels.

Q What become of this water that ran through the wheels to run the pump?

A Pumped up with the rest of the water.

Q Pumped up with the other water?

A Yes sir.

Q In other words, the water run the pump and the water was turned in above the pump, and that constituted a part of the 21 second feet of water which you claim was pumped up?

A Yes.

Q 40 feet?

A I said 40 feet-- what do you mean, 40 feet high?

Q Yes.

A I said I thought it was close to that, might have been more or less, I never made a survey.

Q Do you know what proportion of the water was used to create the power for pumping this water, and what proportion of the water was in the river?

A At the time we pumped the 21 second feet, according to our engineers, who measured the water down Bridal Veil Falls, it was a little better than five second feet running down the pipeline into the needle nozzle, or the nozzle hitting the Pelton wheel.

Q That would make about 16 second feet of water you were pumping out of the river, and you were pumping the other five second feet of water which had already been used to create the power to pump the 21 second feet?

A Yes sir.

Q Where did that water come from?

A From Bridal Veil Falls, the head of ~~ix~~ eight hundred feet.

Q Wasn't that long before 1913?

A Wasn't what?

Q When was that?

A The pipeline was put in in 1908.

Q When was it it was used, when did you pump this 21 second feet?

A It was in 1911.

Q What month, what day of the month?

A I don't know what day.

Q Was it pumped more than on one occasion?

A Yes sir.

Q How many occasions?

A Pumped two years.

Q All the time, winter and summer?

A No sir, in July and August.

Q How do you know that 21 second feet was pumped during July and August?

A It was measured by the engineers, our engineers.

Q Did you see their figures?

A Yes sir.

Q Can you produce them?

A No sir.

Q Where are they?

A I don't know, I think that one or two of the engineers have them now, I think Mr. Brundige has them.

Q Is he here?

A I haven't seen him, no sir.

Q Then, what you are testifying to regarding the quantity of water you are testifying from the figures made by the engineers at that time?

A Yes sir.

Q And figures which you say you saw?

A Yes sir.

Q Where did the 16 second feet come from that was pumped up in addition to the five second feet used for power purposes?

A From Provo River.

Q From below the dam?

A Seepage water that came down--

Q Came through the dam?

A No sir.

MR. STORY: Let him answer.

MR. JACOB EVANS: All right.

A Came from Upper Falls water and seepage water from the dam, Telluride dam down to the pump dam.

Q Do you know how much came from seepage?

A Very little.

Q I asked you if you knew how much?

A No sir.

Q Didn't make any measurements?

A No sir, I did not.

Q How much come from Bridal Veil?

A I don't know that.

Q That was all confined in a pipe, was it not?

A There was no pipe there-- oh, Bridal Veil, yes sir.

Q That was the water you were using to pump?

A Yes sir, Upper Falls water, I say.

Q How much was from Upper Falls?

A I don't know that, five or six second feet, or better.

Q Five or six from Upper Falls, and five or six from Bridal Veil?

A Yes sir.

Q Then the remainder must have come from seepage water through the dam, must it not?

A And seepage water down the river, which was considerable.

Q It came through the dam, at least, your dam was reasonably tight?

A Yes sir.

Q There would be then about ten second feet of water coming either through the dam, or arising in the bed of the creek?

A Between the dam?

Q Below the dam--

A Pumphouse dam.

Q And your log dam?

A Yes sir.

Q That was just for two years, you remember?

A We pumped for four years.

Q You say this log dam wawn't tight?

A No sir, not absolutely tight.

Q Now, do you know whether or not at the time you were pumping water there that it was before or after the time that the cement dam was put in at the intake of the Timpanogos Canal?

A When we were pumping water, I think it was before.

Q You are not certain, however, as to that, are you?

A No sir, but my belief is before that time.

Q Was it at the time that you were pumping that water there if you recollect, when Mr. Newall and these parties came up to complain about it?

A Was the cement dam in, you mean?

Q Yes.

A I don't think it was, no sir.

Q I say, was it at the time you were pumping water, Mr. Newall, Mr. Thompson and Mr. Jones came up to complain about your pumping the water out of the river?

A Yes sir.

Q And you think that was before the cement dam was put in?

A Yes sir.

REDIRECT EXAMINATION by Mr. Story.

Q Mr. Dusenberry, I have drawn on the board a diagram showing in general line the cross section, a cross section through the dam, as I understand you testified it was, this line A to B representing the bed of the -- surface of the bed of the stream above the dam?

A Yes sir.

Q And the two little rectangles parallelograms designated X and Y are the flash-boards on top of the dam?

A Yes sir.

Q And the point from C to D being the crest of the dam?

A Yes sir.

Q And line from D to E being the down stream side of the dam?

A Yes sir.

Q Goes off like this?

A Goes off like that.

Q So that it would be as the diagram now shows it D to E, would it? A. Yes sir.

Q As I understood you to testify in your direct examination, the distance from A to C, that is, from the surface of the river to immediately above the dam up to the crest of the dam, was a foot to foot and a half or two feet, approximately, how much was it?

A This particular point I would say ten or twelve inches from the crest of the dam down.

Q And what was the length of the flash-board, or width, rather?

A Two by twelve.

Q And they were situated or placed right near the upper side of the crest, were they?

A Right on top of the crest of the dam.

Q Now, in spreading the dirt that you mentioned in order to tighten the flash-boards, did it extend along the up-- along the surface of the stream bed?

A Yes sir.

Q Above the dam?

A Yes sir.

Q Just designate in a general way?

A Dirt would spill in here, runway across here, wheel dirt across here and tip it in here, and look something like that, spread out from the bottom of the flash-board down in here.

Q And how high up on the flash-board did it extend?

A Three or four inches, four or five.

Q Was that the condition of affairs this year?

A Yes sir, as I seen it.

Q In other words, when you would dump the earth over above the flash-boards, it would extend up the--

A Spread out, yes sir.

Q And thus tighten the exposed face of the dam?

A Yes sir.

Q Now, if I understood you, at times, did you get as high as the first crack between the flash-boards?

A You mean this crack here?

Q No, the one above that?

A Yes sir, at times we have had it up to that second crack.

Q So ~~that~~ as to make that tight too?

A Yes sir, as a rule we put canvas along there to get that though.

Q I am not sure I remember your testimony correctly, but did you testify that you had tightened the dam to such an extent in previous years as that therewas, but approximately two second feet flowing in the river below the dam?

A Well, I don't know as to the amount of it, it was very small.

Q Do you remember any particular circumstance in relation to the fishway or anything of that kind, that would refresh your recollection?

A Stream was so small a small trout could not get up the river.

Q You remember that condition to prevail, do you?

A Yes sir.

CROSS EXAMINATION by Mr. Wedgwood.

Q. Not quite so much as a heavy dew?

A What?

Q Not quite so much as a heavy dew?

A Oh yes, little bit more than that. I never seen a fish swin in a dew.

RECROSS EXAMINATION by Mr. Jacob Evans.

Q How wide is that dam on top?

A 84 feet.

Q How far back from the upper side of the dam do you put your

flash-boards?

A Upper side of the dam?

Q Yes.

A The flash-boards are about eight or ten inches back on the crest of the dam, or the running board on the crest of the dam.

Q Eight or ten inches back?

A Yes sir.

Q So that you would have eight or ten inches on top of the dam, your flash-boards would be back that distance, and there would then be your eight or ten inches on top of the dam where dirt could be piled in front of the flash-boards to prevent water from running under it, wouldn't there?

A Yes sir.

Q That is where you put your dirt?

A In front of the flash-board?

Q In front of the flash-boards and on top of the dam?

A In the river bed.

Q And some in the river bed?

A Yes sir.

Q It would run clear over and clear down in the river bed?

A Yes sir.

Q That is the length of the dam, is it not, 84 feet-- I mean the width of the dam?

A That is what I said, from one side of the dam to the other is 84 feet.

Q That is across the river?

A Yes sir.

Q What is its depth through, how thick is it up and down the river, how thick is the dam?

MR. A. C. HATCH: At the crest.

A You mean how wide is the dam, or how deep in the ground?

Q How thick is it at the crest, at the top of the dam how wide is it?

A There are two places here I would say sixteen or eighteen feet.

Q I mean on top, we will say at your first point from D to C, what

is the width there?

A Sixteen to eighteen feet, sixteen feet.

Q How far is your flash-boards put back from C, as shown on the diagram?

A Eight or ten inches.

J. C. IVEY, recalled by the defendant, Utah Power & Light Company, testifies as follows:

DIRECT EXAMINATION by Mr. Story.

Q I believe you have testified, Mr. Ivey, that you have been employed by the Utah Power & Light Company and its predecessors in interest, for many years at the upper end of the flume?

A Yes sir.

Q Had charge of the upper headworks, have you not?

A Yes sir.

Q And have you, during the period of your employment, been familiar with the work that has been done at various times by the Utah Power & Light Company or its predecessors in interest in regard to tightening the dam in low water years?

A Yes sir.

Q I wish you would tell the court what has been the custom of the company in that respect during the years that you have been employed up there?

A Well, years I have been there all the time, we have always in low water time tightened the dam up when we didn't have the water to go through our flume, and was entitled to tighten the dam up.

Q When you could not get sufficient water through your flume to satisfy your demand during the low water season, did you tighten the dams, or was it the custom of the company to tighten this dam?

A Yes sir, tighten the dam.

- Q Please tell the court what was done in the way of tightening the dam, how did you do it?
- A Well, we put on flash-boards, also we go to work sometimes with canvas, put along the flash-boards, then haul dirt and put in front of the flash-boards.
- Q How many years did you do that?
- A We have done it practically ever since 1902.
- Q Did you do it as much in high water years as you did in low water years?
- A No sir.
- Q It was low water years you did it principally, was it?
- A Yes sir.
- Q Now, in hauling this dirt to throw in front of the flash-boards, on the up stream side of the flash-boards, I understand it, did you use wheelbarrows and run them along a runway above the flash-boards?
- A Yes sir.
- Q About how much higher than the flash-boards was that runway?
- A Well, I judge about four feet.
- Q And tell me how you dumped the dirt off from that runway in front of the flash-boards?
- A We would run along there with a wheelbarrow and dump a wheelbarrow load of dirt over in front of the flash-boards from the runway.
- Q Did the dirt that you dumped over from this runway in that manner cover up the upper part of the dam proper too?
- A Yes sir.
- Q And extends on the surface of the stream bed up the river?
- A Yes sir.
- Q Well, now, are you familiar with what was done up there this year in the way of tightening the dam?
- A About the same as we always have tightened it.
- Q You are personally familiar with what was done up there this year, are you?
- A Yes sir.

Q Now then, just please tell the court in what respect, if any, that differs from what you ordinarily did in similar low water years in times past?

A Just the same proposition this year as we done in low water time years ago since I have been there.

Q Now, did you do any work in regard to filling holes of any kind in the stream bed above the dam this year?

A I did not myself.

Q Did you see it done?

A I have done it, yes sir.

Q What?

A I have done it, yes sir.

Q I say, did you see it done this year?

A Yes sir.

Q You say you have done it in times gone by?

A Yes sir.

Q What was different in respect to that, what was done this year and in previous years, low water years?

A Just the same.

Q Did you have occasion to observe the amount of water flowing in the bed of the stream below the dam in previous low water years, as you term it?

A Always pretty low, dammed it off just as low as we could possibly get it.

Q What I am getting at is, Mr. Ivey, you did observe those conditions in previous low water years, did you?

A No sir.

Q I say you did observe what water was flowing in the stream below the dam previous years when you tightened the dam?

A Yes sir.

Q That is what I had reference to?

A Yes sir.

Q How does that compare with the condition as it existed after you tightened the dam this year?

A Well, it is on the same principle, turn it off when it is low,

and it is about the same way as done years before.

Q Now, in 1917, the power plant was not operating, was it?

A No sir.

Q You didn't do anything in the way of tightening the dam that year, did you?

A No sir.

Q 1916 was a rather high water year, was it not?

A Yes sir.

Q You remember what the conditions were in 1915?

A Well, it wasn't really bad that year, we didn't have to tighten up very much.

HYRUM F. THOMAS, called by the defendant, Utah Light & Power Company, being first duly sworn, testifies as follows:

DIRECT EXAMINATION by Mr. Story.

Q What is your first name?

A Hyrum F. Thomas.

Q Where do you reside, Mr. Thomas?

A Provo.

Q How long have you resided here?

A Twenty-four years.

Q Were you ever employed as water commissioner on the Provo river?

A Yes sir.

Q During what years?

A 1902 to 1911.

Q Do you remember what year the Provo Reservoir Company commenced to divert water from the river, through and at the Heislet dam?

A No, I don't know I could name the year, somewhere about 1909, I think.

Q Assuming that they diverted the water in the year 1909, commenced the diversion of the water in 1909, you distributed the waters to them, to which they were entitled for three years, did you not?

A Yes sir.

Q Now, I wish you would please explain to the court your method of distributing the water to which they were entitled with particular reference to the use you made of the water which might be flowing in the stream below the power company's dam and above the Heislet dam?

A You mean as far as measurement is concerned?

Q No, as I understand the situation, there was some increment in the river between the Power Company dam and Heislet dam?

A Yes sir, always some water there.

Q Now, in satisfying the Provo Reservoir Company rights during the low water season, when you were distributing the water, did you use the water that was flowing in the stream in that manner so far as it would go, and supplement it by such an amount as might be necessary to fill their rights from water which you took from the Power Company's flume, or from the dam?

A Yes sir.

MR. A. C. HATCH: Just a moment, I don't understand that they had any right except their appropriated rights during that period, I may be wrong, that particular period, I may be in error.

THE COURT: Plaintiff, you mean?

MR. A. C. HATCH: Then claimed an appropriation from the Provo River, and, I may be in error, but I don't recollect they had any inflow from other sources at that time.

MR. STORY: If I understand their claim at the present time, your Honor, it is that they, clear back at the time they constructed their flume or their canal, that they had a primary right to the use of the waters that had-- increment of the river below the Power Company's dam.

MR. WEDGWOOD: That is what we built it for.

MR. STORY: What I am trying to get from this witness is whether or not he distributed to them any primary water because of the appropriation of water below the Power Company's dam, or whether he used the water that was flowing there to satisfy these rights they had, such as the Wright water or the storage water, or whatever rights they did have under the decree of the court, use it as far as it would go, and simply took from the Power Company's flume, or from its dam, such an additional amount as might be necessary to satisfy these rights. That is what I am trying to bring out by this witness. Mr. Murdock testified, you will remember, this morning there was always something coming to them in addition to the amount of their decreed rights from this source. I want to show by this witness nothing of that kind occurred.

MR. A. C. HATCH: I may be in error, but our appropriation was made of the natural flow of the river of unappropriated waters. That was the only right we had. Afterwards, and after diverting water from the Provo River, we acquired other rights, built reservoirs, purchased or leased the Ontario water, and later purchased the Blue Cliff right. It is not shown by this witness, at least, that there were any other rights in any way except just the rights that were acquired to the natural flow of the Provo River by our appropriation, but the question asked the witness is, did you supplement it by turning water from our dam, from the Utah Power & Light dam, or Telluride dam. All we claim^{ed}/then from the Provo River was the water that came into the river below their dam. There was nothing to supplement except it was our reservoir, or at least Ontario water or the Blue Cliff right, which we afterwards purchased. Now, in 1909 was our first diversion. We didn't have any other rights at that time, other than such water as came below your dam in the Provo River, as I now have it in mind, and I do not think I am in error.

MR. STORY: You had your Blue Cliff right that time, didn't you?

MR. A. C. HATCH: No, I think not.

MR. STORY: You had your storage rights, didn't you?

MR. A. C. HATCH: It was after we had filed our application, some considerable time thereafter, we purchased the Blue Cliff right and acquired it. We acquired it before the commencement of this suit, however, but it is not shown, and it is not clear to me that we had any right except this water that flowed through this dam at the time Mr. Thomas was commissioner.

Q During the period of your administration of the waters of the river, did the Provo Reservoir ever claim any storage rights or primary decreed rights?

A Yes sir.

MR. A. C. HATCH: Now, if the court please, there are two questions in one, the answer applies yes did they or didn't they.

Q Did they have some primary decreed rights?

MR. WEDGWOOD: I object to it as calling for the conclusion of the witness.

THE COURT: Yes, I don't think he is competent.

MR. STORY: What I am getting at, rights they claimed under prior decree as Class A water, which this commissioner was called upon to satisfy in his distribution of the waters of the river, and did they have some storage water which they were taking down and he was distributing to them.

MR. WEDGWOOD: Ask what the gentleman did and not what rights they claim.

MR. STORY: Of course that is all beside the question.

MR. WEDGWOOD: No, it is not.

MR. STORY: We are trying to get at what this witness did.

THE COURT: I think this witness can testify what he did, and why he did, it, but, when you ask him whether he had

certain decreed rights, that he is not competent to say so.

MR. STORY: He can testify whether he distributed water in their canal for the purpose of satisfying some particular right.

THE COURT: Certainly, but you have not asked him that. I just suggested you might ask him that.

MR. A. C. HATCH: We do not object to that.

THE COURT: If it is not too much trouble, I would like to have Exhibit 2 brought into court. Exhibit 2 is application 1828.

MR. WENTZ: I will get it.

Q Did you, in the course of your administration of the waters of the river, distribute into the Provo Reservoir Company's canal waters for the purpose of satisfying any primary decreed rights?

A I did--

MR. JACOB EVANS: He can answer that yes or no, did you do it?

A Yes.

Q Just tell us what you did in that respect?

A I can answer you what water I give them.

Q That is what I want you to do.

A I gave them water that was then at that time adjudged to be the Blue Cliff water, waters that came to them from the Ontario water, and, for certain period I gave them waters that came from their reservoir.

Q Now, in satisfying these rights, did you use the waters which were flowing in the stream, naturally flowing in the stream below the Power Company's dam and above the Heislet dam, as far as they would go?

A Yes sir.

Q Did you distribute to the Provo Reservoir Company through its canal at the Heislet dam, or any other place, water to satisfy any right claimed by them in addition to those three?

MR. JACOB EVANS: Wait a moment, we object to this as incompetent, irrelevant and immaterial. I just want to make

this observation, I would like to know what difference it would make just what water was distributed by this watermaster to these people in this lawsuit.

THE COURT: I am unable to see any effect it can possibly have, but the counsel may, and I am inclined to think they are justified in assuming that it has some importance by the apparent importance that has been attached to it by the other side, but the court can see no importance to the views these various commissioners may have had relative to the rights of the parties, growing out of the maintenance of either a tight or leaky dam.

MR. JACOB EVANS: That is just exactly what this lawsuit is for, to determine what rights the parties have.

THE COURT: I do not think the views of the various commissioners on that subject are entitled to very much weight with the court. I think the court must take the responsibility of determining that himself.

MR. STORY: I expect to follow this up with ^{the} question propounded before, did they make any claim upon you for additional rights?

THE COURT: I think you may cut across lots and ask if they made any additional claim, without taking so much time. A great deal of time is taken. I think you are justified in taking the position you do, because there seems to be a good deal of importance attached to it on the other side, cross examination that has been had of your witnesses, and examination of the other witnesses, but, I do not see any importance to it myself, I don't see much importance to the ultimate question you are seeking to ask whether they made any claim. I don't think they waive very much by not making a claim, and I don't think much would be shown by their making a claim. It is a question for the determination of the court entirely as to what the situation growing out of the conditions there may be.

MR. JACOB EVANS: May I just suggest this, if the

court please, in answer to his question he says he is now about to ask the witness, whether or not they made any other claim. This lawsuit is a complete and perfect answer to that question. We set up what our claims are, that they have been depriving us of our claims, they have been wasting the water. That is what this lawsuit is about, because they would not give us what we claimed we were entitled to. Now, to ask this witness whether we claimed anything else doesn't add anything to this lawsuit. It is incompetent, irrelevant and immaterial, it can have no place here, and can serve no purpose, and throw no light on this question.

THE COURT: You may proceed.

Q Did the Provo Reservoir ever during the years you were administering the waters of the stream make a demand on you to distribute to them any additional amount of water to that which you did, and any rights they claimed?

A Do you mean in addition to what I testified to?

Q Yes.

A There was a little other primary right I gave to them and they claimed, and that was the Wright water, and, I think the Dixon water.

Q Anything outside of those did they make any claim?

A No sir.

Q Now, Mr. Thomas, I want to ask you a question in regard to the Timpanogos Company. Were you called upon during the course of your administration of the waters of the river to compel the Power Company to let any water down over its dam or spill it from its flume to satisfy the old Timpanogos right?

A Yes sir.

Q Tell the court in a general way what your experience was in that respect?

A Of course, they being the upper canal for distribution, and your diverting point being below their's, they are naturally the ones that would suffer for the want of water, and invariably, almost invariably they were low.

MR. A. C. HATCH: You made a mistake, Mr. Thomas, you said the Power Company's diverting point was below the Timpanogos.

A I don't mean that, I meant all other people below the mouth of the canyon. That was where the distribution was generally made.

Q The Power Company's flume carried the water around the head-gate of the Timpanogos Company, didn't it?

A Yes sir.

Q And were you called upon at times to compel the Power Company to spill water from its flume, so as to satisfy the Timpanogos Company's canal?

A Yes sir.

Q Was that because there was not sufficient water flowing in the stream above their headgate to satisfy their right?

A Yes sir.

Q You remember approximately what the amount of their right was that time?

A No sir-- you mean in quantity, I guess.

Q I mean in quantity, the Timpanogos right?

A No.

Q Were similar demands such as you have mentioned made upon you by the Timpanogos Company frequently during those years?

A Yes sir.

CROSS EXAMINATION by Mr. A. C. Hatch.

Q What years were they?

A When--

Q First demand made on you, Timpanogos?

A I think all the time after the power plant, Power Company had their dam in the river.

Q There was no tight dam at any of these times when demand was made, no tight dam at the intake of the Timpanogos Canal, was there?

A Some of the time there was not, some of the time there was.

Q Do you know when the tight dam was first put in there?

A I don't know the year, I know that there was one put in before--

Q Concrete dam?

A Yes sir.

Q After that no demand was ever made on you, was there?

A Yes, there was demand made after that for more water.

Q From the Timpanogos?

A Yes sir.

Q What year?

A Why, I think every year.

Q Did you turn water over the dam of the Telluride people to supply them?

A No sir.

Q How were they supplied?

A Well, I don't know the method they used to get more water in, sometimes over their spillway, and --

Q It came over the dam, it came from the Telluride waters?

A Yes sir.

Q To supply them?

A Yes sir.

Q And that was after the Provo Reservoir Company had its canal built?

A Yes sir, part of the time.

Q Now, do you know the capacity of the plaintiff's canal in 1909?

A I measured it once-- you mean the Utah Power Company?

Q No, the plaintiff, the Provo Reservoir Company?

A No, I don't know its full capacity.

Q You know that it was full of water, don't you, the first year?

A It was in high water.

Q Sometime during the year?

A Yes sir.

Q And it continued until the water became very low, didn't it?

A Yes, I think that is true.

Q And they claimed a right to that water?

A Yes.

Q You recognized it?

A Did I recognize their right?

Q You did recognize their right?

A Yes sir.

Q Until it got down to the decreed rights of these former litigants they took their canal full of water, is that right?

A I think that is probably true.

Q I simply asked because you said they made no claim to anything else than the decreed rights and their tunnel water and reservoir water?

MR. STORY: I think he qualified it in low water season.

MR. A. C. HATCH: No, didn't qualify it at all.

THE WITNESS: No use of distribution when it is high water, everybody had plenty.

Q Yes, but there is high water and time between high water and the lowest period, isn't there?

A Yes sir.

Q Do you know for what time they used water each year in excess of these quantities that you say were decreed?

A You mean the number of months or days?

Q No, to what time in the year?

A That would vary, Judge.

Q Sometimes run up to August 1st, would it?

A Well, I don't think it would be that late in the season, it would run to July, anyhow.

Q At the time you were distributing the Provo, or the Blue Cliff Canal rights in their canal, while you were commissioner, you were doing it at the instance of the Blue Cliff Canal Company, weren't you?

A That I was distributing it to the reservoir company?

Q That you were putting it into the reservoir canal?

A I don't know it was at their instance, it was upon the claim

of the reservoir company that I distributed it to them.

T. C. THOMPSON, recalled by the defendant, Utah Power & Light Company, testifies as follows:

DIRECT EXAMINATION by Mr. Story.

Q You have been sworn as a witness in this case?

A Yes sir.

Q You have testified, I believe, for a number of years you were city water commissioner?

A How is that?

Q I say you have testified you have been a water commissioner for the city of Provo, or for the Timpanogos Canal Company?

A Watermaster.

Q Watermaster?

A For both, yes sir.

Q During what years?

A 1909 to 1910, I think it was, I was watermaster for the Timpanogos Canal.

Q Have you been a stockholder in the Timpanogos Canal Company for many years?

A Since 1896.

Q Have you, during that period, been more or less familiar with the water conditions on Provo River at the headgate of the Timpanogos Canal Company during each of these years?

A Yes sir.

Q Did you, in the course of your employment as water commissioner, have occasion to see that the water rights of the Timpanogos Canal Company they were entitled to were delivered to it?

A Yes sir.

Q During either of these two years was there times when there was not sufficient water flowing in the Provo River at your headgate--

A Yes sir.

Q To satisfy your right?

A Yes sir.

Q What was your right at that time?

A I think about eight second feet, if I remember, to ten, somewhere along there.

Q Were you also familiar with these conditions prior to 1909?

A Yes sir.

Q Were there times prior to 1909 when there was insufficient water, that is, prior to 1909, and say subsequent, say to 1904, when there was insufficient water flowing in the stream at your headgate to satisfy your right?

A Yes sir.

Q Was it a common occurrence annually?

A How is that?

Q Was it a common annual occurrence?

A No, not every year, no, just certain years.

Q Did it commonly occur during low water years?

A Yes.

Q What means did you take to divert the water into your canal, I am speaking with reference to your dam, what kind of a dam, if any, did you have built?

A The first year that the plant was moved down, I don't remember what year it was, the Timpanogos Canal constructed a cement dam across the river. Then in 1910, they put in another one above that which the old dam is still there, main part of it is still right in below the other dam, and while I was water-master, I had four large poles that I got from the Utah Light & Power, and wired them to the railroad bridge, so that they would hold steady, and I had them down low enough so that the lower log would lay against this cement dam. Then I would get straw from James Mullin and put in against the logs, and then haul clay from the Smith bank, that is, from the Smith dugway, that clay, and put on top of the straw, That is the kind of a dam we had.

Q Did you, by that means, make a tight dam, or practically so?

A Yes sir, pretty good dam, as tight as this one has been since we put the other cement dam in.

Q When you were unable to get sufficient water from the water from that which was flowing in the river to satisfy your right, what means did you take to augment the supply?

A Go to the Utah Light & Power, and tell them to turn some water down.

Q You say the Utah Power & Light Company, do you mean the Telluride Power Company?

A Yes.

Q Predecessor in interest of the Light Company?

A It was the Telluride Power Company that time.

Q Was that a frequent occurrence?

A Quite often.

Q Your right was satisfied by turning water from the flume of the Power Company into your dam, was it?

A They had taken it down right above the tunnel of the spillway.

Q Do you remember the time when the Provo Reservoir Company canal was constructed?

A Yes.

Q Did this condition that you have described with reference to the satisfying of the Timpanogos rights exist both before and after the construction of the --

A Both before and after.

Q Both before and after the construction of the Reservoir Company's canal?

A Yes sir.

CROSS EXAMINATION by Mr. A. C. Hatch.

Q When you were short of water did the Power Company turn it over their spillway to you, the same as they had before there was any reservoir ever in existence?

A Just the same.

CROSS EXAMINATION by Mr. Jacob Evans.

Q Do you remember when the cement dam was constructed, Mr. Thompson?

A I was watermaster at the time, yes sir, the last one.

Q What year was it?

A 1910, as near as I remember.

MR. JACOB EVANS: I will ask you, Mr. Story, if you know when the Olmstead plant was put into operation, what year, the lower plant, I mean?

MR. STORY: I have a recollection it was about 1904.

Q You think this cement dam was built in 19^I0?

A The last one, the first one would be about--

Q Did you build the first cement dam, your company?

A Yes sir.

Q Without any assistance on the part of the Telluride Company?

A No, they helped.

Q They assisted you?

A Yes sir.

Q Prior to that time you had what is commonly known as a brush dam, didn't you?

A And a bad one.

Q What?

A And a bad one.

Q And the bottom of the intake of your canal was several feet above the bottom of the river, was it not?

A No, not several feet.

Q Well, couple feet?

A I would judge at that time a foot would be all, at the most.

Q And the river at that point was how wide?

A About eighty, I judge, I don't remember just what it was.

Q And a controversy arose, did it not, between your company and the Telluride Power Company as to whose duty it was to raise that water up so that it would flow into your canal after they had changed the location of the power plant?

A Yes.

- Q In other words, when they had their power plant up at Nunn's station, the tail race was a way up the river above the intake of your canal. When the water went past your canal you had no difficulty with your brush dam, in getting the water into your canal, because there was a large stream of water in the river that passed the intake of your canal at that time?
- A Yes.
- Q After they moved, after the Telluride Power Company moved its plant from Nunn's station down to what is known as the Olmstead station, then the tail race of the Telluride Power Company was below the intake of your canal?
- A Yes sir.
- Q And when they took the water out and run it around it lowered the surface of the water in the river at your intake, didn't it?
- A It took it nearly all.
- Q It took it nearly all?
- A Especially the first year.
- Q However, what was left there was down below the bottom of the intake of your canal?
- A Yes sir.
- Q And it required some kind of a permanent structure to bring it up so that it would enter your canal, didn't it?
- A Yes sir.
- Q And a controversy arose concerning that and the Power Company, through its attorneys and representatives, took the position as long as the water was in the river it was your duty to put in an obstruction that would raise it up so that it would flow in your canal?
- A I don't remember that, because we had no trouble to make a stipulation.
- Q Don't you remember you employed, your company employed Judge Thurman and myself for the purpose of bringing a lawsuit against the company on that?
- A Yes, I remember that.
- Q Then you did have controversy with them about it, didn't you?

A Yes, a little.

Q And the result of that was that the company's attorneys, that is, the Telluride's contention was that the water was in the river?

A Yes.

Q And it passed, passed your canal, and that as long as it was in the river that it was your duty to bring the water up to the intake of your canal, put in your obstruction to bring it up, remember that ?

A N o.

Q You don't remember that?

A No.

Q And don't you remember the thing was compromised, by which the company and your company averted a lawsuit, by which they agreed to pay for the materials to construct a cement dam, and you folks agreed to furnish the labor?

A Yes, I remember that.

Q And that was the thing that averted a lawsuit?

A I remember that.

Q It was not the contention there wasn't sufficient water in the river to supply them, but it was because it was below their canal, and it would require the-- the bottom of their canal, and it would require a permanent structure to dam that water off and bring it up so that it might flow into your canal?

A Yes sir.

Q You remember that fact, don't you?

A I know it was put in there every year to raise the water.

Q In order to raise the water up to flow into your canal?

A Yes.

Q And there was seepage water there, and enough passed your canal all the time, but your controversy with the Telluride Power Company was because there was not a sufficient volume of water in the river that it could be taken off as you had theretofore taken it off by the means you had used in taking it off before; that was your controversy, wasn't it?

- A I suppose that was part of it.
- Q That was the main part, that was the substance of the whole thing ?
- A No, because there was many a time we did not have enough water, not half enough to fill even the seepage. When I would have a tight dirt dam in there, there wasn't enough then to give us our portion of water.
- Q Wasn't there some water running below you through this dirt dam?
- A Oh, there is always some went.
- Q Always some went through there?
- A Always a little went.
- Q It was impossible for your company to put in a dirt dam which would stop off all the flow in that river and take it into your canal, wasn't it?
- A They cannot do it now at any time.
- Q But, isn't it a fact, that City Creek was supplied below this dam, intake of your canal ?
- A Yes.
- Q And through the Provo River that run past the intake of your canal?
- A Yes.
- Q So that the supply that went down past your canal also supplied what we call City Creek and City Race?
- A Yes sir.
- Q And that carried how large volume of water?
- A Oh, fifty or sixty second feet, according to the amount of water that was allotted to them.
- Q So that, as a matter of fact, there was fifty or sixty second feet that run through the City Race in addition to your supply that arose below the Telluride dam, wasn't there?
- A No.
- Q Where did this water come from for the City Race?
- A Comes from their tail race, hack in there.

- Q And part of it run to your dam, did it not?
- A Might be at times two or three second feet when the river is high, of course, comes on through, but I have had ^{it} just as tight, I will say I have had it tighter than this summer up there.
- Q You had it as tight as you could make it with a brush dam, didn't you?
- A Brush, I had no brush, I had no brush, I had clay.
- Q But there was always some water running through that dam?
- A Yes, always was, no question about it.

REDIRECT EXAMINATION by Mr. Story.

- Q The same condition in respect to the necessity for having the Telluride Power Company send down additional water from its flume continued after the construction of the last cement dam, as well as before, didn't it?
- A How was that?
- Q I say after construction of the last cement dam you were obliged to call upon the Power Company to supplement the river flow in order to satisfy your right, weren't you?
- A Why, that last dam was put in last year I was watermaster, and what has been the condition, more than I have been there and saw it still leaks, it is all I can tell you.
- Q What I am trying to get at is they had to let water ~~down~~ from the Telluride flume to supplement the ordinary stream flow in order to satisfy your rights after that dam was put in as well as before, didn't they?

MR. JACOB EVANS: He says he doesn't know.

- A I don't know that, because that fall when the dam was put in, I am sure it was 1910. Then in 1911 they had some trouble, the Timpanogos, I think it was 1911, about pumping water above, and that there wasn't enough coming down, and we went up to investigate and had some trouble about it.
- Q They had to let water come down to you to satisfy your right, did they?

A Yes.
Q That is what I am trying to get at.
A Yes, but that was the only trip I made.
Q After that last dam was constructed?
A After that last dam was put in.

RECROSS EXAMINATION by Mr. Evans.

Q There was a good deal of water that escaped through that dam and around it, wasn't there?
A Yes.
Q Both the cement dam and the other dam?
A There is now.
Q And always has been?
A And always has been.
Q As much water escapes probably as you use through the canal?
A I found that when we made the dam.
Q You found that all the time, haven't you?
A All the time, yes sir.

REDIRECT EXAMINATION by Mr. Story.

Q Just so that we may understand, the condition which is there which exists at the present time with reference to water leaking through that dam, is about the same as it was when you were there, was it?
A About the same thing last year, as near as I can see. This last year still water seeps out below.
Q And there has been about as much this last year as there was in previous years, has there?
A Not quite, no; there wasn't as much, no, not this last year, as there was in the majority of previous years there has been more water passed.
Q I am speaking about the amount of water that seeps through the Timpanogos dam, that is, this concrete or cement dam?
A Yes, there wasn't as much this year on an average, you know, as there has been a year or two. That has been just as bad this ^{year}

but an average, more water passed below than there has been this year.

Q That is, you mean to go through the dam or under the dam?

A Under the dam and by the dam.

Q I want to ask you one further question about these dams that were put in while you were water commissioner you say were made of poles and straw.

A Yes.

Q And dirt. Do you mean the court to understand that as much water ran through that dam as ran into your canal?

A No, no, no.

Q Was there anywhere near as much water?

A No.

Q Running through your dam as it did into your canal?

A No sir.

Q Would there be more than a fraction of a second foot running through your dam at the time when you had it as tight as you mentioned?

A I think the tightest I got the dams was about two feet, two to two and a half second feet passed by; that is, got under, and went on down.

RE-CROSS EXAMINATION by Mr. Jacob Evans.

Q Would you know when that particular time was?

A Right in the scarcity of water, it was sometime in July.

Q What year?

A I think that was in either 1909 or '10, I think it was 1910.

Q 1910?

A Yes.

Q The bottom of the river there, I take it, was river boulders?

A Yes, but you know there was a dam across, cement dam in by these logs, little below the new dam.

Q You think the tightest you ever got it there was two or two and a half second feet that would seep around or under the dam?

A That came to the top, I am speaking. Now, there is a pretty

stream that goes northwest on the ground there right by that dam.

Q Right by the cement dam?

A Yes, and we tried to head it off, put that cement dam, that is about all, it would go by and come below, we could not stop that without heavy cement dam.

Q Put in a heavy cement dam to do that, didn't you?

A Yes sir.

Q Still you never successfully succeeded in stopping all the water?

A No sir, we did not.

T. F. WENTZ recalled, testifies as follows:

DIRECT EXAMINATION by Mr. MacLane.

Q Have you measured the seepage under this Timpanogos concrete dam?

A Yes.

Q Various times?

A Yes.

Q During '19?

A No, it was estimated in '19.

Q Measured it in '18?

A '18.

Q What time?

A Well, nearly every week.

Q About what would it amount to, as a rule?

A It run to two to three-tenths of a second foot. Where leaks developed there was more than that. When the dam was in good shape two to three-tenths.

CROSS EXAMINATION By Mr. Jacob Evans.

Q At that time you were distributing water to the Provo Reservoir

Company above the intake of the Timpanogos, were you not?

A Yes.

Q And that water that you were distributing to the Provo Reservoir Company was made up partially, at least, of the seepage that came from the dam, was it not?

A From the Olmstead dam?

Q Yes.

A Yes.

Q And the water also that was coming into the Timpanogos Canal Company was made up of the seepage water coming through the Olmstead dam?

A Yes.

Q During the time that you say there was a small amount of seepage do you know about how much water you were turning to the Provo Reservoir Company and Timpanogos-- oh, just a rough estimate.

A Take the date we used this morning, August 7th--

Q That is this year?

A No, this is '18.

Q All right, '18.

A The Provo Reservoir canal had 65.16 second feet^{in,} the Timpanogos had 10.50. By the Timpanogos dam was three-tenths of a second foot.

Q How much of that water, if you know, was awarded to the Provo Reservoir Company for its reservoir water, its Ontario drain tunnel water and its Wright and Dixon water?

MR. STORY: And also including Blue Cliff.

MR. WELGWOOD: No.

MR. STORY: In 1918?

MR. JACOB EVANS: No, wait until we get these measurements.

A Provo storage water was 26.88 second feet; Ontario tunnel water was 6.16 second feet, and the Provo Reservoir Company Blue Cliff water was 41.--

Q Never mind the Blue Cliff water.

MR. STORY: That was included.

MR. JACOB EVANS: No, it was not included in anything.

What I am trying to find out, was there any of this water turned from the dam at that time?

A There was two second feet of water turned from the flume.

Q All right now, I wish you would take the water that was turned into the river from the reservoirs, from the Ontario drain tunnel, from the Wright and Dixon water, the two second feet, and add those up, and then deduct them from the quantity of water that you were distributing to the Timpanogos Canal Company and Provo Reservoir Company, and tell us what the result is and where it came from?

A There was 75.96 second feet at the mouth of the canyon, 2 second feet of which was turned over the Olmstead flume, making 73.96 second feet through the dam and inflow in the canyon. Now, the inflow in the canyon on that particular day was August 7, 1918, 40.60, 33.36 through the dam.

Q 33.36 through the dam that day, that is, that was the seepage through the dam, under the dam, and around the dam?

A Yes.

Q Coming below the dam?

A Yes.

Q Now, Mr. Wentz, how did the year 1919 compare with respect to the quantity of water flowing in the river, with other years?

A Very much lower. The low water flow of '19 was fifty or sixty percent of normal.

Q Only fifty or sixty per cent of normal?

A Yes, that is all.

REDIRECT EXAMINATION by Mr. MacLane.

Q In your net calculation of 33.36 second feet is, of course, included whatever water was passing through the Donnan flume?

A Yes.

Q Do you know what that quantity was on that day?

A No, I don't know what the quantity was on that day.

- Q But whatever the quantity in the ²¹⁸Dohson flume was should be subtracted from the 33.36, to get the quantity going through the dam?
- A Yes, I omitted that in the calculation.
- Q Your figure of 40.60 inflow in the canyon, includes Upper Falls, does it?
- A Yes, that includes.
- Q Bridal Veil Falls?
- A Yes; all the increase in the river.
- Q Now, you stated, and I just wanted to know that the figure is in my records, that in determining this quantity of 65.16 that you were delivering to the Provo Reservoir Company, you allowed some quantity for the Blue Cliff right ?
- A Yes.
- Q How much was that?
- A 41.67.
- Q 41.67 second feet?
- A Yes.
- Q Under the tentative decree as it stood last year, the Blue Cliff right was a primary right and was distributed at the Heislet dam?
- A Yes.
- Q And that was not true this year, was it?
- A No.
- Q It was changed by stipulation?
- A Changed.

MR. MACLANE: That is all we have, your Honor please.

MR. STORY: Your Honor, I would like to introduce as an exhibit a copy of the blackboard drawing referred to in Mr. Dusenberry's testimony today.

MR. JACOB EVANS: No objection.

(Paper marked Exhibit 601)

THE COURT: Gentlemen, how do you desire to submit this, wish to make an argument, or submit it?

MR. WEDGWOOD: This matter is of a good deal of importance to us. It is a far reaching proposition, it is a proposition, which, in my judgment, is fairly raised by the pleadings, and should be finally disposed of by the decree in this case, and I would like to consult with Mr. Murdock and our associate counsel for five minutes.

THE COURT: I was going to make a suggestion before you consult on it, that Judge MacLane is going away on Saturday.

MR. MACLANE: Yes sir.

THE COURT: How long will you be gone?

MR. MACLANE: I shall be gone for about three weeks.

THE COURT: If it is to be argued orally, would you want to present an oral argument to the court, it should be fixed at a time Judge MacLane can be here. If it is to be submitted on brief, probably can be submitted most any time.

MR. STORY: Even so, Judge MacLane will desire to participate in the preparation of that brief.

MR. WEDGWOOD: We would like a day set for the argument of the case, and of course, it may be done in Salt Lake. We want to submit to your Honor the testimony of Mr. Dusenberry as given before, and perhaps some other testimony in the case there, and we would like to do it fairly well.

MR. JACOB EVANS: We should have this transcript made and we will order this transcript so that we may have that before us. Mr. Davis may make us a transcript.

MR. STORY: Make us our usual copy.

4:40 P.M., RECESS TO 10:00 A.M., NOVEMBER 6, 1919.

IN THE DISTRICT COURT OF UTAH COUNTY, UTAH.

PROVO RESERVOIR COMPANY,

Plaintiff,

vs.

PROVO CITY, et al,

Defendants.

At Salt Lake
November 6, 1919.
10:00 A.M.

MR. RICHARDS: I desire, if I may, to call Your Honor's attention to one or two little things- -

THE COURT: I think possibly I may have in mind what you have with reference to the stated acreage of the Provo City Lots.

MR. RICHARDS: One thing is this: We asked to be permitted to offer evidence to show that the crops are not sufficiently matured by the 21st of July, and the time should be extended; and after considerable discussion the court said he might be disposed to make some slight change in this. There seems to be some question about it and I desire to have the record show positively that the change was directed.

THE COURT: I desire to correct the acreage of the city lots. I find upon checking over my notes that the thirty acres and 30.2304 acres was deducted twice; that was the amount of the deduction for artesian wells; it had been deducted in the amount reported by the general survey, and I from the evidence deducted it again, so it will change the amount announced 475.39 to 498.43 acres, having made that mistake by making the deduction twice.

MR. RICHARDS: That is the finding of the court now,

it should be 475.39?

THE COURT: Yes, sir.

MR. RICHARDS: We desire to take an exception to the action of the court in making the deduction six per cent, 30.34 acres. May we have an exception?

THE COURT: Yes.

MR. RICHARDS: Also exception to the determination of the court that the amount of acreage now is 498.43. I desire to call Your Honor's attention to the shade trees, for the purpose of having the matter in the record. I move that to the 498.43 which Your Honor has just announced, may be added 24.54 acres on account of shade trees, and we do it upon this ground: The uncontradicted testimony shows that that area comprises trees where there was no irrigation ditches and it requires city ditches to irrigate these trees, of course, in the modern part of the city. We ask that that 24.54 acres should be added and move that that be done; Your Honor is familiar with the evidence; we move that this be done.

THE COURT: Is there evidence definite and indisputable?

MR. EVANS: I do not so understand it. I think this was disputed all the way through. We insisted and contended and we think the evidence shows that these trees do not require water, additional water.

THE COURT: That is my impression of it.

(Argument by counsel)

THE COURT: It was gone into in the argument and Judge Richards made the statement and makes it again that the evidence was undisputed, and if so the court wants to make some disposition of it.

(Argument by counsel)

THE COURT: Mr. Bostaff testified that there was twenty-four and a fraction acres of trees for which special ditches had to be constructed and which were not watered from any water that was being conducted for any other use. Now, the question suggested now by Mr. Richards and which had not occurred to my mind until he did suggest it, that this evidence had not been disputed-- had not ~~been~~ contradicted these facts,- I had concluded that the award to Provo City was amply sufficient to take care of their trees and domestic and municipal uses, but if there is a situation where there is direct evidence upon this particular point and uncontradicted, if I might find that is the case-----

MR. HATCH: Several or many of the witnesses who were testifying as to the irrigation of their lots and they owned the trees, as I understand it, if any of them were given any additional time, and the evidence will show there there is no award which was given any additional water by reason of having trees where there was no ditch, and if the trees were there under the system, I take it not irrigated at all, there would not be any use for water for those trees.

(Argument continued by counsel)

MR. HATCH: But the testimony is that there was never any additional water issued to any lot owner by reason of having trees.

THE COURT: Is there that in the evidence?

MR. HATCH: Yes, sir.

THE COURT: That there was never issued to any lot owner additional water---

MR. HATCH: That is all those who had trees.

THE COURT: I understand the situation to be this; with reference to the evidence,- I may be mistaken. From your statement and Judge Richard's, the situation would be that witnesses who testified to having used water for irrigation purposes on their lots and land owned by them, were asked

whether any additional water was given to them on account of their trees and they testified "No." Mr. Bostaff came on the stand and testified that there were twenty-four acres of trees that are so situated that they are not contiguous to land watered by water used for any other purpose. Now the evidence of the witnesses that you refer to would not in any sense even indirectly contradict that, if this is in addition to the trees that lie in and around all the lots irrigated.

MR. HATCH: There is no evidence that there was any water ever issued for those trees or any additional water given to any lot owner or owner of trees by reason of this condition.

THE COURT: My views under this evidence is that this award is ample to cover the irrigation of those trees abundantly, but if the situation of the evidence is as Judge Richards says, I must correct it and add that to it.

MR. WEDGEWOOD: This question was thrashed out last Spring.

(Argument by counsel)

THE COURT: Well, if the evidence is in which would contradict the evidence of Mr. Bostaff, I am satisfied to let the findings stand as it is, but if it is uncontradicted I feel I should give it some weight. I do not believe Mr. Bostaff was called upon to indicate the location in the city of the several streets, and the trees were situated on twenty-four acres; if he did then the evidence you refer to may directly contradict it, Judge Hatch.

MR. HATCH: In his cross-examination he stated a number of different places where these trees were to which he was testifying, within the twenty-four acres; that is as I remember it.

THE COURT: I will ask Mr. Richards to let me have

his transcript of the evidence relating to that, and if the counsel upon the other side have a transcript that they can examine, and indicate to me where the evidence is they rely upon, I will examine it carefully and decide whether I should make any difference in the findings without any further testimony or argument. Now, are there any questions that all of the counsel are interested in that you would like to bring out?

- - - - -

T. F. WENTZ, recalled.

THE WITNESS: In my re-direct examination by Mr. MacLane, I will read just a line or two----

MR. MAC LANE: What page, please?

THE WITNESS: Page 143. It was relating to the deduction I made on the blackboard regarding the leakage in the dam. The question: "Q. In your net calculation of 33.36 second feet is, of course, included whatever water was passing through the Donan flume? Answer; Yes." I should have answered "No."

"Question: Do you know what that quantity was on that day?

"Answer: No.

"Question: But whatever the quantity in the Donan flume was should be subtracted from the 33.36, to get the quantity going through the dam?

"Answer: Yes, I omitted that in the calculation." I also should have answered that "no."

MR. MAC LANE: But the rest of the answer stands?

THE WITNESS : It should have been stricken out--- I should have answered "No."; following that I have shown the inflow in the ~~canyon~~^{canyon} and that included the Upper Falls and the Bridal Veil Falls and the Omlsted flume. In this calculation was measured at Nunn with the Upper Falls and Bridal

Veil Falls flowing in it so the amount was a little less than six second feet; so this would offset the quantity flowing in the Donan flume so the deduction of 33.36 would show the quantity in the dam.

RECROSS EXAMINATION BY Mr. Mac Lane:

Q In what way did you take into your calculation the amount passing through the Donan flume?

A The amount in the flume---the flume was measured before this flow into the flume.

Q You are speaking about the Power Company's flume?

A Yes, sir.

Q I am asking you about the Donan flume. In what way did you take that into your calculation?

A The amount in the Bridal Veil and Lost Creek take care of that amount.

Q Did you measure the amount that day?

A No, sir.

Q How did you know the amount that was going through?

A Well, it carries a small amount of water, it carries usually about six second feet, but under very favorable circumstances it would carry up to eleven second feet, and it is returned---

MR. STORY: In other words you assume that the amount of water running into the flume of the Power Company from Lost Creek and Bridal Veil offset the amount of water that might be running in the Donan Flume?

A Yes, sir.

EXAMINATION by Mr. Story.

Q Where was the point of calculation of this 33.36 feet?

A That was through the dam.

Q Now, I may be very dense, but I really would like to know how you arrive at these figures. Will you please tell me how you arrive at these figures, Mr. Wentz?

- A There was 75.96 second feet at the mouth of the ^{Canyon} canal.
- Q Mouth of the ^{Canyon} canal; you mean at the Timpanoges?
- A That includes the Timpanoges, Provo Reservoir canal and the leakage through the Timpanoges dam; this is the amount in the river at the mouth of the ^{Canyon} canal. Of this amount there was two second feet being diverted from the Olmsted flume at Nunns, and the inflow in the ^{Canyon} canal was 40.60 second feet, leaving 33.36---
- Q Well, that was made up how, or made up of what?
- A The inflow in the ^{Canyon} canal was made up of the waters in the ^{Canyon} canal, springs, this also included the Bridal Veil Falls, Olmsted.
- Q Did you measure these inflows yourself, or did you arrive at it technically?
- A I measured the flume and Provo Reservoir Canal and Timpanoges Canal, and the total at the guage station I took from the observation of the United States Geological Survey.
- Q In other words, this represents the difference, as I understand it, between the total amount of water that you found at the mouth of the ^{Canyon} canal and the amount of water which was passing the guage station, except the two second feet coming from the flume, is that it?
- A I don't understand how you insert the two second feet there; this 40.60 is the difference between the total flow at the mouth of the ^{Canyon} canal; that included the water in the Olmsted Flume and the water in the river. that is in the Timpanoges canal and Provo, the difference at the mouth of the ^{Canyon} canal and the next station.
- Q Now, give us the next station please, using the amount that was passing the guage station just above the dam.
- A I haven't that information here.
- Q What way can you arrive at it definitely? I wish you would show how you arrived at your figures; by deducting the 40.60 from the 75.96, announcing there are 35.96 passing the guage station?

- A No; there was a great deal more than that. There was the amount in the flume, that is the quantity you have here, and the quantity in the Olmsted flume.
- Q I mean over and above the amount that was in the Olmsted flume; would it be 35.36?
- A It would be 33.36.
- Q 33.36?
- A Yes, sir. There were two second feet being diverted from the flume to the river at the Nunn's station.
- Q Then, that is, the total amount in the river would be 33.36 between the guaging station and the mouth of the ^{Canyon}~~canal~~; is that right?
- A No, the total amount in the river is the difference between 73.96 and 33.36, the total amount in the river is 40.60.
- Q Oh, yes, I see now. Well, you would have to take off the two second feet, would you not, from your 40.60?
- A No, that is the---40.60 is the total inflow in the ^{Canyon}~~canal~~ between the guaging station and the mouth of the ^{Canyon}~~canal~~.
- Q In other words, that is the total flow in the river between the guaging station and the mouth of the ^{Canyon}~~canal~~ from all sources?
- A Yes.
- Q (By Mr. MacLane) Your figure as to leakage in the dam, now, do you mean the difference between the total quantity of water at the mouth of the ^{Canyon}~~canal~~ and the measurable inflow in the ^{Canyon}~~canal~~ from various sources?
- A I didn't get the question.
(Question read)
- A Yes.
- Q (Examination continued by Mr. Story.) Now, where did this inflow occur, or this difference in the river occur?
- A Well, a great deal of it occurs right below the dam, Upper Falls, springs, and then there is a very substantial flow comes

into the river just below the waters of it for quite a distance below the dam, and Lost Creek and Guard-quarters.

Q What is the distance between the dam and the mouth of the ^{Canyon} canal, I mean the Light Company's--Power Company's dam and the mouth of the ^{Canyon} canal?

A About four miles.

Q This inflow in the river occurs all along that four miles?

A Yes, sir.

Q You cannot possibly divide it up and tell how much occurs at any one place?

A No.

Q So it would be absolutely impossible for you to tell how much of that water was actually passed through or under the Power Company's dam, would n't it?

A Yes, that is true, exactly; this is as near as I could get at it from the figures I had.

MR. STORY: That is all.

REDIRECT EXAMINATION by Mr. Wedgewood:

Q In view of your answer I ask you--that is, your last answer--is it possible for you to tell whether or not any quantity was passing by the Power Company's dam, or whether there was a tight river there?

A Yes, there was a quantity passed the dam; as I testified before, I waded the stream and observed it, in my opinion it was between thirty-five and forty second feet at the time.

Q That was coming from above the dam down below the dam by some means of flow?

AA Yes.

Q You have answered that question before---how far below did you find this quantity that you have just mentioned?

A Well, it is from one hundred and fifty to two hundred feet on the riffle, below the dam.

Q What was that quantity again?

A Between thirty-five and forty second feet.

Q Now, in that one hundred and fifty or two hundred feet below the dam, what perceptible or measureable quantity, by existing physical conditions, is the inflow of the river?

A Well, it is very small, the perceptible inflow down to---there is no inflow from one hundred and fifty feet of the dam down that you can see. Beginning at about one hundred and fifty feet down there is some small seeps coming in from the south side, I think from one hundred and fifty to two hundred feet they would not exceed over one quarter of a second foot.

Q Then Lost Creek or Bridal Veil or Guard-quarters springs do not come in that one hundred and fifty or two hundred feet?

A No, nor Bridal Veil or Upper Falls.

Q Nor Upper Falls. So, then, if I understand you correctly, the greater portion of the quantity which you testify as being the inflow of the river, added volume to the river, that water between the Power Company's dam and the mouth of the ^{CANYON} ~~canal~~, comes in within two hundred feet of the dam?

A Below.

Q Below the dam?

A Below within two hundred feet of the dam.

Q This is not furnished by any visible tributaries?

A No.

Q Then, tell me how that water gets in the open channel of the river two hundred feet of the dam, this thirty-five or forty second feet, from your own knowledge and information.

A It comes through the dam, beneath the dam, under the dam; you can see where it does come through.

Q So then the fact is---what per cent of this added volume is this water ---what per cent of the added volume between the Power Company's dam and the mouth of the ^{CANYON} ~~canal~~ is the water present two hundred feet below the dam?

- A You mean of the quantity that is present at this time?
- Q The quantity you gave there.
- A It is practically half of it.
- Q Practically half of it?
- A Yes, about half of it.
- Q Fifty per cent; so then while you say to Mr. Story, answering his question in literal language, that you cannot tell how much of this water comes in at any particular place, you must base your answer upon the most technical construction of his question?
- A Yes; I answered the question by the sense I could arrive at it, by the figures I had, it was 33.36 feet. I observed it on the board, and estimated it, wading it three different times.
- Q Regardless of the fact you cannot absolutely fix technically a certain quantity, from a practicable standpoint, if I understand you correctly, about one-half of this added volume goes by the dam into the river channel two hundred feet below?
- A Yes.
- Q Flowing through unseen channels?
- A Yes.

RE-CROSS EXAMINATION by Mr. Story.

- Q Mr. Wentz, you were talking about increment in the volume of the water flowing in the river, were you not?
- A Yes, the 40.60 second feet.
- Q In other words, a gain in the river which cannot be accounted for in any other way other than the appearance of water from some unseen source or coming up from the river bed, is that right?
- A That is right. Part comes in by springs and streams and other comes from the bed.
- Q You understand that the total increment the way you figure it,

between the guaging station which is situated a very short distance above the Power Company's dam, and the mouth of the ~~canal~~^{Canyon} is 40.6?

A Yes.

Q In other words, that is the amount of water which appears in the river over and above the amount of water which you find ^{flowing} in the river at the guage station?

A Yes.

Q I find you also testify that the amount of water which you found immediately below the dam on this day was between thirty-five and forty second feet, is that correct?

A Yes, sir.

Q Well, using the figure as thirty-five, and assuming that that was the amount; you mean to have the Court understand that there was no increment in the bottom of the river from any source on that date below a point say two hundred feet down the river from the Power Company's dam and the mouth of the ~~canal~~^{Canyon} in excess of 5.6 feet?

A No, the total quantity of the water at the mouth of the ~~canal~~^{Canyon} was 73.96, and the inflow in the ~~canal~~^{Canyon} was 40.60, and there was two second feet coming from the Olmsted flume, that was 33.96 feet passing the dam.

Q 33.96 passing the dam?

A Yes.

Q Well, now, as I understand General Wedgewood's question, his meaning was as to whether or not this increment in the river which you talk about occurred within the two hundred feet below the dam, is that correct?

A Well, when I referred to that, I meant the inflow or increase in the river; now, down to one hundred and fifty feet there is no perceptible inflow in it, but from one hundred and fifty to two hundred feet there is a little inflow coming from the south side; you cannot see the exact amount, but I wouldn't think to exceed one-quarter of a second foot.

Q Then, there is no perceptible increment in the river immediately below the dam,- I am talking of increment in the river.

A Not visible upon the surface.

Q The water you find flowing there is water flowing through the dam?

A Yes, sir.

Q At that particular time?

A Yes.

Q You don't mean to say you found any thirty-five or forty second feet actually flowing through at the time you mention?

A Yes, I waded the stream and intended to measure it, but could not place a gate at a suitable place to measure it, but I waded it three times and estimated it at that time.

Q Then, it was nothing more than your estimate on that date of the amount of water flowing through the dam or under the dam?

A Yes, thirty-five to forty feet was my estimate of it by wading the stream.

REDIRECT EXAMINATION by Mr. Wedgewood.

Q Now, Mr. Wentz, you say you found a perceptible inflow, probably would not exceed one-fourth of a second foot at the water's edge; I would like to get these facts absolutely plain. If I understand you correctly, if I catch the proper sense of your language myself,- there was not an open surface tributary flowing one-fourth of a second foot?

A No, not a tributary, coming in as small seep.

Q That is, coming from the ground, about at the water's edge?

A That is true.

Q And entering the stream?

A Yes.

Q That is, the surface of the stream?

A Yes, sir, that is down a hundred and fifty---

Q About two hundred feet?

- A Yes, below the dam.
- Q I also understand you, there was very little water in the surface stream of the river in the stretch of one hundred and fifty feet immediately below the Power Company's dam?
- A No, I did not wish to convey that; there was between, as I estimated it at the time, thirty-five or forty feet.
- Q One hundred and fifty feet below?
- A Yes, sir, coming through the dam---one hundred and fifty to two hundred feet.
- Q But the greater part comes in between one hundred and fifty and two hundred feet.
- A No, the thirty-five or forty second feet, as I estimated it, was coming from the dam, and between one hundred and fifty and two hundred feet as I observed it, there was possibly one fourth of a second foot inflow.
- Q When you say "coming through the dam", do you mean by that that this is actual leakage in the dam?
- A Part of it coming through the dam, through the body of the dam, and part of it around the dam or under the dam, it is all leakage from the dam.
- Q That is what I want to make clear. The dam is the structure that is placed on the bed of the river and attached to the banks?
- A Yes, sir.
- Q Now, the dam proper, itself, does not include anything but that, does it?
- A That is all.
- Q Is it your judgment or your knowledge that water comes into the stream within one hundred and fifty feet that does not leak through the physical structure of this dam, proper? Did you get the question?
- A There is very little that would come into the stream between the dam down to one hundred and fifty feet except what comes

through the dam, around the dam, or under the dam.

Q What I am trying to do is to separate what comes through the dam and what comes around the dam, or under the dam. Is there, according to your judgment and knowledge, a part of this thirty three thirty-six feet that does not leak through the actual physical structure of the dam itself?

A Well, I could not say that, exactly. Part of it comes through the dam and the balance comes, part under or around the dam. Part of it you can see coming through the dam at that time, as I described in my testimony, you would see it from the south side.

Q Now, I realize that this has been gone into quite fully, and I put the matter in a new phase---

MR. MAC LANE: I object to it as being already gone into, and gone into fully.

THE COURT: The objection is overruled, you may proceed.

Q If I understand you, and gather your opinion from your answers, there is a substantial quantity, a substantial part of this thirty-three and fraction second feet that actually comes through the structure made by man, made by the Power Company, that constitutes their actual dam?

A Yes, sir, that is the case in 1918.

Q And ^a ~~the~~ portion ~~that~~ does not come from that, but comes from the river underneath and at the sides?

A Yes, it comes underneath the water surface, you see just below the dam there is a pool of water there you cannot tell where the water is coming from, coming in there from, some of it comes from the submerged structure of the dam some around the dam.

Q This dam is not a submerged structure?

A Part of it might come from what I say the submerged structure, or part of the dam, that is below the pool of water.

Q Now, what comes through the dam itself is visible to the eye?

A The part that is above the dam above the water is visible.

Q Have you an idea of what visible portion, or what the proportion that exists one hundred and fifty feet below, what that portion is or was at that time?

A No, I could not say.

Q What that would amount to, coming from the dam that is visible through the leaks in the structure of the dam under the surface? Could you form---

MR. STORY: I object, the witness says he does not know.

A No.

MR. WEDGEWOOD: He answered your question.

A No, I could not say what proportion of that quantity that was coming through that was visible, that is actually coming through.

Q Have you any judgment whether ~~it~~ it was one-half?

A No, it wasn't as much as one-half.

Q As to the exact quantity, you could not say; you say that it wasn't as much as one half?

A No, not as much as one-half.

Q Is it your---Is your information on the subject sufficient so you could give what would be to you a sufficient fair judgment as to what actual proportion that was coming through that was visible?

A No, I could not say on that, you see these leaks come through, broken up, falling in the stream; it would be impossible to make any approximate estimate what the exact quantity was.

Q It might be as little as one-eighth feet?

MR. STORY: Mr. Wentz has been witness for the plaintiff throughout this entire case. This is a very improper method of examination. I object on that ground.

THE COURT: I think from what Mr. Wentz has stated, any statement would be so purely a guess the Court could not give it any weight.

Q It is less than one-half?

A Yes, sir, it is less than one-half.

Q Just one question: you have testified that as a physical fact the quantity of water which is in the river one hundred and fifty to two hundred feet below the dam varied with the height of the water above the dam, or with the number of flash-boards there were on the dam.

A I testified that these measurements I give here, that these quantities, the height of the water at this time was equal to the top of the first flash-board; the measurements of 1919 was down to the crest of the dam to the top of the first flash board twenty-five to forty second feet.

Q That shows it did vary, as to the height of the water?

A Yes, sir; that shows that condition.

Q Now, then, would that height of the water in the forebay, showing a difference in the quantity of the water below, show or tend to show that that increase came through the dam or around or under neath the dam--- I will put it this way: Would the height of the water in the fore-bay have the greatest influence on the leakage or passage under or around the dam of the water?

A Why, it would be around the dam.

Q Around the dam?

A Yes.

Q Now, at the time you made these two observations, had you in mind the effects of actual leakage in the dam, one time compared to the other, what you could see as leakage through the dam?

A No, I could not say what these were.

MR. WEDGEWOOD: I believe that is all.

RE-CROSS EXAMINATION by Mr. Story.

Q What was the date that these measurements were taken, Mr. Wentz?

A In 1918 or 1919?

Q The one you spoke of first.

A That was in August 7, 1918.

Q What date was ^{nt}the Power Company there operating?

A 1917.

Q You say that the amount of water appearing below the dam varies according to the height of the water in the dam? Is that the only matter which causes a variation in the amount of water passing through the dam?

A No.

Q There are other factors, are there not?

A Yes.

Q It depends upon the condition of the dam at that particular time, doesn't it?

A Yes.

Q As to whether the leaks have been stopped or whether the high water is washing over, or a condition that prevents the leaks?

A It depends on the condition of the repair of the dam, yes.

Q Now, I believe you stated the height of the water in the dam would have the greatest effect of sending the water around the dam?

A Yes, sir, there would be some effect through the dam, but I believe that a small raise would have less effect on the openings through the dam as it would those around the dam.

Q The increase of the height of the water causes a certain pressure uniformly throughout the reservoir, does it not?

A Yes.

Q It would have just as much increase in the pressure where there are leaks through the dam as around the dam?

A Yes; there would be some leaks increased through the dam, but I believe it would be greater around the dam for it would cover a greater surface and the leaks from the forebay following down through would be greater.

- Q It all depends on the amount of surface that leaks?
- A Yes, sir, to some extent.
- Q Do you know the amount of surface that leaks on the side in the dam?
- A I do not want to say that the leaks through the dam would not be increased at all; you see the raise of one foot along there would not make as much increase as---
- Q That is purely hypothetical analysis on your part.
- A To some extent, I think there would be some leaks.
- Q All you can actually say is, testifying from your knowledge, that you ^{have not noticed} ~~find~~ that where there is an increased height of water in the reservoir there is an increased amount of water appearing in the river below the dam?
- A Well, I have noticed the reverse of that mostly; as the head in the forebay is lowered the water below is less in quantity.
- Q Now, during the year 1918, you were distributing---strike that out. At the time you made this measurement you mentioned in the year 1918, you were distributing to the Provo Reservoir Company, as part of their primary right under the Blue Cliff appropriation approximately forty or forty-one second feet, were you not?
- A Yes.
- Q That is under the tentative decree, as has heretofore been rendered by the court?
- A That was in operation then.
- Q That was in operation then.
- A In 1918.
- Q That has since been changed by stipulation, hasn't it?
- A Yes.

MR. STORY: That is all.

REDIRECT EXAMINATION by Mr. Wedgewood.

- Q Now, your answer to Mr. Story's question, that the quantity appearing below would depend upon the repair of the dam, state of

repair?

A Yes.

Q It would also depend on the condition of the puddling of the bed, the banks of the stream or fore-bay above the dam, would it not?

A Yes.

Q Now, if you raised the water one foot in the forebay, it is a fact, is it not, that you increase your pressure about two to three pounds to the square inch?

A Yes.

Q That would be the effect of that. It is also a fact, is it not, if you raised the water a foot in the stream above, or in the forebay that you would subject to inflow of water ~~to~~ such openings in the ground as there were in that one foot, would you not?

A Yes.

Q At the sides?

A Yes.

Q Both sides?

A. Yes.

MR. WEDGEWOOD: That is all.

MR. STORY: That is all.

MR. WEDGEWOOD: Shall we proceed with the argument?

THE COURT: If there is nothing further to be disposed of.

MR. WEDGEWOOD: As to the argument, please, we have prepared a written argument, if Your Honor please, which Mr. Booth will present to the Court.

As a preface to that I desire that throughout the brief the term "leakage by the dam" has been used, the words are perfectly proper and very expressive and used in technical matters of this kind, but while I know that the Court appreciates as well as I the sense in which that term "leakage" has been or is

used, I want to state that it is used in the sense of the river not being a tight river by reason of the dam at that point, and the "leakage by the dam" in this argument means water that passes by the point of that dam by all means open to its discharge.

MR. STORY: We have not been furnished with any copy of the argument, if they want to furnish it on briefs---

MR. WEDGEWOOD: We make the oral argument, but it will be read. We have not asked to submit any brief, not at all.

(Thereupon argument by counsel for plaintiff was read by Mr. A. L. Booth.)

THE COURT: We will take a recess at this time.

MR. STORY: Your Honor, I would like just a few minutes. At the last hearing in this matter, we discussed the question as to presenting written briefs. It was suggested at that time by counsel for plaintiff that they preferred to present it not on written briefs, and wished to make an oral argument. I can say that I am taken completely by surprise that they should come here now and present a written argument, which it seems to me very obviously to have been written by other than the attorneys in the case, to come here and present the mere reading of the argument to the court. We should have time at least to read this, I don't know but what I am dignifying it a great deal by asking time in which to answer it in a written presentation to the court, but we have not had an opportunity and could not have at a mere reading of this by counsel. I would ask twenty days time in which to write a written brief or answer to it, and as

I feel that is the only fair way to present it.

MR. MACLANE: If the Court please, I would like to join in Mr. Story's request.

(Discussion)

The COURT: Well, Gentlemen, I am disposed to grant the request. I do not think the counsel would be satisfied to write an answer to your written argument until they had seen the written argument. I am inclined to think they ought to have the time to present to the Court in writing the substance of their position.

(Discussion)

MR. HATCH: I think if I was judge of the court I would give them the time, but as attorney I would object to them having it.

THE COURT: I will rule that the defendant Power Company have twenty days from this date to present in writing their answer to the argument which has been presented here in writing, and the plaintiff have fifteen days from the time that they are served with this answer to present to the Court a reply to the answer.

Mr. STORY: May it be understood that if I serve three copies on General Wedgewood that may be regarded as service on all counsel for plaintiff?

THE COURT: THAT may be understood?

MR. HATCH: Yes.

MR. BOOTH: Yes.

THE COURT: The court will take recess until such time as the decree may be prepared, and we will have to get together to discuss the terms of it. I will announce ^{to} the committee just what the result is.

MR. RICHARDS: Then, as to the acreage of trees, what time may we have?

THE COURT: What time do you want, you can have such

time as you want within the thirty-five days that has been provided for this other matter.

MR. RICHARDS: We want ten or fifteen days and then it is understood. as I understand it now, that the Court will, without holding session, the court will determine the question as to whether or not these twenty-four and ffraction of acreage shall be added?

THE COURT: Yes, determination of the amount in controversy in the matter.

MR. RICHARDS: The only open question is the amount for the trees. I understand we will fix the time definitely as to the extension of time.

MR. EVANS: I would suggest the ^{defendant}~~plaintiff~~ be given twenty days in which to prepare his argument to the court and serve copies on opposite counsel, and we have fifteen days to answer that.

THE COURT: That may be the understanding.

12:45 P.M. R E C E S S .

2888

IN DIST. COURT
UTAH CO. DIST.
FILED

SEP 24 1921

H. M. Hales Clerk
E. B. Dastrop Deputy