



Holden Kidwell
Hahn & Crapo P.L.L.C.
L A W O F F I C E S

RECEIVED

JUL 15 2009

DEPARTMENT OF
WATER RESOURCES

1000 Riverwalk Drive, Suite 200
PO Box 50130
Idaho Falls, Idaho 83405

Tel: (208) 523-0620
Fax: (208) 523-9518
www.holdenlegal.com

Email: rharris@holdenlegal.com

July 13, 2009

Garrick Baxter
Idaho Department of Water Resources
PO Box 83720
Boise, ID 83720-0098

RE: Research Regarding Point of Diversion Issue, Subcase Nos. 22-228, 22-674B,
22-674C, 22-674D, and 22-674E.

Dear Garrick:

This letter contains research resulting from the field exam performed by myself and Michael Holliday of the Eastern Region office of IDWR to Teton Valley to examine and discuss issues surrounding the above referenced Subcases. The letter also contains references to trial documents I obtained in a file retained by Ray Rigby, who represented Ray Gordon in *Crow v. Carlson*. The primary dispute that remains subject to pending objections before the Snake River Basin Adjudication Court is the appropriate identification of the point of diversion of these water rights.

As you know, the predecessor water rights involved in this matter were the subject of a case that was ultimately decided in the Idaho Supreme Court, which was entitled *Crow v. Carlson*. Upon remand from that decision, the parties, which apparently included the Department as they were the named defendant in this matter, met in Teton Valley and designated a point of diversion for this particular water right. The point of diversion was described as a point approximately 800 feet east and 50 feet south of the NW corner of the SW quarter of Section 26, Township 4N., Range 45E. This location is generally known as the Dewey Headgate. Enclosed is a copy of a USGS map which I obtained from Michael Holliday, and upon which I have added some additional notations based upon our field visit. You can see that Dewey Headgate is located in the middle part of the map.

In addition, we also observed the Meyers Headgate, which is located in Section 30, and is also labeled on the map. This is the currently recommended point of diversion for these particular water rights. As set forth below, we believe that the most just result in these particular cases would be to list the Meyers Headgate as the point of diversion, but to further condition the water rights to state that the diversion rate under these water rights is to be

measured at the Dewey Headgate. This would in effect memorialize what the parties stipulated to in *Crow v. Carlson*. The reasons for doing so are set forth below.

In order to put these water rights in context, it is helpful to describe the historic delivery of the water rights, and explain why the water right holders listed above would have ever even agreed to have their water rights diverted from the Meyers Headgate into the Fox Creek Canal in the first place. We have gone to great lengths to try to understand the historic delivery of water, and obtained greater understanding from our field visit, but also in my review of some of the original trial transcripts in this matter, which were eventually submitted to the Idaho Supreme Court. The Information obtained during the field visit, combined with the documents obtained from Mr. Ray Rigby's Supreme Court file, shed some important light on this matter. Copies of relevant documents are enclosed, and we have done our best to mark those sections most relevant and crucial to this understanding.

Before getting into that history, it is my understanding that the Department's general interpretation of *Crow v. Carlson* is that it was a case merely to quiet title to a water right, and that the point of diversion was never at issue, was not a significant issue before the Court, and therefore IDWR does not have to give any legal effect to the stipulated decree from Idaho Supreme Court. After reviewing the enclosed documents, we very much disagree with that assessment. As will be shown, the point of diversion issue was certainly addressed, and while perhaps it should have been described as a point of measurement, this is no different than the hundreds of other decrees throughout Idaho that did not uniformly describe particular water rights. The fact that water rights were not uniformly described should be of no surprise to the Department. Idaho Code § 42-1427 clearly states that there have been inconsistencies in how elements of a decreed or licensed water right have been defined, and that if a licensed or decreed water right does not describe all of the elements, the Director shall include in his Director's Report recommendations for those elements not so defined. Furthermore, Idaho Code § 42-1401(b) states clearly that one of the Director's roles in the adjudication is to ensure that water rights are accurately reported. This not only relates to the defined elements of a water right, but in our opinion, also allows the Director to include conditions which relate to expectations as to the water right itself. Indeed, Idaho Code ss 42-1411(2)(j) clearly states that one of the elements of the water right can be remarks that are necessary for the definition, clarification, or in this particular case which is of most importance, the administration of a water right. This will become more evident as we discuss this history below.

The above water rights have a decreed priority date of June 1, 1890. It is generally well accepted that the Fox Creek Canal Company was formed in 1916, only after it had decreed to it a high flow right. Thus, Fox Creek Canal Company functions as a type of hybrid entity, which delivers both its decreed high flow water rights, but also acts as a carrying or delivery company to deliver already decreed water rights held by individuals. The Meyers Headgate is one of four diversion points used by the canal company, and is the furthest down stream on Fox Creek. The objectors' places of use are generally located in the N½ of the SW¼ of Section 27. This is approximately 2.5 - 3 miles from the location of the Meyers Headgate. The obvious concern with such a length of canal is conveyance losses through the canal. This therefore begs the question: Why would the objectors' predecessors in interest have ever agreed to divert out of the Meyers Headgate to their respective properties, which would necessarily cause them to suffer increased conveyance losses with their very senior 1890 priority date water rights? The answer lies in how the water rights were historically delivered before being delivered through the Fox Creek Canal.

On the enclosed map, there is a hand drawn channel entitled "Little Fox Creek". If one were to view the approximate location of this channel today, it hardly looks like a creek channel at all. There is a low lying area coming off of Fox Creek, which is lined with a number of cottonwood and other types of trees. Over time, the creek channel has been filled in, and there are even some locations where homes have been built right in the former location of the channel. Enclosed is a 1992 aerial photo given to me by Michael Holliday, and I have circled the location of the trees which generally show the location of a portion of the former channel. While the channel may not exist as it once did, the trees provide very clear evidence that there was a historic channel that came off of Fox Creek, a braided channel, which was commonly referred to as "Little Fox Creek". Water was delivered to the objectors' predecessors in interest through the Little Fox Creek. As a natural channel of Fox Creek, the objectors diverted from the natural channel and could call out upstream junior water right users if water supplies were not adequate. Eventually, because of the conveyance losses through Fox Creek and Little Fox Creek, shutting off juniors up gradient did not lead to significant measurable improvements to the objectors' lands. Eventually the canal company approached these water users and asked if they would consolidate with other water users through a canal that would be diverted from the Meyers Headgate, which was over a mile upstream from the heading of Little Fox Creek. They agreed to do so, but only if the amount to be delivered to their properties was measured such that they did not bear any additional conveyance losses they were already suffering.. There is no other logical explanation as to why these individuals would ever agree to move off of diverting from a

natural channel. They would only do so if they did not have to bear the shrink or transmission losses to where the water was delivered.

Enclosed with this letter is an Affidavit from Ray Gordon that describes in affidavit format how water was delivered to their respective properties. On the second page, I have underlined the reference to Little Fox Creek, which substantiates the existence of this channel, and how water was historically delivered. In addition, in Mr. Rigby's Supreme Court file, there is a hand drawn map which labels the Little Fox Creek Channel, and provides additional evidence of the existence of this channel and its historic use and delivery. Unfortunately, I am not sure who made the drawing, but I believe it was made by Mr. Gordon.

At the trial of *Crow v. Carlson*, before it was appealed to the Idaho Supreme Court, there was extensive testimony on how the water rights were historically delivered to individual properties. Enclosed for your reference are various transcripts from the testimony of Ray Gordon, Dee O'Brien, Boyd Moulton, and others. I have only included those portions that, based upon my review, were most relevant, and related to water delivery matters. Because Mr. Gordon was the named plaintiff in that case, I did include the entirety of his direct examination. I have drawn black lines on that testimony, which I believe is most relevant and important to resolving this particular matter.

To put it bluntly, it was quite clear that the point of measurement-point of diversion issue relating to the Dewey Headgate was an issue front and center before the Court. As such, it seems that the Department's position with this case as merely a quiet title action is not accurate. The issue was addressed, and eventually resolved through the stipulation which listed the Dewey Headgate as the point of diversion. While it likely should have more accurately been described as the point of measurement, it shows direct and clear evidence that the parties desired that the Dewey Headgate be the point at which the Watermaster measured water to each water right holder off of Fox Creek for the reasons stated in the above paragraphs regarding abandonment of Little Fox Creek.

As contained in the trial transcript of Mr. Ray Gordon, there was a number of questions relating to how the property was historically irrigated. There are a number of references throughout to the "old channel of Fox Creek", which appears to be the Little Fox Creek channel that was discussed in the above paragraphs. This is initially described on Page 201, where it references the old Fox Creek channel.

Regarding the point of diversion matter, on Page 232, there was an exchange between the Court and Mr. Gordon distinguishing between what the parties have both called points of diversion. One point of diversion was the point of diversion on the creek, and the other was the point of diversion on the canal itself or where water was diverted to their property. This evidences what was apparently a generally accepted practice in calling the point of diversion off the canal just as the point of diversion off the creek.

The next deposition transcript is from Dee O'Brien. On page 281, Mr. O'Brien described the Dewey Headgate where 80 inches goes north and 40 inches goes south at the dividing point above Deweys. On cross examination, this was further confirmed by Mr. O'Brien. On page 282 of his trial transcript, he clearly gave his opinion as to why he did not like the point of diversion on the canal, and indicated that the canal company had the responsibility to distribute water on the canal. On page 286, Mr. O'Brien indicated at that point in time he was delivering 1890 water, but stated it was from the point of diversion out of the creek. On page 289, Mr. O'Brien continues his conversation on these issues. Continuing on Page 292, the question was asked regarding the diversion point, and Mr. O'Brien responded there is 80 inches and 120 inches and that 40 inches is sent one direction and 2/3 is sent the other direction. This is additional evidence that points of diversion had multiple meanings nearly 30 years ago.

Perhaps the most important language is found on Page 292, where Mr. O'Brien stated that it had been Mr. Bean's contention that the Dewey Headgate "should be the dividing point and if you only have 120 inches there I think that is one thing and should be decided is where is their point of diversion and I hope that will be decided by the Court in this case. You see they contend that that is their point of diversion where the water is divided between the two parties and if it is then you've got 120 inches there that is not enough to fill any of that 1891 decree." Thereafter on page 294 Mr. O'Brien says "if the Court decides the diversion point is the creek you have five second feet that are being diverted you know the creek dammed off that water that is left after the pipeline gets their 1890 water." Thereafter on Page 295, there is an additional discussion about where the water is actually measured. Clearly, Mr. O'Brien's view was that the Court case would resolve any issue over where the actual point of diversion, which is essentially a point of measurement, would be decreed.

The next trial deposition is that of Mr. Boyd Moulton, and it contains some discussion regarding the diversion point and historic irrigation practices on the property. Beginning on Page 96, Mr. Moulton testified that he was talking about a "diversion just above Jim Dewey's house".

The next trial transcript is from Ryan Kunz, and on page 309, he was asked if he knew where the diversion point was that Mr. O'Brien spoke of. He clearly said that he was aware of it, the one that shoots water in either direction. He also testified that he was aware of the other diversion point up on Fox Creek itself.

Lastly, there is a portion of the Court transcript that relates to the point of diversion. Beginning on page 322, Mr. Rigby wanted to make the record clear that the point of diversion claimed by both plaintiff and defendants was the point approximately 800 feet east and 50 feet south of the NW corner, Section 26, a point known as the Dewey Headgate. On Page 323, attorney Lynn Hosner stated that is the point where the diversion presently is and where the parties were getting water.

While I am not extremely familiar with the procedural history in this case, there are two issues that jump out as I review the record. The first is that there was a dispute between the water users and the Watermaster as to where the water diverted to their respective properties was to be measured. Secondly, however, both Crow and Carlson stipulated and plead by complaint the location of what they call the point of diversion which in today's language, would likely be classified as a point of division or point of measurement. As discussed above and shown in the trial transcripts, the phrase "point of diversion" was used loosely to refer to both the point of diversion off of Fox Creek at the Meyers headgate, and the point of division located at the Dewey Headgate. Both Crow and Carlson, however, clearly stated that the point of diversion or measurement was located at the Dewey Headgate. Mr. Ron Carlson, as Watermaster of Water District #1, was a named party. If the State felt that a point of diversion description was in dispute, it had every opportunity to respond to that allegation, and did not. Mr. Dee O'Brien even indicated that he hoped this is an issue the Court would resolve. In our view, it is an issue the Court resolved. After the appeal to the Supreme Court, the parties met on site and again determined that the point of diversion or measurement was located at the Dewey Headgate. While there is nothing in Mr. Rigby's record to reflect this, he recollects that all of the parties met, which included representatives of the Idaho Department of Water Resources, to designate the Dewey Headgate as the point at which their water was measured. Mr. Rigby has also indicated that he recollects a letter from Keith Higginson, the then Director of IDWR, to Mr. Ron Carlson, demanding that he deliver and measure water at the Dewey Headgate to the parties whose property is now owned by the Objectors in the above subcases. We anticipate that once discovery is submitted, we will request that letter.

As we fast forward over 25 years, the SRBA is now defining water rights by a point of diversion which it has interpreted to mean the location on the public source from which water is diverted. This term has not always been defined. In fact, to date the only definition of which we are aware in the Department's Administrative Rules is found under the beneficial use examination rule at IDAPA 37.03.02.010.24, which states that the point of diversion is the "location on the public source of water from which water is diverted." As discussed previously in this letter, the Legislature recognized that with the commencement of the Snake River Basin Adjudication, previous decrees did not uniformly define elements, and therefore, one of the purposes of the SRBA was to be consistent as to how the elements of a water right are to be defined. Therefore, based on the now better defined definition of a point of diversion, it seems rather clear that the point of diversion for these water rights should be listed as the Meyers Headgate as it is the location of Fox Creek where water is diverted from the public supply. However, with this definitional change, without the addition of an additional comment as to where the water should be measured, the water rights to be decreed in the Snake River Basin Adjudication will not accurately document how the water rights have historically been administered. They have been administered by measuring the decreed rates at the Dewey Headgate. We see no reason why the point of diversion for each of the above subcases could not be defined as the Meyers Headgate, but for purposes of further defining administration, also include a condition in the water right necessary for administration pursuant to Idaho Code § 42-1411(2)(j) listing the point where the water right is measured. Without this type of a condition, the Department will have ignored the reliance made by prior water right holders to the 1890 decreed water in moving from Little Fox Creek to the Fox Creek Canal.

Additionally, as we have discussed this issue over the past few years, the general consensus I have received from the Department is that *Crow v. Carlson* did not involve a dispute over the point of diversion, but instead involved a quiet title action. Based on the records I have provided, I significantly disagree with this assessment. The point of diversion was certainly addressed in examination questions, the parties stipulated to the location of the point of diversion in their complaint, and if the Department of Water Resources did not agree with that location, it had every ability to be involved in the case to better define that point of diversion. The Department simply cannot ignore a decree from the Idaho Supreme Court. What it can do is take that decree, and based upon new definitions resulting from the adjudication, define the water right as best it can based on the previous decree. As the Supreme Court Decree now stands, the point of diversion on the Decree is not on a natural channel. Based on the Department's new definition of point of diversion, the actual point of diversion at the Meyers Headgate can be listed as the point of diversion, but in doing so,

the Department simply cannot ignore the Supreme Court decree without including a reference to the Dewey Headgate which the Supreme Court did determine was a point of diversion, which under today's definition, is probably more appropriately termed a point of measurement or point of delivery.

At our field visit, in my discussions with Michael Holliday of the Department, I had concluded that perhaps the issue involving the Dewey Headgate was a canal company issue. As I have thought about the issue further, I have made a complete reversal, and believe strongly that this is not a canal company issue. It is a delivery issue of privately held decreed water rights, owned by individuals, which therefore puts the delivery of these water rights squarely within the jurisdiction of the State of Idaho. The earliest Fox Creek Canal Company water rights date back to 1916, and while they are a delivery company, the delivery of that water through their canals is ostensibly regulated by the State of Idaho. This issue does not involve the canal company. It involves the State, and in our view the Water Right Partial Decrees must include a remark necessary for the administration of the water right which clearly demonstrates that the Dewey Headgate is the point of measurement for these particular water rights.

Previously, we have heard arguments that recognizing a point of delivery off of the public water supply would create an undue burden on the State Watermaster. After reviewing these records and visiting the site, I do not believe that is the case. The Dewey Headgate is right off of a public road, and even if it was off of a public road for some distance, under its regulatory authority, the Department of Water Resources has authority to access these headgates to fulfill their responsibilities to deliver water rights pursuant to priority. Logistically, however, the situation now before the Department and the SRBA Court is quite simple. The Dewey Headgate is well recognized, and it would not be difficult for the Watermaster to measure water at that particular location. In short, logistical concerns should not be a concern.

Lastly, for point of clarification, there is often been reference to what is commonly called the "Brown Headgate". The Brown Headgate is labeled on the USGS map, and is essentially on the boundaries of Section 26 and 27. After the Dewey Headgate divides the water rights, they continue down to the Brown Headgate and are once again split to deliver water to my clients' properties. My clients would prefer to have the Brown Headgate listed as the point of measurement, and as such, I believe Mr. Moulton, who I do not represent, has made such a claim. To be clear, we are relying on the Supreme Court decree which shows that the Dewey Headgate is clearly the point where water should be measured.

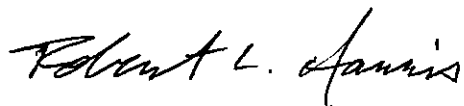
Based on the above evidence, we propose that this matter be resolved by keeping the currently listed point of diversion off of Fox Creek as the formal point of diversion for purposes of the Snake River Basin Adjudication. Because the Meyers Headgate diverts off of the natural channel of Fox Creek, based on the Department's current definitions, this is the appropriate listing of the point of diversion. However, we further propose that a remark be added stating that "The full diversion rate authorized for this water right shall be measured at the Dewey Headgate, which is located in [insert legal description]."

We further note that having the point of measurement at the Dewey Headgate is almost in the middle of the Fox Creek Canal, wherein my clients would still bear some of the transmission losses down to their properties. While we could certainly argue that the intent was that they suffer no transmission loss based on their previous delivery through Little Fox Creek, we believe that the proposal we have made is a fair resolution in that my clients will also bear some of the conveyance loss. We still bear some of the burden.

Please let us know if this would be an acceptable resolution. In our view, it is a good resolution because it recognizes the Department's need to consistently define their water rights, but the remark also clearly shows an intent to document the expectation and history of how water rights have been historically delivered to my clients' properties and gives appropriate respect to the Supreme Court decree. Please let me know within fourteen (14) days of the date of this letter if this would be acceptable to your client. Otherwise, we will continue with the preparation of our discovery requests to the Department and will have them submitted shortly. Based on the above evidence, to the extent it is not acceptable to the Department, we will proceed forward on a motion for summary judgment, and will rely on the Supreme Court Decree as we have in the above letter.

If you have any questions, or wish to discuss this matter further, please let me know.

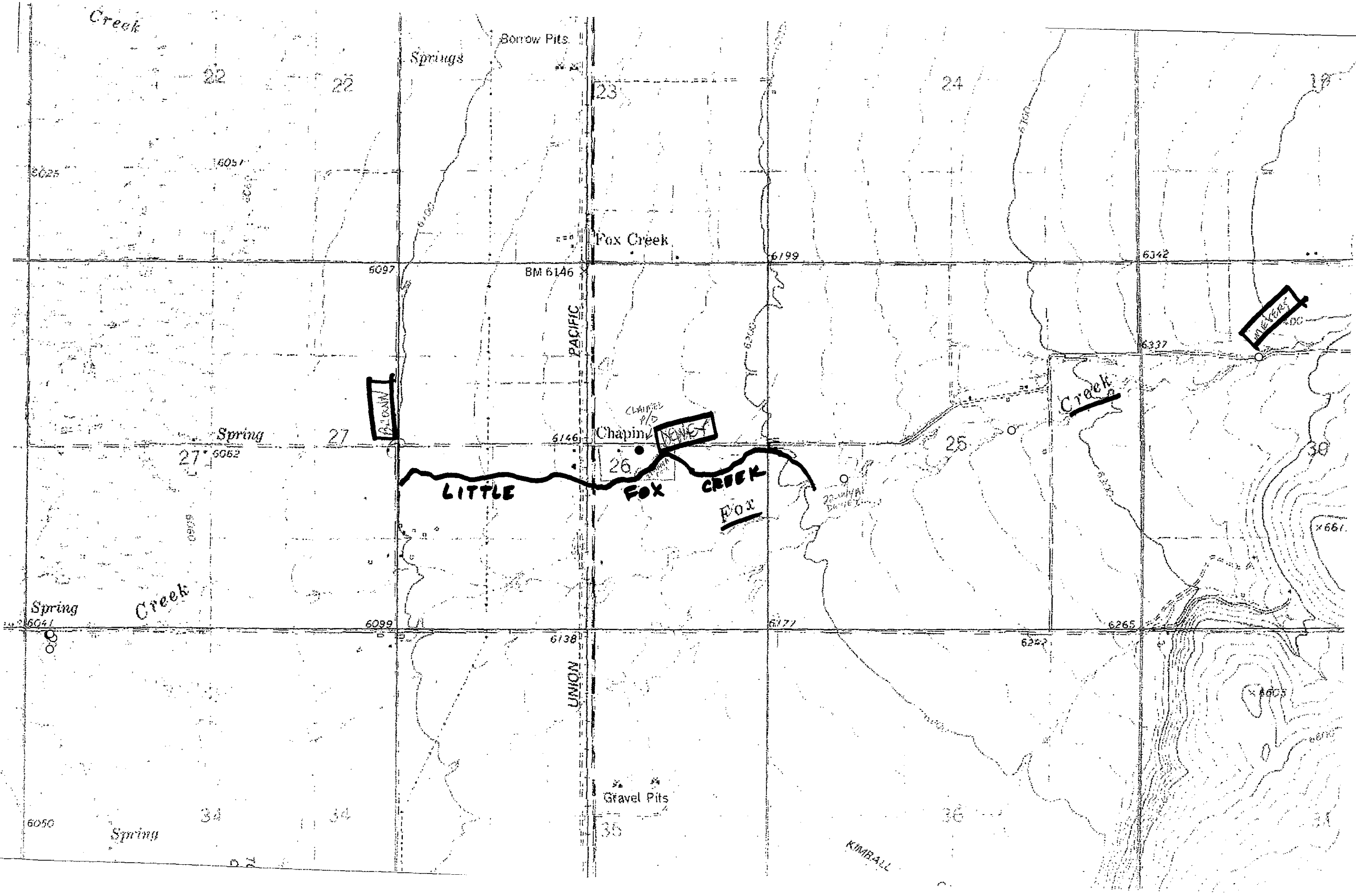
Best Regards,



Robert L. Harris
HOLDEN, KIDWELL, HAHN & CRAPO, P.L.L.C.

Enclosures

c: Ernie Carlsen
Michael Holliday



1 MR. RIGBY: We will call Dee O'Brien.

2 DEE O'BRIEN,

3 called as a witness by and in behalf of the defendant, having
4 first been duly sworn, was examined and testified as follows:

5 DIRECT EXAMINATION

6 BY MR. RIGBY:

7 Q Will you state your name?

8 A. Dee O'Brien.

9 Q And your residence?

10 A. Driggs.

11 Q How long have you lived here?

12 A. In Driggs for approximately going on six years.

13 Q Have you lived in the valley?

14 A. I have been a resident of the valley all of my
15 life except for the time spent away on a mission and going to
16 school.

17 Q What is your present occupation?

18 A. School teacher and in the summer deputy water
19 master for the State of Idaho.

20 Q Did you succeed Art Wilson in that job?

21 A. Yes.

22 Q And do you know who served in that position prior
23 to Art Wilson?

24 A. I believe it was Drew Cooper.

25 Q Do you happen to know how long? How many years?

1 A. I don't. I just know the history of Art, but
2 I don't know anything about Mr. Cooper.

3 Q. So when did you take over the duties?

4 A. My first year was 1978.

5 Q. Nineteen seventy-eight?

6 A. Yes.

7 Q. And are you familiar with the water rights that
8 has been discussed now for nearly two days in this courtroom?

9 A. Yes.

10 Q. Have you been administering that water right?

11 A. I have been.

12 Q. So you know where it is?

13 A. Yes.

14 Q. What lands are involved? How do you recognize
15 the division as a water master of the 120 inches of water that
16 was decreed to Michael Byrne in the Rexburg decree?

17 MR. HOSSNER: We object to this as being irrelevant and
18 immaterial as to how he recognizes. Of course he can testify
19 as to what his records now show, but the reason it is here as
20 I understand it is for the court to recognize that decree however
21 it is going to do it.

22 MR. RIGBY: He is the water master, Your Honor, and he
23 makes the distribution and I want to know how he distributes it.

24 THE COURT: Well, maybe you should ask him how he
25 distributes it because how he recognizes it might be almost

1 anything.

2 MR. RIGBY: I assume he distributes it according to
3 how he recognizes it, the way he interprets it.

4 THE COURT: Yes. The only thing is that Lynn has
5 objected and, of course, Lynn's objection is that it was asking
6 for an interpretation which maybe he is not qualified to give,
7 but he is qualified to tell how it is distributed. Go ahead.

8 THE WITNESS: Okay. The way it has been distributed
9 I have always tried to turn at least a third of the water
10 coming out. Quite often there is more than enough water to
11 fill both of those decreed to both of those lands and so I
12 sent a third one way and two thirds the other and more often
13 than not it is more than enough water to fill that decree and
14 sometimes when the water is below, for example right now
15 approximately 80 inches is going north and 40 inches is going
16 south at that dividing point right above Deweys.

17 MR. RIGBY: That's all we have.

18 CROSS EXAMINATION

19 BY MR. HOSSNER:

20 Q Aren't there other users on that? You say there
21 is a third that goes down and a third goes down the Gordon
22 ditch?

23 A Yes.

24 Q And two thirds goes down the other ditch, that
25 is to the Reggan property?

1 A. Yes.

2 Q. Does anybody else have water coming out of either
3 of those two ditches?

4 A. I don't know. As a water master our primary
5 responsibility--

6 Q. Now, I don't care about that. What I want to
7 know is when you divide that water going down that ditch are
8 there any other users on that ditch after you divide the water
9 and the Dewey place gets part of it and the Moulton property
10 gets part of it and what happens to the water?

11 MR. RIGBY: Now, Your Honor, he has a right to explain
12 his answer.

13 THE COURT: Yes.

14 MR. HOSSNER: After the answer, of course.

15 THE WITNESS: As a water master, if I may preface my
16 answer--

17 Q. (By Mr. Hossner) Why don't you answer my
18 question?

19 A. I will, but as a water master our job
20 description is that we see that the decrees are administered
21 from the diversion point from the creek. Now the diversion
22 point on the creek has been moved and so I see that there is
23 sufficient water taken from the creek, placed in the canal to
24 fill those decrees. Now, if the various property owners have
25 a question on whether or not they are getting the amount of

1 water that they should then they can ask me to come and measure
2 the water that they are getting clear down to their place. The
3 water master doesn't have time to start at the head of the
4 canal and ride clear down to the bottom of the ditch to see
5 where they are putting the water or see they are getting it
6 unless they request that we come down and measure. That is the
7 purpose of a canal company organization. Now, in answering
8 your question two thirds of the water is going in that north
9 ditch, a third is going in the south ditch and I don't know.

10 Q Well, who takes water out of the south ditch?
11 Do you know?

12 A I know that that goes down to Mr. Gordon and on
13 down to Mr. Kunz.

14 Q So Mr. Gordon and Mr. Kunz take out of the
15 south ditch and they are taking a third of the water?

16 A Their water is going out in that direction.

17 Q Then on the property that Mr. Crow owns who
18 takes water out of that ditch besides Mr. Crow?

19 THE COURT: Just a minute. Who did you say? Mr. Gordon
20 and who else?

21 THE WITNESS: Mr. Gordon and Mr. Kunz, the old
22 Ned Hibbert place. They are all in that direction.

23 Q (By Mr. Hossner) They are all taking out of
24 that south ditch?

25 A I don't know.

1 THE COURT: He said all. You said Mr. Gordon and
2 Mr. Kunz and all. Does all mean Mr. Gordon and Mr. Kunz or
3 are there some more?

4 THE WITNESS: No, there's other property.

5 Q (By Mr. Hossner) Now, what about the north
6 lateral? Who takes out of that one?

7 A Mr. Crow, Mr. Moulton, Doc Brown, Mr. Stone.

8 Q Dwight Stone?

9 A No.

10 Q Or Elmer?

11 A That would be Elmer.

12 Q How many shares are in the irrigation canal,
13 the Fox Creek Irrigation Canal Company? How many shares of
14 stock do all of these people that you describe own in that
15 canal company?

16 A As far as shares are concerned, I feel that that
17 kind of a canal, you know, as soon as they start delivering
18 shares then it is up to the canal company's water master to
19 say okay, we are delivering this many shares.

20 Q Well, are you working on this 1890 decree now?

21 A Yes.

22 Q Are you down to the 1890 decree today?

23 A We are down to deliver 1890.

24 Q Are you filling any newer decrees?

25 A Yes.

1 Q What newer decrees are you filling?
2 A We are filling some on the pipeline.
3 Q What decrees are those?
4 A Some up through -- currently about seven second
5 feet that are going into the pipeline.
6 Q Well, is all of the 1916 water, are you below
7 the 1916 decree now that the Fox Creek owns?
8 A Yes.
9 Q When did you go below that?
10 A I would have to check the records to find the
11 exact date.
12 Q But there are still decrees newer than the
13 1890 decree that you are filling?
14 A Yes.
15 Q And are you telling the court that you are not
16 filling any of that 1916 decree now?
17 A No, not with the amount of water we have got.
18 The only time we can go farther than that 1916 decree is if
19 the ones holding the older rights aren't using the water.
20 Q Right. Only if the ones with the older rights
21 aren't using the water.
22 A Then we fill all the priority rights we can.
23 Q So today those old decrees have not been called.
24 Is that what you are telling us?
25 A No. Those old decrees were called.

1 Q Have they been called? Has Mr. Crow
2 1890 decree?
3 A Well, Mr. Bean called for the water.
4 Q This year?
5 A Yes.
6 Q And are you delivering his 1890 water to him?
7 A I am from the point of diversion out of the
8 creek.
9 Q And how many inches are you delivering to that
10 property, that is the property of Mr. Bean's?
11 A I am delivering 80 inches from the point of
12 diversion.
13 Q Have you measured that?
14 A Yes, from the diversion out of the creek.
15 Q How many are you delivering to Mr. Stone?
16 A Now, like I say, that right now, the point of
17 diversion out of the creek there are five second feet day
18 before yesterday. Now, that is being divided. After that
19 point of diversion if they want me to measure like I measure
20 down by the split by Mr. Dewey's.
21 Q Now, let me talk about this. Boyd Moulton,
22 what is his decree?
23 A Eighteen ninety-one.
24 Q Okay, 1891. Dean's decree and Crow's 1890. Who
25 else is on that north lateral?

1 A. Okay, Mr. Stone, for one.
2 Q. Stone and the Crows?
3 A. Boyd Moulton.
4 Q. Boyd Moulton.
5 A. Okay, right now on filling the 1891 decrees,
6 those are the only two, Moulton and Crow.
7 Q. Now, who else is on that lateral that gets
8 water of that lateral?
9 A. Right now we are just filling the 1891.
10 Q. Okay, only filling the 1891. How much water
11 is there supposed to be going down on those '91 decrees?
12 A. It would be a total to fill both of them 5.6 if
13 we could fill through the '91 completely.
14 MR. RIGBY: Excuse me, Your Honor. Could I ask for
15 a point of clarification? I understood your testimony to mean
16 for you to say that you are only filling 1890 decrees. You are
17 filling 1891 as well?
18 THE WITNESS: Well, when there is sufficient water. You
19 see, if they want to fill theirs through their 1890 decree we
20 would have 9.1 second feet going to the pipeline. Apparently
21 we have only got seven second feet which frees up possibly two
22 second feet that we can send down and that becomes available to
23 fill this 1891 decree.
24 Q. (By Mr. Hossner) Well, what kind of decree do
25 you have in that pipeline?

1 A. In the pipeline you have to 1899.
2 Q. How many inches do they have?
3 A. One has 1.6 second feet or 80 inches. There is
4 another 1889 and that is 55 inches and then the 1890 decrees
5 where you have got 160 inches in one place and then you have
6 got another 160 for a total of 9.1 second feet.
7 Q. And those last ones you gave us was 1890?
8 A. Eighteen ninety, so up through 1890 there is a
9 total of 9.1 second feet in the pipeline.
10 Q. And is that what you are putting in the pipeline
11 at the present time?
12 A. Right now I would say there is approximately
13 seven second feet.
14 Q. And is that water only going to these people
15 that have the '89 or the '90 decrees?
16 A. Probably not. It is my understanding when they
17 put the pipeline in they were willing to put their decreed
18 water in and go on a share basis so that they weren't guaranteed
19 that they would get their full decree, but get according to their
20 share.
21 Q. Now, Boyd Moulton, doesn't he have 160 inches?
22 A. He had 160 inches of 1891.
23 Q. Okay, that is Moulton and that is on the same
24 ditch as the Crow property?
25 A. Right.

1 Q And the Crow property has 120 inches and you
2 claim that you are recognizing now 80 inches?
3 A Yes.
4 Q Now, how many inches does Mr. Stone have?
5 A Of early water?
6 Q Yes.
7 A He doesn't have any according to this.
8 Q Is there anybody else on that ditch that has
9 any 1890 or '91 somewhere in there water?
10 A Not according to this.
11 Q Now, you say that you are giving at the present
12 time Ray Gordon 40 inches?
13 A That is being delivered.
14 Q Of an 1890 decree?
15 A Yes.
16 Q Now, if my arithmetic is right over in the side
17 where Mr. Bean is there are 240 inches in that north lateral.
18 Over on the south lateral there is to be 40 inches.
19 A No.
20 Q Well, who else is in the south--
21 A What I am saying is that being diverted and this
22 gets complicated, being diverted from the creek there is enough
23 water. There's five second feet. That is 250.
24 Q All right, there's 250 inches diverted from the
25 creek?

1 A. Now, we are not talking about the
2 the dividing point down by Dewey where we have 90
3 one way and 40 going the other. We are talking about the
4 diversion point recognized by the Department of Water Resources.
5 At that diversion point we have got 250 inches which is plenty
6 for the 40 inches and plenty--

7 Q. You are saying that when it goes down from that
8 diversion point it is divided and you are putting approximately
9 80 inches in the south lateral and approximately 160 or 170 in
10 the north lateral, is that right? Is that the way it figures
11 out?

12 A. No. I am saying that we have got five second
13 feet going from there and what is being reaching is about 120
14 inches. You have got that much ditch loss.

15 Q. Then you are telling us in the south lateral
16 whoever has -- You are claiming that there's 40 inches that
17 belongs to Ray Gordon. Is that what you are telling us?

18 A. I am saying we are splitting it in thirds and
19 two thirds.

20 Q. No, I don't care how you are splitting it. How
21 many inches do you say Ray Gordon has coming?

22 A. I am saying 40 inches.

23 Q. Okay, who else in that south lateral has any old
24 decree? Mr. Kunz, does he have an old decree?

25 A. No.

1 Q But you are putting a third of the wa
2 that side when there's 40 inches and two thirds down the
3 side where there is a total, if my calculations are right, 80
4 inches to Crow and 160 which is 240. So on the north side you
5 have 240 inches where they are entitled to water and on the
6 south side there are 40. Why are you splitting a third and
7 two thirds? You are not splitting according to decrees, are
8 you?

9 A Well, I am according if you get that much water
10 in there. Then we say okay, we have got this much water that
11 will reach this point and it has been a contention. You know,
12 this is the question that Mr. Bean brought up. He said: Okay,
13 I want this as my diversion point and so if you consider 120
14 inches that reaches that point then it no longer becomes --
15 you know, we don't have enough water to fill part of Mr. Moulton
16 decree. So, you send 80 inches one way and 40 inches the other
17 way.

18 Q But you are not doing that, are you?

19 A That is what I said, you have got 80 inches
20 going down to Mr. Crow's property and 40 inches to Mr. Gordon.

21 Q No, you don't.

22 A I do.

23 Q You have 240 inches going down the north side,
24 or you should have.

25 A No. I have got 250 inches coming out of the

1 creek at that dividing point and I think that is the only
2 thing that needs to be settled in this.

3 Q Where is their diversion point?

4 A Okay, right now there is 80 inches and 120
5 inches. We send 40 or a third of that decree south, two thirds
6 of that decree north.

7 Q But you are not doing it?

8 A I am. There is 40 inches now and all I have
9 got is 120 inches of that old decree.

10 Q But you are not doing it because you have
11 Mr. Moulton--

12 MR. RIGBY: Your Honor, I don't think he should argue
13 with the witness.

14 MR. HOSSNER: I just want to ask him a question.

15 Q (By Mr. Hossner) You have got Mr. Moulton--

16 MR. RIGBY: Now, you want it that way, but he is
17 telling that that is the way he is delivering it.

18 THE WITNESS: Right now there is not enough water
19 reaching that dividing point to fill Mr. Moulton's decree.

20 Q (By Mr. Hossner) Now, it is a fact, is it not,
21 that Mr. Moulton has 160 inches that goes down the north side?

22 A Of 1891 water.

23 Q That's right. You are saying that Bean and Crow
24 and Byrne has only 80 inches in the north lateral?

25 A Right.

1 Q Now, that's 240 inches?

2 A Right, when there is enough water--

3 Q We don't care. We are just mixing math up.

4 A Well, you can't deliver water that is not there.

5 Q I agree with you. In the south lateral you have
6 decided that there is 40 inches that should go down the south
7 lateral to the Gordon property?

8 A Right.

9 Q Now, that's a total of 280 inches. Forty going
10 down the south lateral is one seventh of 280, is that right?

11 A Right. You have got 280 inches there.

12 Q Well, we are just talking about a volume. So,
13 it is a fact that six sevenths of the water should go down the
14 north lateral and one seventh should go down the south lateral--

15 MR. RIGBY: Your Honor, I object to the question. He
16 said there is only 120 inches at that point and, if it is, then
17 that takes out the 91. I should think that would be obvious.

18 THE COURT: Yes, that is the way I figure it, but I
19 guess he can answer.

20 THE WITNESS: It has been Mr. Bean's contention to me that
21 should be the dividing point and if you only have 120 inches
22 there I think that is one thing that should be decided is
23 where is their point of diversion and I hope that will be
24 decided by the court in this case. You see, they contend that
25 that is their point of diversion where the water is divided

1 between the two parties and if it is and you have got 120
2 inches there that is not enough to fill any of that 1891
3 decree.

4 Q (By Mr. Hossner) But isn't it so, Mr. O'Brien
5 if you are dividing there, if the Moulton water is coming down
6 and the Bean water is coming down--

7 MR. RIGBY: But, Your Honor, I object again. That is
8 a fact not in evidence. The Moulton water isn't coming down
9 because we are on the 1890 water.

10 THE WITNESS: If you consider the point of diversion
11 where the head gate is that comes out of Fox Creek, then you
12 are correct.

13 Q (By Mr. Hossner) Is the Moulton water now
14 coming down to that point of diversion between Mr. Bean or
15 Mr. Bean's water is divided with Mr. Moulton?

16 THE COURT: I understood him to say that the Moulton
17 and the Crow water was coming down.

18 MR. HOSSNER: That is what I understood.

19 Q (By Mr. Hossner) Is that a fact?

20 A At the division point right now there is enough
21 water to fill that 1891 decree.

22 MR. RIGBY: And that is the point.

23 THE WITNESS: Yes. If the court decides the diversion
24 point is the creek you have five second feet that are being
25 diverted, you know, the creek dammed off, that water that is

1 left after the pipeline gets their 1890 water.

2 Q (By Mr. Hossner) Right now what is at the
3 diversion point in inches? Are you telling us that is only
4 1890 water at the diversion point?

5 A At the dividing point what is there is 120
6 inches.

7 Q And that is all there is today?

8 A That is all that is there.

9 Q So today you are sending a third of that and
10 you are not giving any to the Moultons? You are sending a
11 third over to Mr. Gordon?

12 A Forty inches is going south and 80 inches going
13 north.

14 Q And there's no more '91 water?

15 A Right, if you consider that the diversion point.

16 Q Now, when did you go off of the 1891 water?

17 A Again I have to check the records to see, you
18 know, going back to see how much water we have had at that
19 point.

20 Q Now in 1978 apparently you were present or '79
21 or sometime when Mr. Gordon called for what he claimed to be his
22 water?

23 A Mr. Gordon, as far as calling, as I remember the
24 date in 1978, now Mr. Bean has been the only one -- Well, let
25 me retract that. He has been the initial one that called for

1 the water and then in 1978 or '79 Mr. Gordon said, "What about
2 my decree?" Then upon investigation, and that was mentioned
3 also by some of the board of directors and then upon investiga-
4 tion I found the property description in the decree and
5 delivered the water.

6 Q And when was that that you did this?

7 A It was in '79. As I remember, the problem
8 came up in 1978. It seems to me like it was the first year
9 I was water master.

10 Q So in 1978 that is when Mr. Gordon called for
11 his water?

12 A Seventy-eight or '79 is when he mentioned to
13 me: What about my water?

14 Q Now, did you measure out his water at that time?

15 A At that time I split it so that he was getting
16 his water.

17 Q Well, when you say his water, was there only
18 120 inches at the point of diversion?

19 A No. At that time at the point of diversion
20 there was more than, as I remember, there was more than 120
21 inches.

22 Q How much was there?

23 A I don't recall.

24 Q But it was more than 120 inches?

25 A It was more than 120 inches.

1 Q And Mr. Bean, were you able to give him his 120
2 inches?
3 A I was able to get the water down to him.
4 Q And was he satisfied with the amount that he had?
5 A He seemed to be. You know, he didn't come back
6 after that.
7 Q So you are telling us that it has only been
8 today or yesterday or the next day when you have been down to
9 that 1891 decree when you have split that water, that is, when
10 you were dealing solely with the 1890 water and everybody else
11 was shut off and you are giving 40 inches of that 1890 water
12 to Mr. Gordon, 80 inches to the Crow property and the only time
13 that is happened is this year since you have been there?
14 A Every year I have been there, as has been
15 mentioned before, you know, we haven't said that well we are
16 just going to let this amount of water go down the creek.
17 Q But were you down to the 1890 water last year?
18 A Yes.
19 Q And the 1890 water, did it come down to where
20 Mr. Bean asked or the predecessors asked for that 1890 water?
21 A He didn't last year.
22 Q When did you go on the 1890 water last year?
23 A I don't remember the day.
24 Q This year he asked for the 1890 water?
25 A Right.

1 Q And in 1979 or '78 you weren't down to the 1890
2 water when the dispute came about?

3 A When he called for the water there was more water
4 than that.

5 Q Do you remember exactly last year when the call
6 was made or when you made this determination that you were on
7 the 1890 water?

8 A It wasn't called last year.

9 Q So the decree was not called in 1980?

10 A Not in 1980.

11 Q When was the decree called this year?

12 A The exact date?

13 Q Yes.

14 A July 17th.

15 Q Who called you for the delivery of the water on
16 July 17th, 1981?

17 A Mr. Bean.

18 Q After that time did you shut off any older
19 rights than the 1890 rights?

20 A I delivered his water. I didn't actually shut
21 any ditches off.

22 Q How much water did you deliver to him?

23 A There was 150 inches delivered through the north
24 channel.

25 Q That would be 150 inches through the ditch that

1 serves the Crow property?

2 A. Yes. That is the point of division.

3 Q. How many inches do you have in the pipeline now?

4 A. Well, there would be the seven second feet,
5 approximately 350 inches.

6 THE COURT: Hasn't that question been asked and
7 answered?

8 MR. RIGBY: Several times, Your Honor.

9 Q. (By Mr. Hossner) Three hundred fifty inches.

10 A. Seven second feet.

11 Q. How long after July 17th of '81 of this year
12 when you called the water when the 150 inches started going
13 down that north lateral? How long did that continue?

14 A. How long did he have the 150 inches?

15 Q. Well, does he still have it or when did that
16 taper off? Is there still 150 inches going down the north
17 side?

18 A. No. Like I say, there is 80 inches.

19 Q. Now there is only 80?

20 A. Yes.

21 THE COURT: Well, Mr. Hossner, these questions have all
22 been answered several times. I don't know why you are going
23 over it and over it.

24 MR. HOSSNER: I have no further questions, Your Honor.

25 MR. RIGBY: We have no further questions.

I am Ray Gordon son of Daniel and Bessie Gordon. I was born in October of 1924. My parents bought the S. $\frac{1}{2}$ of S.W. $\frac{1}{4}$ of Section 27 Township (4) Range 45 E. Boise Meridian containing 80 acres more or less, together with all water rights there unto pertaining. This transaction was made June 29th, 1916. Again on April 19th 1927 my parents bought the S. $\frac{1}{4}$ of S.W. $\frac{1}{4}$ of Section 26 Township (4) Range 45 E. Boise Meridian, together with all water rights.

I am now owner of the above discribed property and have lived on same all of my life except a little less than 2 years during world war 2. During my life time the water has always been delivered to this property as well as the other property on Fox Creek by the canal company through a network of canals and ditches. Sometimes canals or ditches have been changed or combined in an effort to save water.

I well remember when there was a canal running down the south side of the Parm Fenton and Christensen property (presently owned by Dick Clark) and when the south side of the canal gave way at two different places it had to be abandoned. I remember that the canal company hired Bill Stone and he with the help of the stock holders built the headgate that is now called Myers. The water then came down to a point just east of the road above the Thomas Nelson house (now owned by Stan Nelson). And the water still uses this route. There it divided through that headgate, some going streight west and some going at an angle to the southwest just to the north of Thomas Nelson's house on down just to the north of Charles Misnor's. Then to follow the road to the southwest to a point just a short distance past where the road turns streight to the west. At this point the ditch divided again. One stream following the north side of the road to a point a little above the Bill Stone home where it crossed to the south side of the road where it proceeded on west to the Dewey and Riggan property (now owned by Boyd Moulton and Lloyd Willden) as well as others in the area. The other stream crosssed the road to the south from the above mentioned point and ran to the south and west over to the main

fox creek chanäl. From there it turned due west crossing the
little fox creek close to where it diverted from the main creek.
This ditch then proceeded due west down and across the highway
and railroad tracks to the Dan Gordon property. And that is
where I remember the measuring device being, which measured
the water to said property. Not until the ditch was changed to
its prsent location and Art Wilson became water master, do I
remember the Gordon water being measured anywhere above the
property line. I do not remember exactly where but I do
know the Dewey and Riggan water was measured well below the
railroad and highway.

6	5	4	3	2	1
7	8	9	10	11	12
18	17	16	15	14	13
19	20	21	22	23	24
29	27	28	27	24	25
31	32	33	34	35	36

gross
gross
net 800

4 N R 45



1 MR. HOSSNER: That is all I plan on doing.
2 MR. RIGBY: Do you want to introduce it or do you want
3 us to?
4 MR. HOSSNER: Go ahead.
5 MR. RIGBY: Will you please mark that for the defendants
6 by the next exhibit number?
7 (Defendant's Exhibit D was marked for identification.)
8 MR. RIGBY: Your Honor, we would offer Defendant's
9 Exhibit D, which consists of the first page and the signature
10 page of the contract of sale of March 1st, 1978, from
11 Rasmussen as seller and Steven Merrill Crow and Cynthia Ruth Crow
12 as buyer of the property known as Reggan place and we would
13 like to offer it into evidence.
14 MR. HOSSNER: The records of Teton County would show
15 that document as being recorded.
16 THE COURT: Do you stipulate that it could be admitted?
17 MR. HOSSNER: Yes. That is the contract.
18 THE COURT: All right, it will be admitted.
19 (Defendant's Exhibit D was received in evidence.)
20 MR. RIGBY: These defendants will call Ray Gordon.
21 RAY GORDON,
22 called as a witness by and in behalf of the defendants, having
23 first been duly sworn, was examined and testified as follows:
24 DIRECT EXAMINATION
25 BY MR. RIGBY:

1 Q Will you state your name?
2 A Ray Gordon.
3 Q Where do you reside?
4 A Fox Creek in the Victor area.
5 Q Are you one of the defendants in this action?
6 A Yes.
7 Q What is your wife's name?
8 A Mary Jean Gordon.
9 Q Is she also a defendant in this case?
10 A Yes.
11 Q What day were you born?
12 A October 5th, 1924.
13 Q Where?
14 A On the farm.
15 Q We have spoken of two particular 80's in this
16 trial that you own at this time. Now, would you identify those
17 two 80's? What is the east 80? Where did that come from?
18 A When was it acquired?
19 Q Where did you get it?
20 A I got it from my father.
21 Q And his name?
22 A Daniel Gordon.
23 Q And he received title to that property, did he not,
24 through the conveyances that are described in the deed that
25 plaintiffs introduced yesterday?

1 A. Yes.
2 Q. And you agree that that is the chain of title
3 from the original patent down to you?
4 A. As far as I know, yes.
5 Q. Now, is that the 80 that your home is located on?
6 A. Yes, sir.
7 Q. But you weren't born on that 80?
8 A. No. I was born on the other 80.
9 Q. And who owned that 80?
10 A. My parents.
11 Q. And the house you were born in is located where
12 from your present house?
13 A. Directly across the road.
14 Q. So it would be on the east side of the lower 80?
15 A. Right.
16 Q. Now, that means that you are now how old?
17 A. Fifty-six.
18 Q. You are 56? Where have you lived during those
19 56 years?
20 A. In those two homes in my permanent residence.
21 Q. You have lived there in other words all your life?
22 A. Right.
23 Q. Now, if I calculate correctly from the testimony
24 given by Mr. Bean yesterday you would be about a year older
25 than he is, is that right?

1 A. Probably.

2 Q. Did you know Mr. Bean?

3 A. Yes.

4 Q. Do you remember when he used to come out and
5 stay with his grandfather?

6 A. Yes.

7 Q. Did you associate together?

8 A. Yes.

9 Q. In what way?

10 A. Well, we slept together as kids.

11 Q. And you played together?

12 A. We played together, fished together.

13 Q. So you are aware of the fact that he did spend
14 portions of the summers with his grandfather and his grandmother?

15 A. Yes.

16 Q. And when did your father die?

17 A. In 1967.

18 Q. When did he convey the property to you?

19 A. The north 40 of the upper 80 running east and
20 west was given to us at the time we were married.

21 Q. When was that?

22 A. I will have to have help.

23 Q. Should we call your wife about that?

24 A. Yes. It was March 30th.

25 Q. What year?

1 A. Nineteen fifty-five.
2 Q. And you two have lived there as husband and wife
3 since that time?
4 A. Yes.
5 Q. How many children do you have?
6 A. We have five.
7 Q. Now, you acquired that 40 which you say is the
8 south half of the east 80?
9 A. The north half.
10 Q. The north half of the east 80 at the time of your
11 marriage?
12 A. That's right.
13 Q. When did you acquire the other property?
14 A. Sometime after my father's death. My mother
15 kept it for some time and she conveyed it to me.
16 Q. Did you help your father on that farm while you
17 were growing up?
18 A. Yes.
19 Q. Was that your job?
20 A. Yes, mainly.
21 Q. Did you help irrigate?
22 A. Yes.
23 Q. Did you know where the ditches were?
24 A. You bet.
25 Q. Did you know Mr. Reggan?

1 A. Yes.
2 Q. And did you know anything about his place?
3 A. Yes.
4 Q. Why?
5 A. Well, I walked over there nearly every foot of
6 it, I suppose, during my lifetime.
7 Q. Did you ever run part of it?
8 A. Yes.
9 Q. When?
10 A. In 1978.
11 Q. How much did you run?
12 A. The hay ground on the south side of the south 80
13 of the Reggan place and the hay ground on the south side of
14 the 20.
15 Q. And the 20 is the portion above the 160?
16 A. That's right.
17 Q. That was later acquired by Mr. Reggan?
18 A. Yes.
19 Q. And who did you lease that from?
20 A. I had a crop share agreement with Don Saingdon.
21 Q. And did he have an interest in this property?
22 A. Yes. He was there before Mr. Crow came. I don't
23 know what their relationship was on the property.
24 Q. He was there after Mr. Rasmussen?
25 A. Yes.
Q. So how many acres did you farm total?

1 A. Oh, between 35 and 40, I would guess.
2 Q. Did you irrigate it?
3 A. Yes.
4 Q. And at the same time were you irrigating your
5 own property?
6 A. Yes.
7 Q. Now, you have been there 56 years. Do you
8 remember any problems concerning the water on your place or
9 the Reggan place during those years?
10 A. Will you be more specific?
11 Q. Let me rephrase the question. Do you ever recall
12 a time when Mr. Reggan would come after the water or go up
13 the ditch after the water?
14 A. I remember when he called for his old decree.
15 Q. And do you remember who he would call?
16 A. No.
17 Q. Now, what would happen?
18 A. My father took care of all of that business. I
19 had very little knowledge of it, but I know that some of the
20 ditches were dry, but I never remember the folks being
21 completely out of water down there.
22 Q. Even when the old decree took the water? Now
23 when Mr. Reggan would go after the water do you recall what
24 would happen to the water in the Gordon's ditch?
25 A. No, other than it never did go dry. There was

1 always a little water there.

2 Q. Did more come after he went after the water?

3 A. Possibly sometimes, possibly not. I don't know.

4 You know we had a lot of dry years and there would be some
5 years that we were very short even when they didn't call for
6 the water, so I couldn't say.

7 Q. Was it also short on the Reggan's place at the
8 same time?

9 A. It would be short everywhere.

10 Q. Do you ever remember then during those years
11 when your father had it afterward when you did not have an
12 water if there was any water at all in the canal or in the
13 creek?

14 A. Not unless they were working on the ditch and then
15 we were maybe out for a little while, but not normally.

16 Q. Now, you heard Mr. Stone speak yesterday of a
17 time he remembered when the water was sent to the Reggan place
18 and it was cut off from your place. Do you remember that?

19 A. No, I don't.

20 Q. Do you remember him talking about how the ditch
21 went -- I don't know, behind the barn or through that area
22 someplace to a raspberry patch? What do you remember about
23 that?

24 A. I know the ditches and I know that the ditch
25 that comes and waters the center part of our property between

1 the two channels.

2 Q What two channels?

3 A It was the old Fox Creek channel, the large one
4 that goes approximately through the center of our property
5 and there is another smaller one. There's lots of smaller
6 ones, but this one goes down on the north side of our house
7 and the bigger one goes to the south side and the ditch goes
8 on down past our house and then above our house there is one
9 that goes directly north and it used to go through
10 Elmer Stone's place just a little ways and then it would turn
11 to the west a little and there was a division gate there and
12 from that division gate it would go to the left and follow the
13 fence line down and into what was known then as the Doc Brown
14 60 which was above the 20 of Mr. Reggan's as far as a hundred
15 yards or so and it would go back into our place and it went
16 around the old channel there, the small one. Now, the other
17 ditch went across approximately through where Elmer has his
18 house now and watered part of the south side of the Doc Brown
19 place and Elmer moved his cabin over there on the ditch bank
20 and that run for several years and he wanted to build on and
21 then that ditch was cut out. Now, the water run from the
22 south to the north there all right, but I cannot conceive of
23 it ever being forced back from the north to the south which it
24 would have had to have gone well over a hundred feet to have
25 gotten back into the other ditch to have gone into our

1 Mr. Cooper brought there about this old decree?

2 A. That's right.

3 Q. And was the water distributed pursuant to that
4 decree?

5 A. I am sure it was.

6 Q. It had been before that date?

7 A. It must have been.

8 Q. And you knew there was something, but you didn't
9 know what it was?

10 A. Well, I knew we hadn't been without water and I
11 knew I was going to be without water, so I suspected.

12 Q. Now, to your knowledge, did Mr. Moulton after he
13 learned that ever call for that water again?

14 A. No.

15 Q. I mean take your water.

16 A. No.

17 Q. And he recognized your right at that time, did
18 he?

19 MR. HOSSNER: We object to that as a leading question.

20 THE COURT: It is a leading question.

21 Q. (By Mr. Rigby) But he never objected to your
22 water coming down to you after that time?

23 A. Not to my knowledge.

24 Q. And you always received your water?

25 A. That's right.

1 Q Now, there was some testimony here yesterday
2 concerning your water right with the Fox Creek Irrigation
3 Company and I ask what has been marked for identification
4 purposes as Defendant's Exhibit A and I'll ask you to tell the
5 court if you can what that is?

6 A Well, it is a certificate for 80 shares of water
7 in the Fox Creek Irrigation Company.

8 Q And who is it issued to?

9 A Dan Gordon.

10 Q What is the date of the certificate?

11 A Twenty-one of April, 1920.

12 Q Who signed that certificate? Can you tell?

13 A Thomas M. Grover and George A. Dewey.

14 Q Now, you said that is issued to your father,
15 Dan Gordon?

16 A Right.

17 Q Who owns it today?

18 A I do.

19 Q But you haven't had it changed on the books?

20 A I haven't had it transferred.

21 Q I will ask you to look at what has been marked
22 for identification as Defendant's Exhibit 8 and ask you to tell
23 the court if you can what that is.

24 A This is also a certificate for 80 shares of water
25 in Fox Creek Irrigation Company issued to Dan Gordon on the

1 29th of May, 1931, singed by Joe W. Dewey, secretary and
2 Ed Reggan, president.

3 Q Again that was issued to Dan Gordon?

4 A Right.

5 Q Who owns that stock today?

6 A I do.

7 Q And you haven't had it transferred on the books
8 of the corporation?

9 A I haven't.

10 Q So that is the total of how many shares?

11 A One hundred sixty.

12 Q For how many acres?

13 A One hundred sixty.

14 Q This is the east 80 that was listed in the
15 decree, Defendant's Exhibit C and when we speak of the east
16 80 was any of this water stock issued for the land that is
17 listed in that decree?

18 MR. HOSSNER: We would object, Your Honor. These
19 exhibits have not been shown to me or introduced.

20 MR. RIGBY: You saw them yesterday.

21 MR. HOSSNER: No, I didn't.

22 MR. RIGBY: Oh, I wanted to introduce them but we
23 needed a better foundation.

24 THE COURT: I thought they were admitted yesterday.

25 MR. RIGBY: No. I will give you a little more foundation

1 if you want it.

2 THE COURT: Are you offering them now?

3 MR. RIGBY: I just want to tie it to that land first
4 and then I will. Do you still have an objection, counsel?

5 MR. HOSSNER: Well, yes, Your Honor. The reason I
6 wanted to look at those is Mr. Rigby is making an attempt to
7 tie them with the land. On the face of these certificates
8 they are simply 80 shares of stock and there is no land
9 described on those shares of stock. There is no record books
10 showing that that share is tied to that land and any testimony,
11 if such is the case, would be hearsay unless the books are
12 presented here showing that it is tied to the land or some-
13 way other than just conjecture that it is tied to the land.
14 I don't want them making an assumption there, but that is my
15 objection.

16 MR. RIGBY: Your Honor, I assumed that would be his
17 objection and that is the reason that this man is competent
18 to testify and that is why I was laying the foundation.

19 THE COURT: Well, now what is your objection to the
20 testimony?

21 MR. HOSSNER: My objection is that he started to
22 testify that this water was tied to this land. There is
23 nothing on the face that shows that. He has no books here
24 that shows that.

25 THE COURT: I guess that maybe we had better lay a

1 foundation.

2 Q (By Mr. Rigby) Referring to Defendant's Exhibit
3 C, which has been admitted into evidence, there is an item
4 Michael Byrne and the description of some property. Do you
5 own any of the property at this time that is listed under
6 the item Michael Byrne?

7 A Yes.

8 Q What is it?

9 A The south half of the Southwest Quarter of
10 Section 26, Township 4 North, Range 45, East Boise Meridian.

11 Q Now, do either one of these proposed exhibits
12 represent shares of stock for that 80 acres?

13 A Yes.

14 MR. HOSSNER: We object, Your Honor, as being
15 speculation. These shares of stock speak for themselves. They
16 represent 160 shares of stock in the Fox Creek Canal Company.

17 MR. RIGBY: Your Honor, they don't say what it is for.

18 THE COURT: That's right.

19 MR. RIGBY: So he has a right to tell us what he knows
20 that it is for.

21 THE COURT: Well, I guess he probably don't know. He
22 was pretty young when they were issued. He wasn't even born,
23 was he?

24 MR. RIGBY: No, but he has them transferred to him now.

25 THE COURT: Yes, but he can tell us how the water was

1 used and that should be sufficient and I think the canal
2 company officers yesterday testified that they recognize that
3 he had the right there, so I don't know what the point is in
4 arguing about it.

5 MR. RIGBY: Well, I want the record clear that he owns
6 160 shares of water and 80 is for that east 80 because that is
7 a fact and he has a right to testify to it.

8 THE COURT: Yes, he has a right to testify where
9 he used that. I don't think he has a right to testify how the
10 people who wrote that stock intended it. If he wants to tell
11 us how he used it he may.

12 Q. (By Mr. Rigby) Was 80 shares of this water for
13 the land that you just described?

14 A. That's right.

15 MR. HOSSNER: We object again, Your Honor. That is the
16 same that was sustained.

17 THE COURT: Well, I am going to sustain the objection.
18 He can tell us how he used it. I don't think he knows what the
19 people who wrote those shares intended it for. He wasn't there
20 and he can't know. He can tell us how it has been used and
21 that should be sufficient.

22 MR. RIGBY: All right, I will offer into evidence
23 proposed Exhibits A and B.

24 THE COURT: And they are admitted.

25 (Defendant's Exhibits A and B were received in evidence.)

1 THE COURT: I may be wrong, but it seems to me that
2 those certificates are made to Dan Gordon and that he owned
3 that property and they couldn't be used for any other purpose.

4 Q (By Mr. Rigby) Now, what water rights do you
5 claim as far as the Fox Creek decree, as the Fox Creek decree
6 itself?

7 A. One hundred sixty shares.

8 Q And that is in the canal company?

9 A. That's right.

10 Q Now, what about the Michael Byrne decree? What
11 portion of that do you claim?

12 A. The water was decreed to three 80's and what
13 was it, 120 inches?

14 Q Well, do you know?

15 A. I think that was the testimony yesterday. I
16 didn't know before.

17 THE COURT: You didn't know before yesterday how much
18 was in that decree? Is that right?

19 THE WITNESS: Yes, I did, but I had forgotten. I have
20 to refresh my memory at times on things like that.

21 Q (By Mr. Rigby) Let me hand you Plaintiff's
22 Exhibit 4 and ask you to look at that exhibit which has been
23 admitted and see if you can find the name of Michael Byrne.

24 A. Yes.

25 Q And tell what that water right is.

1 A. It is 120 inches June 1st, 1890, of Fox Creek.
2 Q. Now, do you claim any portion of that water right
3 A. Yes.
4 Q. Is this the water right that you have spoken of
5 that was in dispute at a time when Mr. Cooper was the water
6 master?
7 A. Yes.
8 Q. And at the time that Mr. Wilson was the water
9 master?
10 A. Yes.
11 Q. And also at the time of this present water
12 master?
13 A. Yes.
14 Q. And how much then do you claim of that water
15 right?
16 A. Well, I claim one third of it.
17 Q. And have those three water masters recognized
18 that third interest as belonging to you, those three state
19 water masters?
20 MR. HOSSNER: We would object, Your Honor, as being
21 hearsay.
22 MR. RIGBY: Just a minute.
23 Q. (By Mr. Rigby) In the manner they have delivered
24 to you over the years?
25 A. Yes.

1 Q And is that water right used in conjunction with
2 your shares of stock in the Fox Creek Irrigation Company?

3 A Yes.

4 Q So the water is administered not only by the
5 state water masters, but also by the canal water masters, is
6 that right?

7 A That's right.

8 MR. RIGBY: Could we have the clerk please mark this?
9 (Defendant's Exhibit E was marked for identification.)

10 Q (By Mr. Rigby) Mr. Gordon, you have testified as
11 to the water distribution system on your two 80's. Have you
12 made a little sketch to aid the court in depicting your
13 testimony that you have already given?

14 A Yes.

15 Q I hand you what has been marked as Defendant's
16 Exhibit E and ask you to look at that and tell the court if
17 that is the sketch that you have prepared?

18 A Yes, it is.

19 Q And on that sketch have you tried to show the
20 property owners?

21 A Yes.

22 Q And are those the property lines that are shown
23 in blue?

24 A Right.

25 Q And then have you shown your ditch system and the

1 homes in red?

2 A. Yes.

3 Q And does that fairly depict the water system as
4 it goes over your property?

5 A. Closely as I can, yes.

6 Q And does it also show by a pencil sketch the
7 course of the old channel?

8 A. Yes.

9 Q Of Fox Creek?

10 A. Yes.

11 MR. RIGBY: Then as an aid to the court we would offer
12 into evidence Defendant's proposed Exhibit E.

13 MR. HOSSNER: So that I am clear now, this doesn't
14 show, does it, Mr. Rigby, the ditch or water that comes to the
15 Crow property?

16 MR. RIGBY: No. You introduced one yesterday doing
17 that, so he did for the other side. We could do and put the
18 two together, but there is already one exhibit that does that.

19 MR. HOSSNER: To show the distribution system to him
20 we have no objection other than where is the point of
21 diversion? I don't see the diversion point on that either.

22 MR. RIGBY: Well, it is east of here and right in
23 where yours is. In other words what yours didn't show this one
24 tries to depict on his side.

25 MR. HOSSNER: We have no objection and that is his water

1 system as it is today?

2 MR. RIGBY: That is his water system, Mr. Gordon's
3 water system.

4 THE COURT: It is admitted.

5 (Defendant's Exhibit E was received in evidence.)

6 Q (By Mr. Rigby) Now, for the record, Mr. Gordon,
7 so that it will be your testimony--

8 THE COURT: Now, just so I understand, this little
9 strip right in here, that is the 80 acres that you claim is
10 under the decree? Is that right?

11 THE WITNESS: Yes.

12 THE COURT: This down here you own, but it is not under
13 the decree?

14 THE WITNESS: Not under the decree, no.

15 Q (By Mr. Rigby) For the record, then, Mr. Gordon,
16 you did not show the distribution system for the Reggan property?

17 A No.

18 Q Because that was shown on the exhibit that was
19 introduced yesterday by plaintiffs, Plaintiff's Exhibit 9, is
20 that right?

21 A Yes.

22 Q Now, so that we can assist the court in
23 amalgamating these two, there is a point on Plaintiff's Exhibit
24 9 that is marked as an asterisk and it is entitled "Point of
25 Diversion." Is that the same point that you have shown on your

1 exhibit as the beginning point of your system on the top of the
2 page?

3 A. Yes.

4 Q. And possibly then we could have you, if it is
5 all right with counsel since you asked the question, could we
6 mark here an asterisk and put, "Point of Diversion," because
7 it is the same point of diversion, is it not?

8 A. This is up here, and this one here is a little bit
9 wrong. This would be this same line.

10 Q. So this goes up a little ways?

11 A. This goes from here up to the point of diversion.

12 Q. Where is this point of diversion?

13 A. This is just the fence line.

14 Q. Why don't you draw it on up?

15 THE COURT: When they showed me the point of diversion
16 didn't they say it is up here somewhere? It is not on here?

17 MR. RIGBY: Yes. The point of diversion out of Fox
18 Creek itself?

19 THE COURT: Yes.

20 MR. RIGBY: The point of diversion from the canal where
21 it was spoken of this morning and Mr. Wilson talked about
22 yesterday is this point right here and counsel, if you wouldn't
23 mind just watching for a minute, we would run this, would we
24 not, on over across the road and over to this point?

25 MR. HOSSNER: That's right.

1 THE WITNESS: It is up above Jim's house.

2 Q (By Mr. Rigby) Which is on the corner?

3 A. About on this here.

4 MR. RIGBY: Now, if you would verify, I have made an
5 asterisk and written "Point of Diversion."

6 Q (By Mr. Rigby) Now, is that approximately the
7 same place as indicated on Plaintiff's Exhibit 9 as the point
8 of diversion?

9 A. It would be the same.

10 THE COURT: I wonder if you would mind having him show
11 on there some way, maybe with some cross marks, where that old
12 channel is that they say runs through his property that he
13 can't get across and use the flume?

14 THE WITNESS: To this point over here on the 80?

15 THE COURT: Yes.

16 THE WITNESS: That would be another 80 laying a half
17 a mile by a quarter and Jim Dewey's property was five acres out
18 of that at that time and this was on the old channel a quarter
19 of a mile east of that.

20 THE COURT: Yes, but they said it run across your
21 property too.

22 THE WITNESS: No, the flume did.

23 THE COURT: But the channel did.

24 THE WITNESS: Oh, the old channel runs approximately --
25 it is on here. These dotted lines indicate about where the old

1 channel is.

2 THE COURT: Okay, that is what I was wondering. Well,
3 how do you get this water across here, then? I thought you
4 couldn't cross that channel.

5 THE WITNESS: You can't up here, but there is a ditch
6 across on that.

7 Q (By Mr. Rigby) Now, Mr. Gordon, tell us the
8 history as you know it of any irrigation that was done to the
9 east 80.

10 A As long as I can remember, my father purchased
11 the land in 1920. I was born in 1924, so I had it for four
12 years and I wouldn't remember for too long, but the same part
13 that is under cultivation today is the same as it was then,
14 approximately 20 acres, and the rest of that land, we water
15 some of the sage brush sometimes when there is an excess of
16 water in that area we farm and the rest we use for pasture.

17 Q Now, is that irrigated out of that easterly
18 ditch when you do irrigate that pasture land?

19 A ~~It can be irrigated out of both ditches.~~

20 Q And do you irrigate it out of both ditches?

21 A Yes when the water is high enough.

22 Q And otherwise it goes on down to serve your
23 lower ground in that same 80?

24 A In that 80 and the other.

25 Q Now, there has been some mention made of you not

1 using this water on that particular 80. Does the water from the
2 east 80 and the west 80 run together in the same ditches?
3 A. Yes. There is only one ditch.
4 Q. Do you water with this decreed water and your
5 water from the Fox Creek Irrigation Company on both 80's together
6 A. Yes.
7 Q. And where is the major part of this water used?
8 A. The major part of my water is used on the lower
9 80.
10 Q. How much of that 80 is being watered?
11 A. All except the old creek channel and the other
12 channel comes up a little ways, probably three or four hundred
13 rods.
14 Q. So do you have any idea of the acreage that is
15 irrigated?
16 A. Probably 60.
17 Q. Sixty out of the 80?
18 A. Yes.
19 Q. And the other 20 would be what?
20 A. Pasture.
21 Q. Does it ever get any irrigation?
22 A. Some down at the bottom.
23 Q. And does the creek going through there sub some
24 of the grass land in that pasture?
25 A. Yes, a lot more in the years past than now.

1 Q Now, you say now. You mean it is different now
2 than it has been historically?
3 A Oh, yes.
4 Q What has happened? I mean what is different that
5 you observed?
6 A Well, they put the sprinkler system on the upper
7 part above the highway and when they don't put the water out
8 you just don't get the sub and we have to irrigate a lot
9 harder and a lot more to get any sub at all.
10 Q Now, you said you also had been aware of the
11 Reggan's place and you actually operated some of that. Is that
12 same thing true of the Reggan place?
13 A I would say I am sure it is, but I haven't been on
14 it since I run that part of it and I didn't go over the land.
15 It is just hay ground.
16 Q But does the fall of the land go to the west?
17 A Yes.
18 Q From you?
19 A Yes.
20 Q From your land?
21 A Yes.
22 Q To the Reggan place?
23 A Yes.
24 Q And then to the river?
25 A Yes.

1 Q And how about this year?
2 A Well, of course this year until the first of
3 June we were all knee deep in the mud and then from then on
4 we haven't had much water. It all came out in about a week.
5 Q Is the water divided? Do you still have water?
6 A Yes.
7 Q And do you feel like you are getting your share
8 according to the decree?
9 A Yes. I trust the water master's judgment on
10 that.
11 Q And the water master has been distributing it
12 that way?
13 A Yes.
14 Q Is that how it has been done historically?
15 A Right.
16 Q Now, you heard the testimony yesterday of the
17 witness Dwight Stone that Michael Byrne, there was no record
18 in the courthouse of Michael Byrne ever owning an interest in
19 that property.
20 A Yes, I heard that.
21 Q Now, is there a record in that courthouse where
22 he claimed an ownership in the property?
23 A I think so.
24 Q What is it?
25 A I read it yesterday in your files there.

1 Q Well, is it in the pleadings of the case?
2 A Yes.
3 Q Where he claims this 80 acres?
4 A Right.
5 Q And then the decree followed where he got the
6 water for it?
7 A That's right.
8 Q Mr. Wilson I believe testified yesterday that
9 the water he felt was divided and he thought that an automatic
10 measuring weir did it and if there was a surplus one way there
11 was a surplus the other way and if there was a shortage one
12 way there was a shortage another way. Did you hear that
13 testimony?
14 A Yes.
15 Q What do you think about how the water has been
16 distributed?
17 A I feel that that gate was put in properly, but
18 it has to be kept clean or it won't do it.
19 Q Was it distributed that way?
20 A Yes.
21 Q And are there times when there is an abundance
22 of water that comes down there?
23 A Yes.
24 Q Historically have there been very many times
25 when there has been a crunch when there hasn't been sufficient

1 water for everybody's needs?

2 A. Yes.

3 Q. Very many times?

4 A. Well, we are short of water in the late seasons

5 nearly every year, but to really be critical not too many times.

6 Q. Most all of the witnesses were asked, Mr. Gordon,

7 yesterday if they ever remember of Mr. Gordon calling for his

8 water. First of all do you remember that testimony?

9 A. Yes.

10 Q. Now, what is your response to that, Mr. Gordon?

11 A. He never did call for any water that I know of.

12 Q. Did you?

13 A. No. Well, yes, in 1978.

14 Q. Now, to your knowledge did Mr. Gordon ever call

15 for water?

16 A. No.

17 Q. Who did call for the water that you know?

18 MR. HOSSNER: Pardon me. Is that Dan Gordon?

19 MR. RIGBY: Dan Gordon.

20 Q. (By Mr. Rigby) To your knowledge you did call

21 for your water?

22 A. Whoever had the old decrees on the creek. I

23 can't name some of them, but I am sure that I would miss some.

24 Q. Well, did Mr. Reggan?

25 A. Yes.

1 Q He would call for his water?
2 A Yes.
3 Q Then when you called for the water did he make
4 any distribution to your system at that time?
5 A I don't know.
6 Q But did you have water?
7 A We had water.
8 Q So is that why you never called for it is because
9 you had water?
10 MR. HOSSNER: I believe these all are leading questions.
11 THE COURT: That is a leading question.
12 Q (By Mr. Rigby) Why didn't you call for the
13 water? Do you know that?
14 A My father?
15 Q You or your father before that one indident that
16 you spoke of.
17 A I didn't think the water was ever that short and
18 I didn't feel that I was taking any water away from any of the
19 neighbors.
20 Q Were you getting water?
21 A Yes.
22 Q And was your father getting water?
23 A Yes.
24 Q So somebody was providing the water for you, is
25 that right?
A Yes.

1 Q And, of course you don't ever remember any
2 discussions or any problems of water between your father and
3 Mr. Reggan?

4 A No.

5 Q Never a problem that you can remember of?

6 A Not that I ever heard of, no.

7 THE COURT: Gentlemen, while you are looking at that I
8 think this is a good time to call a recess. We will recess for
9 ten minutes.

10 (Court was in recess for ten minutes.)

11 THE COURT: Mr. Gordon was on the witness stand and he
12 was undergoing direct examination. You may continue.

13 Q (By Mr. Rigby) Mr. Gordon, just to complete
14 the record you was showing by your sketch where your point of
15 diversion is and we identified it as the same point of
16 diversion as the Reggan's property. Now, is that point of
17 diversion on the creek or on the canal itself?

18 A It is on the canal.

19 Q So the point of diversion for the water itself
20 out of creek, is that the same point of diversion that the
21 plaintiff described and pointed out to the court yesterday?

22 A Yes.

23 Q So the water comes from Fox Creek into the canal
24 system down to the point of diversion mentioned on these two
25 sketches where it is divided among the number of people that

1 you indicated, is that true?

2 A. Right.

3 Q. And you talked about the farm ground that you
4 had farmed in those two 80's. What crops do you raise?

5 A. Hay and grain.

6 Q. Pasture?

7 A. And pasture, yes.

8 Q. And does all of that 160 acres require water?

9 A. If all does, but I don't get it.

10 Q. Where is that?

11 A. Well, some of it is inaccessible to the old
12 creek and to put water on it would be more expensive than the
13 value that you would get out of it. Dry pasture is better.

14 Q. What if there was more water? Could you irrigate
15 more land if you had the water?

16 A. Oh, yes.

17 Q. And is that true of most of the people in that
18 area?

19 A. Yes.

20 Q. Have you ever abandoned or forfeited any of your
21 water rights?

22 A. No.

23 MR. RIGBY: Your Honor, we have the soil conservation
24 maps that would be very helpful for the court to look at
25 counsel. I would like to have the court look

1 see the whole layout. It would be a nice picture on the top
2 of what this picture is, so I would like to have this marked as
3 two exhibits. I have put the two maps together with scotch
4 tap.

5 (Defendant's Exhibit F was marked for identification.)

6 MR. RIGBY: Now, I would like to offer into evidence
7 Defendant's Exhibit F as being two maps put together with
8 scotch tape that were prepared from photographs by the Soil
9 Conservation Service and just for the assistance of the court
10 to look at and maybe orient himself on those sketches.

11 MR. HOSSNER: When were these photographs taken,
12 Mr. Rigby?

13 MR. RIGBY: I can't tell you.

14 MR. HOSSNER: For the record, now, Mr. Rigby, I see a
15 '78 on the top. Were these taken in 1978?

16 Q. (By Mr. Rigby) Mr. Gordon, you are on the
17 witness stand under oath. Do you know when those photographs
18 were taken?

19 A. 1978.

20 MR. HOSSNER: So these photographs are simply to
21 represent what the terrain looked like in 1978?

22 MR. RIGBY: In 1978.

23 MR. HOSSNER: There is no claim that this is how the
24 ditch system looked like back in 1890?

25 MR. RIGBY: No, just what it showed back in 1978 so that

1 you get the lay of the land and he can orient himself with
2 those sketches.

3 MR. HOSSNER: For that limited purpose we have no
4 objection.

5 Q (By Mr. Rigby) Mr. Gordon, will you please
6 stand and look at this sketch and point out, if you can, your
7 two 80's?

8 A This is the upper 80 and this is the lower 80.

9 Q And where is your home?

10 A This is my home right here. This is the home on
11 the old homeplace.

12 Q Where you were born?

13 A Where I was born.

14 Q And where is the 20 acres and the 160 of the
15 Reggan's place?

16 A This is the 20 acres here and this is the old
17 Reggan home site and this is the 160.

18 THE COURT: Where is the upper 80?

19 THE WITNESS: It runs from this line here which is
20 the road in front of our house up to here.

21 THE COURT: And this is what you call the lower 80?

22 THE WITNESS: Yes, the lower 80 which we are talking
23 about.

24 THE COURT: And your home is on this 80?

25 THE WITNESS: My home is right in here. My folks' home

1 is across the road.

2 THE COURT: Now, where is your ditch?

3 THE WITNESS: The ditch comes in up here. This is the
4 point of diversion approximately here. It comes across at an
5 angle and crosses the highway and the railroad tracks and into
6 this other 80 or this 40 which belongs to Jack Rasmussen and
7 then into my property and down along here one ditch goes clear
8 down around through and in this part. Another one cuts across
9 through here and goes down in this part and one comes from
10 here and it comes down and crosses over here.

11 Q. (By Mr. Rigby) Is that where it crosses the
12 old channel that you were speaking about?

13 A. Yes.

14 MR. HOSSNER: Where is the old house site that you claim?

15 THE WITNESS: Right here. The one I spoke of was right
16 here. It had water to this area here.

17 Q. (By Mr. Rigby) And where is the remnant of the
18 old ditch that you speak of?

19 A: It runs right along this fence line.

20 THE COURT: Now, where is the Reggan property?

21 THE WITNESS: This is the 20 and this is the 160 in
22 question.

23 THE COURT: Okay.

24 Q. (By Mr. Rigby) Now, while you are here, counsel,
25 I want to ask a couple of questions.

1 Q (By Mr. Rigby) Mr. Gordon, while you are
2 standing here would you please look at the little white spot
3 on the upper portion of the upper 80 and tell the court what
4 that is?
5 A Well, that is a little swale that goes down
6 through here and comes back into the creek and we took a
7 dozer and built a pond there so that we could fill it when the
8 water was plentiful and sink water to help bring this up as
9 long as there was water there.
10 Q Is that used to give water to your livestock
11 that is there?
12 A Yes.
13 Q And does it also sub the grass in that pasture,
14 in that area?
15 A Not very much. It would help the lower there.
16 Q It helps the lower ground?
17 A Yes.
18 Q In what manner?
19 A Well, when you fill the ground full enough it
20 starts to come up in the bottom and the more of it that we can
21 sink in this upper gravelly ground it comes up down on the
22 Reggan place and when that is full it comes up on the bottom of
23 our place.
24 Q Would you point out to the court the farm ground
25 that you have on that 180?

1 A. The farm ground itself, this is farmable around
2 this area, all the light area here. We use that. Then there
3 is an area from here up that comes to that point here and back
4 down around the trees on the northwest side of this creek. The
5 other side is a little too rough.

6 Q Now, the lower 80?

7 A. Of course all of this except where the buildings
8 are, this little pasture here and trees. This is the little
9 area of trees that comes up and this is the old creek bed here
10 that we do farm.

11 Q Now, does that also show on the Reggan property
12 the part that is farmed and the part that is in brush?

13 A. Yes. Now, this might be a little deceiving over
14 in here. Some of it is farmable. It doesn't quite show it.
15 This is a little brushy area in here and there is a little
16 farm ground down here and this is farmable. This is a spring
17 hole here and this is brush all around down through here and
18 this is open over through this country.

19 Q How about this other side?

20 A. This area used to be quite subby here. This area
21 used to be plowed, but not much of this down here.

22 MR. HOSSNER: I wonder if I might ask a question? Where
23 is the 20 acres on this upper 80 that you talked about when your
24 dad used to be with you? Where was the 20 acres that you
25 talked about that was farmable on this upper 80?

1 A That would be this piece in here and this corner
2 over here.

3 Q And it is 20 acres today?

4 A It is still the same size.

5 Q (By Mr. Rigby) That is farmed and the rest is
6 pasture?

7 A Yes.

8 MR. RIGBY: I thought that might be helpful.

9 THE COURT: Yes.

10 Q (By Mr. Rigby) Now, the ditches that you used
11 to farm those two 80's, are they pretty much the same ditches
12 that have been there as long as you can remember?

13 A Yes.

14 Q And has the ditch up in the southeast corner of
15 the upper 80 been abandoned? Do you use it anymore?

16 A No. We have never used it.

17 MR. RIGBY: I believe that you may question.

18 CROSS EXAMINATION

19 BY MR. HOSSNER:

20 Q The ditch that you said you never used is that
21 ditch that goes along the east end of that upper 80?

22 A No. The one that goes down the south side where
23 the old homesite used to be.

24 Q Is it your testimony or do you know that
25 ditches were as they are now back in your father

1 before your father's time?

2 A. On the upper 80?

3 Q. Yes.

4 A. Yes. There is only about one place they can go.

5 Q. And when was that flume built up about a quarter

6 of a mile east of the upper 80?

7 A. I don't know. It was an old flume when I was a

8 young lad.

9 Q. Do you have any knowledge that was ever built by

10 Mr. Byrne?

11 A. No.

12 Q. And do you have any knowledge about the

13 irrigation by Mr. Byrne? Do you have any knowledge that he

14 ever irrigated that property, that upper 80?

15 A. No.

16 Q. When Mr. Byrne and his predecessors were there had

17 you checked the courthouse records to see if there was any

18 indication that he ever owned that upper 80 we are calling it,

19 that 80 acres in section 26?

20 A. No. I have never checked it. I have no reason

21 to.

22 Q. As far as Mr. Byrne is concerned he nor any of

23 his successors never lived on that upper 80 during your time

24 that you are aware of?

25 A. No.

1 Q You testified that there is an old cabin site
2 over on that southeast corner. Are you implying that Mr. Byrne
3 lived there? Is that what you are implying or just an old
4 site that somebody lived there sometime?

5 A He lived there.

6 Q When did he live there?

7 A I don't know. I think it could be found out
8 though.

9 Q How can you find that out?

10 A His one daughter was born there.

11 Q How long ago was this? How old is she?

12 A I don't know.

13 Q And are you saying that water was taken over to
14 that home site?

15 A I am saying there was an orchard there and a
16 ditch.

17 Q Are you saying that he is the one that took water
18 to that home site?

19 A I don't know. I would assume that he did if he
20 lived there.

21 Q Let me show you, if I may, what we have had marked
22 as an exhibit. This was filed in 1900. How old was that
23 daughter that you are talking about?

24 A I don't know.

25 Q You don't know how old she was?

1 A. No.

2 Q. I am going to show you what has been marked as
3 Plaintiff's Exhibit Number 1 and just refer you to this exhibit.
4 You say you believe he used water over on that southeast
5 corner. Is that what you are saying?

6 A. I am saying there is a ditch there. I don't know
7 that he used water. I assume he did if he lived there.

8 Q. Now, I want to show you Exhibit Number 1 and have
9 you read there if you can and it is signed by Michael Byrne
10 according to the records here in the courthouse.

11 MR. RIGBY: Now, just read silently because I am going
12 to object to its admission.

13 Q. (By Mr. Hossner) Now, I have shown you what has
14 been marked as Exhibit 1 which is a notice of water right. Now,
15 after you read that is there any place in there that shows he
16 claims that he is going to put any water on that upper 80 that
17 is described in it as section 26?

18 MR. RIGBY: I have to object, Your Honor, on the grounds
19 that the instrument speaks for itself and the admission of that
20 instrument has been denied. Who knows what other locations
21 there might have been?

22 THE COURT: I think he can probably answer that question
23 as to whether or not it does show the description of the other
24 property.

25 Q. (By Mr. Hossner) Now, you have read it carefully

1 and nowhere in there does it show any claim that he was going
2 to put water on that upper 80, does it?

3 A. No.

4 Q. What is the date on that? When was that signed?

5 A. 8-26-1981.

6 Q. If I am reading it right it says 1900.

7 A. I am sorry. I read this over here. The second
8 day of September, 1900.

9 Q. And that says, does it not, that he intends to
10 use the water for irrigation on the southwest quarter?

11 MR. RIGBY: Now, Your Honor, again I have to object.

12 THE COURT: Yes. It is not an exhibit and I can't let
13 you read from it.

14 Q. (By Mr. Hossner) But based on that and using
15 this possibly to refresh your own memory, this exhibit, this
16 document here, shows, does it not, that at least in 1900 this
17 document shows that he never did intend to put any water on that
18 upper 80?

19 MR. RIGBY: Now, Your Honor, I have got to object to
20 that. Whatever that document says is one thing. He could have
21 filed several documents.

22 MR. HOSSNER: Your Honor, this is cross examination.
23 This man testified that he thought he used water on that
24 southeast corner. This document shows that he did not, which
25 is the best evidence.

1 MR. RIGBY: No, it wasn't.

2 THE COURT: Are you going to ask for the admission of
3 that?

4 MR. HOSSNER: I am, yes.

5 THE COURT: Why don't you?

6 MR. HOSSNER: Your Honor, we supplied it yesterday and
7 we reoffer it now again as an exhibit in this courthouse that
8 shows his claim of water on the 22nd of September, 1900, which
9 is signed by him and it is a document in this courthouse showing
10 where he claimed to irrigate his water. For no other reason
11 the case appears to be did he use water over there and this man
12 said that he thought he did and this refutes that, refutably.

13 THE COURT: Well, I don't think it does, but you may
14 show it to Mr. Rigby.

15 MR. RIGBY: I have seen the document. If this document
16 were introduced just for what it says and not what he says it
17 says I would have no objection and I would say that this
18 document as long as it is introduced as being a filing of
19 Michael Byrne prior to the Rexburg decree, and that is all that
20 it shows, then I will have no objection, but I certainly object
21 to it being admitted as being a refutation of anything. Let it
22 speak for itself.

23 THE COURT: Well, gentlemen, I am going to admit it.
24 I refused it yesterday because I refused to consider it as
25 showing a mistake in the deed or a correction of the deed and I

1 still refuse to consider it in that manner, but I will consider
2 it in connection with how the water might have been used. Now,
3 as Mr. Rigby says, it will be admitted for what it says, and not
4 for what someone else says it says.

5 MR. HOSSNER: We understand that the document will
6 speak for itself and that is all we want it to do.

7 THE COURT: You can show that as admitted now.

8 (Plaintiff's Exhibit 1 was received in evidence.)

9 Q (By Mr. Hossner) So, Mr. Gordon, whatever your
10 testimony is about whether he did or did not use water over on
11 that southeast corner is conjecture on your part, is it not?

12 A. He may have lived there in the winter.

13 Q. So you don't know when he lived there, if he lived
14 there for what duration and if he used any water on the
15 southeast corner?

16 A. All I know is his daughter was born there.

17 Q. And you don't know if she was born there, but that
18 was his house?

19 A. He was living in the house when his daughter was
20 born.

21 Q. When was that?

22 A. I don't know.

23 Q. Do you have any idea if he built that house?

24 A. No..

25 Q. Now, he apparently, if you say he lived there and

1 you believe he lived there, apparently he abandoned that, didn't
2 he?

3 A. He moved.

4 Q. And would it be fair to say that he never did
5 prove up on a claim there to your knowledge?

6 A. No, that wouldn't be fair.

7 Q. Did he prove up on it?

8 A. Yes.

9 Q. How do you know that?

10 A. It would be the same testimony. If you want I
11 will give it to you. It is hearsay.

12 Q. You have no proof that he ever proved up on that
13 claim or do you have proof that a patent was ever granted to
14 him by the United States government?

15 A. No.

16 Q. Do you have proof that he in fact put any of that
17 water over there?

18 A. No, other than...

19 Q. And you claim that--

20 MR. RIGBY: Let him finish his answer. Other than what?

21 THE WITNESS: Other than hearsay.

22 MR. HOSSNER: Hearsay is what he told me.

23 Q. (By Mr. Hossner) Now, when he left that property
24 and abandoned that property do you have any proof or evidence
25 that he ever at any time put any of this 120 inches of water

1 over on that property?

2 A. No.

3 Q. And do you claim that he did?

4 A. It was decreed to it.

5 Q. Well, I know, but what I am asking you is did he
6 ever use any water over on that property?

7 A. Not to my knowledge.

8 Q. Are you claiming that he broke out the 20 acres
9 over on that upper 80? Are you claiming that he was the one
10 that broke out the 20 acres for farm purposes?

11 A. No.

12 Q. You don't know who broke that out?

13 A. No.

14 Q. Was it Johnny Williams that actually had the
15 patent on this property from the federal government?

16 A. I have never seen that.

17 Q. Do you know who it was patented to?

18 A. No.

19 THE COURT: It was patented to a man by the name of
20 Williams.

21 MR. RIGBY: We have admitted the exhibits and they
22 speak for themselves.

23 Q. (By Mr. Hossner) Are you aware that it was
24 patented in 1917?

25 A. From that exhibit, yes.

1 Q And you purchased the property down from the
2 original 1917 patent, your dad, and then you obtained the
3 property?
4 A Right.
5 Q You never did obtain any property from
6 Mr. Michael Byrne?
7 A No.
8 Q As this thing has gone along have you ever
9 claimed until you first became aware of it in 1957 this water
10 right?
11 A I couldn't. I wasn't aware of it.
12 Q And was your father aware of it to your knowledge?
13 A I don't know.
14 Q Now, you say that in 1942 or 1943 when Mr. Stone
15 testified the water was shut off completely to the Ray Gordon
16 property do you have any personal knowledge of that?
17 A As I said before, I did a lot of irrigating on
18 the berry patch and I don't believe water could be put through
19 there.
20 Q When were you in the service?
21 A From 1944 to 1946.
22 Q And, as you recall yesterday, Mr. Stone testified
23 that between I think it was 1942 and '45 or '43 and '45,
24 sometime during this time is when that water was shut off over
25 to your dad's place. Do you remember that?

1 A. I don't remember the year.
2 Q. You don't remember the year that he said the
3 water was shut off?
4 A. No.
5 Q. Now, very likely because that was within this
6 time phrame between 1942 and '45, as Mr. Stone said, you would
7 have been in the service during that time?
8 MR. RIGBY: Is that your testimony, counsel, or are
9 you asking him?
10 MR. HOSSNER: I am asking him.
11 Q. (By Mr. Hossner) If it was shut off during that
12 time between '42, '43, '44 and '45, during part of that time,
13 you would have been in the service?
14 A. I was in the service in the fall of '44 and I got
15 out in the spring of '46.
16 Q. You would have been gone in the summer of '45?
17 A. Of '45.
18 Q. So that could have been that time, it very well
19 could have been the time when your dad's head gate was shut
20 off?
21 MR. RIGBY: Well, Your Honor, I have to object to that
22 line of questioning. He didn't give his testimony and the
23 record will show that Mr. Stone testified it was 1941 or 1942
24 and he was there at that time.
25 THE COURT: I thought it was '43.

1 MR. RIGBY: We can go back and search the
2 that is what my notes say, from 1941 to '42.

3 Q. (By Mr. Hossner) So, anyway, you were not on
4 the farm all the time in the summer in the 1940's is my point.

5 A. Except for the time I was in the service, yes.

6 Q. So if something happened when you were in the
7 service of course you didn't know about it?

8 A. I think I would have known about it.

9 Q. Would your dad have written to you?

10 A. He would have written to me.

11 Q. Now, you said yourself that you didn't know
12 anything about this decree until 1957.

13 A. I didn't.

14 Q. And you say your dad didn't know anything about
15 that?

16 A. I didn't say that.

17 Q. What about your father? Did he know about that
18 decree?

19 A. I don't know what he knew about it.

20 Q. Starting in 1957, sometime around there, you
21 became aware through one of your water masters that part of the
22 Reggan decree you believed -- that part of your property, that
23 upper 80, was involved in that Reggan decree?

24 A. No, the Mike Byrne decree.

25 Q. Well, the Mike Byrne decree which came through

1 Reggan and on down through Moulton, you believe that part of
2 your property was included in that?

3 A. It was listed in it.

4 Q. It was listed? Now, after it was listed did
5 you go to any of the parties that owned that property and that,
6 of course, would have been Reggans or Moultons or anybody
7 after and never discussed with them your share of that decree?

8 A. I discussed the decree, yes.

9 Q. And did you ever call for that decree and
10 reduce their flow of water?

11 A. In 1978.

12 Q. And in 1978 that is the first time you ever
13 called for your decree?

14 A. That's right.

15 Q. When you called for your decree what happened on
16 that day?

17 A. The state water master asked me what to do with
18 it and I said to distribute the water as it should be and he
19 did.

20 Q. Now, did the people that were farming that, and
21 that would be Mr. Bean, that were farming the Reggan property
22 that now belongs to Mr. Crow, did he get all of the water that
23 he wanted?

24 A. Mr. Bean was not farming the property.

25 Q. When that decree was called?

1 A. No.
2 Q. Who was farming it?
3 A. I was.
4 Q. So the year that the decree was called you were
5 farming the Reggan property?
6 A. That's right, the hay field that I testified
7 before.
8 Q. And who called the decree that time? Did you call
9 it or Mr. Bean?
10 A. I don't know who did.
11 Q. You don't know who called for it?
12 A. I don't know if it was Mr. Bean or Mr. Crow or
13 who.
14 Q. So somebody called the decree?
15 A. That's right.
16 Q. And they first apparently got the 120 inches of
17 water?
18 A. That was the testimony yesterday.
19 Q. And sometime later apparently you came and made a
20 contest about that?
21 A. That's right, immediately.
22 Q. And that would be in 1978?
23 A. Right.
24 Q. And when you contested it what happened then?
25 A. As I said before, the state water master asked me

1 what I wanted to do with my share of that water and I said to
2 divide it as it was supposed to be.

3 Q But that was the only time in 1978 that ever
4 happened?

5 A That's right.

6 Q Then of course suit was filed thereafter and that
7 is why we are here in court today?

8 A That's right.

9 Q Now, it is a fact, is it not, that Mr. Byrne never
10 did prove up on that land, that is never did get a deed or
11 patent to that land from the federal government?

12 MR. RIGBY: Your Honor, this is repetitious. We have
13 gone over that about four times and he has admitted that his
14 name does not appear on the chain of title.

15 THE COURT: Yes. He has admitted that. I think I will
16 sustain the objection.

17 Q (By Mr. Hossner) And it is a fact also, is it
18 not, that you have never proved or no testimony that Mr. Byrne
19 ever used any water over on that upper 80 that you are
20 claiming?

21 A No.

22 Q You have no proof at all that he ever used water
23 over there?

24 A No, other than hearsay.

25 Q And because Mr. Reggan is over on his 160 acres,

1 and that is the one that belongs to Mr. Crow now, did he have
2 his home over there as far as you know?

3 A. Mr. Reggan, yes.

4 Q. And did Mr. Byrne have his home there?

5 A. I don't know.

6 Q. And Mr. Byrne then apparently transferred all of
7 his water down to his successors, at least his deed says in the
8 first deed from him to his successor, Mr. Reggan, it says all
9 water rights go to Mr. Reggan. Are you aware of that?

10 A. Yes.

11 Q. Now, during that time the testimony was
12 yesterday that there had been 120 inches delivered down to the
13 Reggan property.

14 MR. RIGBY: I object to that statement of a fact. The
15 record speaks for itself, Your Honor, and it is not a fair
16 question to ask this man to make the statement that all the
17 witnesses have said that 120 inches was always delivered down
18 there and I can recall many witnesses saying no. It was high or
19 low and it was divided and it was distributed according to
20 shares of stock. So I object to the form of the question as
21 not conforming to the record as I understand it.

22 THE COURT: Well, I think that it is an improper question
23 to ask because you are telling him what the evidence says and
24 I know what the evidence says. It won't help me to have him tell
25 me.

1 Q. (By Mr. Hossner) Back to your Exhibits A and B,
2 which are your two water certificates, when did your father buy
3 that upper 80? That would be the 80 that you are claiming part
4 of this water is on. When did he buy that?

5 A. I believe the records show 1920.

6 Q. Who did he buy that from?

7 A. I would have to look at the contract to see.

8 Q. Do you know when he received the deed?

9 A. No.

10 Q. I show you what has been marked as Exhibit Number
11 12. I note here that this property was awarded to Culver in
12 1927 and would it have been sometime after that that your dad
13 bought that upper 80? The Culvers owned that upper 80, did they
14 not, that ultimately your father bought?

15 A. I don't know whether that shows it on mine. I
16 have the contract.

17 Q. Do you have it here?

18 MR. RIGBY: Your Honor, we have furnished this informa-
19 tion to counsel on interrogatories and we would be happy to
20 submit that statement again if he would like it. It is hard for
21 this man to remember all those dates of all those transactions.
22 If he would like to take this. There is the title report of
23 that 80 acres with the names and patents, the deeds and the
24 dates and the whole thing.

25 THE COURT: You don't have a deed to it, do you? Or do

1 you?

2 THE WITNESS: Yes, I have a deed.

3 MR. RIGBY: The deeds were introduced by them yesterday.
4 The whole chain of title is in evidence.

5 THE COURT: Well, then, what does it matter?

6 MR. HOSSNER: Well, just for a couple of questions.

7 Q (By Mr. Hossner) I note on your title report that
8 it shows that Dan Gordon bought that property in 1928.

9 A That is probably right then. It must be the lower
10 acres in 1920.

11 Q The lower 80 which is not any subject to this suit
12 and 1928 was that upper?

13 A Yes.

14 Q So then your water certificates would be probably
15 the one you got in 1930 would have been given after that upper
16 80 was purchased?

17 A Probably, yes.

18 MR. RIGBY: We would like to explain that, counsel, but
19 we were prohibited from that.

20 MR. HOSSNER: And I apologize.

21 Q (By Mr. Hossner) And the water certificate that
22 you have introduced, that would be your Exhibits A and B, those
23 water certificates are certificates so you can transport
24 apparently 160 shares or whatever that amounts to in inches
25 through the canal system and do you own other land other than

1 these two 80's?

2 A. Yes.

3 Q. What lands are those?

4 A. I own lands up in the mouth of the Fox Creek
5 canyon.

6 Q. How many acres?

7 A. Approximately 265.

8 Q. So is it fair to say that these certificates of
9 stock that you have simply give you some inches of water in
10 Fox Creek and can you tell me how many inches that is in Fox
11 Creek?

12 A. At first it was an inch to the acre, but I
13 believe they just filed on that later on and it is more than
14 that now, but the original was an inch to an acre.

15 Q. So you can take about 160 inches out of Fox
16 Creek on that old 1916 decree?

17 A. Yes.

18 Q. And after 1916 you then have to go to the decreed
19 right and if you have any water you have to have had a decreed
20 right to get anything after 1916?

21 A. I believe that's right.

22 Q. Now, you testified that the north half of the
23 east 80 was deeded to you in 1957?

24 A. Approximately.

25 Q. And that would be the part over on the north side

1 of the old channel of Fox Creek that goes through there?

2 A. Well, half of it where it comes.

3 Q. When you farmed the property that now belongs to
4 Mr. Crow in 1978 did you ever have to call for that decree for
5 the property of Mr. Crow's?

6 A. No.

7 Q. And how many inches of water were you getting on
8 that property in 1978?

9 A. I don't know.

10 Q. Was it all the water that you needed or desired?

11 A. Early it was and a little later on they started
12 to irrigate on the place above and I had trouble getting water
13 down there.

14 Q. So your testimony is that somebody in 1978 called
15 that decree on that property?

16 A. That's right.

17 Q. Who else other than yourself was irrigating that
18 property in 1978?

19 A. I was aware of no one.

20 Q. So you are saying somebody called, that you
21 complained to Mr. Crow or anybody?

22 A. No.

23 Q. Then when they called for that water even though
24 you were handling all of the water on the Reggan property and
25 all the water on your own property at that time?

1 A. That's right.

2 Q. And you say you objected to the division of the
3 water?

4 A. Yes.

5 Q. Why would that be since you were having both
6 streams of water? Why did you object?

7 A. Because it took the water away from several of
8 my neighbors as well as it took water away from my 160 which
9 is most important.

10 Q. Once you were handling the water over on the Crow
11 property couldn't you have used it over on your 160 then?

12 A. No.

13 Q. You couldn't trade that water back and forth?

14 A. No, no way.

15 Q. Was it a practice to have that water traded with
16 the consent of the owner which would be Mr. Crow?

17 A. It was divided up above. I don't know how you
18 would trade it unless you traded it at the diversion point and
19 to my property it was locked, shut off.

20 Q. You are telling me the only one that complained
21 about not getting enough to the Reggan property and the Crow
22 property was yourself?

23 A. I was the one that was using the water.

24 Q. So you would be the only one to complain about
25 it?

1 A. That's right.

2 Q. Yet you say somebody called their decree that

3 would be the Crow decree now for use on the Reggan property?

4 A. That is the way it appears.

5 Q. Even though you didn't want it?

6 A. I didn't say anything about it. I wasn't asked.

7 Q. Isn't it a little phenomenal that unless you are

8 complaining you are irrigated and somebody complained?

9 A. It might be, but that is the way it was.

10 Q. So even in '78, right up through there, that old

11 Michael Byrne decree was being called for that property

12 belonging to Mr. Crow?

13 A. That's right.

14 Q. And that is the first time that you ever

15 intervened and said that part of that belongs to my property

16 over in the other section 26?

17 A. No.

18 Q. When else had you intervened?

19 A. In between 1957 and 1961, I don't know the exact

20 year, when Mr. Moulton called for the water and you had that

21 testimony in a little while ago.

22 Q. Did Mr. Moulton get his water that time?

23 A. No.

24 Q. Did he get all he needed?

25 A. They said he did yesterday. I don't know that

1 he did.

2 Q You have no idea? They said he got all he
3 needed, so he got all he needed? In other words you weren't
4 taking any water from him that he needed or claimed at that
5 time?

6 A No.

7 Q Have you ever taken any water that anybody
8 claimed or needed with this possible exception in 1978?

9 A I never called for that old decree.

10 Q So you had never taken any of that?

11 A Except in 1956 or '58.

12 Q And you said that even at that time you never took
13 any that Mr. Moulton needed?

14 A He withdrew his demand for the water that year.

15 Q Because he was getting his stream and was getting
16 the water he wanted?

17 A No.

18 Q Did you shut him off dry?

19 A No. He found out I had part of his stream and he
20 just dropped it.

21 Q How do you know that?

22 A That is hearsay evidence from the state water
23 master.

24 Q But now yesterday Art Wilson testified that the
25 first time that he had been aware as a state water master, and

1 his records reflect it that if there was any part
2 water on any property other than that belonging to
3 it was probably 1962 or '63 or '64 in there and he came to work
4 in '61 and shortly thereafter he and Mr. Stone went through
5 the records and at that time they found part of that water had
6 a description that was this upper 80. Now, that is what
7 Mr. Wilson said.

8 A. That is not quite correct.

9 Q. Are you refuting your own witness?

10 A. He is all right, but he didn't know about my
11 part in it, Mr. Stone. Mr. Wilson probably forgot about me
12 when he was asked about it and testified yesterday.

13 Q. You asked him to go check on it and then he found
14 it over there in about shortly after '61 they found it?

15 A. That's right.

16 Q. Now, your testimony was, and I am not quite sure,
17 you are saying what Mr. Stone said yesterday could not have been
18 so when he watered that raspberry patch?

19 A. I don't believe the water could be run in that
20 direction. The water in the ditch there runs from south to
21 north and it would have to be run from north to south and the
22 old channel would have to be brought down the branch of the old
23 channel which absorbed a lot of water and I don't believe it
24 would ever stretch that far. It would need dikes and so forth
25 to my knowledge put in there to do it.

1 Q Well, apparently that happened when you were
2 away.
3 A No.
4 Q Do you remember that incident of him bringing the
5 water--
6 MR. RIGBY: Now, Your Honor, I object to that statement
7 of the fact of the record again because that isn't what the
8 record shows. That is an unfair question and I object to it.
9 He said apparently that happened while he was away. The record
10 does not show that.
11 THE COURT: No, the record doesn't show it because the
12 record doesn't show that it happened in '44. He might have
13 been away and I think we can all agree it is possible. People
14 can't remember exactly what the years were.
15 Q (By Mr. Hossner) But you don't remember this
16 raspberry incident when your father went to Mr. Stone and he
17 had the water brought to the raspberry patch?
18 A No.
19 Q Could that have been when you were in the service?
20 MR. RIGBY: We have gone over that, Your Honor, twice.
21 I object to it as being repetitious.
22 THE COURT: Well, I don't remember what he said, but I
23 am sure it could have been.
24 THE WITNESS: I would like to answer the question. I
25 believe the record says it was in '42 or '43.

1 Q (By Mr. Hossner) Just answer my question if you
2 would. Could that raspberry incident have been while you were
3 in the service?
4 A I rather doubt it.
5 Q Where did Johnny Williams live when he had that
6 property?
7 A I don't know.
8 Q Do you know when he left or why he left?
9 A The only time I remember where Johnny lived was
10 on the 80 just north of us. Now, he may have run the 80 from
11 there. That is only a quarter of a mile away.
12 Q Apparently he is the man that at least got a deed
13 to it at one time?
14 A Yes. His wife's folks lived across the road when
15 my folks lived there.
16 Q Were you alive during the time that he farmed that?
17 A No.
18 Q Do you know why he left that property?
19 A No.
20 Q Do you know when the first time was when that
21 property was irrigated? Do you know that?
22 A It has been irrigated all of my life.
23 Q But do you know before that?
24 A It would be hearsay.
25 Q Well, do you know when it was iri

1 have an idea?

2 MR. RIGBY: Now, he has asked you and you have a right
3 to tell him.

4 THE WITNESS: I know that when my folks came into the
5 country they said there were hay stacks up on the arid part of
6 this ground part of the year, so it had been plowed one time or
7 another.

8 Q It was farmed at that time?

9 A I don't know.

10 Q When did your folks come to the country?

11 A About 1916 or 1917.

12 Q So back in '16 or '17 you say there were hay
13 stacks there which you are saying indicated that would be on
14 the upper 80?

15 A On the top part of it, yes.

16 Q Now, at that time Michael Byrne was not there?

17 A No.

18 Q Let me ask you then apparently when Mr. Byrne
19 testified down in that court case he said--

20 MR. RIGBY: Now, I object, Your Honor. That was
21 offered yesterday and rejected.

22 THE COURT: Yes.

23 MR. RIGBY: And we have tried all through this trial to
24 get the evidence of those rejected documents back into the
25 trial and I think it ought to be rejected and c

1 instructed not to continue to try to read that record into the
2 court.

3 MR. HOSSNER: Well, Your Honor, it is important, of
4 course, to our case as well as this court's determination in
5 this case to ascertain and determine if in fact at the time of
6 this incident if Mr. Michael Byrne was watering or where he had
7 that water where he was using it at the time of that decree and
8 the only way we can establish that is we can establish through
9 witnesses who are alive and well and there are none of those.
10 Of course we are talking about people who would have been quite
11 old at the present time. Now, we have the testimony--

12 MR. RIGBY: Now, Your Honor, the best evidence of the
13 land that was watered by law is that decree. Now, that is an
14 absolute finding set in concrete and he is trying to show
15 evidence -- for instance, if we were to take segments of
16 testimony that has been offered in this trial 71 years from now
17 and try to settle another case on the basis of a bit of the
18 evidence that went into this trial would be misleading. The
19 only thing we care about is what that judge said at the end
20 and the court found as a matter of law that water was
21 diverted, appropriated and applied to a beneficial use to this
22 80 and we can't attack it. We can't go behind it and I
23 vehemently object to the continued attempts to get any of that
24 testimony or part of that trial in before this court.

25 MR. HOSSNER: But, Your Honor, the whole qu

1 appears to me to be the court back then said that this land
2 was included in the description of the 120 inches of water.
3 Now, that does not mean, and this witness testified himself
4 there is only 20 acres tillable on that 80 acres.

5 MR. RIGBY: Now.

6 MR. HOSSNER: Today.

7 MR. RIGBY: He is having him testify, Your Honor, of
8 hay stacks on the top of that 80. We have tried to keep out
9 the hearsay testimony. He ought to tell what he knows, but it
10 would all be hearsay. Counsel has asked sufficient times to
11 tell what he knows, but it is all by hearsay. I have tried to
12 keep that out and this information which predates that decree.
13 Now, Your Honor, it seems to me unimportant what happened before
14 that decree. Legally water was appropriated and applied to a
15 beneficial use as the date of that decree. That is a legal
16 established decree. Now, the only thing that these people can
17 do as proof that we forfeited it or abandoned it and trying to
18 go back now and piece together what happened from 1890 to 1957
19 is impossible. The only thing is can they come in at this date
20 and prove, since we have a decree, that they by a prescriptive
21 use or adverse use have taken that right away from us and I
22 implore the court to stay on the only issues that are before
23 this court, so the regular quiet title proceedings that the
24 plaintiff has for five years at least last past used that water
25 openly, adversely and all hostility to this deci

1 prove it and to go back beyond that is clouding the record. It
2 is getting off from the real issue involved and, so, I want
3 the record clear that we object to it, any of that testimony.

4 THE COURT: Well, now that you have had your argument
5 let Mr. Hossner make his argument.

6 MR. HOSSNER: Well, Your Honor, Mr. Rigby has assumed
7 that apparently 40 inches of that water was used over on that
8 southwest quarter in 26. He has assumed that.

9 MR. RIGBY: No, I haven't assumed it. The decree.

10 MR. HOSSNER: On that 80 acres that now Mr. Gordon
11 owns.

12 THE COURT: Well, I would assume it too.

13 MR. HOSSNER: But, Your Honor, we are testifying and
14 bringing out evidence to show and this evidence will show that
15 in fact that water was not being used on that 80 acres.

16 THE COURT: Well, it will show that it was not being
17 used there or that it will show it was being used somewhere
18 else.

19 MR. HOSSNER: It will show that he was using 120 inches
20 of this water on the 160 acres that belonged to Mr. Gordon.

21 MR. RIGBY: From his own testimony.

22 MR. HOSSNER: I am sorry, that presently belongs to
23 Mr. Crow. His testimony will show that this 160 acres was all
24 that he claimed which was the southwest quarter.

25 THE COURT: Well, I don't think I want you to tell me

1 what it says. I would rather have what it says. Are you
2 offering it as an exhibit?

3 MR. HOSSNER: Yes, Your Honor. We would reoffer this
4 exhibit as testimony in that court case. Your own files and
5 records in your own court, your own decree in your own court
6 which you may review. He was examined and he was cross
7 examined and he testified the amount of water he was using and
8 where he used it and that is the best evidence.

9 THE COURT: How do you get that testimony?

10 MR. HOSSNER: I got it out of your court file. Well,
11 the Rexburg water case. I am sorry, in Fremont County, Idaho.

12 THE COURT: Is that his whole testimony?

13 MR. HOSSNER: His whole testimony is here.

14 THE COURT: Did he have an attorney?

15 MR. HOSSNER: He was questioned by Mr. Holley.

16 THE COURT: Well, of course, he got water. He got a
17 water decree for this property of Mr. Bean's and he also got a
18 water decree for the property of Mr. Gordon's. Now, I don't
19 know how he got it and I am not at this point going to claim
20 that he didn't get it or I am not going to permit you to show
21 that it was a mistake and I won't accept that evidence for that
22 purpose at all, but if you want to produce that evidence to help
23 to indicate how the water might have been used by him after he
24 got the decree I am willing to let you do it.

25 MR. HOSSNER: That is the only reason we would offer it,

1 Your Honor.. We don't want you to amend the decree. We simply
2 offer it to show his testimony which is the only testimony that
3 I know of at that time that is available.

4 THE COURT: Now, I know that Mr. Rigby feels that it is
5 not important and it doesn't have anything to do with--

6 MR. RIGBY: I think it is highly prejudicial because
7 his testimony was long before the decree.

8 THE COURT: Maybe I will agree with you after I get
9 around to deciding, but I would like to have it there so that
10 I can use it if I need it. I am going to let it in. Well,
11 gentlemen, it is noon and I am going to call a noon recess now.

12 (Court was in recess for noon.)

13 THE COURT: At the time of the recess Mr. Gordon was on
14 the witness stand. I believe he was undergoing cross examination

15 Q. (By Mr. Hossner) Mr. Gordon, I was looking at
16 your Exhibits A and B which are those two water certificates
17 that are standing in the name of your father. I don't note that
18 those have been transferred. In fact, they aren't even endorsed
19 on the back. How do you claim ownership of those?

20 A. Through a gift certificate or a gift deed of the
21 property.

22 Q. And were these certificates included in the deed
23 on the property?

24 A. Yes, all water rights were included in the gift
25 deed.

1 Q And that is how you get A and B? Were they
2 physically delivered to you at that time?

3 A By my mother, yes.

4 Q So when you got the gift deed on the original
5 80 acres when you first got married -- I am sorry, on the 40
6 acres when you first got married did you get one of these
7 certificates at that time?

8 A No. It was left in the family file.

9 Q When were these delivered to you, then, in 1957?

10 A That's right.

11 Q Why have you not had them changed or new
12 certificates issued?

13 A I haven't had them changed, no.

14 Q How much land is tilled over there by the old
15 home site that you have talked of there in the southeast corner?
16 How much tillable acres are right around there?

17 A I don't know. There is a saw mill on it now.
18 It is a business.

19 Q Well, back in the old days before the saw mill.
20 How many acres were over there by what you are calling the old
21 cabin?

22 A Just what lays between the fence and the creek
23 there, probably several acres.

24 Q How many would that be?

25 A Oh, two to four.

1 Q Would that include the old site that you said
2 used to be an old cabin and garden patch? There would be two
3 to four acres right there?
4 A Yes.
5 Q Did you see evidence right there of a garden
6 site around the old cabin site, the old garden plot?
7 A The only evidence that was there was the irises
8 that grew there and the orchard that was there.
9 Q And how many trees were in the orchard? How
10 much of an area did the orchard take into account?
11 A At the time I remember it, probably ten or twelve
12 trees.
13 Q And away from the cabin site then going on down
14 that fence line, I guess it would be west, wouldn't it?
15 A Right.
16 Q And there was an old ditch that went down through
17 there?
18 A That's right.
19 Q And you have never used it or claimed water
20 through it?
21 A No.
22 Q Do you know when that was dug?
23 A No.
24 Q Where does that old ditch end up?
25 A It went down two or three hundred yards because

1 of the old creek that makes a circle there.

2 Q So that old ditch would have ended up in the old
3 creek bed?

4 A That's right, it could have done.

5 Q So if in fact there was ever any water taken to
6 that old site from the old flume above the Wanless place it
7 would have gone pretty much just to that southeast corner and
8 went down 200 or 300 feet and in the old creek bed?

9 A No, yards, not feet.

10 Q So that would be closer to six to nine hundred
11 feet?

12 A Yes.

13 Q And that water along that fence, did it irrigate
14 to the north? Does that land lay to the north so that the
15 water flows to the north or the south?

16 A It would flow to the north.

17 Q Is there any crop land right along the old ditch?

18 A Not at this time, no.

19 Q And I thought I saw when you were pointing out
20 where the crop land was on that map the crop land all lies on
21 the east of that and on the other side of the wash -- I am
22 sorry. West of the old cabin site on down to the west end of
23 the property and to the other side of the old wash?

24 A That's right.

25 Q You also talked a little bit about a gate put in

1 to distribute that water. Is that the gate you are talking
2 about that was put in by Art that testified yesterday,
3 Art Wilson?

4 A. At the diversion point?

5 Q. Yes.

6 A. Yes.

7 Q. And that would have been put in about when?

8 A. I don't know.

9 Q. He testified yesterday sometime he thought
10 around the '60's or at least during his term. Would that be
11 right?

12 A. He would know.

13 Q. Prior to that time was the point of diversion
14 above where it was put in in the '60's or was it at the same
15 spot?

16 A. There was another head gate there, a board head
17 gate before the cement structure was put there.

18 Q. Do you know when the board head gate was put in
19 there?

20 A. It would be after 1946.

21 Q. Are we talking about the same place where the
22 water is diverted now?

23 A. Yes.

24 Q. Are you acquainted at all what type of diversion
25 there was that is shown in Plaintiff's Exhibit 1 which was the

1 old claim of diversion or at least when the diversion was
2 probably up the canal probably 800 feet? What type of
3 diversion was up there? Do you know?

4 A. Which one do you mean?

5 Q. Well, I am talking about--

6 A. The one above the new one?

7 Q. That this new one replaced which was up the
8 ditch apparently 800 feet or so.

9 A. No, that would have had to have been up the
10 ditch nearly a mile from the highway.

11 Q. Okay, what type of diversion was that?

12 A. What was the structure made from?

13 Q. Yes.

14 A. Wood.

15 Q. And was that diversion replaced in 1946 and
16 moved down the ditch about a mile or whatever it was?

17 A. That diversion was abandoned and the canal was
18 changed.

19 Q. And in '46, as you recall?

20 A. After that time, yes.

21 Q. And did you take your water out of that old
22 point of diversion? Did you and your dad take the water out of
23 the old point of diversion which was about a mile from the
24 present diversion?

25 A. Yes.

1 Q And you never did run any water across and down
2 the south edge of this upper 80 that is in contention? You
3 never did run your water across by the cabin site and down that
4 south boundary line of the property in contention?

5 A No, we haven't.

6 MR. HOSSNER: I have no further questions.

7 REDIRECT EXAMINATION

8 BY MR. RIGBY:

9 Q Mr. Gordon, you indicated that you hadn't had
10 the certificates changed. Do you receive assessments from the
11 canal company?

12 A Yes.

13 Q And you pay them?

14 A Yes.

15 Q On how many shares?

16 A One hundred sixty shares.

17 Q Does the canal company then recognize in making
18 those assessments that you own the stock?

19 A Yes.

20 Q Is there any particular reason why you haven't
21 taken these certificates to the secretary and had them
22 transferred?

23 A No.

24 Q Counsel asked you at one time, and I am not sure
25 how the question was stated, and I am asking you for a

1 clarification now, whether you had any evidence that
2 Michael Byrne had put water on that 80 or constructed any of
3 the ditches and I believe you answered no. Now, I am asking,
4 Mr. Gordon, do you have any evidence that he didn't?

5 MR. HOSSNER: Now, we object, Your Honor. I think he
6 has already answered the question.

7 MR. RIGBY: No, I am asking him the reverse.

8 THE COURT: Yes, that's right. He said no, didn't you?

9 THE WITNESS: To his question?

10 THE COURT: Yes.

11 Q (By Mr. Rigby) To my question?

12 A I haven't answered it.

13 Q In other words do you know one way or the other?

14 A No. I don't know anything about it.

15 Q But have you relied on the decree?

16 A Yes.

17 Q And were the ditches there as long as you
18 remember?

19 A Yes.

20 Q And do the ditches actually serve the full 80?

21 A Yes.

22 Q So was your testimony just from your own knowledge
23 while you have been there?

24 A Yes.

25 Q And not as to what somebody else did before that?

1 A. No.

2 Q. And you worked with your father there to farm
3 the place?

4 A. That's right.

5 Q. Now, does the lower 80 get more of your water
6 than the upper 80?

7 A. At times of the year.

8 Q. Why?

9 A. Well, the lower 80 has a little better soil, so
10 we water the upper 80 first and then we move it down on the
11 lower 80.

12 Q. And do you interchange the water and use it
13 wherever it produces the best crops?

14 A. Yes.

15 Q. On the 460?

16 A. Yes.

17 Q. So then is any of this decreed water used on the
18 lower 80?

19 A. All of the water is mingled together so it would
20 have to be, yes.

21 Q. And has been as long as you remember?

22 A. As long as I remember.

23 MR. RIGBY: I believe that is all we have.

24 MR. HOSSNER: We have nothing.

25 THE COURT: That is all. You may call your next witness.

1 Floyd Moulton across the street?

2 A. About 30 years.

3 Q. Was there ever a time that you or he or together
4 ever abandoned your water or ever gave up that 120 inches?

5 A. No.

6 Q. Was there ever a time when Mr. Gordon ever demanded
7 any of the 120 inches to your knowledge?

8 A. No. I can't remember of any.

9 Q. When you and Mr. Moulton were in the irrigation
10 process did you run your streams of water together?

11 A. Yes.

12 Q. Did you divide them down by your property?

13 A. Yes or we traded. Sometimes we just traded back
14 and forth. He would have it two days and I would have it three
15 or something.

16 Q. Now, a fellow that you talked about that was with
17 the State of Idaho, what was his name?

18 A. Drew Cooper.

19 Q. And he was the state water master?

20 A. As I understand, yes.

21 Q. And he is the fellow that you contacted and went
22 up and made the weir so you could measure the 120 inches?

23 A. Right.

24 Q. Where was the weir in relation to where you took
25 the water out? Where did you take it, out of the stream or out

1 of the canal?

2 A. Well, we took it out of the canal, you know, we
3 had about four other fellows' water there, you know, and as
4 I remember, we put the weir just below where it was diverted to
5 see if we were getting ours.

6 Q. Who was the other four fellows who had water by
7 your weir?

8 A. Well, there was Frank Burger and Dan Gardner and
9 Dan Gordon and myself and Elmer Stone's water was in there too.

10 Q. Now, after '46 when you demanded your water were
11 there any of these other people who took it out of the same
12 point of diversion? Were their inches cut down or their water
13 shut down?

14 A. Well, as I remember, they turned us our water. I
15 don't know what happened with theirs.

16 Q. During the time that you were using the water that
17 belonged to yourself and your uncle Floyd, during that time,
18 did the Gordons ever claim any of that water or make a demand on
19 you for any of that?

20 MR. RIGBY: Just a minute. Your Honor, could I ask a
21 question in aid of an objection?

22 THE COURT: Yes.

23 Q. (By Mr. Rigby) Mr. Moulton, I believe you just
24 testified that you are talking about a diversion point. I am
25 not sure I know right where that is, but if I understand your

1 testimony there were other people there, Frank Burger, Dan
2 Gordon and Elmer Stone took their water out of another place
3 above the weir, is that right, or am I wrong? Where you put
4 your weir they took this water out above there, is that right
5 or not?

6 A. Well, we are talking about a diversion just above
7 Jim Dewey's house just up above the house and I can't remember
8 how many there were there all together, but there were several
9 people there together.

10 Q. Yes.

11 A. It comes down the canal there and has the point of
12 diversion for five or six or whatever number of water rights
13 there is there.

14 Q. Right, and then your weir was to measure the water
15 coming on down to you and Floyd Moulton?

16 A. Yes, right.

17 Q. And you say you don't know what happened then, that
18 you got yours, but you don't know what happened to them?

19 A. Yes, I can't remember.

20 MR. RIGBY: Okay,

21 Q. (By Mr. Hossner) During the time that you were out
22 there for that 30 years did there ever come a time when the
23 water became so low or so dry that you had to go up and call in
24 the State of Idaho or any other person to turn your water?

25 A. I can't remember a year in Chaffin that there was

1 ever enough water. There is never enough water in that ditch,
2 but some years it got lower than it did others and so on these
3 low years we would get busy and call for our water or try
4 anyway and go through the process. We got our water usually.

5 Q After you called for your water did you get 120
6 or 160 and Mr. Moulton's 120?

7 A Well, we got a stream of water. I never measured
8 water myself and I don't exactly know the inches, but it was a
9 good stream of water.

10 MR. HOSSNER: I have no further questions.

11 CROSS EXAMINATION

12 BY MR. RIGBY:

13 Q Mr. Moulton, did you hear the testimony of
14 Vernal Foster?

15 A Right, I did.

16 Q And I believe he testified that he didn't mess
17 with decrees, but distributed the water of the canal company.

18 A I don't quite understand that. You say the water
19 of the canal company?

20 Q Yes. I think that was his testimony.

21 A Well, the water doesn't belong to the canal
22 company. They just distribute it.

23 Q Well, don't they own some decreed water right?

24 A The canal company?

25 Q Yes.

1 A. No, not the way I understand it. The land owns the
2 water.

3 Q. Well, wasn't the canal company itself decreed 83.2
4 second feet of water with the January 22nd, 1916 priority date?

5 A. I wouldn't know.

6 Q. So you mean you have been laboring under the
7 impression that the water that came down to you was strictly
8 by virtue of your 1891 right?

9 A. Right.

10 Q. When you say you called for the water, who did
11 you call?

12 A. We called Drew Cooper. He came there to the
13 house, to Boyd's house, and I was there.

14 Q. And what would he do?

15 A. Well, he sent us up the ditch to build a weir. I
16 remember that.

17 Q. Now, when he was the district water master for
18 this area he would turn it into the channel of the Fox Creek
19 Irrigation Company, isn't that right?

20 A. I don't know. I don't know what he did, but I
21 do remember us going up there with a board plank to build the
22 weir.

23 Q. But at the same time, according to Mr. Foster,
24 they tried to see that everybody had some water, isn't that
25 right?

1 A Well, that was their prerogative, I guess, but
2 they weren't to do it with my water or Floyd's water.

3 Q But did they do it? Do you know that?

4 A Well, if they did it they did it against my will.

5 Q Well, that may be. Did you ever see anybody cut
6 off of the water?

7 A Yes, Elmer Stone.

8 Q He was actually cut off?

9 A Yes, cut off.

10 Q Do you know of anybody else?

11 A Well, he was on our ditch after it was diverted and
12 he came out of our ditch and his was shut off dry.

13 Q When was that?

14 A About that time, the late '30's or early '40's.

15 Q Anytime since then since you are aware of?

16 A I don't remember particularly the years, but he
17 was cut off from the water when we called for our decrees.

18 Q How many times? Do you know?

19 A It seems like they were doing it every year, but
20 I guess we didn't. It seemed like every year that Floyd was
21 upset about not getting any water more so than I was.

22 Q Now, Mr. Moulton, you don't recall Floyd being
23 advised by the state water master of the decree to the
24 Ray Gordon land?

25 A No.

1 Q In '78 and '79?

2 A Yes.

3 Q Is there any time you can think of when you have
4 been cut off of water from '57?

5 A Well, we were cut off as you were talking before
6 in 1968 or '69. The water was shut off when Bob called for the
7 water.

8 Q That's when Bob called for his water is when you
9 were shut off? Now, is that '68 or '69 or '78 or '79?

10 A It was '78 and '79.

11 MR. HOSSNER: I have no further questions.

12 REDIRECT EXAMINATION

13 BY MR. RIGBY:

14 Q But the water was turned back on after the
15 meeting, is that right?

16 A Yes.

17 MR. RIGBY: That is all.

18 THE COURT: You may call your next witness.

19 MR. RIGBY: We will call Ryan Kunz.

20 RYAN KUNZ,

21 called as a witness by and in behalf of the defendant, having
22 first been duly sworn, was examined and testified as follows:

23 DIRECT EXAMINATION

24 BY MR. RIGBY:

25 Q State your name.

1 A. Ryan Kunz.
2 Q. And your address?
3 A. Victor, Idaho, the Chaffin area.
4 Q. And are you the son of Merle Kunz who has just
5 testified?
6 A. Yes.
7 Q. Have you ever acted as water master for the
8 Fox Creek Irrigation Company?
9 A. Yes, sir, in 1975, '76 and '77.
10 Q. And are you a stockholder in that company?
11 A. Yes, sir, I am. I am on the board of directors
12 also.
13 Q. And you are also on the board of directors?
14 A. Yes.
15 Q. Now you heard the testimony of Dee O'Brien?
16 A. Yes.
17 Q. And you know of the diversion point that he
18 speaks of?
19 A. Yes, sir. I helped build it.
20 Q. That is the one that shoots water either onto
21 the north or to the south?
22 A. Yes.
23 Q. And you are also aware of the diversion point up
24 on the creek where the water comes out of the Fox Creek
25 itself into the Fox Creek canal?

1 A. Yes, sir.
2 Q. Now, what did you do as a water master and what
3 were your instructions at the time the water got down to the
4 old decrees? Who made the determination how that water got
5 divided?
6 A. Well, whenever it got down to decrees it was
7 always left up to the state water master, but it was never
8 called for while I was the water master.
9 Q. You are on the board this year?
10 A. Yes, sir.
11 Q. And are you aware of the fact that it was
12 called for this year?
13 A. Yes, sir.
14 Q. And did the board leave it then to the state
15 water master?
16 A. The state water master, yes, sir.
17 Q. And it is being divided as he so testified?
18 A. Yes.
19 MR. RIGBY: That's all we have.
20 MR. HOSSNER: We have no questions.
21 THE COURT: That is all. You may call your next
22 witness.
23 MR. RIGBY: Ross Foster.
24 ROSS FOSTER,
25 called as a witness by and in behalf of the defendants was

1 circumstance and incident, but because Mr. Gordon came forth
2 and disputed the water decree which I didn't know anything
3 about, that was the reason for the incident to happen.

4 THE COURT: I have heard all of this now. Why are you
5 asking him now? It is almost word for word.

6 Q (By Mr. Hossner) The only question I want to
7 ask if you will summarize and bring this to a conclusion. When
8 the water came down to you and was divided how much -- Now,
9 the water master said that it was divided and you got 80
10 inches and Mr. Gordon got 40 inches. What is your estimate of
11 that?

12 A. My estimate is that I had more than 80 and he
13 had more than 40. I think it was probably 150 inches or more
14 and probably there would have been 60 or 80 inches the other
15 way. That is just an estimate. I don't know.

16 Q But did you have all of the water that you
17 needed at that time?

18 A. Absolutely for the rest of the season.

19 MR. HOSSNER: I have no further questions.

20 MR. RIGBY: No questions.

21 THE COURT: That is all.

22 MR. HOSSNER: We have no other rebuttal.

23 MR. RIGBY: Your Honor, just for the record because
24 counsel wondered if we made this clear. It can be stipulated
25 that the point of diversion claimed by both this plaintiff and

1 the defendants is as counsel for the plaintiffs asked to
2 ammend his complaint to provide that it was at a point
3 approximately 800 feet east and 50 feet south of the northwest
4 corner.

5 THE COURT: It is in his ammended complaint?

6 MR. RIGBY: Yes, but it hasn't been written in and
7 that is the reason I want to make sure.

8 THE COURT: Well, read that over again, then.

9 MR. RIGBY: At a point approximately 800 feet east and
10 50 feet south of the northwest corner of the Southeast Quarter
11 of Section 26, Township 4 North, Range 45 E.B.M. in Teton
12 County. Now, is that correct, Mr. Stone?

13 MR. STONE: That is how I understand it.

14 MR. RIGBY: Is that so stipulated, counsel?

15 MR. HOSSNER: Yes, that is so stipulated. That is the
16 point where the diversion presently is and where these parties
17 are presently getting water.

18 MR. RIGBY: And all of the testimony has concerned that
19 point of diversion where the water goes north to the Reggan
20 place and south to the Gordon place.

21 THE COURT: Okay. Well, gentlemen, the attorneys in
22 this case have been living with this case for quite a while
23 now. They filed the complaint quite a while ago and have been
24 studying the law and preparing for it and they know quite a
25 lot of the answers, but I don't know them because I haven't