

Post-It® Fax Note	7671	Date	# of pages 8
To Phil Rassic		From Allen Merritt	
Co./Dept.		Co.	
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DISTRICT COURT SREA  
TWIN FALLS, IDAHO  
FILED 5/15/97

IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT OF THE  
STATE OF IDAHO, IN AND FOR THE COUNTY OF TWIN FALLS

\*\*\*\*\*

In Re the General Adjudication of Rights to  
the Use of Water from the Snake River  
Basin Water System.

HAROLD JONES and RAY JONES,  
Plaintiffs,

vs.

NAF IRRIGATION COMPANY, a Utah  
Corporation; LARRY KEMPTON in his  
capacity as an individual and as  
president of NAF IRRIGATION  
COMPANY; LAVERNE KEMPTON,  
individually and in his capacity as  
Water Master and Ditchrider for NAF  
IRRIGATION COMPANY; MONTE  
CAMPBELL as an individual; and JEFF  
SESSIONS doing business as ROUND  
MOUNTAIN RANCH,

Defendants.

CASE NO. 92-00014

ORDER PROVIDING FOR  
PRELIMINARY INJUNCTIVE RELIEF

\*\*\*\*\*

Counsel for the plaintiffs, Patrick D. Brown of Hepworth, Lezamiz &  
Hohnhorst, Chtd.

Counsel for the defendants, Boyd L. Baggett and Roger D. Ling of Ling,  
Nielsen & Robinson.

ORDER PROVIDING FOR PRELIMINARY INJUNCTIVE RELIEF - 1

On Wednesday, May 8 and Thursday, May 9, 1996, the court conducted a hearing on the plaintiffs' Application and Motion for Entry of a Preliminary Injunction. On Friday, May 10, 1996, and before completing the evidentiary hearing, this court entered an oral ruling granting preliminary injunctive relief. The oral ruling and this written Order, which is based on the oral ruling, are necessary in order to most fairly and expeditiously provide immediate and necessary interim relief, to avoid waste and irreparable injury, and to preserve the status quo to the greatest extent possible given the facts presented to date.

IT IS THEREFORE ORDERED, under I.R.C.P. 65 and this court's inherent equitable powers, that the following shall occur:

1. Counsel for the plaintiffs, Patrick D. Brown, and counsel for the defendants, Boyd Baggett and Roger Ling, shall immediately contact the appropriate personnel at the Idaho Department of Water Resources and the Utah Division of Water Resources for the purpose of immediately attempting to convene a joint meeting and in order to put together a plan for the comprehensive distribution of the waters of Clear Creek, among and between those having rights to use the waters of Clear Creek in Box Elder County, Utah, and Cassia County, Idaho. The plan shall include provisions to have one or more persons act as watermaster to distribute water among the users of Clear Creek for the 1996 irrigation season, and it is preferred that such person or persons shall not be the parties to this lawsuit, unless by agreement between the parties to this lawsuit. Counsel for the parties shall keep the court informed about progress towards reaching a plan and shall diligently strive to have a plan in place by no later than Friday, May 17, 1996 at 5:00 p.m.

ORDER PROVIDING FOR PRELIMINARY INJUNCTIVE RELIEF - 2

2. Until a plan is in place and operating, Laverne Kempton is ordered to act as watermaster and to administer the distribution of water among the rightholders on Clear Creek according to all applicable court decrees, including the decree entered by Judge Christensen concerning the Utah water rights, the decree entered by Judge Cavannah concerning the Idaho water rights, and the decree entered by Judge Johnson concerning the distribution of water among the Utah and Idaho water rights and water users on Clear Creek. During the 1996 irrigation season, the terms of the decrees shall be followed except; (a) by consent of the parties, if Clear Creek declines to 9 cfs after July 1, 1996, measured at a point known to the court and the parties as "Monte's Shop" or the "Old Stage Crossing," it shall be distributed on turns; and (b) as otherwise provided in this Order.

3. Laverne Kempton shall keep written records of his activities as watermaster. Laverne Kempton shall communicate with individual water users on Clear Creek in order to give the particular user notice about when water will be delivered, adjusted and curtailed for that user's rights or shares, and in order to otherwise operate the water system according to the decrees and this Order. Laverne Kempton shall not communicate with one water user about another user's rights except to the extent necessary to fulfill his duties under this Order and the decrees. The parties and the witnesses listed below shall be entitled to contact Laverne Kempton in order to inform him of their needs with regard to delivery, curtailment and adjustment of their particular rights and shares. The parties and witnesses shall not deliver, curtail or adjust their own diversions or those of other users and shall have all such work done by Laverne Kempton, unless there is an emergency.

ORDER PROVIDING FOR PRELIMINARY INJUNCTIVE RELIEF - 3

4. On reasonable request, Laverne Kempton shall provide, and Dave Sundberg shall have, all reasonable access to review and observe how Laverne Kempton is administering the waters on Clear Creek and to check diversions, measurements, and other matters relating to the administration of water on Clear Creek. Dave Sundberg shall be allowed to contact Laverne Kempton and to review, observe, check diversions, and measurements only for the purpose of obtaining information about the administration of the water resources on Clear Creek but shall (not administer the resource himself.) If discrepancies, disputes or concerns arise about how Laverne Kempton is administering the resource, Laverne Kempton shall not attempt to resolve the discrepancies with Dave Sundberg but shall inform counsel for the defendants of the problems and allow counsel to handle the situation. In the same manner, Dave Sundberg shall not attempt to resolve disputes or discrepancies with Laverne Kempton but shall contact counsel for plaintiffs in order to allow counsel to handle the situation.

5. During the 1996 irrigation season, the Idaho water rights shall be delivered according to the Cavannah decree except as follows:

- a. The plaintiffs shall be allowed to use the 70" of their water right dated June 14, 1911, measured at the point where water is diverted, either upon their property known as the Upper Place, or they may elect to divert the water at a place known as the Idaho Weir for use upon their property known as the Lower Place;
- b. Of the water decreed with a priority date of November 23, 1911, and known to the parties as the "Settler's" water, the first 320" of water

ORDER PROVIDING FOR PRELIMINARY INJUNCTIVE RELIEF - 4

available under the November 23, 1911 priority date shall be divided equally between the Naf Store and the plaintiffs. The plaintiffs shall be entitled to use up to 160" of that water. 80" of the 160" for the plaintiffs shall be used on the Upper Place and the other 80" shall be used on the Lower Place by diversion through the Idaho Weir;

- c. After the above water with a November 23, 1911 priority date is filled, defendant Jeff Sessions shall be entitled to 80" of water for use on Round Mountain Ranch by diversion through the Idaho Weir;
- d. After the above water is filled, the plaintiffs shall be entitled to 90" of water with a priority date of July 14, 1912, which may be used on either the Upper Place or Lower Place.
- e. After the above water is filled, defendant Jeff Sessions shall be entitled to 80" of water diverted at the Idaho Weir for use on Round Mountain Ranch.
- f. Plaintiffs have the right to 70" of water decreed to the Lower Place with priority of June 1, 1881, and defendant Jeff Sessions has the right to 85" of water, with priority of June 1, 1992, for use on the Round Mountain Ranch, both of which are diverted through the Idaho Weir. Plaintiffs and Sessions shall continue to combine the 70" and 85," as they have done in the past, and rotate the use of those rights on turns of three (3) equal days a piece on the Lower Place and on Round Mountain Ranch.

ORDER PROVIDING FOR PRELIMINARY INJUNCTIVE RELIEF - 5

6. The plaintiffs are enjoined from seeking interim relief from the Idaho Department of Water Resources to curtail the use of the dam on Round Mountain Ranch. This Order does not enjoin the plaintiffs or defendants from pursuing the ordinary course of reconsideration or appeals of decisions by the Idaho Department of Water Resources concerning defendant Jeff Sessions' Application for a Dam Permit or Application to Transfer Water Rights.

7. The plaintiffs, and the witnesses for the plaintiffs, are hereby enjoined and restrained from having any contact with the defendants <sup>*Dave Sundberg, Nadyne Sundberg*</sup> ~~or one another~~ except as provided in this Order. Likewise, the defendants are hereby enjoined and restrained from having any contact with the plaintiffs and the plaintiffs witnesses <sup>*Laverne Kempton, Larry Kempton, Mont Campbell*</sup> ~~or one another~~, except as provided by this Order. Contact with Laverne Kempton may occur and Laverne Kempton may contact the plaintiffs and the plaintiffs' witnesses as provided in paragraph No. 2, above. For the purpose of this paragraph, the plaintiffs shall be considered Harold Jones and Ray Jones and their spouses, Beth Jones and Karen Jones respectively. The plaintiffs' witnesses are Dave Sundberg and Nadyne Sundberg. The defendants are Laverne Kempton, Larry Kempton, Mont Campbell and Jeff Sessions.

8. Larry Kempton shall deliver Nadyne Sundberg's horses to the property of Dave Sundberg and put them in the corral on Dave Sundberg's property on Monday, May 13, 1996.

9. Mont Campbell shall be given access across the property of Dave Sundberg to put in a replacement weir. The replacement weir shall be in place and in operating order by Friday, May 17, 1996. In the event Mont Campbell is unable to have

ORDER PROVIDING FOR PRELIMINARY INJUNCTIVE RELIEF - 6

the replacement weir in by that time, counsel for the defendants shall contact counsel for the plaintiffs to attempt to agree about access after that time.

10. The parties are enjoined and restrained from contacting the Idaho Department of Water Resources or the Utah Division of Water Resources about distribution on Clear Creek, except through their respective counsel.

11. The parties and witnesses are not enjoined and restrained under this Order from having contact with one another in order to accomplish the objectives set forth in paragraph No. 1 of this Order, but such contact shall occur only in the presence of, and with the consent of, counsel for the respective parties.

12. Nothing in this Order shall constitute a waiver of any claim or defense previously asserted in this case. Further this Order and water use hereunder, shall not be used or considered as a basis for asserting any claim or defense, or waiver thereof, relating to rights in or the use of water.

13. Counsel for the respective parties shall serve this Order upon their clients and return affidavits to the court proving such service as soon as possible.

IT IS SO ORDERED.

Dated this 15 day of May, 1996.

  
Honorable Daniel C. Hurlbutt  
District Judge

ORDER PROVIDING FOR PRELIMINARY INJUNCTIVE RELIEF - 7

**Conformed Copies to:**

**Patrick D. Brown  
Hepworth, Lezarniz & Hohnhorst  
133 Shoshone Street North  
P. O. Box 389  
Twin Falls, ID 833303-0389**

**Roger D. Ling  
Boyd L. Baggett  
Ling, Nielsen & Robinson  
615 H. Street  
P. O. Box 396  
Rupert, ID 83350**

PD851125.510llm

*Tiffany W. Head  
Deputy Clerk of the Court*

**ORDER PROVIDING FOR PRELIMINARY INJUNCTIVE RELIEF - 8**



MEMORANDUM

TO: PHIL RASSIER, GLEN SAXTON, DAVE TUTHILL  
FROM: NORM YOUNG *NY*  
RE: CLEAR CREEK WATER DELIVERY PROBLEMS  
DATE: April 9, 1997

*Norm*  
*Vault*  
*Water Dist 43-B file -*

Allen Merritt has asked for guidance to respond to the attached letter from the Idaho watermaster on Clear Creek. The letter has six pages with each page stapled to supporting documents. Allen's immediate concerns are:

1. What should IDWR do to respond to the threats against the watermaster?

2. Is there a way to expedite the SRBA review of the rights to resolve some of the issues raised? Would it be preferable to move this matter into federal court so that the interstate issues can be resolved?

Please review the letter, give me your ideas, and I will get back to Allen. This obviously needs to be expedited.

4/22/97

GAVE ALLEN MERRITT FEEDBACK ON OUR REVIEW BY TELEPHONE AND ASKED HIM TO DRAFT A RESPONSE *NY*

## MEMORANDUM

**TO:** Norm Young  
**FROM:** Dave Tuthill *DT*  
**DATE:** April 21, 1997  
**RE:** Clear Creek Water Delivery Problems

Based on a preliminary review of this issue, it appears that the Clear Creek problems are 90% water delivery problems and 10% water right problems resolvable by adjudication of the Idaho water rights. On one hand, due to the severe nature of the problems it is tempting to volunteer the services of the SRBA to resolve that portion of the problems within its means. On the other hand, these problems appear to be sufficiently explosive that whomever on the SRBA staff is assigned to this task would likely be involved with its resolution on a nearly full time basis for the summer of 1997.

The four Senior Water Resource Agents working in Southern Region on the SRBA are already fully tasked for 1997 to achieve the established goals. Assignment to this task could reduce our SRBA work effort by essentially 25% at a critical time, when significant SRBA progress is necessary. One could view Clear Creek SRBA work to be contributory to completion of the SRBA in the long term. However, Basin 43 is queued behind Basins 36, 71 and 72 for preparation of irrigation information, and 1998 work on this task would be a much better time from the standpoint of the coordinated SRBA workload. Also, the nature of SRBA work is that results are formally reported and are subject to appeal for protracted periods -- this type of work does not optimally lend itself to resolution of immediate water delivery disputes such as those facing Water District 43-B.

Relative to the possibility of moving this case to federal court, it seems that an intermediary step would be for the ID and UT water resource agencies to have a joint meeting in the area to see if other remedies are available. Federal involvement at the point where water rights have not yet been decreed seems complicated. Is it possible to come to an interim solution pending decree of water rights?

In summary, I would prefer to not embroil the SRBA in this dispute at the present time. However, the SRBA is certainly part of IDWR and if directed to do so the Adj. Bureau would support the Water Management Division's efforts in this situation.

L A W O F F I C E S

*Hepworth, Lezamiz  
& Hohnhorst*

- Established 1952 -

March 27, 1997

**TWIN FALLS OFFICE**

John C. Hepworth  
John T. Lezamiz  
John C. Hohnhorst  
Jeffrey J. Hepworth  
Penelope Parker\*\*  
Eileen A. McDevitt\*  
Patrick D. Brown

Wm. L. Nungester  
of Counsel

**BOISE OFFICE**

J. Charles Hepworth\*  
John J. Janis

\*Member CA Bar  
\*\*Member UT Bar

Allen Merritt  
Department of Water Resources  
1341 Fillmore, Suite 200  
Twin Falls, ID 83301-3380

RE: Dave Sundberg

Dear Mr. Merritt:

Dave Sundberg, who I understand has been elected as the Deputy Watermaster on Clear Creek, dropped off the enclosed letter to me. He asked that I forward it to you. Apparently he thought that Judge Hurlbutt's order concerning the Jones, Kemptons, and Campbell precluded him from communicating directly with you.

In any event, I understand the documents present questions he would like you to respond to before the irrigation season.

Sincerely,

HEPWORTH, LEZAMIZ & HOHNHORST,  
Chartered

By:   
Patrick D. Brown

PDB/llm  
Enclosures  
/0327AM.llm

*HLH*  
Chartered

**TWIN FALLS OFFICE**  
208-734-7510  
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P.O. Box 2582  
Boise, ID 83701-2582  
FAX: 208-342-2927

RECEIVED

MAR 28 1997

Department of Water Resources  
Southern Region

Dear Mr. Merritt,

In answer to the concerns expressed in your letter, in the order in which you expressed them, firstly, Mr. Sessions was not worried about the "Hurlbutt order" so much as he was worried that I am "against him". In the "Hurlbutt order" it is specified that the watermaster(s) preferably should not be parties to the lawsuit. I am not a party. Jeff's complaint was that he wanted Vern Kempton to turn his water. Vern is a party, but Jeff voted for him in Utah, so Jeff's concern was not appropriateness according to the court order.

On Feb. 21, 1997, the advisory committee of Water District 43-B met and discussed your letter. Jeff and Vern presented a "Restraining Order" which Mont Campbell claims to have against me, which says I cannot trespass on my farm. Their contention was that I cannot measure the creek at the gauging station because of this order. Jeff also claimed that Scoffield (his partner) has a restraining order against me, which is not true and he didn't show us the "order". In fact, he admitted that he had not seen it. I have attached a letter from Scoffield's attorney and a copy of Campbell's "Restraining order" and a transcript of what the court actually said. The property in the "Restraining order" does not include the land where the gauging station or measuring board is. The measuring board is in my headgate and according to Utah law, I have the right to check and maintain it. Paragraph 4 of the "Hurlbutt order" specifies that I can check the diversions on Clear Creek, even in 1996, so these gentlemen are not interested in following the order.

An attorney in Utah has advised me that these efforts and others to harrass me which Kemptons, Campbell, Scoffield and Sessions are doing should be taken up in the Idaho court as a matter of contempt of court. They have been giving me quite a variety of harrassment and threats including they say they say they are going to kill me if I measure the water. A court order may be necessary for my protection while I perform my duties.

The "Hurlbutt order" is certainly not adequate to instruct a watermaster for 1997. Paragraph 12 says this order shall not be used to establish or deny claims or defenses. Jeff has claimed 4.3cfs in his SRBA claims but in court he was claiming 3.2cfs. At the meeting on Feb. 21, he was very concerned about increasing the ditch capacity to accomodate these rights. I told them I would talk to Ray about it. Ray is of the opinion that before they spend a lot of time and money changing ditches, he would rather the court make a decision as to whether the right exists or not. I have attached a copy of the transcripts of the testimonies given at the hearing on Jeff's transfer application last February and at the hearing before judge Hurlbutt last May. The testimonies were very long and I have only included the parts about the Settlers right. It is obvious from Mr. Ling's opening statement that the only basis they pretend for the claim is that Joneses have it and they want to keep up with the Joneses.

In the committee meeting on Feb. 21, Jeff and Vern insisted that the reason the right has never been shown in the records is because past watermasters never measured or recorded the water when there is more than 40cfs in the stream. The present watermaster will measure the water and record it even when there is more than 40cfs. I have attached a copy of two pages from a book that Guy Sundberg had which shows the rights when Delbert Holmgren, Lew Gunnell, and Mary Iverson were still here. It shows Harold Jones had Settlers rights and Merle Jones did not. The first page shows the measurement data for the Idaho wier, so we know that Guy Sundberg had the technology available to him to measure at least 61.8cfs going through the Idaho weir,

*Copy of order to  
advise that  
- Trespassing  
- Right of Inland  
- 1997  
- Utah Settlers  
- Joint Inland  
- agreement*

LAW OFFICES OF  
**SMITH, KNOWLES & HAMILTON**

A PROFESSIONAL CORPORATION  
4723 HARRISON BOULEVARD, SUITE 200  
OGDEN, UTAH 84403  
PHONE (801) 476-0303  
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MELVEN E. SMITH  
DAVID L. KNOWLES\*  
DAVID R. HAMILTON  
ROBERT KARIYA  
STANFORD A. GRAHAM  
GARY R. WILLIAMS

\*ALSO MEMBER CALIFORNIA BAR  
AND WYOMING BAR

OF COUNSEL:  
FREDRICK "BUCK" FROERER III

June 11, 1996

Dave Sunberg  
H.B. 72  
Malta, Idaho 83342

RE: *Steve Scoffield*

Dear Mr. Sunberg:

I have been retained by Steve Scoffield to represent him regarding your trespassing over Steve Scoffield's property and your interference with Steve Scoffield's fences.

Steve has informed me that you contend to have a right to travel on Steve's property in order to check a headgate which apparently is part of a watering system you utilize. Steve Scoffield disagrees with your position, although he does acknowledge that the water master may have some rights to check the headgate. You, however, do not have such a right.

Steve Scoffield has also informed me that you have been building fences around property which you do not own and that you may attempt to remove fencing materials installed by Steve Scoffield.

Demand is hereby made that you immediately cease entering onto Steve Scoffield's property for any reason whatsoever and that you refrain from removing fencing materials owned by Steve Scoffield. If you fail to abide by the aforementioned demands, I have been instructed to immediately file suit against you to obtain a permanent injunction, prohibiting you, by law, from entering Steve Scoffield's property and from removing fencing materials, and for damages incurred.

Sincerely,

**SMITH, KNOWLES & HAMILTON, P.C.**



Melven E. Smith

cc: Steve Scoffield

BRIGHAM DISTRICT

SEP 9 3 36 PM '96

DALE M. DORIUS #0903  
Attorney for:  
P.O. Box 895  
29 South Main Street  
Brigham City, UT. 84302-0895  
Phone: (801) 723-5219

IN THE FIRST JUDICIAL DISTRICT COURT OF BOX ELDER COUNTY  
STATE OF UTAH

---

LAMONT D. CAMPBELL,	:	AMENDED ORDER ON ORDER
	:	TO SHOW CAUSE
Plaintiff,	:	
vs.	:	
DAVID SUNBERG,	:	Civil No. 960000058
Defendant.	:	

---

This matter having come on regularly on Plaintiff's Order to Show Cause on the 12th day of August, 1996, before Judge Ben Hadfield of the above-entitled Court, and the Plaintiff having appeared in person and by his attorney, Dale M. Dorius, and Defendant having appeared in person Pro Se, and the Court having heard the testimony of the parties and being fully advised in the premises, it is hereby ORDERED, ADJUDGED, AND DECREED:

1. That Defendant is restrained from proceeding with construction in any on the rock wall located on the property in dispute in this action, more fully described as follows:

The Northeast quarter of Section 1, and the East 3/4ths of the East half of the Northwest quarter of Section 1, Township 14 North, range 13 West, Salt Lake Meridian, containing 220 acres more or less.

2. That Defendant is restrained from trespassing on the property in dispute in this action.

3. That Plaintiff is allowed to maintain the use of the

*file copy*  
96-5

Amended Order - P. 2

property in dispute in this action in the same manner as Plaintiff was before instigation of this action.

4. Plaintiff is restrained from interfering with the rock wall pending the Court's determination of the parties' rights.

5. Defendant is restrained from removing, altering, or changing any of the existing boundary lines, fences, or other structures on the property in dispute in this action.

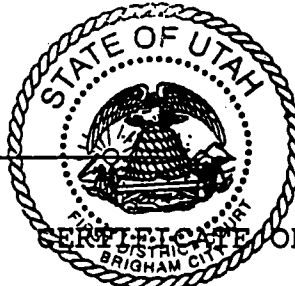
6. Each of the parties are restrained from further personal contacts, harassments, threats, etc.

DATED this 24 day of Sept., 1996.

RECOMMENDED BY:

BY THE COURT:

\_\_\_\_\_  
Commissioner



John H. Hatfield  
DISTRICT COURT JUDGE

I hereby certify that I mailed a true and correct copy of the foregoing Amended Order to Defendant, David Sunberg, at NAF, RT, Malta, Idaho 83342, this 9<sup>th</sup> day of <sup>September</sup> ~~August~~, 1996.

DALE M. DORIUS

1 across the boundary line until the court can hear  
2 everything.

3 THE COURT: That makes it a little difficult,  
4 because how can the court prohibit each other from  
5 encroaching until the court determines if there is a  
6 boundary by acquiescence or not?

7 MR. DORIUS: We want a restraining order against  
8 the defendant mainly because the encroachment is  
9 affecting the plaintiff's water rights.

10 THE COURT: I'll need to hear some evidence.  
11 What I'm suggesting to you, in these types of cases  
12 the court can issue a restraining order that will try  
13 to preserve the status quo so we don't have people out  
14 getting in fist fights or pulling guns on each other  
15 whether a fence will be torn out or erected. I can't  
16 at this point issue an order as to who is to stay off  
17 which part of the property because I won't determine  
18 today who owns it.

19 MR. DORIUS: That's okay with us if the court  
20 would issue a restraining order and then the matter --  
21 the only problem we have is this rock structure he has  
22 built next to a ditch right that we have.

23 THE COURT: I'll ask the bailiff to come up and  
24 pop open our grease board. Let me have you give me  
25 maybe a little sketch drawing so we have a point of



1 those things aren't relevant to the question of who  
2 owns that land.

3 MR. SUNDBERG: Okay. I have a copy of my  
4 father's will in which he did not leave any property  
5 to Lamont Campbell.

6 THE COURT: I suspect you'll want to hold all of  
7 those for a trial, for a later proceeding, because I'm  
8 not determining today if the fence is the boundary or  
9 if the rock wall is or somewhere else.

10 I will authorize the issuance of a  
11 preliminary injunction. The injunction is to remain  
12 in effect until further order of the court. Either  
13 side may request that it be modified or abolished by  
14 requesting that in writing and noticing the matter up  
15 for a hearing on the court's calendar.

16 The parties are restrained from removing  
17 or altering any of the existing monuments at the  
18 locations in dispute. They are restrained from any  
19 further construction on the rock wall pending the  
20 resolution of this matter, or from taking any action  
21 on the rock wall. The plaintiff will be restrained  
22 from -- in other words, if he's going to try and  
23 ditch, he'll have to do that in a way that doesn't  
24 damage the rock wall while this order is in effect.

25 Any other issues that we need to have in

1 for him to stay off of my property.

2 THE COURT: I understand that. The difficulty  
3 is, right now we have an area of no-man's land is the  
4 correct term. The question is whether it's yours or  
5 his. Since I'm not resolving that part today, I can't  
6 very well tell him to stay off that property because I  
7 haven't determined today that it is yours.

8 MR. DORIUS: He has to go on his property to get  
9 the irrigation.

10 THE COURT: To the extent there's an irrigation  
11 easement he has the right to exercise the rights of  
12 that easement.

13 MR. SUNDBERG: He has, as he says, an easement,  
14 yet he himself barricaded it and goes through my yard  
15 to get to the same headgate. On the way through he  
16 stops and threatens me with everything.

17 THE COURT: If you want I'll have one more  
18 provision put in there and that's that both parties  
19 are prohibited and restrained from making any threats  
20 against the other party. I could order you to be kind  
21 and good to each other. I'm not sure that would help  
22 the situation. At least I'll order that neither side  
23 make threats against the other. I'm not at this point  
24 accusing either of you of doing anything. Just from  
25 here forward, no more threats.

Q. Did you receive a phone call in the last couple of weeks from Larry Kempton?

Brown

A. Yes, I did.

Nadyne

Q. What did Mr. Kempton call and say to

you?

A. Well, several things. He said that he had just gotten the letter the day before, and he was very upset about it. And I wasn't sure what the letter was.

And I was on my way, supposed to be on my way to Boise for a convention. So I told him I really didn't have time to talk.

But he told me that Guy would turn over in his grave if he knew what Dave was doing. And he was very upset with the things that Dave was doing. In fact, he said, "If Dave thinks that this will be over when it's over, he's crazy because we will get him."

*N2d you  
Sundberg*

MR. BAGGETT: Move to strike,  
Your Honor. These statements would have been hearsay.

THE COURT: Mr. Brown, for what purpose are the statements being offered?

MR. BROWN: Your Honor, they're not within the hearsay. They're statements by a

recommendation before any order is entered. That plan will be presented to the court and all of the parties. And if there is disagreement as to that recommendation, everyone will be heard before any order is entered.

Now, certainly my hope is that the two jurisdictions, that being Utah and Idaho, can put together a plan reflecting the decrees and the laws that exist so that the entire system can be operated in a way that everyone will agree to.

In the meantime, I am ordering that Vern Kempton, the watermaster, continue to operate the system. Now, the system must be operated, of course, pursuant to all of the decrees that apply to that system.

In order to assist a full understanding of the operation of the system, I am going to order that Dave Sundberg be allowed at all reasonable opportunities to review how the system is being operated by checking all measuring stations, by checking all points of diversion. Mr. Sundberg

Judge  
Hurburt

And we have agreement on a few, not as many as we'd like. And we have a method by which one of the other agreements can be resolved by the court.

And if the court would like, I'll try to go through and identify those that we have no agreements on, and then the ones we have agreement on. Is that satisfactory with you?

THE COURT: That's fine.

MR. LING: As to the -- there was a claim by the plaintiffs that they have 160 inches from what is known as a Settlers right under the Idaho decree. And we have not -- I guess our position is we are not willing to agree they have it, although we want to make it clear we claim we also have a part of that same Settlers decree. And we think their proof is -- and they refused to acknowledge our right to anything.

And so we feel evidence that they present to establish theirs would be the evidence that we'd rely on as well as our own. So there's no

And we have agreement on a few, not as many as we'd like. And we have a method by which one of the other agreements can be resolved by the court.

And if the court would like, I'll try to go through and identify those that we have no agreements on, and then the ones we have agreement on. Is that satisfactory with you?

THE COURT: That's fine.

MR. LING: As to the -- there was a claim by the plaintiffs that they have 160 inches from what is known as a Settlers right under the Idaho decree. And we have not -- I guess our position is we are not willing to agree they have it, although we want to make it clear we claim we also have a part of that same Settlers decree. And we think their proof is -- and they refused to acknowledge our right to anything.

And so we feel evidence that they present to establish theirs would be the evidence that we'd rely on as well as our own. So there's no

right. Now, I am not ruling whether or whether  
or not Mr. Sessions in perpetuity has a Settlers  
right. But, again, my purpose here is to, as  
fairly as possible, allow everybody to operate as



10 FT CIPPOLETTI WEIR

IDAHO DECREES.

HEIGHT IN INCHES	CFS	NAME	DATE	INCHES	TOTAL	TOTAL CFS.
16 15/16	56.4	HOLMGREN -	1 JUNE 1881	120		
17 1/16	57.0			150		
17 3/16	57.6			110		
17 1/4	58.2	HAROLD JONES.		25		
17 3/8	58.8			70	6.25	12.50
17 1/2	59.4	LEW GUNNELL	2 JAN 1882	100	7.25	14.50
17 5/8	60.0	MERLE JONES	1 JUNE 1882	35	8.10	16.20
17 3/4	60.6	LEW GUNNELL	31 JAN 1884	110	9.10	18.20
17 7/8	61.2	DELBERT HOLMGREN	15 JUNE 1886	195	11.05	22.10
18-0	61.8	L & G. RAY OLSON.	15 JUNE 1892	100	12.05	24.10
		HOLMGREN	1 JUNE 1884	110		
				135		
				220	16.70	33.40
		GUNNELL -	11 JUNE 1894	140	18.10	36.20
		HOLMGREN.	1 MAY 1908	130		
			21 MAY 1910	60		
			17 JAN 1911	26.66	20.22	40.53

IDAHO DECREES.

	DATE	INCHES	TOTAL C.F.S.
HAROLD JONES. NAF RANCH	14 JUNE 1911 23 NOV. 1911	70 160	
MARY JVERSON	23 NOV. 1911	160.2416 <sup>2</sup> / <sub>3</sub>	48.33
HAROLD JONES. NAF RANCH	14 JULY 1912	90.2506 <sup>2</sup> / <sub>3</sub>	50.13
HOLM GREN	14 JULY 1912	75.2581 <sup>2</sup> / <sub>3</sub>	51.83
GONNELL (SARA)	10 APR. 1914	86.2661 <sup>2</sup> / <sub>3</sub>	53.23
LAC RAY OLSON	1 APR. 1921	140.2801.66	56.83

plus 20-25cfs going out the side ditches. It was my experience all the years I know Guy, that he measured the water and recorded it.

I have attached a copy of "Guy Sundberg's last page" which was stipulated in court as being accurate and agreed on as the existing rights, as shown on page 13 of the transcript. Stapled to it is a typed copy dividing the rights at the point where the "Settlers rights" comes in and showing the effect that claiming more water with that priority would have on the "existing rights". Obviously any new appropriation with that priority would infringe on the later rights of every other water user on Clear Creek, besides decreasing the percentage of every other right when the decree is full.

To understand the relationship of Clear Creek to the Jobe Adams decree and the other decrees on Clear Creek, I have attached some documents taken from the court record of Albion Land Co. vs Naf Irrigation Co. I gave a copy of the record to Frank Hitchcock last summer so you should have a copy in your files. The court has it and it is referred to as the "black book" in the transcript.

(1) Page 190-198 is the Opinion of the court which was given at the end of the trial in 1932.

(2) The Dietrich decree of Albion Land Co vs Settlers Land and Water Co. on pages 107-116, with two pages of the Jobe Adams decree stapled to it. The Dietrich Decree was given in 1919. Page 6 of the Jobe Adams decree says that the Dietrich decree is the one that should govern Clear Creek in Idaho. The Jobe Adams decree is a Raft River decree and didn't particularly discuss Clear Creek except that it lists the rights, including several claims which have never been recognized or even possible to deliver. Pages 158-159 show the rights taken from the Jobe Adams (Cavanah) decree. I have marked the ones that have never been recognized and were never delivered by the past water-masters. They do not show up in the Dietrich decree.

Page 4 of the Jobe Adams decree shows that the Settlers Land and Water Co. was dormant at the time the decree was given in 1929. Pages 195-196 of the "Opinion" shows the company as being abandoned because there was no water for their farms. It says "not a stockholder---is not an occupant --or receiving water under the Dietrich decree".

That may have been true in 1932, but Hazel Blair Hunter intervened and claimed the 70 and 90 inches appurtenant to Joneses upper place. They are decreed to J.B. Brown in the Dietrich Decree, paragraph 9. The Hunter home is the house where Ray Jones lives now and was occupied during the thirties. The farm where the Naf store is now has been occupied continuously since that time also. However, the Settlers Land and Water Co., per se, did not intervene in the lawsuit.

The Dietrich decree lists as place of use for the Settlers Land and Water Co., in paragraph 10, 9600 acres, of which, the only places which have been farmed or occupied by people since 1932 are the Northwest quarter of Section 27 which is now owned and occupied by Boyd Hoskins (Naf Store), and the  $\frac{1}{2}$  of NE $\frac{1}{4}$  and the NE $\frac{1}{4}$ NE $\frac{1}{4}$  of Section 27, where Ray Jones lives and the NW $\frac{1}{4}$ NW $\frac{1}{4}$  of Section 26, just East of Ray's house. Hoskins' water runs out the West side of the Idaho weir and Ray's water is mainly on the East side, although some of the ground is on the West, so he can use either ditch.

As shown on page 132 of the "black book", this "Opinion" of the court was incorporated into an order. The Utah State Engineer and the Idaho Commissioner of Reclamation appointed George Lawrence to study the creek. He surveyed the lands which were irrigated in 1933 and also the lands which were not. 843.8 acres were irrigated in the upper division and 1120 acres in the lower division, even though the water is decreed to much more ground than that.

A BRIEF RUNDOWN OF THE WATER RIGHTS AND METHODS OF DISTRIBUTION OF WATERS OF CLEARCREEK NEAR NAF, IDAHO. APRIL 1 1988

CLEARCREEK ORIGINATES IN THE RAFT RIVER MOUNTAINS IN THE STATE OF UTAH, FLOWS GENERALLY NORTH AND CROSSES INTO THE STATE OF IDAHO. HAVING WATER USERS IN BOTH STATES.

IN THE 1930'S TROUBLE DEVELOPED BETWEEN THE ALBION LAND CO. (BOB MATHISON) AND THE UTAH USERS A TRIAL WAS HELD IN U.S. COURT IN SALT LAKE CITY - JUDGE TILLMAN JOHNSON PRESIDING. A STUDY OF THE STREAM FLOW WAS ORDERED AND A COURT APPOINTED WATER MASTER DISTRIBUTED THE WATER FOR SEVERAL YEARS, AT THE END OF WHICH TIME JUDGE JOHNSON HANDED DOWN A DECREE AN ABRIDGEMENT OF WHICH IS AS FOLLOWS.

IN THE SPRING WHEN THE STREAM FLOW BECOMES ENOUGH TO BE USED, ALL OF THE WATER IS TO BE USED BY THE UPPER DIVISION, WHICH IS COMPRISED OF ALL THE UTAH USERS AND THAT PORTION OF THE NAF RANCH IRRIGATED BY WATER DECREED TO THE NAF IRRIGATION CO.

ATA TIME WHEN THE STREAM FLOW AVERAGES MORE THAN 20 SECONDFEET FOR A PERIOD OF 24 HOURS ALL OF THE WATER, EXCEPT 1/2 SECOND FOOT PRIMARY RIGHT BELONGING TO THE PHILIP OSPITAL RANCH, IS TO BE DELIVERED TO THE LOWER DIVISION UNTILL A TOTAL OF 2560 ACRE FEET HAS BEEN USED BY THE LOWER DIVISION, AFTER WHICH TIME AS

IT IS TO BE DIVIDED BETWEEN THE TWO DIVISIONS 43% TO THE UPPER DIVISION 57% TO THE LOWER DIVISION. AT ANY TIME THE TOTAL FLOW FALLS BELOW 17 SECOND FEET IT IS ALL TO BE RETURNED TO THE UPPER DIVISION.

AFTER A TOTAL OF 720 ~~ACRE~~ FEET HAVE BEEN USED JOINTLY BY THE TWO DIVISIONS 43% TO THE UPPER, 57% TO THE LOWER AT A TIME WHEN THE STREAM FLOW FALLS BELOW 36 SECOND FEET ALL THE WATER WILL BE USED BY THE LOWER DIVISION FOR A PERIOD OF 12 DAYS (SO CALLED 12 DAY RUN) OR UNTILL THE FLOW FALLS TO 17 SECOND FEET. IN THE EVENT THERE IS NOT ENOUGH WATER TO RUN 720 ACRE FEET JOINTLY THE 12 DAY RUN DOES NOT APPLY (1 SEC FT = 2 ACRE FEET IN 24 HR. EACH WATER USER IS REQUIRED TO BUILD AND MAINTAIN AT THEIR OWN EXPENSE A SUITABLE DIVERSION STRUCTURE AND A MEASURING DEVICE AT EACH OF THEIR POINTS OF DIVERSION THE WATER OF THE UPPER DIVISION IS DIVIDED AS FOLLOWS

$\frac{1}{2}$  SEC FT PRIMARY

SAM OSPITAL

$\frac{1}{3}$  SEC FT PRIMARY

NAF IRRIGATION CO

THIS IS THE SO CALLED GARDEN STREAM SO THAT A GARDEN STREAM MAY BE USED AT THE TIME ALL WATER IS USED BY THE LOWER DIVISION.

$11 \frac{1}{3}$  SEC FT

NAF IRRIGATION CO.

4.09 SEC FT

NOT COMPANY - 3.0 SEC FT RYAN RIGHT

16.25 SEC FT TOTAL  
(FULL DECREE)

$\frac{3}{5}$  SUNDBERG  $\frac{2}{5}$  CAMPBELL -

1.09 DIVIDED CAMPBELL KEMPTON-JENSEN

WHEN THE FLOW IS LESS THAN A FULL DECREE THE WATER IS DISTRIBUTED AS FOLLOWS.

CLEAR CREEK RANCH

WARD JENSEN

LARRY KEMPTON

MDNT CAMPBELL

GUY SUNDBERG

SAM OSPITAL

3 days 11 hrs 20 min.

7 hrs 22 min

17 hrs 39 min.

2 days 11 hrs 02 min

2 hrs.

21 hrs 33 min.

THE UTAH WATER IS DECREED IN CUBIC FEET PER SECOND. (SECOND FEET) 1 SECOND FOOT = 1 ACRE FOOT EVERY 12 HOURS. 1 SECOND FOOT = 450 GALLONS PER MINUIT -

THE IDAHO EARLY DECREES (INCLUDES ALL OF THESE) WERE MEASURED IN MINERS INCHES, RECENTLY THE SECOND FOOT STANDARD HAS BEEN USED,

1 MINERS INCH = 9 GALLONS PER MINUIT

50 MINERS INCHES = 1 CUBIC FOOT PER MINUIT

OR- 1 ACRE FOOT EVERY 12 HOURS

THE FOLLOWING CHART LISTS THE DECREED WATER FOR THE PRESENT OWNERS IN ORDER OF PRIORITY, THE AMOUNT IN MINERS INCHES AND THE TOTAL STREAM FLOW IN INCHES AND SECOND FEET REQUIRED TO FILL THE DECREE

FIRST 1/2 SEC FT. OSPITAL RANCH.

NEXT 11 2/3 SEC FT. TO NAF IRRIGATION CO TO BE CREDITED TO THE USERS ACCORDING TO THEIR "B" STOCK  
NEXT 4.09 SEC FT TO THE NON STOCK HOLDERS.

THE STOCKHOLDERS AT PRESENT AND THEIR PERCENTAGE OF STOCK ARE AS FOLLOWS.

SAM. OSPITAL	.043 "B" STOCK	.033 "A" STOCK
MONT CAMPBELL	.45 "B" STOCK	.33 "A" STOCK
LARRY KEMPTON	.136 "B" STOCK	.102 "A" STOCK
WARD JENSEN	.036 "B" STOCK	.027 "A" STOCK
CLEAR CREEK RANCH	.33 "B" STOCK	.50 "A" STOCK.

Company "A" & "B" to "A" July 1st. Changes from "B" to "A"

WHEN THE FLOW REACHES OR EXCEED A FULL DECREE THE DISTRIBUTION IS ON A PERCENTAGE OF THE ACTUAL FLOW OF WATER AND IS AS FOLLOWS (PRESENT OWNERS 1988)

SAM OSPITAL	.063
MONT CAMPBELL	.415
GUY SUNDBERG,	.1105
LARRY KEMPTON	.121
WARD JENSEN	.061
CLEAR CREEK RANCH	.238

THIS INCLUDES ALL PRIMARY, COMPANY AND OUT OF COMPANY RIGHTS FOR EACH USER -

THIS PERCENTAGE HAS BEEN USED WHEN THE FLOW EXCEEDS 14 SEC FT TO SIMPLIFY COMPUTING EACH USERS WATER - HAS BEEN USED MORE THAN 35 YEARS TO MY KNOWLEDGE -

IN THE FALL WHEN THE FLOW FALLS TO 6 SEC FT (~~6 SEC FT~~) AT THE OLD STAGE CROSSING (THE OLD SCHOOL HOUSE ROAD) IT IS TO BE USED THE WHOLE STREAM ON A TURN SCHEDULE OF 8 DAYS. AND IS LISTED HERE AS TO PRESENT OWNERS

THE IDAHO DECREES AND DATES OF PRIORITY

	DATE	INCHES	TOTAL	TOTAL SEC FT.
HOLMGREN LAND & LIVESTOCK CO,	1 JUNE 1881	120		
		150		
		150		
		110		
		25		
		70	625	12.50
CLEAR CREEK RANCH				
GUNNELL RANCH.	2. JAN 1882	100	725	14.50
MERLE JONES	1 JUNE 1882	85	810	16.20
GUNNELL RANCH.	31 JAN 1884	100	910	18.20
HOLMGREN	15 JUNE 1886	195 <sup>35</sup>	1105	22.10
L & G	15 JUNE 1886	100	1205	24.10
HOLMGREN	1 JUNE 1887	110	1670	33.40
		135		
		220		
GUNNEL RANCH	1 JUNE 1897	140	1810	36.20
HOLM GREN	1 MAY 1908	130	2076.66	40.53
	21 MAY 1910	60		
	17 JAN 1911	26.66		
CLEAR CREEK RANCH	14 JUNE 1911	70	2416.66	48.33
	23 NOV 1911	160		
NAF STORE	23 NOV 1911	160	2416.66	<del>2775.66</del>
CLEAR CREEK RANCH	14 JULY 1912	90	2506.66	50.13
HOLM GREN	14 JULY 1912	75	2581.66	51.63
GUNNELL RANCH	10 APR 1914	80	2661.66	53.23
L & G	1 APR. 1921	140	2801.66	56.33



Idaho Water Rights

DATE	Holmgren	Jones	Stewart	Sessions	Arimo	Hoskins	TOTAL
1881	120 150 150 110 25	70					
1882			100	85			
1884			100				
1886	85 110				100		
1887	110 135 220						
1897			140				
1908	130						
1910	60						
1911 Jan	26.66						
1911 June		70					
Totals	1451.66	140	340	85	100	0	2096.66
before Settlers	28.63	2.8	6.8	1.7	2	0	41.93 cfs
1911, 23 Nov		160				160	
1912	75	90					
1914			80				
1921					140		
Total inches	1506.66	390	420	85	240	160	2801.66
Total cfs	30.13	7.8	8.4	1.7	4.8	3.2	56.03
Percent of stream	53.77%	13.92%	14.99%	3.03%	8.56%	5.71%	99.93%

If Sessions takes additional 160 inches  
245  
8.25%

If he takes 4.3cfs or 215 inches  
300  
9.94%

A full decree would be 59.23 or 60.33cfs

The rights dating 1912, 1914, and 1921 would not receive water until a correspondingly later time. Every other water user would receive a smaller percentage of the water when the decree was full, depending upon how much Mr. Sessions is claiming.

them at least, you couldn't offer them unless you owned some land or had some rights that would be tied up with the decrees.

Mr. Bissell: On this matter the court will recollect the pleadings showed the ownership of the lands in the plaintiff and in the defendants and cross-complainants.

The Court: Isn't that all admitted in the pleadings?

Mr. Bissell: No, it was denied but we filed written stipulations to the effect—

The Court: Put your stipulations in the record as part of the record. Couldn't have anything better than stipulations.

Mr. Bowen: We stipulated the ownership of the land.

The Court: We don't have to offer any testimony in the record about the ownership of land!

Mr. Bowen: No.

The Court: That would recite this case came on to be heard; among other things the stipulation was made—and quote it; that hereupon John Smith called by the plaintiff testified in substance and effect so and so—enough to cover the situation so as to show your people had some right; that Bill Jones was called by the defendant and testified in substance and effect to sustain the contentions made by the defendant; that there were other witnesses called pro and con testifying so and so, or testifying along the same lines; that at the conclusion of the trial of the case the court made the following ruling; then insert my opinion that I wrote at the time; it is part of the record; that hereupon and subsequent to the writing of the opinion the court made an order—whatever it is in the record—appointing these commissioners and directing them to make these investigations; that this was done and that thereafter for three or four years—whatever it was—reports were made, and the last report—which ever one you people used in drawing the findings—

Mr. Bissell: The last report that incorporated a resume of all the prior reports.

The Court: Then you would incorporate that report, and it being introduced in evidence and made a part of the record in this case by the witnesses being sworn, the court thereupon made his findings of fact and conclusions of law.

I do not know what more you would want. You have your assignment of error that it was wrong to appoint these commissioners or to do otherwise than to decide the case when we got through with it; and then you have enough to show whether the court was bound to follow those decrees or not, taking into consideration the finding I made in my opinion; while that was not denominated findings it was in fact preliminary findings that—whatever I said—that the court was without sufficient information to determine the rights of the parties.

Mr. Bissell: I think that is sufficient.

The Court: If that is all you want to review, put it in writing and submit it to Mr. Bowen; then you have three questions of law raised; no questions of fact in the case, and you can do that in about ten pages.

(Plaintiff given to and including May 4th to prepare amended statement.)

(Defendants given to and including May 15th to suggest amendments.)

(May 22nd set down for settlement of same.)

Opinion.

This is a suit for injunctive relief brought by the plaintiff, a California corporation, and the owner of certain lands in the State of Idaho. The defendants are residents of the State of Utah and their irrigable lands in Utah with one exception. There are certain interveners residents of the State of Idaho and owning land in that state. The defendants and interveners in their pleadings set up affirmative matter and ask for injunctive relief.

This is not an action to quiet title and it is conceded that the court is without authority or jurisdiction to do so.

All of the parties to the suit appearing, except the defendants Neils Neilson and Earl Neilson, claim a right to use the waters of Clear Creek for the irrigation of their respective lands. Clear Creek is a tributary of Raft River which latter is a tributary of Snake River. Clear Creek is a small interstate stream flowing north from Utah into the State of Idaho. It is a characteristic mountain stream flowing during the high

water season of spring and early summer sometimes as much as 180 second feet, later in the year after the melting of the snow the only source of supply is the springs along the course of the creek and flowing water is found only in the upper channels of the stream and here in relatively insignificant quantity. Something over fifty years ago, that is in the late 70s and early 80s of the past century, the pioneer appeared and settlers on some of the lands along the course of the creek began to make use of the water for irrigation purposes. There were two groups of these settlers, one at and near the mouth of the Clear Creek canyon in what is now the State of Utah, the other in the valley of Clear Creek and Raft River in what is now the State of Idaho. These settlements were and are a few miles apart. The lands in Idaho first taken up by these early settlers were the natural meadows which existed from the annual overflow of the creek. There were probably a thousand or more acres of such meadow land appropriated by these settlers at this early date. The land at and immediately below the mouth of the canyon in Utah was rough and more precipitous than the meadow lands just referred to. To completely irrigate the meadow lands these early settlers made a few short ditches and threw in here and there temporary dams; the lands were irrigated by the waters of the stream springing over them during the period of overflow. Shortly after their appropriation of the meadows some of the settlers began to sow tame grasses and alfalfa seed, increasing the area of used land. The amount of this increase is somewhat uncertain. These new lands were irrigated during the overflow period by the building of new ditches and the extension of old ones and by the location of temporary dams in the channel of the stream and at other strategic points. It is, I think, quite evident from the evidence that during this early period the settlers upon these lands made use of the high water flowing in the stream during the spring and early summer for the purpose of producing grass for pasturage or hay on these natural meadows and from the lands sowed with tame grasses and alfalfa. They were stockraisers and wanted grazing lands and hay for their cattle. About the same time that these Idaho settlers began to make use of these meadow lands, other settlers began to occupy the lands at the mouth of the canyon in the State of Utah. These settlers were of the same class as those lower down the stream and like them were more interested in producing grass for pasture and hay for

stock than they were in developing farms of the usual type. As already said the land in that neighborhood was rough and quite steep, necessitating the construction of more permanent headgates and longer ditches for the diversion of the waters of the stream. I think it quite evident from the evidence that the Utah settlers quite early diverted the waters of Clear Creek during the high water season upon practically all of the two Government sections involved in this litigation; thereby growing upon these lands grasses suitable for pasturage for stock and in certain areas capable of being mowed for hay. It was during this early period that John Naf settled upon and began to irrigate what is now designated as the John Naf ranch. This ranch is situated below the Idaho state line and lies about half way between the lands at the mouth of the canyon and the meadows below in the State of Idaho. The very soon was producing grasses and crops upon all of his land capable of being irrigated at all. During this early period, as already said, these settlers were diverting the waters of Clear Creek during the high water season mainly for the purpose of producing pasturage and hay for their stock. All were satisfied because apparently the water was sufficient for their several requirements. At the present time, and in fact for many years past, the water has been used on both sides of the state line for producing crops of other sorts, particularly grain, alfalfa seed and second crops of alfalfa hay, and to some extent probably on both sides of the state line there has been an increase in the acreage attempted to be cultivated, and in Utah the number of users was also increased. It is undoubtedly true that at the present time the demand upon the flow of Clear Creek exceeds the capacity of the stream normally to supply. This condition of over-demand, together with the meager supply resulting from the dry seasons preceding the present year and beginning in 1926, has brought the situation to a head in this lawsuit. However, this is not the first lawsuit involving the use of the waters of Clear Creek; on the contrary it is the fifth of such suits called to the attention of the court during the progress of the trial. One of these is the case of Raft River Land & Livestock Company vs. John Lind and others. This case was filed in this court on March 6, 1907, and involved among other uses the use of the waters of Clear Creek upon lands now owned by the plaintiff. In the opinion in that case I said:

"It does not appear in the record but upon the argument I



is that on November 23, 1911, there was no such quantity of water, or any substantial quantity of water unappropriated flowing in Clear Creek, and there has never been a flow of as much as 60 second feet in Clear Creek at any time except usually for a few days during the high water season in the spring and early summer of the year.

X The evidence in this case shows that not a stockholder of the Settlers Land & Water Company is now an occupant of any of the lands involved in that litigation or receiving water under the Dietrich decree.

The seventh paragraph of the Hart decree affords an illustration of an award physically impossible of fulfillment. It provides that the plaintiffs Sweetser and Pierre, predecessor of plaintiff in the present action, "shall be entitled, during each and every year from July 1st until April 15th, to the use of one-half of the waters flowing in Clear Creek on their lands • • • for irrigation, domestic, culinary and stock purposes, superior to any other right." It is indisputable in the evidence in the present case that after the beginning of the low-water period, at least during the remainder of the summer, the waters of Clear Creek do not flow down to the Sweetser-Pierre lands, and no *pro tanto* is now made that the plaintiff as their successor claims any such right as the Hart decree gives.

As already suggested, this court is without authority or jurisdiction to quiet the title of the plaintiff to its right to the use of the waters of Clear Creek, and it is the theory of the court that it is without authority or jurisdiction to quiet title in favor of the Utah users. Indeed there is already a superiority of decrees quieting titles and fixing priorities and quantities of use. No decree of court ever added a drop of water to the flow of any stream. The concern of the court in the present case is not to determine with meticulous accuracy the quantity of the flow or the time of the use. My concern is to evolve a practical plan by which the parties best entitled to the use of the flow of Clear Creek shall make the best use of it.

It is quite evident that until a certain quantity of flow has been reached as it increases in the spring of the year, and after a certain flow has been reached as it decreases in the summer, the water in the creek can only be used advantage-

ously on the lands in Utah and on the Naf ranch in Idaho. Between these minimum flows the waters of the streams may be used with equal advantage on the lands in both Utah and Idaho. During this period of flood or high flow, usually beginning in April and ending the last of June or early July, the question is how much of the varying flow is each group entitled to and how shall it be divided between them?

It is clear from the evidence that the flood waters of Clear Creek have been used on the lands in both Utah and Idaho for such a long period of time that it is idle to say that the owners of these lands are not entitled to such use. The right to divert and use these waters during the high water period in the future should be determined by their division and use in the past. The evidence quite conclusively shows that the early settlers in both Idaho and Utah were able to put water over their lands once during the high water period and in some years some of the lands were irrigated twice. Whether it is more desirable in the use of the water to irrigate land a second time rather than to spread it over additional land once is a question for the irrigator to determine for himself. The flood waters of Clear Creek, as already said, flow usually during May and June and the users must spread them on their lands as and when they come. If the flow is high, there is enough for everybody and to spare; if the flow is low, later appropriators must go without. If, as was the case in 1930 and 1931, the flood waters are abnormally low, I think in equity and good conscience the water should be taken in turn by the upper and lower group of settlers based upon their early use and appropriations, and by them used to preserve and keep alive their crops as much as possible. A water master of reasonable intelligence, with a list of users before him would divert to all on days of abundance; when the flow decreased he would treat off the late appropriators; at a certain point he would treat the upper and lower users as having prior rights based upon their early use and appropriations, and would require them to give and take on terms and in such way as to make the best use of the flow of the water in the stream at the moment.

It is impossible under the evidence in this case for the court to say that the plaintiff or any particular user is entitled to any specific quantity of the flow of Clear Creek for any particular day or for any definite length of time. The quantity of the flow of Clear Creek during the high water season varies

from day to day and, in fact, from hour to hour, dependent upon natural changes over which we have no control, and it is not possible that the court could now do justice between the parties. Under the evidence it is impossible to say how much of the water which will be flowing in Clear Creek on the 15th day of June, 1933, should be turned down the stream for the Idaho users. The reason is apparent. It is impossible to forecast even approximately what the flow on the 15th of June, 1933, will be, and it is equally impossible to forecast what the flow will be on any day during the high water season.

It does not follow, however, that the court should refuse any relief to plaintiff and the Idaho interveners because of this uncertainty. They are in justice entitled to fair treatment by the upper users, and the court is inclined to retain jurisdiction of the cause for the purpose of overcoming that uncertainty by some plan of distribution which will secure the parties their respective rights. I am inclined to appoint the chief irrigation officers of the States of Utah and Idaho as commissioners with directions to take the matter in hand and by joint experiment during the year 1933 work out, if possible, some feasible plan of equitable distribution of this varying flow of Clear Creek during the high water season. These matters will be taken up and discussed with counsel at some convenient time to be fixed hereafter.

Filed in United States District Court, District of Utah, September 14, 1932.

Order of Court.

Whereas, the matter of the settlement of the amended statement of the evidence came duly on for hearing at Salt Lake City on the 22nd day of May, 1937, and Whereas certain objections were made to the amended statement of evidence as presented, and Whereas, the court refused to settle the same until certain amendments were made therein and certain reports requested by the defendant Naf Irrigation Company were inserted therein, and Whereas, it was agreed that such statement of evidence as amended shall be settled when such portions of the reports of the engineers and commissioners Gardner, Lawrence and Hamming as shall be designated by counsel for the defendant Naf Irrigation Company are included therein, and Whereas, the attorney for the defendant Naf Irrigation Company has agreed to designate such portions of said

reports as he considers material on or before the 12th day of June, 1937;

It is hereby Ordered that the date for settling the amended statement of the evidence be, and hereby is, extended to and including June 12th, 1937, and that the time for docketing the appeal herein be, and hereby is, extended and enlarged to and including the 12th day of July, 1937.

Dated this 27th day of May, 1937.

TILLMAN D. JOHNSON, District Judge.

Filed in United States District Court, District of Utah, May 27, 1937. W. B. Wilson, Clerk. By V. P. Ahlstrom, Deputy.

Order of Court.

Whereas, the matter of the settlement of the amended statement of the evidence came duly on for hearing at Salt Lake City on the 22nd day of May, 1937, and Whereas, certain objections were made to the amended statement of evidence as presented, and Whereas, the court refused to settle the same until certain amendments were made therein and certain reports requested by the defendant Naf Irrigation Company were inserted therein, and Whereas, it was agreed that such statement of evidence as amended shall be settled when such portions of the reports of the engineers and commissioners Gardner, Lawrence and Hamming as shall be designated by counsel for the defendant Naf Irrigation Company are included therein, and Whereas, the attorney for the defendant Naf Irrigation Company has agreed to designate such portions of said reports as he considers material on or before the 12th day of June, 1937;

It is hereby Ordered that the date for settling the amended statement of the evidence be, and hereby is, extended to and including June 26th, 1937, and that the time for docketing the appeal herein be, and hereby is, extended and enlarged to and including the 26th day of July, 1937.

Dated this 12th day of June, 1937.

TILLMAN D. JOHNSON, District Judge.

Filed in United States District Court, District of Utah, June 12, 1937. W. B. Wilson, Clerk. By V. P. Ahlstrom, Deputy.

Owner's Name	Date of Priority	Amount Awarded Sec. Ft.	Total Sec. Ft.	Acreage Applied to
3. Nat Irrigation Co.	1885	2,660		160
James Campbell, Hartough Rt.	A. E. 1885	0,097		4
Sophia J. Nunn, Ryan Rt.	S. J. 1885	0,060		3.6
Tracy Brothers, Ryan Rt.	S. J. 1885	0,040		2.4
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4. Nat Irrigation Co.	1893	2,637	5,987	160
Mrs. M. E. Campbell, Vin Campbell Rt.	1893	2,660		35
		0,583		
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5. Nat Irrigation Co.	1900	3,243	9,230	220
James Campbell, Hartough Rt.	A. E. 1901	3,680	12,910	4
Sophia J. Nunn, Ryan Rt.	S. J. 1901	1,740		104.4
Tracy Brothers, Ryan Rt.	S. J. 1901	1,160		69.6
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7. James Campbell, Hartough Rt.	A. E. 1902	2,967	15,877	23
	1902	0,383	16,260	976 Ac.
		16,200		

Table II (Continued).  
DIETRICH-CAVANAH DECREES.  
Prior to 1903.

Set Up In Order of Priorities.  
(Tabular Form).  
Lower or Idaho Division.  
(B)

Owner's Name	Date of Priority	Amount Awarded S. Ft.	Acreage Applied to
1. Albion-Idaho Land Co.	June 1, 1881	2,40	120
Baker Tract	June 1, 1881	3,00	150
Wilkes Tract	June 1, 1881	3,00	150
Shamble Tract	June 1, 1881	2,20	110
Schwabacher Tract	June 1, 1881	1,40	70
Kelso Tract	June 1, 1881	0,50	25
James Kempton Tract	June 1, 1881	12,50	625
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2. Beneficial Life Insurance.	Jan. 2, 1882	2,00	100
Louis J. Gunnell Rt.			
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3. Albion-Idaho Land Co.	June 1, 1882	1,70	85
Round Mountain Tract			
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4. Beneficial Life Ins. Co.	Jan. 31, 1884	2,00	100
Louis J. Gunnell Rt.			

Table II (Continued).  
ALL DECREED RIGHTS SUBSEQUENT TO 1903.  
Set Up In Order of Priorities.  
(Tabular Form).  
(C)

Owner's Name	Date of Priority	Amount Awarded S. Ft.	Acreage Applied to
5. Albion-Idaho Land Co.	June 15, 1886	1,70	85
Ledy Neal Tract	June 15, 1886	2,20	110
Gallagher Tract	June 15, 1886	2,00	100
Ray Olson	June 15, 1886	5,90	295
James S. McGill Rt.	June 15, 1886		
<hr/>			
6. Albion-Idaho Land Co.	June 1, 1887	2,20	110
James Kempton Tract	June 1, 1887	2,70	135
Jerome Kempton Tract	June 1, 1887	4,40	220
Pierce Tract	June 1, 1887		
<hr/>			
7. Beneficial Life Ins. Co.	June 11, 1897	2,80	140
Louis J. Gunnell Rt.		36,20	1810

Owner's Name	Date of Priority	Amount Awarded S. Ft.	Acreage Applied to
1. Mrs. A. L. Dowler and Thomas McChey	May 1, 1908	2,60	130
Albion-Idaho Land Co. Rt.		0,80	40
Joseph O. Smith	Feb. 1, 1909	1,60	80
John O. Smith	Aug. 4, 1909	0,80	40
3. E. R. Smith	May 21, 1910	1,20	60
Benj Wilmore	Jan. 17, 1911	0,53	26.5
5. E. Lee Hunter	Jan. 14, 1911	1,40	70
Joshua B. Brown Rt.			
6. Oscar Fredericksen	Nov. 23, 1911	3,20	160
Settlers Land & Water Co.			
7. E. Lee Hunter	July 14, 1912	1,80	90
Joshua B. Brown Rt.		1,50	75
Benj Wilmore	March 14, 1914	1,50	90
8. Benj Wilmore	April 10, 1914	1,60	80
Sarah Gunnell	April 1, 1921	2,80	140
10. Ray D. Olson	April 6, 1921	1,60	80
11. Wm. H. Smoot	June 18, 1921	2,40	120
12. F. O. Vosburg		26,63	1281.5

tion 36, Township 15 North of Range 13 West of the Salt Lake Meridian; to whom United States patent to said described lands was issued June 10, 1898, and which patent is recorded in Book "R" of Deeds, at page 283, in the Records of Box Elder County, Utah.

Through Charles Lewis for the Southeast Quarter of the Northwest Quarter, the north half of the Southwest Quarter and the Southwest Quarter of the Southwest Quarter of Section 36, Township 15 North of Range 13 West of the Salt Lake Meridian; to whom United States patent was issued on June 11, 1897, and which patent is recorded in Book "R" of Deeds at page 264 in the Records of Box Elder County, Utah.

Through Heleman Campbell and Shel E. Baker for the Northeast Quarter of the Southeast Quarter of Section 36, Township 15 North of Range 13 West of the Salt Lake Meridian; to whom patent was issued by the State of Utah on the 25th day of January, 1904, and which patent was issued pursuant to a certificate of sale issued Sept. 1, 1899, and is recorded in Book "X" of Deeds, at page 53, of the Records of Box Elder County, Utah.

Through Sarah R. Campbell for Section 2, Township 14 North of Range 13 West of the Salt Lake Meridian, and the South Half of the Northeast Quarter and the West Half of the Northwest Quarter of Section 36, in Township 15 North of Range 13 West of the Salt Lake Meridian; to whom patent from the State of Utah was issued for said lands on May 10, 1912, and which patent is recorded in Book "3" of Deeds, at page 447, of the Records of Box Elder County, Utah; and which patent was issued pursuant to certificate of sale issued on the 6th day of February, 1901.

Through Central Pacific Railroad Company and Durham Land and Cattle Company for the north half of the Southwest Quarter of Section 1, Township 14 North of Range 13 West of the Salt Lake Meridian; to which said described land United States patent was issued to Central Pacific Railroad Company on the 5th day of September, 1896, and is recorded in Book "Q" of Deeds, at page 335 of the Records of Box Elder County, Utah.

Through John Naf for the Southeast Quarter of Section 27, Township 16 South of Range 27 East of the Boise Meridian in Cassia County, Idaho. Patent issued April 18, 1888.

That the defendant Charles Raymond Campbell is the owner of and in possession of the following described property:

Northeast Quarter and the West 10 acres of the North Half of the Southeast Quarter of the Northeast Quarter of Section 36, Township 15 North of Range 13 West of the Salt Lake Meridian, in Box Elder County, Utah, and that he deraigns title thereto through Lucinda P. Campbell, to whom United States patent was issued for the said described lands on the 1st day of March, 1904, pursuant to a filing made August 26, 1895.

That the defendant Knute Verne Johnson is the owner of and in possession of the following described property:

All of Section 30, Township 15 North of Range 13 West of the Salt Lake Meridian, in Box Elder County, Utah, and that he deraigns title thereto through Central Pacific Railroad Company and Durham Land and Cattle Company; United States patent to which said lands was issued to the Central Pacific Railroad Company on the 5th day of September, 1896, and is recorded in Book "Q" of Deeds, at page 335 of the Records of Box Elder County, Utah.

Whereupon, plaintiff offered in evidence as Ex. A. the decree of the District Court of the United States for the District of Idaho, in the case of Albion-Idaho Land Co. vs. Settlers Land & Water Company, said offer being joined by the interveners Beneficial Life Company, Sarah H. Gunnell and Ray D. Olson. Mr. Bowen, counsel for defendants, objected to the introduction of said exhibit as incompetent and immaterial; that it is not plead, and defendants herein were not parties thereto. Objection overruled, exception noted, and said exhibit admitted, the same being in words and figures as follows:

"Albion-Idaho Land Company, a corporation, Plaintiff, vs. Settlers Land & Water Company, a corporation, Benjamin Wilmore, Priscilla Brown, Joshua B. Brown, Mary J. Brown, et al, Defendants; and James S. McGill, Plaintiff, vs. Albion-Idaho Land Company, a corporation, Settlers Land & Water Company, a corporation, Benjamin Wilmore, et al., Defendants, and Louis J. Gunnell, Intervener.



## Decree.

The above-named cases were pending in the above entitled court, and the case of James S. McGill, plaintiff, vs. Albion-Idaho Land Company, a corporation, et al., defendants, came regularly on for trial before the above-entitled court, sitting without a jury, at Pocatello, in the State of Idaho, on the 19th day of October, A.D. 1916. By order of the court duly made and entered in the cause with the consent of all parties, both of the above named cases were consolidated for trial. The Albion-Idaho Land Company was represented by its solicitors C. C. Richards and W. J. Mitchell; plaintiff James S. McGill was represented by his solicitor S. T. Lowe; defendant Settlers Land & Water Company, a corporation, Sarah Hawks, Sarah Smart, Joshua B. Brown, Priscilla Brown, John Williams, and Mary J. Brown, were represented by their solicitors, Nebeker, Thatcher & Bowen; the intervenor, Louis J. Gunnell, was represented by his solicitor, T. Bailey Lee; defendant Benjamin Willmore, was represented by his solicitors, George Q. Rich and J. H. Peterson. The following named defendants having been duly and regularly served with process, or having entered their voluntary appearance in the cause, and having failed to answer or otherwise plead within the time limited by law and the orders of the court, and the defaults of the said defendants having been entered, and the order of the Clerk having been made that the complaint of the plaintiff be taken as confessed as to the said defendants and each of them to-wit: O. R. Nelson, R. S. Cook, Inham, Fannie I. Short, William M. Johns, Randolph W. E. Gee, James W. Stewart, Hans Sorenson, Jr., James W. Hall, Lillie D. Underwood, John F. Comerford, William Southfield, John R. Muffer, Catherine Vosburgh, Fred C. Vosburgh, Roy D. Olson, Sarah H. Gunnell, Job P. Miller, Roy D. Platts, John O. Smith, Joseph O. Smith, W. F. Marcus, Charles Miller, M. M. Hendry, and O. J. Sjoberg. And it further appearing that the following-named defendants were not served with process, and did not enter their appearance in either of said causes to-wit: R. P. Peatts, Charles E. Kent, Daniel P. Walter, R. S. Fessenden, Effie Hawks, Ernest A. Charlton, Fred T. Darling, F. E. Gunnell, and Edward C. Davis, the complaint as to the said named defendants was dismissed.

The court having heard and carefully considered all of the evidence introduced upon said trial and said cause having

been fully argued and submitted, and decision rendered thereon, and the court being fully advised in the premises,

It Is Ordered, Adjudged and Decreed:

1. That Sarah Hawks and Sarah Smart and John Williams, having failed to submit proof in support of their respective claims, neither of said defendants is entitled to the use of any of the waters of Clear Creek.

2. It appearing that the defendants Priscilla Brown and Mary J. Brown had sold and disposed of their rights and properties prior to the filing of either of the causes above named, and their successors in interest not having been made parties to the causes, it is ordered that the said Priscilla Brown and Mary J. Brown take nothing by their cross-complaint.

3. That the Albion-Idaho Land Company be, and it is hereby awarded the use of the water of Clear Creek of the dates, in the amounts, and for use upon lands, as follows, to-wit:

(a) 120 inches, or 2.4 second feet, dating from June 1, 1881, for the Baker tract of 160 acres, namely, the north half of the southeast quarter, and the southeast quarter of the southeast quarter of Section 29, and the southwest quarter of the southwest quarter of Section 28, in Township 15 South of Range 27 East of the Boise Meridian.

(b) 150 inches, or 3 second feet, dating from June 1, 1881, for the Wilkes tract of 160 acres, namely, the east half of the southwest quarter, and the southwest quarter of the southeast quarter of Section 33, in Township 15 South of Range 27 East, and the northwest quarter of the northeast quarter of Section 4, in Township 16 South of Range 27 East of the Boise Meridian.

(c) 150 inches, or 3 second feet, dating from June 1, 1881, for the Shangle Tract of 160 acres, namely, the northwest quarter of Section 33 in Township 15 South of Range 27 East of the Boise Meridian.

(d) 110 inches, or 2.2 second feet, dating from June 1, 1881, for the Schwabacker tract of 160 acres, namely, the south half of the northeast quarter and the east half of the southeast quarter of Section 4, in Township 16 South of Range 27 East of the Boise Meridian.

(e) 70 inches, or 1.4 second feet, dating from June 1, 1881, for the Kelso tract of 160 acres, namely, the northeast quarter of Section 3 in Township 16 South of Range 27 East of the Boise Meridian.

(f) 85 inches, or 1.7 second feet, dating from June 15, 1886, for the Leafy Neal tract of 280 acres, namely, the northeast quarter and the north half of the southeast quarter, and the southeast quarter of the southeast quarter of Section 33 in Township 15 South of Range 27 East of the Boise Meridian.

(g) 25 inches, or .5 of a second foot, dating from June 1, 1881, and 110 inches, or 2.2 second feet, dating from June 1, 1887, for the James Kempton tract of 160 acres, namely, the northeast quarter of Section 15, in Township 16 South of Range 27 East of the Boise Meridian.

(h) 135 inches, or 2.7 second feet, dating from June 1, 1887, for the Jerome Kempton tract of 160 acres, namely, the northwest quarter of Section 15 in Township 16 South of Range 27 East of the Boise Meridian.

(i) 110 inches, or 2.2 second feet, dating from June 15, 1886, for the Gallagher tract of 400 acres, namely, the east half of Section 32, and the west half of the southwest quarter of Section 33, in Township 15 South of Range 27 East of the Boise Meridian.

(j) 130 inches, or 2.6 second feet, dating from May 1, 1908, for the Retan tract of 160 acres, namely, the east half of the northwest quarter, the northeast quarter of the southwest quarter, and the northwest quarter of the southeast quarter of Section 4 in Township 16 South of Range 27 East of the Boise Meridian.

(k) 220 inches, or 4.4 second feet, dating from June 1, 1887, for the Pierce tract of 440 acres, namely, the south half, and the south half of the northwest quarter, and the southwest quarter of the northeast quarter, of Section 10 in Township 16 South of Range 27 East of the Boise Meridian.

(l) 85 inches, or 1.7 second feet, dating from June 1, 1882, for the Rice or Round Mountain tract of 160 acres, namely, the west half of the southeast quarter and the southeast quarter of the southeast quarter of Section 13, and the northeast quarter of the northeast quarter of Section 24 in Township 16 South of Range 27 East of the Boise Meridian.

(m) That the point at which the said waters are diverted from said stream, except from Round Mountain and Black Pine Creeks is located in Section 27 in Township 16 South of Range 27 East, Boise Meridian, said point having been designated in this action as the head of the Brackenbury ditch.

(n) That whatever amounts of water are received from said Round Mountain and Black Pine Creeks by said company shall be considered as part of the waters distributed by this decree, said Round Mountain Creek and said Black Pine Creek being deemed, considered and found to be tributaries of said Clear Creek.

4. That the Albion-Idaho Land Company or any of the appropriators having a lower point of diversion shall not be entitled to divert any of the waters of the said Clear Creek when the same does not exceed 200 inches, or 4. second feet, at the said Company's said point of diversion.

5. That the plaintiff, James S. McGill, be, and he is hereby, awarded the use of the water of said Clear Creek of the date, in the amount, and for use upon lands, as follows, to-wit:

(a) 100 inches, or 2 second feet, dating from June 15, 1886, for use upon Lot 2 and the southwest quarter of the northeast quarter and the west half of the southeast quarter of Section 5, and the northwest quarter of the northeast quarter of Section 8 in Township 15 South of Range 27 East of the Boise Meridian; provided, however, that the amount of the Boise Meridian; provided, however, that the amount of water which the said James S. McGill shall be entitled to receive from the said Clear Creek shall not, at any time, when added to the amount he then is entitled to receive, or is receiving, under his decree of 140 inches, of the waters of Raft River, exceed one inch per acre, or an aggregate of 200 inches or 4 second feet.

(b) That the point at which the said water is diverted from the said stream is located near the northwest corner of the northeast quarter of Section 17 in Township 15 South of Range 27 East of the Boise Meridian.

6. That the intervenor, Louis J. Gunnell, be, and he is hereby, awarded the use of the waters of the said Clear Creek of the dates, in the amounts, and for use upon lands, as follows, to-wit:

(a) 100 inches, or 2 second feet, dating from January 2, 1882, for use upon the east half of the northwest quarter and the west half of the northeast quarter of Section 29 in Township 15 South of Range 27 East of the Boise Meridian.

(b) 100 inches, or 2 second feet, dating from January 31, 1884, for use upon the east half of the southwest quarter and the west half of the southeast quarter of Section 20 in Township 15 South of Range 27 East of the Boise Meridian.

(c) 140 inches, or 2.8 second feet, dating from June 11, 1897, for use upon the south half of the northwest quarter and the west half of the southwest quarter of Section 20, in Township 15 South of Range 27 East of the Boise Meridian.

(d) The present points at which the said water is diverted from said stream are located in Section 29 in Township 15 South of Range 27 East of the Boise Meridian.

7. It is Ordered that the foregoing rights of the plaintiff, James S. McDill, and of the intervenor, Louis J. Gummel, shall be deemed satisfied, if when such waters are in the said stream, the requisite amounts of water are available in a constant flow at their several points of diversion, and it shall not be material whether such water flows unused down the channel of the said Clear Creek or wastes back into the said channel from lands of other users higher on the stream, or is, in whole or in part, water from Black Pine or other contributing sources.

8. That the defendant, Benjamin Willmore, he, and he is hereby, awarded the use of the waters of the said Clear Creek of the dates, in the amounts, and for use upon lands as follows, to-wit:

(a) 60 inches, or 1.2 second feet, dating from May 21, 1910, for use upon the northwest quarter of the northwest quarter of Section 25, the northeast quarter of the northwest quarter and the north half of the northeast quarter of Section 26, in Township 16 South of Range 27 East of the Boise Meridian.

(b) 90 inches, or 1.8 second feet, dating from March 14, 1914, for use upon the northeast quarter of the northwest quarter, the northwest quarter of the northeast quarter and the northeast quarter of the northeast quarter of Section 26 in Township 16 South of Range 27 East of the Boise Meridian.

(c) The point at which the said water mentioned in the two foregoing paragraphs is diverted is located in the southeast quarter of the northeast quarter of Section 27 Township 16 South of Range 27 East of the Boise Meridian.

(d) 26.66 inches, or 8/15 of a second foot, dating from January 17, 1911, for use upon the southwest quarter of the northeast quarter of Section 26 in Township 16 South of Range 27 East of the Boise Meridian.

(e) 75 inches, or 1.5 second feet, dating from July 14, 1912, for use upon the southeast quarter of the northeast quarter and the northeast quarter of the southeast quarter of Section 26 in Township 16 South of Range 27 East of the Boise Meridian.

(f) The point at which the water is diverted from Clear Creek mentioned in paragraph "d" and "e" above, is situated in the southeast quarter of the southeast quarter of Section 27 in Township 16 South of Range 27 East of the Boise Meridian.

(g) 13.33 inches, or 4/15 of a second foot, of the water of Rice Canyon Creek, dated from January 17, 1911, for use upon the southwest quarter of the northeast quarter of Section 26 in Township 16 South of Range 27 East of the Boise Meridian.

(h) 35 inches, or 7/10 of a second foot, of the waters of said Rice Canyon Creek, dating from July 14, 1912, for use upon the southeast quarter of the northeast quarter and the northeast quarter of the southeast quarter and the southeast quarter of the southeast quarter of Section 26 in Township 16 South of Range 27 East of the Boise Meridian.

(i) The point at which the water from Rice Canyon Creek mentioned in the two foregoing paragraphs numbered "G" and "H" is diverted is located in the southwest quarter of the southwest quarter of Section 25 in Township 16 South of Range 27 East of the Boise Meridian.

9. That the defendant, Joshua B. Brown, he, and he is hereby, awarded the use of the waters of the said Clear Creek of the dates, in the amounts, and for use upon lands, as follows, to-wit:

(a) 70 inches, or 1.4 second feet, dating from June 14, 1911, and 90 inches, or 1.8 second feet, dating from July 14,

12, for use upon the north one-half of the northeast quarter and the southwest quarter of the northeast quarter of Section 27 and the northwest quarter of the northwest quarter of Section 26, all in Township 16 South of Range 27 East of the Boise Meridian.

b) The point of diversion of the said water from the Clear Creek is situated in the northeast quarter of the northeast quarter of Section 27 in Township 16 South of Range 27 East of the Boise Meridian.

9. The defendant, Settlers Land & Water Company, and it is hereby, awarded the use of the waters of the Clear Creek of the date, in the amount, and upon any lands, as follows, to-wit:

a) 3,000 inches, or 60 second feet, dating from November 23, 1911, for use upon the northeast quarter, the northwest quarter, the southeast quarter and the southwest quarter of Section 2; the southwest quarter, southeast quarter, and northwest quarter of Section 3; the southwest quarter, northeast quarter, southeast quarter of the southwest quarter, west half of the southwest quarter and west half of the northwest quarter of Section 4; the northeast quarter, southeast quarter, east half of the southwest quarter, east half of the northwest quarter of Section 5; the northwest quarter, northeast quarter, southeast quarter and southwest quarter of Section 8; the northeast quarter, northwest quarter, southeast quarter and southwest quarter of Section 9; north half of the northwest quarter, north half of the northeast quarter and southeast quarter of the northeast quarter of Section 10; the northeast quarter, northwest quarter, southeast quarter and southwest quarter of Section the northwest quarter, southwest quarter, west half of the northeast quarter, west half of the southeast quarter, northeast quarter of the southeast quarter of Section 12; west half of the northeast quarter, northwest quarter, northeast quarter, west half of the southeast quarter, and southeast quarter of the southeast quarter of Section 13; northeast quarter, northwest quarter, southeast quarter, southwest quarter of Section 14; the southeast quarter, northwest quarter of Section 15; the northeast quarter, southwest quarter, southeast quarter, southwest quarter of Section 16; the northeast quarter, northwest quarter, southeast quarter, southwest quarter of Section 17; the southeast

quarter of Section 21; the northeast quarter, northwest quarter, southeast quarter, southwest quarter of Section 22; the northeast quarter, southeast quarter, northwest quarter, southwest quarter, of Section 23; the northeast quarter, northwest quarter, southeast quarter, southwest quarter of Section 24; the northwest quarter, west half of the northeast quarter, northeast quarter of the northeast quarter of Section 27; the north half of the northwest quarter, north half of the northeast quarter of Section 26; the northwest quarter of the northwest quarter of Section 25; all in Township 16 South of Range 27 East of the Boise Meridian, containing 9,600 acres.

(b) The point at which said water is diverted from said Clear Creek is located in Section 27, Township 16 South of Range 27 East of the Boise Meridian.

11. It is Further Ordered, Adjudged and Decreed that each of the said appropriators take the water in the order of the dates of their said priorities, that each is entitled to the whole of his prior appropriation before any subsequent appropriator is entitled to any; and that appropriators of the same date, and consequently of equal dignity, take, as tenants in common, in proportion to the amount awarded each, and that each of said appropriators shall, prior to the next irrigation season, install and thereafter maintain, at his own expense, at his point, or points, of diversion, suitable standard weirs and diversion works.

12. That the parties hereto be, and each of them is, perpetually enjoined and estopped from, in any manner, interfering with the flow of the waters of the said Clear Creek, or its tributaries, except in accordance with the terms and conditions of this decree. And the title of each of the parties is hereby quieted to the use of the waters of Clear Creek and its tributaries in the quantities and with the priorities herein specified, and that no one of the parties hereto, who have made default, as hereinbefore stated, has any right to or any interest in any of the waters of said Clear Creek or its tributaries.

13. It is further ordered that before the commencement of the irrigation season of 1920, all parties to whom water rights are hereby decreed, install in a workmanlike manner, and thereafter maintain, substantial headgates and measur-

ing weirs, of a type approved by the State Engineer of Idaho, at their several points of diversion.

Done in open court this 18th day of October, A. D. 1919.

FRANK D. DIERFRIEGH,  
United States District Judge.

Endorsed: Filed Oct. 18, 1919, W. D. McReynolds, Clerk."

Whereupon one J. E. Hayes was called and duly sworn as a witness for the plaintiff and testified as a witness for the plaintiff in support of the allegations of plaintiff's complaint. Whereupon, upon the examinations of said witness, a certain map prepared by said witness, showing the location and ownership of the lands of the various parties hereto was offered and marked Ex. B, and admitted for the purpose of illustration without objection, a copy of which said exhibit is attached as an exhibit to Ex. A-1.

Whereupon plaintiff offered in evidence as Ex. C, page 97 of the annual report on irrigation and drainage, 1904, published under direction of Edwood Mead, acting under authority of the Secretary of the Interior of the United States, purporting to be an official government publication dealing with the water supply and the water users, on and from Clear Creek in the years 1902 and 1903, which said exhibit on said page contained the statement: "There are three ranches in Idaho irrigated by the waters of Clear Creek. In Utah there are two small tracts under irrigation." All defendants objected to the introduction of said book, pamphlet or report as not being properly identified, incompetent and immaterial, which objection was by the court sustained, and plaintiff granted an exception.

Whereupon plaintiff offered in evidence Exs. D, E, F, G, H, and I, which are certified copies of the watermaster's reports showing the delivery of water on Clear Creek to Idaho users or the years 1926 to 1931, inclusive, which exhibits were objected to by all defendants as immaterial, irrelevant and incompetent hearsay and not within the issues,—objection overruled and exhibit admitted.

Whereupon plaintiff offered in evidence as Ex. J, certified copy of the decree in the case of Sweetser vs. Campbell, said decree being a decree of the District Court of Box Elder County, Utah, to the admission of which decree defendants objected upon the ground that the same was incompetent, immaterial, irrelevant and not within the issues, was not pleaded and not all present defendants parties; and for the further reason that the District Court of Box Elder County, Utah, was without jurisdiction to enter the same, which objection was by the court overruled, exception noted, and said decree admitted in evidence as Ex. J, which said decree is in words and figures as follows:

"John Sweetser and James Pierce, surviving partners of the Partnership firm of Sweetser Bros. & Pierce, Plaintiffs, vs. Heleman Campbell, S. E. Baker, O. L. Ryan, Mrs. S. J. Ryan and John Naf, Defendants.

Decree.

"This cause coming on to be heard upon the pleadings and evidence, the plaintiffs being represented by W. L. Maginnis, and the defendants Heleman Campbell, S. E. Baker and John Naf being represented by Messrs. A. J. Weber and Thomas Maloney and the defendant O. L. Ryan and Mrs. S. J. Ryan being represented by R. H. Jones, Esq., and the court being fully advised in the premises and each of said parties consenting thereto and waiving findings of fact and conclusions of law, the court orders, adjudges and decrees:

1st. That the plaintiffs herein are entitled to 600 miners inches of the waters of Clear Creek under a four-inch pressure, measured at their headgates at the south end of their field in Idaho in a box 16½ feet long with ¾ of an inch fall to the rod, beginning with the beginning of the irrigation season, about the 15th day of April of each and every year for use for the purpose of irrigating the property described in the complaint, being the real estate belonging to Sweetser Bros. & Pierce and shall have the right to the use of the said 600 miners inches up to and including the high water season of Clear Creek until July 1st of each and every season; that the said right during said time is superior to any other right to the use of water of Clear Creek.

2nd. That the defendant John Naf is entitled to have 100 miners inches of the waters of Clear Creek under a 4-inch

lish the allegations contained in his answer and cross-complaint and in rebuttal of certain evidence of Robert Matheson.

Whereupon Neils Neilson was called, sworn and testified as a witness for himself, and gave evidence tending to establish the allegations contained in his answer and cross-complaint.

Whereupon Sophia Ryan Nunn was called, sworn and testified as a witness on her own behalf, and gave evidence tending to support the allegations of her answer and cross-complaint.

Whereupon Edward J. Murphy was called, sworn and testified as a witness for the intervenor Olson, tending to establish the allegations contained in the complaint of the intervenor Olson, and also tending to establish the allegations of the complaint of intervenor Beneficial Life.

Whereupon Mrs. McGill was called, sworn and testified as a witness for the intervenor Olson, and gave testimony tending to establish the allegations of the complaint in intervention of defendant Olson.

Whereupon the said cause was argued by counsel, submitted to the court, and said cause was by the court taken under advisement.

That thereafter the court rendered a decision in said cause, which said decision is marked "Opinion" and attached hereto as a part of this statement.

That thereafter the court, on its own motion and over the objection of the plaintiff, did on the 28th day of March, 1933, issue a certain order appointing the Commissioner of Reclamation of the State of Idaho and the State Engineer of the State of Utah as commissioners, "to determine the flow of and Clear Creek at its various stages and to determine at what stages, if any, in the flow of said stream the waters would not flow in sufficient quantity to admit of beneficial application on the lands of the plaintiff and intervenors, and to make such studies of the lands of the respective parties as will enable them in conjunction with the other information assembled by them, to report recommendations to the court respecting the most economical and beneficial use and distribution of the waters of said stream."

That thereafter, and pursuant to said order of the court, the State Engineer of the State of Utah and the Commissioner of Reclamation of the State of Idaho appointed one George A. Lawrence as assistant engineer during the irrigation season of 1933.

Mr. Lawrence made a detailed report of the work done by him, including the following:

(a) An actual survey of the lands in the upper division and in the lower division, which were irrigated during the season, and also all of the irrigated lands in each division which were not irrigated during the season of 1933, together with a complete classification of the kind of crops grown on each tract. By his actual survey there were irrigated in the upper division during the year 1933, 843.8 acres, and in the lower division 1,120 acres. With respect to channel conditions Mr. Lawrence said:

"As Clear Creek emerges from the mouth of Clear Creek Canyon there are three courses that the water has taken in the past years. These courses are shown on Plate 5 and are called the East Channel, Middle Channel, and the West Channel, respectively. As far down as the lane near the middle of Section 36 these channels are quite thickly covered with a growth of willows and birch trees along the banks and even in the channel proper.

"Further down the channels there is very little vegetation along the creek beds except sage brush, until near and just below the Utah-Idaho line, where there are bunches of willows and wild rose bushes along and in the channels. The willows and brush are not quite as thick and numerous as those mentioned as being along the channels just below the mouth of the canyon.

"In Idaho the channels are devoid of willows until they enter the meadow lands where the underground water has encouraged their growth. \* \* \*"

"In an attempt to eliminate so many channels in Utah, the East Channel was cleaned as much as possible in the time available. The Idaho users decided to eliminate the old creek channel in Idaho as far down as the north end of the Pierce tract, shown on Plate 6. In order to do this the channel known as the Blackenbury Ditch was enlarged, with the idea

do with Almo Creek.

XVI.

That the said tributaries of Raft River above named and set out, subject to the limitations mentioned as to Clear Creek and Almo Creek, together with the waters of certain springs arising in the bed or Raft River and adjacent thereto, constitute the water supply of said Raft River, and that any and all appropriations made and water diverted from said creeks and springs heretofore mentioned constitute an appropriation and diversion from Raft River and serve to deplete the flow thereof and interfere with and diminish the supply of water available for diversion and beneficial application by those parties owning land irrigated from said Raft River by means of diversions made directly from Raft River, and therefore, all diversions made from each, any and all of said tributary streams, with the exception of Almo Creek and the limitation upon Clear Creek, are hereby ordered, adjudged and decreed to be diversions made from the waters of Raft River, and the naming of the streams from which said diversions are made in this decree shall be construed only as fixing the point of diversions, and not as conferring an independent water right from the stream mentioned, but that such water rights shall be deemed a water right from Raft River as of the priority named and inferior only to all priorities on Raft River and superior to junior priorities of said stream.

XVII.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the use of the waters of, or to be diverted from Clear Creek, or its tributaries are separate and distinct from and are not inferior and subject to any right herein decreed to the use of the waters of, or to be diverted from Raft River and its said tributaries, and that nothing in this decree contained shall be construed to alter, change or modify the rights of the users of water of or diverted from Clear Creek under the terms of the decree rendered by this court in the case of Albion, Idaho Land Company vs. Settlers Land & Water Company, et al, but that the rights therein granted are hereinafter expressly confirmed.

XVIII.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED That all of the lands mentioned, described and set out in this decree are semi-arid in character and without irrigation are incapable of producing ordinary agricultural crops; that the duty of water for the irrigation of said land is hereby established and fixed at one-fiftieth (1/50th) of a second foot per acre; and that, notwithstanding the fact that in some instances lands hereinafter described have decreed water rights of different priorities, the maximum amount which may be diverted by any appropriator at any one time under any and all of the priorities hereinafter set out shall be, and is hereby, limited to one-fiftieth (1/50th) of a second foot of water per acre for the land described in this decree, and that the use of the water herein mentioned is limited and confined to the land described in this decree, and that at all times when the water hereby decreed is not being actually used upon the land to which the same is hereby decreed, the said water must be permitted to flow down the stream for the benefit of junior appropriators.

11.

That at the date of the filing of the complaint, and lis pendens herein, the defendant, Pacific Land & Water Company, was a defunct corporation of the State of Utah. That the directors thereof were H.C. Edwards, C.N. Strevel, H.A. LaFount, Walter F. Druehl, George F. Wassom and W.B. Outkelt, who were at said time the statutory trustees of the said defunct corporation.

111.

That the Almo Water Company, at the time of the filing of the complaint and lis pendens herein was a corporation duly organized and existing under and by virtue of the laws of the State of Idaho, having its principal place of business at Almo, Cassia County, Idaho.

IV.

That the defendant, Settlers Land & Water Company, was at the time of the filing of the complaint and lis pendens herein, a corporation duly organized and existing under and by virtue of the laws of the State of Idaho, having its principal place of business at Naf, Cassia County, Idaho, but at said time said corporation had become and was dormant for failure to comply with the revenue laws of the State of Idaho, and that Robert E. Williams, Fred A. Martin, Oscar S. Joberg, Joseph Torrensen and John Spaulding, citizens and residents of the State of Idaho, and former directors thereof had become and were at said time the statutory trustees thereof.

V.

That the defendant, George Creek Irrigation Company, is a corporation duly organized and existing under the laws of the State of Utah.

VI.

That the defendant, International Mortgage Bank, is a corporation organized and existing under and by virtue of the laws of the State of Washington, having its principal place of business at Spokane, Washington.

VII.

That the defendant, North American Mortgage Company, is a corporation duly organized and existing under and by virtue of the laws of the Kingdom of Holland, having its principal place of business in the United States of America at Spokane, Washington.

VIII.

That the defendant, National Copper Bank is a national banking association, organized and existing under the laws of Congress of the United States relating to banks and banking, having its principal place of business at Salt Lake, Utah.

IX.

That the defendant, Walker Brothers Bank is a banking corporation organized and existing under and by virtue of the laws of the State of Utah, with its principal place of business at Salt Lake, Utah.



Page 135 shows that the lower users claimed that one good irrigation would keep their crops alive. On pages 171-172 it tells us that two things were derived from the 830-1120 acre ratio. 43% of the land irrigated is in the upper division and 57% is in the lower division, therefore the high water is divided 43-57%. An application of six inches of water in the lower division is necessary to keep crops alive, so for 1120 acres it requires 560 acre feet. These two facts are put into the Johnson decree. When the creek rises to 20cfs, all of the water goes to the lower division and is used to keep crops alive on the 1120 acres.

Page 138 tells us that in 1933 the creek run up to 120cfs during the peak flow. Even if the creek has more than the amount of the decrees it still goes to the same ground. Due to conveyance losses it is necessary to combine streams and trade them from place to place as described on pages 171, 173, 180, 181, and 154. This policy of trading water and combining streams was set forth by the Commissioner of Reclamation in Idaho and is necessary to get the best use of the water in the short time that it goes to the Idaho users. This policy has been followed since that time and is the basis of Joneses policy of taking all of their water to the lower place when the water first goes to Idaho. When the water goes to Idaho, they put all of it on the Kelso tract which is one of the earliest rights on the creek with a priority date of 1881. After they get that ground watered once, then they may use it on the upper or lower place, following the order given in the "Opinion" on page 197.

Page 177 tells us that "as soon as the stream exceeds 20 sec. ft. the lower users should be given one water application requiring 560 acre feet. At this stage, the lower users will have just completed one good application of water so the creek flow should be divided between the upper and lower divisions in proportion to acreage irrigated, (43%-57%)". Page 187 tells us the 57% is measured at the Idaho weir.

They started out with the policy that when the creek is split 43-57, the first 100cfs should go to the rights prior to 1903, but page 143 shows they decided that was not necessary and that policy was not put into the decree. On page 163 the policy was changed so that all the flow above a full decree "should be proportioned between all the users in proportion to their respective rights". This policy has been followed since that time. The typed page that is stapled to Guy Sundberg's explanation is based on that policy.

I have attached a copy of a memorandum which has the percentages in the upper division which was apparently given to you by Mont Campbell. This is accurate and shows how the water is divided when there is more than a full decree in the upper division. The assumption made in the first paragraph of the second page is probably not true.

When the creek goes on turns as discussed in your memorandum, the turn schedule is based on the decree which was in effect at the time Naf Irrigation Co. was formed in 1911. The decree by judge Hart is found on pages 117-120. Before July 1, the defendants, each of whom had 160 acres, had 100 inches decreed to each of them. John Naf had the priority right and Campbell and Baker, a partnership, had a right which kind of shared it's priority with the Ryan right. Each of these three rights had 100 inches before July first. After July first, Half of the creek was turned down to Sweetzer and Pierce, who owned what is now the Lower Division of Clear Creek. The other half of the stream was taken in turns in an eight day rotation. John Naf had it for four days, then Campbell and Baker took two days, then Ryan took two days.

Naf Irrigation Co. was formed in 1911 based on the Naf right, the Campbell and Baker right, and the Ryan right. Before July 1, J.B. Brown was given 33% of the company stock for the Naf right, and after July 1, he had 50% of the stock for the 4 days out of 8 which was decreed to Naf in the Hart decree.

to make it large enough to carry all the water used by the lower lands. . . .

"At the junctions of the several channels there are no structures to divert the water from one channel to another, consequently rock dams, reinforced with soil were used to make all the diversions between the channels. Figure 1 shows such a dam at the heads of the East and Middle Channels in Utah. Figure X shows the junction of the main channel and the Blackenbury Ditch.

"A point to be noted here is that it is difficult to understand how any regulation or control of the water of other seasons could be accomplished under the conditions in which the channels were found this spring.

"Each and every one of the users were instructed to have their ditches clean and to provide a turnout structure and a measuring device if they had not already done so. No water was turned to anyone until they had a measuring device installed, and in proper working order."

Mr. Lawrence's report further contains a determination of losses throughout the course of the stream. For the purpose of his study he divided the territory into four zones, zones 1 and 2 being in Utah; zone 3 comprising the old Naf ranch in Idaho; and zone 4 the stretch of territory 2.3 miles in extent from the measuring *wier* called the Big *Wier* of the Albion-Idaho Land Company, down to the nearest point of use in the lower territory. In this connection Mr. Lawrence reports:

"Since the loss in zone 3 compares somewhat to the loss in zone 2, it is reasonable to conclude that the amount of water that would reach the large *wier* would be small until the discharge at the gauging station reached more than 15 c.f.c."

"Having reached the large *wier* the water has a distance of approximately 2.3 miles to travel before it reaches any of the lands of the lower users. The section of 2.3 miles just referred to is what comprises zone 4. The sub-surface structure in this section is somewhat comparable to that in zone 2 and the loss would be also comparative . . . . The writer therefore concludes that the stage of the creek at which the water would reach the lower lands beneficially is below that of May 29, i.e. below 29 c.f.c."

" . . . During the part of May 1st to May 29th the loss by

delivering the water to the upper users only was 29.5 per cent of the total discharge, while for the remainder of May with practically all of the water going to the lower users, the loss was 45.6 per cent of the total discharge. This loss would have been an even greater per cent had the discharge been as low as it was during the delivery to the upper users. . . . The writer, therefore, concludes that for the season of 1933, the proper time to have turned the water to the lower users would have been on the morning of May 26th, at which time the discharge at the gauging station was approximately 22 c.f.c."

With respect to the water requirement in the respective divisions, Mr. Lawrence reports:

"From June 27th to July 11th no water was delivered to the upper users. From July 11th on, no water was delivered to the lower users. During the period from June 27th to July 11th, the crops on the upper lands suffered considerably. Some of the upper users had no water from June 22nd to July 11th, and consequently their crops suffered with the drought. The lower users have claimed that if they have one irrigation, their lands become filled with sufficient waters to make the crop. Under the condition of this year the writer is inclined to doubt this to some extent, although the lower lands stand the drought much better than the upper lands."

With respect to deliveries to the Gunnell and McGill tracts, Mr. Lawrence reports:

"During this period (June 22 to June 24) the Gunnell and McGill places received all the water that went over the large *wier* with the exception of the water that was lost by seepage and that which overflowed onto the lands of the Albion-Idaho Land Company. In some places the Gunnell-Olsen ditch did not have sufficient capacity to carry all the water, with the result that water sometimes flooded out on the meadow lands of the Albion-Idaho Land Company tracts, mainly the Shangle and Baker tracts. However, the area covered by this water flooding out of the ditch was small.

"From June 22nd to June 24th the large *wier* discharged 106.34 acre feet. The number of acre feet delivered to the Gunnell and McGill tracts totals 46,888 acre feet. This makes a loss of 56 per cent. It might be mentioned at this point that the water had been in the old creek channel before June 22nd, so that it was not completely dry."

nish a sufficient basis for any definite determination as to the most economical distribution of the waters of Clear Creek, on which account we recommend that the Order heretofore made by this court be extended to cover the coming season's operations on the stream. We believe that the water users generally will approve and appreciate such action."

Upon this recommendation the court, on the 10th day of March, 1934, issued an order which read in part as follows:

"It is now by the court ordered that the said Order of March 28, 1933, and orders supplementary of and subsequent thereto, be continued in force and effect for and during the year 1934, it being understood, however, the said recommendation is made subject to the provision that the said commissioners shall report to the court the result of their observations, experiments and findings on or before the 1st day of December, 1934, and that such report shall be in such detail as will enable the court and counsel to determine the facts concerning the observations, recommendations and findings of the said commissioners."

Pursuant to said Order of March 10, 1934, the commissioners appointed, on April 14, 1934, Mr. M. R. Gardner as engineering assistant for the irrigation season of 1934. Mr. Gardner also did his work well and on November 30, 1934, filed with said commissioners and the court, a detailed report of his findings.

Following a careful study of the reports made both by Mr. Lawrence and by Mr. Gardner, considered in the light of several visits to Clear Creek during the irrigation seasons of 1933 and 1934, the commissioners, on January 24, 1935, filed a report with the court. This report described Clear Creek, setting up that it was an interstate stream, rising in the Raft River Mountains in Box Elder County, Utah, from whence it flowed in a Northerly direction crossing the State Line into Idaho, thence flowing in a Northerly direction for about fifteen miles in Idaho, where it emptied into Raft River; that 'it is a flashy stream, flowing ordinarily less than 5 sec. ft. except in May when it rises abruptly to a high stage for a period of from two to four weeks, following which it falls as abruptly to a point below 5 sec. ft.' The report also described the tracts irrigated from Clear Creek, dividing them into two natural divisions,—the Upper and the Lower divisions. The

Upper division contains about 1000 acres, of which 842 acres were irrigated in 1933. It is located for the most part in Utah, having a soil varying from a coarse sandy loam, one foot deep, to a sandy loam three feet deep and all underlain by coarse gravel. The Lower division contains about 2000 acres, 1120 acres of which were irrigated in 1933. It is located in Idaho having a soil varying from a fine sandy clay loam, two feet deep, to a fine clay loam, fifteen feet deep and all underlain by gravel subsoil. The report further showed that 43% of the lands irrigated during 1933 were in Utah and 57% were in Idaho. The report stressed the fact that there were heavy conveyance losses in Clear Creek and described the methods of irrigation used in part as follows:

"Irrigation is done generally by flooding which requires a large head of water for efficient application. Where the flow is divided into small stream a large proportion is lost by percolation into the gravel subsoil.

"The water of Clear Creek has been decreed to appropriators in stream proportions which cannot be beneficially applied, due to the rapid fluctuations of the stream which make it impossible to maintain the decreed proportions and to the high conveyance losses which prohibit efficient delivery of small streams. Efficient conveyance and application require that small irrigation streams be combined to give sufficient head for flooding. The total amounts which appropriators would receive under present decrees are not far in excess of what can be beneficially used, and ordinarily are far less than an adequate supply.

"The Decreed Rights are based on priority of appropriation and should be maintained as nearly as possible, although the method of distribution should be modified to increase its efficiency. It is our understanding that Utah users have a decree fixing rights as among themselves and similarly the Idaho users have a decree fixing relative rights as among themselves. We understand there is no decree fixing relative rights as between the Idaho group and the Utah group. For purposes of our operation we tried to apply the two decrees as among the users they applied to, but made no attempt to determine the relative rights of the two separate groups which we understand to be the purpose of this present suit. As to this, we are trying to recommend the most beneficial

17 sec. ft. or less before the 560 acre feet is so diverted, the entire flow shall then be diverted by Utah users. After said Idaho users have received 560 acre feet and until the sun of all diversions is less than 52.8 sec. ft., the division shall be made 43% to Utah and 57% to Idaho users, having prior to 1903 rights, measured at the points of diversion, up to a total of 100 sec. ft. Available water over and above that necessary to supply 100 sec. ft. diversions shall be subject to use by Utah and Idaho users with priorities subsequent to 1903.

"4. After the Idaho users will have secured 560 acre feet and the diversions are less than 52.8 sec. ft., the Idaho users shall receive the first 36.2 sec. ft. excepting the Ospital and Naf rights mentioned above, the Utah users all available above that amount, until the stream flow at the U.S.G.S. station falls below 17 sec. ft. after which all the water shall be diverted by Utah users. Rights subsequent to 1903 are generally those of the Settlers Land and Water Company, which have, we understand, been abandoned.

"5. That the water commissioner be appointed each irrigation season to divide the water as herein set out as modified by the courts. If at any time, the commissioner finds that the division is such as to deprive the water users of the State of Utah or Idaho of their rights or that the water is not being used beneficially he may, upon proper showing, be given hearing and a court order making adjustments in the distribution so that they can be made without delay.

"6. That in cases where the quantity of water determined to be due to the various individuals be too small for practical irrigation purposes, such rights as feasible be combined, and rotated among the various users in such a manner as to deliver to each the total quantity of water which he would receive if distribution were made on a basis of continuous flow. Such combination of rights and flow are matters of practical distribution and should be under the control of the water commissioner who is under the jurisdiction of the court.

"Notwithstanding the rights decreed, users of water should at no time be permitted to divert more water than can be beneficially used and thus the waste of water should be prohibited.

"7. That in order to protect the prior rights to the use of the water of Clear Creek the water commissioners should not only divide the water between the Utah and Idaho users as

way of handling and apportioning the meager and intermittent supply of water.

"An application of six inches of water in the Idaho division is necessary for a good irrigation and this will require the applying of 560 ac. ft.

"We feel that during the two years in which investigations have been conducted by the undersigned commissioners, the stream flow has been subnormal, and for this reason, the information gathered is insufficient to make recommendations for a final division of water between the Utah and Idaho users. However, we submit the following recommendations for a trial period of at least two years."

Following, as a part of the report, recommendations of the commissioners were made and are given in full, as follows:

"1. It appears from existing decrees that Phillip Ospital and the Naf Irrigation Company have rights which are prior to all others and the system of distribution should not interrupt the enjoyment of these rights. We recommend that neither of these rights be subject to the division of the water as between the Utah and Idaho users hereinafter allocated, but shall participate continuously as prior rights except during that period in which flow is divided 43% to Utah and 57% to Idaho hereinafter set out when they shall participate pro rata with the Utah users.

"2. That all Utah rights and those of the Hunter Ranch in Idaho, located in Section 27, T. 16 S., R. 27 E., BB.&M., be designated as Utah division and all rights below said Hunter Ranch, Idaho division.

"3. That from the beginning of each year, the Utah users shall be permitted to divert all the water of Clear Creek until the time when the flow of said creek measured at the U.S.G.S. gauging station described above, including the water diverted above that point, reaches a daily average of 20 sec. ft. or in excess thereof for two consecutive days. At this stage all the water of said Clear Creek, excepting the primary rights of Ospital and the Naf Irrigation Company, above referred to, shall go to be diverted by the Idaho users having rights prior to 1903. Said Idaho users shall continue to divert all of said water until they have received 560 acre feet, provided that in the event the creek flow at the U.S.G.S. station reaches

"The water of Clear Creek this year, 1934, was handled by a commissioner appointed by the U. S. District Court and was distributed on the basis of the Christensen decree for Utah users and the Dietrich and Cavannah decree for the Idaho users.

"The water supply of Clear Creek for the 1934 season was probably the lowest ever experienced, the peak flow May 8th being 12.75 c.f.s. compared with 120 c.f.s. on June 10, 1933. . . . Losses in a stream of from six to twelve c.f.s. from the U. S. G. S. weir to the school road, 6,000 feet distance, were found to be around 10 per cent and in the same stream in delivery to the Naf ranch diversion at the north boundary of Section 36, a distance of 9500 feet, loss of 30 per cent was encountered. On June 8 and 9 a loss of 54 per cent was observed in making a delivery of 4.5 second feet from the U. S. G. S. station to the Naf Ranch diversion. As a rule, per cent loss was found to be inversely proportionate to stream flow quantity.

"As so heavy a loss was encountered to make delivery to the Naf diversion and with only a peak flow of 12.75 c.f.s. measured at the U. S. G. S. Station, no attempt was made to deliver water to the lower district as it was evident that no stream of beneficial quantity could have been made to reach the irrigated lands in the lower district as an additional 14,760 feet of dry porous channel would have to be traversed from the Naf ranch diversion to the closest irrigated lands of the lower district."

"The top soil of the lower district consists of a fine clay loam beneath which is a very thick bed of clay which accounts for the fact that no so much water is needed on these lower lands to produce heavy crops. Also as a rule, water table is close as shown by the general meadow appearance of these fields. It is claimed by Mr. Matheson, of the Albion-Idaho Land Co. that in normal years more profit is made in the growing of the natural meadow and bunch grasses than if this land were seeded to alfalfa or grain. It is claimed by the lower users that one good thorough irrigation is sufficient to produce a full first and second crop of alfalfa hay or meadow hay. This was demonstrated at the McGill Olson Ranch where 2 good crops of hay were harvested from 1 good irrigation of the land by Raft River water. Although no water was put on

the *Gunnel* place, young alfalfa plants stayed alive and green as late as August."

On January 24, 1935, the court's commissioners filed with it their report containing certain recommendations for a trial period of distribution of the waters of the stream introductory to which recommendation they stated:

"The percentage of conveyance loss can be considerably reduced without depriving either the Utah or Idaho divisions of their rights by distributing the entire flow in Utah while the stream is small and then turning the entire stream when large to Idaho users until their lands are supplied as herein after set out."

For the year 1935 Mr. Humming was appointed by the court's commissioners as their assistant. At the close of his season's work Mr. Humming made a detailed report of his operations concluding with the following:

"Conclusion.

"The waters of Clear Creek were distributed, in conformity with the recommendations of the commissioners to the court, during the irrigation season of 1935 as a trial period. This method seems to be about the best that can be devised to distribute the waters of Clear Creek.

"During the early part of the season the discharge of Clear Creek is small, from 2 to 15 second feet, only a small part reaching the lower division and no part reaching the lower end of the lower division. If all were to go there, it would all be lost, but if used in the upper division the loss would be comparatively small. When the discharge was more than 20 second feet all the water was diverted by the users of the lower division until 560 acre feet had been taken. During this time, the users in the upper division received no waters but this was not so long as to cause the crops to suffer for want of water. After this, both divisions took water at the same time until the total diversion dropped to 36.2 second feet or less, when the user of the lower division again diverted all the water until the discharge was 17 second feet. This also was a short period and caused no water shortage in the upper division. After the discharge had decreased to 17 second feet all the water was diverted by the users of the

bined, and related among the various users in such manner as to deliver to each the total quantity of water which he would receive if distribution were made on a basis of continuous flow. Such combination of rights and flow are matters of practical distribution and should be under the control of the Water Commissioner who is under the jurisdiction of the court. Notwithstanding the rights decreed, users of water should at no time be permitted to divert more water than can be beneficially used and thus the waste of water would be prohibited.

We feel that during the four years in which investigations have been conducted by the undersigned commissioners Clear Creek has exhibited a sufficiently wide range of runoff characteristics and the accumulated distribution data now available are adequate to warrant recommendations for a final division of the water between the Upper and Lower users. We therefore recommend that the court make an order covering the distribution of the water of Clear Creek in accordance with the plan set out above, and we request and recommend that the undersigned commissioners be relieved of further responsibility.

Respectfully submitted,

R. W. FAIRIS,  
Commissioner of Reclamation of Idaho.  
T. H. HUMPHREYS,  
State Engineer of Utah.  
Commissioners.

Dated January 7, 1937.

Thereupon the court gave notice to all parties of a hearing upon the reports of the Commissioners to be held at the court room of the court on January 11, 1937, at 10 o'clock A. M., at which time and place all parties were represented by their counsel. Whereupon the following proceedings took place.

The Court: Gentlemen, we are here today to bring to a conclusion and to a form of decree the case of Albion-Idaho Land Company vs. Naf Irrigation Company and others.

As we all know, we have been experimenting for a number of years in this Clear Creek water flow in an endeavor to arrive at some method of distribution which will be equitable and

(3) That, from the beginning of each year, the Upper users shall be permitted to divert all the water of Clear Creek until the time when the flow of said creek measured at the U. S. G. S. gauging station described above, including the water diverted above that point, reaches for 24 consecutive hours, an average of 20 sec. ft.; at this stage, all the water of said Clear Creek, excepting the primary rights of Ospital and the Naf Irrigation Company, above referred to, shall go to be diverted by the Lower users. Said Lower users shall continue to divert all of said water until they have received 560 acre feet, provided that in the event the creek flow at the U. S. G. S. gauging station recedes to 17 sec. ft. or less before the 560 acre feet is so diverted, the entire flow shall then be diverted by the Upper users. After said Lower users have received 560 acre feet, if the daily average flow continues to exceed 17 sec. ft. the division shall be made on the basis of 43% to the Upper users and 57% to the Lower users, measured at the points of diversion hereinbefore described. This division shall continue until 1000 ac. ft. has been thereby diverted—570 ac. ft. to Lower users and 430 ac. ft. to Upper users, and further continue on this same basis during those periods when the total diversions exceed 36.2 sec. ft., provided that in the event the creek flow at said gauging station reaches 17 sec. ft. or less before the 1000 ac. ft. is diverted then the entire flow shall go to the Upper users.

(4) After the Lower users have diverted 560 ac. ft. and 1000 ac. ft. additional has been diverted by the Upper and Lower users, then during those periods when the total diversions are less than 36.2 sec. feet, and the flow at the U. S. G. S. gauging station is more than 17 sec. ft., all of the flow excepting the Ospital and Naf rights mentioned above, shall go to the Lower users, provided that in the event the Lower users divert the entire flow for a total of 12 days, not including the time in which said 560 ac. ft. was diverted, then the division shall be made 43% to Upper users and 57% to Lower users during the time the creek flow exceeds 17 sec. ft. When the stream flow at the U. S. G. S. gauging station is less than 17 sec ft., the entire flow shall be diverted by the Upper users.

(5) In cases where the quantity of water determined to be due to the various individuals be too small for practical irrigation purposes, such rights as feasible should be com-

diverted, the entire flow shall then be diverted by the Utah users. After said Idaho users have received 560 acre feet and until the sum of all diversions is less than 52.8 sec. ft., the diversion shall be made 43% to the Utah users and 57% to the Idaho users, having rights prior to 1903, measured at the points of diversion, up to a total of 100 sec. ft. All available water, over and above that necessary to supply 100 sec. ft. diversions, shall be subject to use by the Utah and Idaho users with priorities subsequent to 1903.

(4) After the Idaho users will have secured 560 acre feet and the diversions are less than 52.8 sec. ft., the Idaho users shall receive the first 36.2 sec. ft. excepting the Ospital and Naf rights mentioned above, and the Utah users all available above that amount, until the stream flow at the U.S.G.S. gauging station falls below 17 sec. ft., after which all the water shall be diverted by Utah users. Rights, subsequent to 1903, are generally those of the Settler's Land and Water Company, which have, we understand, been abandoned.

(5) That a water commissioner be appointed each irrigation season to divide the water as herein set out or as modified by the court. If at any time the Commissioner finds that the division is such as to deprive the water users of the State of Utah or Idaho of their rights or that the water is not being used beneficially he may, upon proper showing, be given a hearing and a Court Order, making adjustments in the distribution, can be made without delay.

(6) That in cases where the quantity of water determined to be due to the various individuals be too small for practical irrigation purposes, such rights as feasible be combined, and rotated among the various users in such manner as to deliver to each the total quantity of water which he would receive if distribution were made on a basis of continuous flow. Such combination of rights and flow are matters of practical distribution and should be under the control of the Water Commissioner who is under the jurisdiction of the court. Notwithstanding the rights decreed, users of water should at no time be permitted to divert more water than can be beneficially used and thus the waste of water would be prohibited.

(7) That in order to protect the prior rights to the use of the water of Clear Creek the Water Commissioner should

not only divide the water between the Utah and Idaho users as above recommended, but should see that the priorities of all claimants are satisfied and should distribute the waters of the stream among the various parties according to their priorities and rights as they may be ascertained from the existing decrees.

(8) That this recommended division be only temporary until more information is available and the above recommended division has been tried out."

On May 24, I reported to the Commissioners that the sum of all diversions to date was 2262 acre feet; of which the Upper Division had absorbed 548 acre feet and the Lower Division 1714 acre feet, i. e., 24% by the users of the Upper division and 76% by the users of the Lower division.

From the 25th of April to the 24th day of May, all of the waters of Clear Creek have been diverted by the users of the Lower division, in conformity with the Order of the Court, and so long as the flow of Clear Creek is 36.2 sec. ft. or less and more than 17 sec. ft. all the flow of said creek will continue to go to the users of the Lower division. The users of the Upper division began making complaints about their crops burning.

On the 26th day of May, I recommended, at the request of the Commissioners, that the waters of Clear Creek be distributed henceforth 43% to the Upper division and 57% to the Lower division until the flow of the said creek receded to 17 sec. ft., or less, after which time the entire flow will be diverted by the users of the Upper division.

This recommendation was approved and I was directed henceforth to distribute the waters of said creek as recommended, which was done.

#### DECREES.

Tabulations have been prepared to show the names of the owners, date of priorities, amount of water awarded and acreage to which the awards apply, set up according to the priorities as given in the decrees heretofore mentioned.

In the tabulation of the Christensen decree, the awards to Philip Ospital from Italian Creek, a tributary of Clear Creek,

watered areas was burned beyond recovery and the areas planted to grain were suffering badly. On the other hand the Lower Users had received sufficient water for 3 heavy applications, which is in excess of actual needs.

This situation was presented to the court May 29. The commissioners were instructed to modify the plan of distribution to meet the existing conditions and make equitable distribution of the available water, whereupon, beginning with June 1, division was made on a basis of the acreages entitled to water,—43% to the Upper Users and 57% to the Lower Users. This continued until June 20 when the total flow, being less than 17 sec. ft. was, according to Recommendation No. 3, turned to the Upper Users. From April 1 to August 15,—the irrigation season, there was a total of 4647 ac. ft. diverted from Clear Creek, of which 36.5% was used by the Upper Users and 63.5% by the Lower Users.

The inequality of division of the water under the plan recommended arose from the fact that the runoff of Clear Creek in 1936 began almost a month earlier than in previous years of record and because of intermittent periods of cold weather, the stream flow ranged between 20 and 50 sec. ft. for seven weeks, and raised above 50 sec. ft. for only 9 days, while in other years of record it remained above 50 sec. ft. for a longer period than it remained between 20 and 50 sec. ft.

To meet these varying conditions of stream discharge, therefore, we recommend modifications in paragraphs 3 and 4 of the plan recommended in our report to the court of February 20, 1936; otherwise, the general plan therein outlined should remain the same. Due to excessive seepage loss in stream bed when carrying small streams to the Lower division, the entire flow should be used by the Upper division when it is less than 20 sec. ft. As soon, however, as the stream exceeds 20 sec. ft., the lower users should be given one water application requiring 560 acre ft. At this stage, the Lower Users will have just completed one good application of water so the creek flow should be divided between the Upper and Lower divisions in proportion to acreage irrigated, (43%-57%). This distribution should continue until both divisions will have received sufficient for a complete application which will require 1000 ac. ft. Then, if the creek flow continues at high stage, the stream should continue to be divided between the Upper and Lower divisions on the

court. On April 23, however, since the flow had exceeded 30 sec. ft. for more than two consecutive days,—April 23 and 24, it was, under Recommendation No. 3, turned to, and used by the Lower division until May 8, when they had received 560 ac. ft., which was one good application; however, by Recommendation No. 3, they continued to use the entire flow until May 12, which amounted to an additional 276 ac. ft. On May 12 the stream exceeded 36.2 sec. ft., whereupon, under Recommendation No. 4, the excess over and above 36.2 sec. ft. was turned to the Upper users who had thus been 17 days, —April 25 to May 12, without water. (This admittedly is too long a period for crop production on the soils there obtaining.) From May 12 to 22 the Upper users, by Recommendation No. 4, received that part of the flow of the stream in excess of 36.2 sec. ft., amounting to 250 ac. ft. (which was insufficient for one application for the lands in the Upper division with rights prior to 1903), while the Lower division received an additional 704 ac. ft. A peak flow of 75 sec. ft. was reached on May 14 and continued throughout May 15. Of that flow, however, 15 sec. ft. were lost in transit. At no time during the month did the flow reach or exceed 100 sec. ft. No water, therefore, was supplied to the rights subsequent to 1903, under Recommendation No. 3. On May 22, the stream fell below 36.2 sec. ft., and according to Recommendation No. 4, the entire flow was again turned to the Lower users who received an additional 415 ac. ft. from May 22 to 30, while the Upper users were without water.

Before the end of May, it became evident that the discharge of the creek was quite unlike that of any of the former years of record. It also appeared from Mr. Hamming's weekly reports that the plan of distribution for 1936 which was recommended by us and adopted by the court and which was being followed, did not take into account such an unusual runoff as was occurring. As a consequence, therefore, the Upper users were not receiving an equitable proportion of the stream flow, nor that which was intended when the plan of distribution was recommended.

From investigations made May 20 it was very evident that the Upper Users, with 43% of the lands, had received less than 25% of the water to that date; also that from 25% to 35% of the area had received during the season no water whatsoever. As a result, therefore, the first-crop hay on the un-



shows 17 feet at the gauging station. I do not believe there would be any material conflict. As I remember Mr. Hamming recommended 15 second feet at the Albion weir which I think on the average would not be particularly different from 17 feet at the gauging station.

Examined by Mr. Bissell, the witness testified:

As I recall the land acreages there were 860 for the upper division as against 1120 in the lower division as measured by Lawrence. That was verified by Gardner. I do not think Mr. Hamming has changed that any. The ratio adopted by us for dividing the stream when it is divided is 43 to 57. The acreages of 976 acres for the upper division and 1810 for the lower division are taken from decrees but the ratio of land as found by Mr. Lawrence's measurement was 864 for the upper division against 1120 for the lower division. The ratio is 43% to 57%. Mr. Hamming recommended that we take the decree division but the commissioners felt there was no relation between those decrees and as no one had shown any errors in our figures as to relative acreages we stayed by our findings. In his last report Mr. Hamming recommended a division of 35% to the upper division and 65% to the lower division based on old decrees but the division was never made on that basis during the time we conducted the experiments. We had no record of how the figures in the old decrees were arrived at and did not adopt his suggestions. Taking into consideration the cultivated acreage in each of the states and the amount of water decreed prior to 1903, I would say that 35% to the upper division and 65% to the lower division as recommended would not be disadvantageous or inequitable to the lower users. We studied that point very carefully. Lawrence's first report divides the acreage 860 and some acres to 1120. That is the basis upon which we divided the waters during stages when the flow was divided between the two divisions. Mr. Lawrence was the first deputy we had up there. The first thing he did was to make a survey of the lands on the upper and the lower sections under cultivation. He found in the upper section 842.4 acres and in the lower 1120 acres. None of the succeeding commissioners made any further determination of the acreage. Mr. Hamming did not make a survey. But in his 1935 report he did confirm the others. The only change we made in 1936 was that after the lower division had received to 560 acre feet it is divided on the 43-57

basis until a thousand more feet had been delivered to the two divisions. Then it all goes to Idaho again until the flow falls to 17 second feet at the gauging station. During all the years we have experimented with the stream the water has been used in the upper division until a flow of 20 second feet was reached. When we were dividing the water between the upper and the lower divisions on the basis of 43% to the upper and 57% to the lower we measured the water for the lower division at the Albion-Idaho weir which is about half a mile below the Utah-Idaho line. The only change made under the order of the court in 1936 was to shorten the period during which the upper division could be deprived of any water. That was because in prior years the stream had risen gradually so that the upper division got a watering before the whole stream was turned down to the lower division whereas in 1936 it rose so rapidly that the 20-foot stage was reached before the upper division had had a full watering. After the first little flash we had a long cold spring. All the water was going to the lower users between the flow of 52 second feet and 36 second feet. That was the very point about which we expressed some hesitancy about adopting our 1935 recommendations as final. That is why the court asked for another year for experiment. I think we have now experienced the worst variations this stream will show and our recommendation is flexible enough to meet any condition which will probably arise.

The Court: A decree once made is iron bound and inflexible. It ought to have enough flexibility to protect the parties for whom it was made. The truth is, as we know in Utah, the decrees made by the courts back in the 90s and 1900s, the court undertook to fix things on the basis of uniformity when there is no uniformity in the flow of a stream. That is the reason I have been anxious, if possible, to work out some sort of flexibility that would meet the situation that might arise, and be fair and just to the parties. You cannot do it by writing a decree and saying one person is entitled to so much water as a uniform flow. The courts did not know what they were talking about when they began doing that—did not stop to consider a stream like Ogden River having several hundred feet of water flowing in it in the early spring and before the summer is over barely enough for one irrigation.

It seems to me, gentlemen, in this case these men, one of

April 1st to May 24th.....All to Upper Division  
 May 24th to June 4th.....All to Lower Division  
 June 4th to June 20th.....43% to Upper Division  
 and 57% to Lower Division, up to 100 second feet.  
 For about 7 days, there was a flow in excess of 100 second feet, which excess went to rights subsequent to 1903.

June 20th to June 25th.....36.2 second feet to Lower, and balance Upper Division.  
 June 25th to July 5th.....All to Lower Division  
 July 5th and thereafter.....All to Upper Division

"Between May 24th and June 4th, the rights prior to 1903 in the lower division received the 560 acre feet provided for in paragraph 3 of the recommendations referred to above. At the time the 560 acre feet had been delivered, the stream had not yet reached its maximum discharge for the season. The stream flow remained above 100 second feet for only 8 days so rights subsequent to 1903 received water for only 8 days during the season and the maximum amount available for them on any day was only 12 second feet. During the entire period of June 4th to June 20th, when the water was being divided 43% to the Upper Division and 57% to the Lower Division, all rights prior to 1903 in both the Upper and Lower Divisions were receiving a larger flow than that specified in the decrees and during about 8 days of the 17, were receiving approximately 190% of the amount called for by their decrees. These amounts may be somewhat more than were necessary for an adequate supply but not sufficient data are available to warrant a recommendation to change the quantities.

"A fear on the part of some Upper Division users that they might be without water for an injuriously long period between the time when the water is all turned to the Lower Division and when it is turned back in accordance with the proposed distribution plan, does not seem to be well founded. It appears to be mutually agreed that a period of 14 days without water at that particular time of the year will not materially injure the upper division, but that if the period extends materially beyond 14 days for any user, his crops would burn to such an extent that application of water at a later date would not restore them. From a study of the hydrographs of the stream, it appears highly improbable that the flow would ever come in such a manner as to deprive the Upper Division

average flow during the low period, is less in a year like 1934, than in more nearly normal years, yet the most pronounced difference between years of small and years of large discharge seems to be in the duration of the high period.

"At the beginning of the 1935 season, the water table was undoubtedly excessively depleted due to the extreme water shortage for 1934. The conditions of the water table probably did not approach normal at any time during the 1934 irrigation season. It was found that the height of the water table varies with the stream flow; that the ground water from the upper division tends to flow northeasterly, away from the stream and toward Round Mountain Creek, before it returns to the irrigated tracts below; that the ground water which reaches the territory between the upper and lower division seems to flow northerly to the meadows of the Albion-Idaho and Company tracts; and that, under conditions existing during the past three years, the ground water does not reach sufficient height to be of material benefit for sub-irrigation. It seems quite probable that in a series of normal stream flow years, the ground water would be replenished to such an extent as to provide some sub-irrigation on the lands of the lower division.

"Measurements made during 1935 tend to substantiate previous conclusions that channel losses in the natural stream bed are very high. As a whole, it would appear that 1935 losses were lower than in either 1933 or 1934. This, probably, is partially due to the improved methods of operation used in 1935, and to the increased stream flow over that of 1934. The loss in the section between the upper and lower division was again found to be so high as to make it impractical to attempt to deliver water to the lower division when the stream flow is less than 17 second feet.

"Distribution of the available water during the 1935 irrigation season was made as directed by the court, in conformity with the recommendations contained in our 1934 report and according to the priorities established by the Christensen Decree, applying to the upper or Utah Division, and the Dietrich and Cavanah Decree, applying to the lower, or Idaho Division. Under this plan, the distribution between the two divisions, with dates, was as follows:

son, it did not operate so well. In fact, a change in the order for the distribution of the waters of Clear Creek proved necessary and was made and put into effect on the 31st day of May to avoid the complete destruction of the crops of the users of the Upper division for want of irrigation water.

It so happened that the flow of Clear Creek increased sufficiently at the same time to give the users of the Upper division more water than the new order gave them had the flow not increased and this did not deprive the users of the Lower division of the water because of the new order until the flow again decreased to 36.2 sec. ft. or less.

After the flow of Clear Creek had receded to less than 52.8 sec. ft., the division of the water continued on a 43% to the Utah division and 57% to the Idaho division basis until the flow receded to 17 sec. ft. and less when the entire flow was distributed among the users of the Upper division. This operated quite satisfactorily, except perhaps to the users of the Lower division.

Of the total quantity of water diverted from April 10 to July 2, the Upper division received 31.8% and the Lower division 68.2%, showing that the users of the Lower Division received more than their share as recommended to the court, viz., 57%.

The ratio of 43% to 57% to the users of the Upper and Lower divisions respectively, having rights prior to 1903 is based on the number of acres irrigated by each division as determined and reported in the 1933 report by the then Assistant Commissioner and this ratio has been used since.

The true ratio, however, should be founded on the existing decrees, which is found to be, when based on the acreage to which the water has been decreed, as 45% to 55%; when based on the quantity of water awarded, 31% to 69%. Now, striking an average, we get 33% to 67%, or practically 1 to 2, and this ratio should be adopted for future calculations inasmuch as it conforms to the decrees.

The above ratios do not apply to, or include, the rights subsequent to 1903.

The total quantity of water awarded to the users in both divisions, having rights prior to 1903 is 52.46 sec. ft., not including Ospital's rights from Italian Creek.

All the flow, over and above 52.46 sec. ft., (the sum of all diversions), should go to the users holding rights subsequent to 1903, up to the limit of their awards and the remainder, if any, should be proportioned between all users in proportion to their respective rights.

An attempt was made to make some improvements last spring. Some brush was removed from the East Channel and a few diversion headgates and weirs were installed, but, owing to the early rise of Clear Creek, this work was discontinued. All such work should be done after the irrigation season. The time available in the spring is too short to accomplish much.

It has been suggested that a concrete ditch be constructed to carry the waters of Clear Creek to the users, thereby saving the loss that now obtains.

Such ditch should be large enough to carry all the water awarded to the users holding rights prior to 1903, i. e., 52.46 sec. ft., and should extend to the North boundary of Section 36, T. 15 N., R. 13. W., S. 1. M., thence its section can be reduced to carry 36.2 sec. ft. to a point near the center of Section 15, T. 16 S., R. 27 E., B. M. The length of the first section would be 1 1/4 miles and the second section 2 3/4 miles long.

Such ditch will carry all the water now flowing through the East Channel and the size required for such ditch on the available grade, viz., 3% or 158.4 ft. per mile is 3 ft. bottom, side slopes 1:1 and 1.5 ft. deep, allowing a reasonable depth for free-board. Such ditch will require 708 cu. yds. of concrete per mile and the cost will probably be about \$18,000 per mile.

The total losses during the 1935 and 1936 seasons average about 755 acre feet per season. Not all of this can be saved by the said concrete ditch as there will always be more losses. Perhaps not over 75% or about 566 acre feet, may be gained by such ditch. The cost will then be nearly \$32.00 per mile per acre feet.

If such ditch was constructed, then there would be no good reason why the water of said creek could not be distributed according to the priorities and quantities fixed in the combined decrees applying to both divisions, as herein set up in tabulated form (Table II).

MEMORANDUM

L. E: 24-Aug-1994

FROM: Allen Merritt

TO: Norm Young, Dave Shaw

SUBJECT: Field Visit to Clear Creek & Discussions with Watermaster

*Rec'd at  
Kerr's 8-24-94*

On Aug 22, 1994 Frank Hitchcock and I met with Vern Kempton the Clear Creek Watermaster. Also at the meeting was Larry Kempton, Vern's father and Mont Campbell, Secretary of the Naff Irrigation Co. We met at Vern's residence in Utah in the Clear Creek drainage. Prior to the meeting Frank and/or Frank had reviewed all the Idaho Clear Creek claims for the various parties in Idaho. I had also had an opportunity to become familiar with the Naff Decree which directs the splitting of the water between Utah & Idaho.

At the meeting I explained that our purpose of meeting was to aid us in understanding how water was delivered from Clear Creek so that we can utilize this in reviewing the SRBA Claims filed by the Idaho waterusers and also to gain information which may be used to resolve the dispute between Sessions & Jones.

They explained that Vern was relatively new to the job of watermaster on the creek. A Mr. Sundgren (maybe Sundberg) had been watermaster for almost 30 years but he had died two years ago. I asked Vern to explain how he measured the water and how he determines when to turn the water between Utah & Idaho. Vern indicated that the gauge specified in the Naff decree was washed out years ago and that he measures the water thru the Utah users' Cipolletti Weirs (Company Weirs) and when they add up to more than 20 cfs Idaho gets turned water. He indicated that Idaho then gets water until the water drops back to 17 cfs measured at the Idaho Weir (The weir on Ray Jones' Naff Ranch). I asked if any Idaho Water is diverted in Utah and he said no. He said all of Jones' water diverted in Utah was part of the Utah division. He indicated that all the water he delivers goes thru (Company Weirs). I asked if they had historical records for the delivery and he showed us how the water was turned this year. (We copied this info) They indicated that Sundgren had all the records and some were lost in a fire and the others if any were with Mrs. Sundgren.

We discussed with Mont what Idaho users had filed claims in the SRBA and we discovered that some users have not claimed what the watermaster over the years has delivered. We noted in the copy of the decree what rights have not been claimed. Two of note include a right for Holmgren (probably just missed) and then the water for around the Naff Store (Fredericksen) which was not claimed. They indicated that the Gunnell rights had not been used for 30 years and if Stewart (new owner) filed claims they wanted to object. We explained that people could file late claims and we really couldn't stop them.

We also discussed with Mont how the Utah Division water was split up. He indicated that in Utah the rights are mixed between privately held and Naff Irrigation Company rights. He allowed us to copy how this is split up which I have reduced to the attached spreadsheet. In essence

000016

D. 2: 24-Aug-1994

MEMORANDUM

the Company has two types of stock delivery depending on the time of year. These two types of stock were created in an effort to compensate delivery of lower flows down the losing creek to the lower user (Ray Jones). It is my understanding that the creek is rotated based on the  $\frac{2}{3}$  of the whole creek.

During our discussion I expressed my concern that the water measurement locations now used for determining when to turn water to Idaho may be shorting Idaho's time with water since the measurements are made downstream from the decreed gauge site on a stream with acknowledged large losses. After our meeting we visited the site of the USGS gage and it was found to be washed out. We also visited the (Company weir) approx. 300' downstream of the old USGS gauge which has a channel opening of 11' wide and they discussed the possibility of somehow modifying this structure to enable measurements being taken at this location. It appears to me that measurement as close to the old gauge site should be encouraged or required to fulfill the intent of the decree. I do not believe that shifting the site down 300' would make much difference. I suggested that they look into maybe a ramped weir and suggested they contact the Dept of Agri Research Center or U of I to find out more information. They talked more along the lines of building a board to form a Cipolletti weir on the concrete structure. I encouraged them to start to measure near the old USGS as close as possible to be fair.

CLEAR CREEK UTAH DIVISION

A" STOCK ... AFTER FIRST OF JULY UNTIL THE LAST DAY OF FEBRUARY

OWNER	CFS IN COMPANY	% IN CO.	CFS OUT OF COMPANY	TOTAL CFS	% OF STREAM
HAROLD JONES	5.83	50.04%	0	5.83	35.83%
DUANE CAMPBELL	2.28	19.57%	0.16	2.44	15.00%
LARRY KEMPTON	1.2	10.30%	0.38	1.58	9.71%
MONT CAMPBELL	1.03	8.84%	1.2	2.23	13.71%
HALL/DUANE CAMPBELL	0.62	5.32%	0	0.62	3.81%
SAM OSPITAL	0.38	3.26%	0	0.38	2.34%
HYRUM CAMPBELL	0.31	2.66%	0.58	0.89	5.47%
GUY SUNDBERG	0	0.00%	1.8	1.8	11.06%
PHILIP OSPITAL	0	0.00%	0.5	0.5	3.07%
TOTAL	11.65	100.00%	4.62	16.27	100.00%

SCOFFIELD  
JENSEN  
JC OFFICE

B" STOCK ... MARCH FIRST TO JULY FIRST

OWNER	CFS IN COMPANY	% IN CO.	CFS OUT OF COMPANY	TOTAL CFS	% OF STREAM
HAROLD JONES	3.89	33.36%	0	3.89	23.89%
DUANE CAMPBELL	3.04	26.07%	0.16	3.2	19.66%
LARRY KEMPTON	1.6	13.72%	0.38	1.98	12.16%
MONT CAMPBELL	1.37	11.75%	1.2	2.57	15.79%
HALL/DUANE CAMPBELL	0.84	7.20%	0	0.84	5.16%
SAM OSPITAL	0.5	4.29%	0	0.5	3.07%
HYRUM CAMPBELL	0.42	3.60%	0.58	1	6.14%
GUY SUNDBERG	0	0.00%	1.8	1.8	11.06%
PHILIP OSPITAL	0	0.00%	0.5	0.5	3.07%
TOTAL	11.66	100.00%	4.62	16.28	100.00%

SCOFFIELD  
JENSEN  
SCOFFIELD

pressure, measured in a box 16½ feet long with ¾ of an inch fall to a rod at the head of his ditch, the same being about 70 rods south from the Utah and Idaho State line during the irrigating season beginning about the 15th day of April of each and every year for the purpose of irrigating the real estate described in the answer and cross-complaint as the property of the said John Naf and shall have the right to the use of the said 100 miners inches up to and including the high water season of Clear Creek until July 1st of each and every season and that during said time said right is superior to any other right to the use of water of Clear Creek except the right hereinbefore set out and decreed to Sweetser Bros. & Pierce.

3rd. That the defendants Heleman Campbell and S. E. Baker are entitled to have 100 miners inches of the waters of Clear Creek under a 4 inch pressure measured in a box or boxes 16½ feet long with ¾ of an inch fall to a rod at the head of his ditch or ditches on Clear Creek beginning with the beginning of the irrigation season about the 15th day of April of each and every year for the use for the purpose of irrigating the property described in the answer and cross-complaint as the property of the said Heleman Campbell and S. E. Baker and other property and shall have the right to the use of the said 100 miners inches up to and including the high water season of Clear Creek until July 1st of each and every season; that the said right during the said time is superior to any other right to the use of waters of Clear Creek except those of plaintiffs and of the defendant John Naf hereinbefore set out. In the event that there should be only 800 inches of water then the said Baker and Campbell shall equally divide said 100 inches Campbell and Baker taking 50 inches and O. L. Ryan taking 50 inches.

4th. That the defendant O. L. Ryan is entitled to have 100 miners inches of the waters of Clear Creek under a 4-inch pressure measured in a box 16½ feet long with ¾ of an inch fall to a rod at the head of his ditch or ditches on Clear Creek beginning with the beginning of the irrigation season, about the 15th day of April of each and every year for use for the purpose of irrigating the property described in the answer and cross-complaint as belonging to said O. L. Ryan and shall have the right to the use of the said 100 miners inches up to and including the high water season of Clear Creek until July 1st of each and every season and that the said right

during the said time is superior to any other right to the use of water of Clear Creek except those of the plaintiffs and of the defendants John Naf, Heleman Campbell and S. E. Baker hereinbefore set out.

5th. That defendant Mrs. S. J. Ryan, having filed a disclaimer in this action, disclaiming any right to the use of the waters of Clear Creek, is not entitled to the use of any of its waters.

6th. That the plaintiffs John Sweetser and James Pierce as surviving partners subject only to the rights hereinbefore decreed are entitled to have 840 miners inches of the waters of Clear Creek under a 4-inch pressure measured in a box 16½ feet long with ¾ of an inch fall to the rod at their head-gates at the south end of their field in Idaho on said Clear Creek beginning with the beginning of the irrigation season about the 15th day of April of each and every year for use for the purpose of irrigating the real estate of Sweetser Bros. & Pierce and shall have the right to the use of the said 840 miners inches up to and including the high water season of Clear Creek until July 1st of each and every season; that the said right during said time is superior to any other right except those hereinbefore set out to the use of water of Clear Creek.

7th. That the plaintiffs John Sweetser and James Pierce as surviving partners shall be entitled during each and every year from July 1st until April 15th to the use of ½ of the waters flowing in Clear Creek on their land as described in the complaint for irrigation, domestic, culinary and stock purposes, superior to any other right.

8th. That the defendants Heleman Campbell, S. E. Baker, O. L. Ryan and John Naf, subject to the provisions hereinbefore decreed shall be entitled during each and every year from July 1st to Oct. 1st, for irrigation, domestic, culinary and stock purposes of one-half of the waters of Clear Creek, the same to be divided between them as follows:

a. That beginning on the 2nd day of July of each and every year that the said John Naf shall be entitled to the use of all of the said one-half of the said Clear Creek for a period of 4 days of 24 hours each;

b. That after the said John Naf has used the water for said 4 days, the said defendants Heleman Campbell and S.

E. Baker shall be entitled to the use of all of said water, being the one-half of the said Clear Creek for the period of two days of 24 hours each;

c. That after the said Helmann Campbell and S. E. Baker, the defendant O. L. Ryan shall be entitled to the use of said water, being one-half of the waters of Clear Creek for a period of 2 days of 24 hours each;

d. That said use shall continue in rotation as herein set out during the period of time from July 1st to Oct. 1st of each and every year.

9th. That in order to properly divide the waters of Clear Creek from July 1st and give to the plaintiffs their proportion thereof as hereinbefore provided for, a sufficient box shall be constructed and placed in the head of the plaintiffs' ditch near the defendant John Naf's property and the half of the said stream shall be there measured out to plaintiffs by the said John Naf.

That each of the parties to this action, their servants, agents, attorneys or others connected with them or acting for them shall be and hereby are perpetually enjoined from taking any of the waters of said Clear Creek except as herein provided for until after all of the said parties receives or has the opportunity to receive the quantity of water during the times allowed them by this decree.

That each of said parties is required to construct and maintain a box for the measurement of his quantity of water such as is hereinbefore described.

Each party to pay his own costs, the costs of this court, and of its officers to be divided equally between the plaintiffs on the one hand and the defendants jointly on the other.

Done in open court this 11th day of July, A. D. 1901.

CHAS. H. HART, Judge.

Whereupon plaintiff offered in evidence as Ex. K the decree of the District Court of Box Elder County, Utah, in the case of Naf Irrigation Company vs. Campbell, et al, to the admission of which the defendants objected as incompetent and immaterial, and upon the ground that the same was not valid, and that none of the plaintiffs or interveners were par-

ties. Exception noted and decree admitted as Ex. K, which decree is in words and figures as follows:

"Naf Irrigation Company, a corporation, Plaintiff, vs. Irvin Campbell, D. R. Kempton, Lorin Kempton, A. E. Hart-sough, and Sophia J. Ryan, Defendants.

Decree.

This cause having come on regularly for trial in open court on the 14th day of August, A. D. 1917, before the Honorable George Christensen, acting Judge, sitting without a jury, Messrs. Nebeker, Thatcher & Bowen appearing as counsel for the plaintiff, Naf Irrigation Company and Thurman, Wedgwood & Irvine appearing as attorneys for Irvin Campbell, D. R. Kempton, Lorin Kempton and Philip Ospital, the last named party having been entered as a defendant by stipulation during the progress of the trial, and George Hal-erson Esq., appearing as attorney for defendant A. E. Hart-sough and Sophia J. Ryan and Levi T. Campbell, who was entered as a party defendant by stipulation, during the progress of the trial.

Testimony on behalf of the plaintiff was heard from witnesses introduced in its behalf, and documentary evidence in its behalf was offered and received.

Witnesses on behalf of the defendants were also called and sworn and examined in behalf of said defendants offering the same, and also documentary evidence was offered and received in their behalf, respectively.

And after examining all the testimony offered and received for and on behalf of the respective parties, and the stipulations entered into between the said parties, and after hearing the arguments of the respective counsel, aforesaid, the court took said cause under consideration, and after having duly considered the law and the evidence, and being fully advised in the premises, the court made its Findings of Fact and Conclusions of Law, which are filed herein in writing and ordered judgment to be entered in said cause in accordance with said findings and conclusions;

Wherefore, it is Ordered, Adjudged and Decreed as follows:

1. That the parties hereto, both plaintiff and defendants, are entitled to the use of all of the waters of Clear Creek and



ARTICLES OF INCORPORATION

Of The

MAF IRRIGATION COMPANY.

--oOo--

KNOW ALL MEN BY THESE PRESENTS: That we, the undersigned, a majority of whom are residents of the State of Utah, do hereby associate ourselves together for the purpose of forming a corporation under the laws of the State of Utah and for that purpose do adopt the following charter and Articles of Agreement, to-wit:

I.

NAME OF CORPORATION.

The name of this corporation shall be the MAF IRRIGATION COMPANY.

II.

WHERE ORGANIZED.

This corporation is organized at Maf, Box Elder County, State of Utah.

III.

TIME OF DURATION.

This corporation shall continue in existence for the period of one hundred years.

IV.

PURSUIT AND BUSINESS.

The business and pursuit of this corporation shall be to own, develop and operate the property, privileges and rights hereinafter described and referred to; and to acquire, own, hold, lease, buy, sell and regulate, control and dispose of water for irrigation, culinary, household and stock watering purposes;

To construct, conduct, own, hold, lease, buy, sell, maintain and operate water ditches, canals, reservoirs, artesian wells, and all other instrumentalities for the storage, distribution, control and use of water for all useful purposes;

And the corporation may acquire, lease, own, hold, sell and dispose of all such real and personal property as may be necessary or convenient to to carry into effect or accomplish the purposes of this corporation.

And in general this corporation shall have power to do all things that a natural person might, could or would do for the purpose of carrying on the pursuit and business herein mentioned and for the benefit and development of the same.

The waters belonging to this corporation shall be delivered exclusively to stockholders, and shall be distributed to the persons entitled thereto at the point of intersection of stockholders ditches with the natural channel of Clear Creek, Box Elder County, Utah.

V.

PLACE OF BUSINESS

The place of the general business of the corporation is Maf, Box Elder County, State of Utah.

VI.  
CAPITAL STOCK.

The amount of the capital stock of this corporation shall be ten thousand (\$10,000.00) Dollars, which shall consist of Three Thousand Five Hundred shares of Class "A" stock of the par value of One (\$1.00) Dollar per share, and Six Thousand Five Hundred shares of Class "B" stock of the par value of one (\$1.00) Dollar per share.

The stockholders owning class "A" stock shall be entitled to all of the water belonging to the corporation from and including the 1st. day of July until the 1st. day of March of each and every year.

The stockholders owning class "B" stock shall be entitled to all of the water belonging to the corporation from and including the 1st day of March until and including the last day of June of each and every year. In all other respects the two classes of stock shall be equal, and the privileges, conditions and burdens attaching to one class shall attach to the other class.

VII.  
INCORPORATORS

The following are the names of the incorporators and their places of residence, together with the amount of stock and class of stock each party has subscribed:

NAME.	RESIDENCE	AMOUNT OF STOCK SUBSCRIBED IN SHARES	
		Class "A"	Class "B"
J. B. Brown	Naf,	1000	1500
Helaman Campbell	"	375	1125
William Nyatt	Wellsville,	250	750
James Campbell	Naf,	187	563
Dr-Kempton	"		
Dr-R-Kempton	"		
Dr-T-Campbell	"		
Irving-Campbell	"	187	563
Walter Campbell	"		

VIII.  
OFFICERS AND QUALIFICATIONS.

The number and kind of officers of the corporation is; A Board of three directors a President, a Vice-President, a Secretary and Treasurer; their qualification shall be to own at least five shares of either class of the capital stock of the corporation their terms of office shall be for one year and until their successors shall be elected and qualified. The Board of directors shall be elected at the annual meeting of the stockholders. The president and Vice-President shall be elected by the Board of Directors from among their own members. The Secretary and Treasurer shall be elected by the Board of Directors and he may or may not be a member of the Board. Any officer may resign his office by giving the Board of Directors thirty days written notice thereof, but the same may be accepted upon shorter notice. Any officer, excepting director, may be removed from office by a vote of two-thirds of the Board of Directors.

Every officer of this corporation shall qualify as required by law within thirty days after his election or appointment and in the event of a failure to so qualify the Board of Directors may declare the office vacant. The Board of Directors may by appointment, fill any vacancy that may occur by resignation or otherwise.

IX.  
OFFICERS FOR FIRST YEAR.

The names of the officers to serve until the first election are:

William Wyatt  
J. B. Brown  
Helaman Campbell

President and Director.  
Vice-President and Director  
Secretary and Treasurer & Director  
Director.

X.

That a majority of the Board of Directors shall be necessary to form a quorum and be authorized to transact the business and exercise the corporate powers of the corporation. The Board of Directors shall enact by-laws regulating the business of the corporation.

XI.

That the annual meeting of the stockholders of the corporation shall be held on the first Monday of February in each year at Two o'clock p.m. at the office of the corporation in Kef, Box Elder County, Utah, for the election of directors, the hearing of reports of the officers of the business transacted during the preceding year ending December 31st. and the transaction of such other business as shall lawfully come before it. The directors shall be elected by ballot and the person receiving a majority of the votes cast at such meeting, shall be held and declared to be elected. Each stockholder shall be entitled to as many votes as he holds shares of either class of the capital stock and representation by proxy duly appointed in writing and filed with the Secretary of the meeting prior to the counting of the vote, shall be allowed at all meetings of the stockholders, either general or special.

XII.

The private property of the stockholders of the corporation shall not be liable for its obligations.

XIII.

Notice of all special stockholders' meetings shall be given by mailing, with the postage prepaid, a notice thereof at least ten days before the date of meeting to each stockholder at his Post Office address as shown by the books of the corporation, which notice shall state the time, place and object of the meeting. Special meetings of the stockholders may be called at any time and for any purpose relative to the business of the corporation by the President or Vice-President and any three directors or by stockholders representing at least one-third of either class of the outstanding capital stock of the corporation.

Notice of the annual meeting of the stockholders shall be given in like manner as notice of special stockholders' meeting, except that the notice of the annual meeting need not specify the object of the meeting, except to state that it is an annual meeting.

XIV.

The capital stock of the corporation shall be assessable for the purpose of paying the expense of maintaining, operating and improving the property of the corporation.

XV.

Six Thousand Five Hundred shares of the capital stock of this corporation is fully paid for by the transfer to this corporation of the following property; consisting of water rights in Clear Creek, situated in Box Elder County, Utah, near Naf, Utah, , and this corporation accepts the said water rights in full payment of the said capital stock, and the incorporators whose names are hereinafter subscribed hereby grant, bargain and sell out all of their right, title and interest in and to the following described property to the said corporation. The said property hereinbefore mentioned is described as follows, to-wit: All of the right, title and interest owned or possessed by the persons whose names are subscribed to these Articles of Incorporation in and to the waters of Clear Creek in Box Elder County, State of Utah.

IN WITNESS WHEREOF, the above named incorporators have hereunto set and subscribed their names this 19th day of July, A.D., 1911.

William Wyatt  
J. B. Brown  
Heleman Campbell  
Walter Campbell  
James A. Campbell

STATE OF UTAH, )  
County of Cache ) ss.

William Wyatt, being first duly sworn, deposes and says; That he is one of the incorporators of the NAF IRRIGATION COMPANY, and one of the signers of the foregoing articles of incorporation; that it is his bona fide intention and the bona fide intention of the other incorporators and of the said corporation to commence and carry on the business mentioned in said agreement; that he verily believes that each party to said agreement is able to pay and will pay the amount of stock subscribed for by him; that at least ten per cent of the stock subscribed by each stockholder and not less than ten per cent of the capital stock of the corporation has been paid in by the property taken by the corporation of the several stockholders mentioned; that the undersigned is acquainted with said property and that it is reasonably worth the amount in cash for which it was accepted by said corporation, to-wit, the sum of six thousand five hundred (\$6,500.00) Dollars.

William Wyatt

Subscribed and sworn to before me this 29th day of August, A. D., 1911.

(Notary Public Seal)

Horace G. Nebeker, Notary Public  
My Commission expires Jan 5th, 1915

STATE OF IDAHO, )  
County of Cassia. ) ss.

Heleman Campbell and J. B. Brown being first duly sworn, each for himself deposes and says: That he is one of the incorporators of the NAF IRRIGATION COMPANY, and one of the signers of the foregoing Articles of Incorporation; that it is his bona fide intention and the bona fide intention of the other incorporators and of the said corporation to commence and carry on the business mentioned in said agreement; that he verily believes that each party to said agreement is able to pay and will pay the amount of stock subscribed for by him. That at least ten per cent of the stock subscribed by each stockholder and not less than ten per cent of the capital stock of the corporation has been paid in by the property taken by the corporation of the several stockholders mentioned; that the undersigned are acquainted with said property and that it is reasonably worth the amount in cash for which it was accepted by the said corporation, to-wit: the sum of Six thousand five hundred Dollars (\$6500.00) Dollars.

Heleman Campbell

J. B. Brown

Subscribed and sworn to before me this 5th day of September, A. D., 1911.

W. R. Stevens, Notary Public.

(Notary Public Seal)

My commission expires: Jan 5th, 19

STATE OF IDAHO, )  
County of Cassia. ) ss.

William Wyatt, Heleman Campbell and J. B. Brown, each for himself being first duly sworn on oath deposes and says: I am one of the Directors of the NAF IRRIGATION COMPANY, a corporation, and I will discharge the duties of such office to the best of my judgment; I will not do nor consent to the doing of any matter or thing relating to the business of said corporation with intent to defraud any stockholder or any creditor of the corporation or the public.

William Wyatt

Heleman Campbell

J. B. Brown

Subscribed and sworn to before me this 5th day of September, A. D., 1911.

W. R. Stevens, Notary Public

(Notary Public Seal)

My commission expires Jan 5th 1915

AMENDMENT TO ARTICLES OF INCORPORATION OF NAF IRRIGATION COMPANY.

THIS IS TO CERTIFY, That on the 15th day of August A. D. 1912, at a meeting of the stockholders of Naf Irrigation Company, duly and regularly called for the purpose of making amendments to the articles of incorporation of said company, the articles of incorporation of said company were amended in the following particulars, to-wit:

Article Four (4) was amended by adding the following: "All water used North of the old stage crossing on Clear Creek shall be measured to stockholders at said stage crossing, and all loss of water by seepage or evaporation North of said point shall be sustained by persons using water North of said point. For the purpose of determining the quantity of water that stockholders are entitled to, where the water is used North of said crossing, the amount of water flowing at said crossing shall be deemed to be delivered to stockholders the same as if it were actually delivered at the point of intersection of stockholders' ditches with the main channel of Clear Creek."

We do further certify that the said corporation has issued to the stockholders therein six thousand five hundred (6,500) shares of capital stock, and that the amendment to the articles of incorporation aforesaid was passed by a vote representing all of the said outstanding capital stock, to-wit, by a vote of six thousand five hundred (6,500) shares of the capital stock, and that all of the stockholders of said corporation voted in favor of such amendment.

IN WITNESS WHEREOF, the president and secretary of said corporation have signed this certificate, and this amendment, this 15th day of August A.D. 1912.

William Wyatt  
President.

Heleman Campbell  
Secretary

OF  
N A F I R R I G A T I O N C O M P A N Y .

SECTION 1. THE PRESIDENT. The President shall preside over all meetings of the board of directors, and of the stockholders. In cases of the absence of the president and vice-president from any meeting of the directors or of the stockholders, the meeting shall elect a president pro tem, who shall perform the duties of president at such meeting.

The president may call meetings of the directors whenever he may think it necessary upon such notice as he may deem reasonable.

He shall sign as president all such contracts, certificates of stock and other instruments in writing as shall have been first approved by the board of directors, and he shall cause the corporate seal to be affixed to all instruments required by law to be under seal.

SECTION 2. THE SECRETARY. It shall be the duty of the secretary to keep a record of the proceedings of the board of directors and of the stockholders; he shall keep a book of blank certificates of stock, fill up and countersign all certificates of stock issued, and make the corresponding entries in the margin of such book on the issuance of the same.

The secretary shall keep a proper transfer book and stock ledger in debit and credit form showing the number of shares issued to and transferred by each stockholder, the date of such issuance and transfer and by and to whom transferred.

The secretary shall discharge such other duties as may be prescribed by the board of directors and also such other duties as are prescribed by the board of directors and also such other duties as are prescribed by these by-laws.

SECTION 3. THE TREASURER. It shall be the duty of the treasurer to receive and receipt for all moneys paid to the corporation, and he shall disburse the funds of the corporation upon the orders signed by the president and countersigned by the secretary.

The treasurer shall furnish such statements and perform such other duties as may be required by the board of directors.

SECTION 4. AGENTS AND EMPLOYEES. All agents and employees shall be appointed by the board of directors and shall be removed at the pleasure of

the board. The compensation of all officers, agents and employees of the corporation shall be as fixed by the board of directors.

SECTION 5. STOCK CERTIFICATES. Stock certificates shall be of such form and device as the board of directors shall prescribe, and each certificate shall be signed by the president and countersigned by the secretary and have the corporate seal attached; each certificate shall express on its face the number, date of issuance, the number of shares for which, and the name of the person to whom issued.

SECTION 6. TRANSFER OF STOCK. Shares of stock may be transferred at any time by the holders thereof, or by attorney legally constituted or by the legal representatives of the holders, by endorsement on the certificate of stock; no transfer shall affect the right of the corporation to treat the holder of record as the holder in fact, for the purpose of voting and receiving dividends until such transfer is made upon the books of the corporation, or a new certificate is issued to the person to whom it has been transferred. The certificate that has been transferred shall be surrendered to the secretary and by him cancelled before a new one is issued, and the secretary shall preserve the certificate so cancelled as a voucher. In case of the loss or destruction of a stock certificate a duplicate thereof may be issued provided a sufficient indemnity bond against loss or damage to the corporation by reason of the finding of such lost certificate be first approved by the board of directors and filed with the secretary.

SECTION 7. MEETINGS OF THE BOARD OF DIRECTORS. The Board of Directors shall meet as often as the business of the corporation shall require; meetings of the board may be called by the president or by any two directors upon such notice as he or they may deem reasonable. Such notice may be either oral or written.

SECTION 8. MEETINGS OF STOCKHOLDERS. The board of directors may call meetings of the stockholders whenever they deem it necessary. Notice of meetings of the stockholders, whether regular annual meetings or special meetings shall be given by the secretary by written notice delivered to each stockholder personally or mailed to him postage prepaid at least ten days prior to the day appointed for such meeting. Such notice shall state the time and place when and where the meeting will be held. Any meeting of the



stockholders may be adjourned from day to day until all business before it shall be disposed of.

SECTION 9. WATERMASTER. The board of directors shall appoint a watermaster whenever the board deems it necessary for the orderly distribution of the water, or the protection of the company's interests. It shall be the duty of the watermaster to turn water to the stockholders at the point of intersection of stockholders' ditches with the natural channel of Clear Creek.

SECTION 10. MAIN CHANNEL AND DITCHES. The Board of Directors shall make proper arrangements for the repair and maintenance of the main channel of Clear Creek. Each stockholder shall at his own expense repair and clean such ditches as are used in the use and distribution of his proportionate share of the water of the Company.

SECTION 11. WATER. All water used North of the old stage crossing on Clear Creek shall be measured at that point, and all loss by seepage or evaporation North of that point shall be sustained by the parties using water on land North of said crossing, but water shall be delivered to stockholders at the point of intersection of their ditches with the natural channel and it shall be the duty of the board of Directors to prevent unlawful diversions or interference with the water so long as it flows in the Main Channel, and until it is diverted by the stockholders, and until it reaches the point of diversion in stockholders' ditches. Each stockholder shall construct at his own expense a head gate or weir at the point of intersection or diverting channel with the natural channel of Clear Creek, such weirs to be constructed in accordance with the plans and specifications adopted by the board of directors, and no water shall be delivered to stockholders who fail to comply with this by-law.

Passed by the stockholders of Naf Irrigation Company, on the 15th day of August, 1912.

SIGNED BY:

WILLIAM WYATT  
WELFMAN CAMPBELL  
J. B. BROWN  
WALTER CAMPBELL  
JAMES A. CAMPBELL

The Hart decree was made by consent of the parties without findings of fact or conclusions of law, ignoring the important fact that there were other people on Clear Creek who were also using water. In 1913 the decree of Naf Irrigation Co. vs Ervin Campbell was given by judge Christensen, which includes all of the Utah water users. The Christensen decree changed two things besides recognizing the other water users. Each of the 160 acre tracts received 2.66cfs instead of 100 inches, and the turn schedule was changed so that the creek goes on turns when there is 6cfs measured at the North boundary of section 36, which is behind Jensen's house at Harold Jones' top headgate. The turns are based on the earliest rights including the rights which were not in Naf Irrigation Co. The earliest rights up to a total of 6cfs were divided into 346 parts so that;

present owner	original right	priority	cfs	parts
Scoffield	Ospital	1878	.5	30
Naf Irr. Co.	John Naf	1881	.33	
		1883	1.66	
		1884	.66	
	Cambell+Baker	1885	2.66	
			<u>5.32</u>	300
Sundberg 3/5				
Cambell 2/5	S.J. Ryan	1885	.1	6
Cambell	Hartsough	1885	.067	4
Jensen	Ervin Cambell	1893	.583	5
Kempton	Levi Cambell	1902	.383	1
				<u>346</u>

The rights before Ervin Cambell add up to 5.987, so the parts awarded to him were not complete. Levi Cambell received 1 part which was not based on priority. The rest were awarded at the approximate rate of 60 parts per second foot. Most of the later rights do not receive water when the creek is on turns.

The Utah judge obviously had no jurisdiction over water appurtenant to ground in Idaho. The decree speaks of  $\frac{1}{4}$  of the share of the waters, etc. in paragraph 6. This can be understood if we bear in mind that the Hart decree gave John Naf  $\frac{1}{2}$  of the stream  $\frac{1}{2}$  of the time (4 days of 8) or  $\frac{1}{4}$  of the total stream.

Paragraph 6 of the Christensen decree leaves some question as to whether Joneses water (Naf right) is even decreed to Naf Irrigation Co. The title is not quieted, but the defendants etc. are enjoined from setting up claims to the water or from interfering with the water reaching Idaho.

A quick look at Vern's records will show that he did not turn any Naf Irrigation Co. water to Ray Jones in July, 1995. Joneses farm is entirely in Idaho, so the question needs to be resolved as to whether I should be in charge of making sure that the water is delivered to Joneses.

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT  
OF THE STATE OF UTAH, IN AND FOR BOX ELDER COUNTY

-----ooOoo-----

Naf Irrigation Company,  
a corporation,

Plaintiff,

-vs-

Irvin Campbell, D. R. Kempton,  
Lorin Kempton, A. E. Hartsough,  
and Sophia J. Ryan,

Defendants.

RECEIVED

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This cause having come on regularly for trial in open court on the 14th day of August, A. D. 1917, before the Honorable George Christensen, acting Judge, sitting without a jury, Messrs. Nebeker, Thatcher & Bowen appearing as counsel for the Plaintiff, Naf Irrigation Company, and Thurman, Hedgwood & Irvine appearing as attorneys for Irvin Campbell, D. R. Kempton, Lorin Kempton, and Philip Ospital, the last named party having been entered as a defendant by stipulation during the progress of the trial, and George Halverson Esq., appearing as attorney for defendant, A. E. Hartsough and Sophia J. Ryan, and Levi T. Campbell, who was entered as a party defendant by stipulation during the progress of the trial.

Testimony on behalf of the plaintiff was heard from witnesses introduced in its behalf, and documentary evidence in its behalf was offered and received.

Witnesses on behalf of the defendants were also called and sworn and examined in behalf of said defendants offering the same, and also documentary evidence was offered and received in their behalf, respectively.

And after examining all the testimony offered and received for and on behalf of the respective parties, and the stipulations entered into between the said parties, and after hearing the arguments of the respective counsel, aforesaid, the court took said cause under consideration, and after having duly considered the law and the evidence, and being fully advised in the premises, the court made its Findings of Fact and Conclusions of Law, which are filed herein in writing, and ordered judgment to be entered in said cause in accordance with said Findings and Conclusions:

WHEREFORE, it is ORDERED, ADJUDGED AND DECREED, as follows:

1. That the parties hereto, both plaintiff and defendants, are entitled to the use of all of the waters of Clear Creek and its tributaries at such times between the 1st day of July and the 1st day of December, both inclusive, when the flow thereof does not exceed six cubic feet per second, measured at the point of diversion of the Naf Ditch at the North boundary line of Section thirty-six (36), Township Fifteen (15) North of Range Thirteen (13) West of the Salt Lake Meridian, in Utah, in the following proportions, to-wit: Levi T. Campbell is entitled to one-three hundred forty-sixth ( $1/346$ ) part of the flow of said stream during said mentioned times; the defendant Irvin Campbell is entitled to five-three hundred forty-sixth ( $5/346$ ) part thereof; the defendants D. R. Kempton, Lorin Kempton and Philip Ospital, are entitled to thirty-three hundred forty-sixth ( $30/346$ ) part thereof; the defendant A. E. Wartsough is entitled to four-three hundred forty-sixth ( $4/346$ ) part thereof, the defendant Sophia J. Ryan, is entitled to six-three hundred forty-sixth ( $6/346$ ) part thereof, and the plaintiff, Naf Irrigation Company is entitled to three hundred-three hundred forty-sixth ( $300/346$ ) part thereof.

2. The said plaintiff, Naf Irrigation Company is entitled to divert one-fourth ( $1/4$ ) of the proportional part of the stream awarded to it through its ditches leading to the lands of its stockholders in Idaho, described as being all of the Southeast Quarter of Section twenty-seven (27), Township sixteen (16) South of Range Twenty-seven (27) East of the Boise Meridian, Cassia County, State of Idaho.

3. That in addition to the rights hereinbefore specified, the defendants, D. R. Kempton, Lorin Kempton, and Philip Ospital are entitled to divert from Clear Creek and conduct through a ditch running to and by their dwelling house situate near the banks of said stream in Section 11, Township Fourteen (14) North of Range Thirteen (13) West of the Salt Lake Meridian, Box Elder County, Utah, a small stream of water, which is to be discharged back into the natural channel of said Clear Creek, and to take therefrom sufficient waters for their uses for strictly culinary purposes.

4. That during all times other than the period of time hereinbefore specified the parties hereto are entitled to the use of the waters of said Clear Creek, and its tributaries, in the quantities and with the priorities following, to-wit:

The defendants, D. R. Kempton, Lorin Kempton and Philip Ospital, one-half ( $1/2$ ) cubic foot per second, with a priority dating from 1878 one-third ( $1/3$ ) cubic foot per second diverted from Italian Creek, with a priority dating from 1890; one-sixth ( $1/6$ ) cubic foot per second, with a priority dating from the year 1908.

The Plaintiff, Naf Irrigation Company, one-third ( $1/3$ ) cubic feet per second, with a priority dating from the year 1881; 1.66 cubic feet per second, with a priority dating from the year 1883; two-thirds ( $2/3$ ) cubic foot per second, with a priority dating from the year 1884; 2.66 cubic feet per second, with a priority dating from the year 1885; 2.66 cubic feet per second, with a priority dating from the year 1893; 3.68 cubic feet per second, with a priority dating from the year 1900;

The Defendant, Irvin Campbell 35/60 of a cubic foot per second, with a priority dating from the year 1893;

The defendant, Levi T. Campbell 23/60 of a cubic foot per second, with a priority dating from the year 1902.

The defendant, A.E. Hartsough, 4/60 cubic foot per second, with a priority dating from the year 1885; a 4/60 of a cubic foot per second, with a priority dating from the year 1901.

The defendant, Sophia J. Ryan, 1/10 of a cubic foot per second, with a priority dating from the year 1885; a 2.9 cubic foot per second, with a priority dating from the year 1901.

5. That the waters, and the right to the use of the waters herein decreed and awarded to the defendants, D. R. Kempton, Lorin Kempton and Philip Ospital, shall be used upon and become appurtenant to the lands of the said named parties lying and being in Sections One (1), Two (2) Eleven (11), and Twelve (12), Township Fourteen (14) North of Range Fourteen (14) West of the Salt Lake Meridian, in Box Elder County, Utah.

6. The title of each of the said parties in and to the waters and use of the waters of the said Clear Creek, and its tributaries is hereby quieted in the proportions and quantities and according to the dates of priority in this decree specified, except that as to one-fourth ( $1/4$ ) of the proportionate share of the waters of the said stream which was awarded to the plaintiff, Naf Irrigation Company during the period of time when it takes a specified proportionate amount of the entire stream, and as to 2.66 cubic feet per second thereof during the time when a specified number of cubic feet per second of water is awarded to the said Naf Irrigation Company, the title of the said plaintiff is not quieted, but the defendants, and each of them is hereby enjoined and restrained, and they and their employees, servants, agents and successors in interest are enjoined and restrained from in any manner or wise setting up any claim to the said waters, and from in any manner or wise preventing the flow of the same to and from the ditches and diverting works of the said plaintiff and its stockholders, to and upon the lands of its stockholders situated in Idaho, and hereinbefore in this decree described.

7. Each of the parties hereto is required to construct and maintain, at his or its point or points of diversion, at his or its own proper cost and expense, a good and sufficient measuring weir and headgates to enable one charged with the distribution of the waters hereby awarded among the said parties, to measure and to distribute to each the amounts and quantities and proportions of water awarded to him or it respectively, by the terms and provisions of this decree.

8. That a commissioner shall be appointed by the Court annually on the request of either of the parties hereto, without notice to any other part, to distribute and apportion the waters of Clear Creek among the parties hereto in accordance with their rights as defined by this decree, said commissioner to qualify by taking oath of office, and by filing a good and sufficient bond in such a sum as the Court making the appointment may direct, and the costs and expenses of such commissioners shall be borne and paid by the parties hereto in proportion to their respective interest in the waters so distributed.

It is further Ordered, Adjudged and Decreed that each of the parties to this action shall pay his or her, or its own witnesses and that the plaintiff herein recover from the defendants its court costs herein expended, excepting its witness fees, which said costs are hereby assessed in the sum of \$15.20; the defendants, D. R. Kempton, Lorin Kempton, and Philip Ospital to pay one-fifth (1/5); the defendant Irvin Campbell to pay one-fifth (1/5); the defendant Levi T. Campbell to pay one-fifth (1/5), the defendant A. E. Hartsough to pay one-fifth, and the defendant, Sophia J. Ryan to pay one fifth (1/5).

10. And it is further ordered, adjudged and decreed, that each and every of the parties to this action, the plaintiff and the defendants, and each and every of their servants and employees, and their successors in interest be, and they and each of them are perpetually enjoined and restrained from in any manner interfering with the waters of the said Clear Creek, and its tributaries, except as their rights herein decreed may appear; and each of said parties, his, her, or its agents, counsellors, employees and successors in interest are hereby perpetually enjoined and restrained from in any manner interfering with the rights of any other party or parties to this action as said rights herein appear in the use of said waters, or in the use of any dam, gate, conduit, canal, or other works used in the diversion of any of said waters, except as their rights are herein defined and decreed with respect to the quantity of water herein allotted to each of said parties respectively, and with respect to the date of their respective appropriations in so far as priority of rights is by this Decree fixed: it being the intention of this

decree that the rights of said parties to the use of said waters shall be governed by and according to the proportionate amounts apportioned to each of the parties during the season of the year when the whole of the stream is divided among the said parties in fixed proportions, and shall be governed during the remaining periods of time according to the dates of the respective priorities of the parties hereto.

Done at Chambers this 18th day of November, 1918.

George Christenson  
Presiding Judge.

Filed Nov. 27, 1918, John G. Wheatley, Clerk. By Louise Ingram, Deputy.

The Johnson decree is based on experimentation for 4 years by the Idaho Commissioner of Reclamation and the Utah State Engineer. Three concerns are brought up on page 197 of the court "Opinion" which are the basis of the experimentation;

(1) "The right to divert and use these waters during the high water period in the future should be determined by their division and use in the past". The court points out on page 193 that "The demand upon the flow of Clear Creek exceeds the capacity of the stream". On pages 195-196 it discusses the fact that the 60cfs and 9600 acres decreed to Settlers Land and Water Co. is not a reasonable decree.

(2) "I think in equity and good conscience the water should be taken in turn by the upper and lower group of settlers based upon their early use and appropriations, and by them used to preserve and keep alive their crops as much as possible." On page 196, "My concern is to evolve a practical plan by which the parties best entitled to the use of the flow of Clear Creek shall make the best use of it."

(3) "A watermaster of reasonable intelligence---would require them to give and take on terms and in such a way as to make the best use of the flow of the water in the stream at the moment." "Whether it is more desirable in the use of the water to irrigate land a second time rather than to spread it over additional land once is a question for the irrigator to determine for himself."

With reference to No.(1), the only way Sessions could take more water would be to take it from somebody who has been using it in the past. The ground where his pivot is was never irrigated until 1994 and it was not developed with water from Clear Creek. I don't see how Sessions could claim 4.3cfs or 3.2cfs with a priority date of 1911 for developing 40 acres of new ground in 1994 using water from Round Mountain Creek. The 560 acre feet of water when the creek first goes to Idaho is not set aside for developing new ground on Round Mountain Ranch. The water when the creek is split between Idaho and Utah is divided according to the existing acreage which was historically irrigated and is not really available for new appropriation or new development. There is no un-appropriated water in Clear Creek.

(2) The waters of Clear Creek have been set aside for keeping alive the crops on the existing lands, the only way Sessions can develop new ground is for somebody to stop irrigating their old ground. Joneses policy of taking all of their water to the lower place is based on this decision by the judge and the policies set by the Commissioner of Reclamation during the next 4 years.

(3) Giving and taking and trading water is a policy which was ordered by the judge and developed by the Commissioner of Reclamation and has been followed by the users of Clear Creek for 65 years. The court designated the waters of Clear Creek for keeping crops alive first and then if the irrigator wants, to irrigate the ground which does not have crops planted. Like everyone else on Clear Creek, Joneses don't have enough water to grow crops on all of their decreed ground, so they have to decide which ground to plant. The lower place stands the drought better than the upper place so it is possible to grow crops there with one irrigation, which is all the ground in Idaho usually gets. The upper place would probably not produce a crop with one irrigation because of the gravelly nature of the soil. Joneses have the right to trade water with Sessions or Arimo or anyone else who is willing in order to get the best use of the water during the short time that the water is in Idaho. Trading water between the upper and lower places is a matter of following the court order and the Commissioner of Reclamation's policy and does not require changing the place of use or listing all of the possible places of use that might be encountered by trading water.



of water for more than 14 days at this time under the plan of division we have proposed. It would be necessary that the stream flow remain between 17 second feet and 36 second feet, for more than two weeks in order to bring this condition about and all records indicate that the change of flow, both rising and falling, is very rapid at this particular stage, shown graphically in the hydrographs of the daily discharge of Clear Creek attached hereto and made a part hereof.

"We feel that during the three years in which investigations have been conducted, by the undersigned commissioners, the stream flow has been subnormal, and for this reason, the information gathered is not sufficient to make recommendations for a final division of the water between the Upper and Lower users. However, we believe the system of distribution used in 1935 to have been as equitable and as conducive to maximum beneficial use as any that could have been devised; and we believe that there is now available sufficient information so that the court may make an order covering the distribution of water for next year; that the order can be carried into effect by a competent engineer, appointed as commissioner, by the court, and we recommend that the undersigned commissioners be relieved of further responsibility.

"As our recommendations for operation for the future, we wish to repeat our recommendations numbered 1 to 8, inclusive, as submitted to you, in our report for the year 1934, and dated January 24, 1935."

After the filing of said report the court gave notice of a hearing thereon, at which all parties were represented by counsel. The Commissioner of Reclamation of the State of Idaho, Mr. R. W. Paris, and Mr. Reed Jerman, Assistant State Engineer of the State of Utah, were sworn and examined, and among other things, testified that if under the plan of distribution proposed and recommended by them the flow of the stream should be such as to deprive the upper division of water for a period of more than fourteen days, their crops would be ruined and upon consideration the court requested them, without objection from any of the parties, to continue their investigations for another year, to which the said commissioners consented.

They employed again as their assistant for the year 1936 Henry Hamming. At the close of the irrigation season Mr.

Hamming filed his report with the State Engineer of the State of Utah and the Commissioner of Reclamation of the State of Idaho, which is herewith copied in full.

The said commissioners, to-wit, the Commissioner of Reclamation of the State of Idaho, and the State Engineer of the State of Utah, thereupon, and on the 7th day of January, 1937, filed their report with the court, a copy of which is included herein in full.

The United States District Court, District of Utah, Northern Division, in the case of the Albion-Idaho Land Company, a corporation, vs. Haf Irrigation Company, a corporation, et al, Equity No. 12673, on the 28th day of March, 1933, issued an order, which read in part as follows:

"It is hereby ordered that the Commissioner of Reclamation of Idaho and the State Engineer of Utah, and their respective successors in office are hereby appointed and designated by the court as Commissioners to supervise the distribution of the waters of Clear Creek during the irrigation season of 1933, without special compensation, to determine the flow of said Clear Creek in its various stages and to determine at what stages, if any, in the flow of said stream the waters would not flow in sufficient quantity to admit of beneficial application on the lands of the plaintiffs and interveners, and to make such studies of the lands of the respective parties as will enable them, in conjunction with the other information assembled by them, to report recommendations to the court respecting the most economical and beneficial use and distribution of the waters of said stream and to this end to conduct such observations, studies and examinations as in their judgment may be necessary to enable them to make such report as is hereinbefore specified. In this connection, the said named commissioners are authorized to employ a competent engineering assistant to enable them to carry out the provisions of this order."

On the recommendations of the Commissioners, the aforementioned order of the court has been continued to include the irrigation seasons of 1933, 1934, 1935 and 1936.

In conformity with the aforesaid order, the said commissioners appointed George A. Lawrence as engineering assistant during the irrigation season of 1933, Mr. R. Gardner during the irrigation season of 1934 and Mr. Henry Hamming

"The water of Clear Creek this year, 1934, was handled by a commissioner appointed by the U. S. District Court and was distributed on the basis of the Christensen decree for Utah users and the Dietrich and Cavanaugh decree for the Idaho users.

"The water supply of Clear Creek for the 1934 season was probably the lowest ever experienced, the peak flow May 8th being 12.75 c.f.s. compared with 120 c.f.s. on June 10, 1933.

• • • Losses in a stream of from six to twelve c.f.s. from the U. S. G. S. weir to the school road, 6,000 feet distance, were found to be around 10 per cent and in the same stream in delivery to the Naf ranch diversion at the north boundary of Section 36, a distance of 9500 feet, loss of 30 per cent was encountered. On June 8 and 9 a loss of 54 per cent was observed in making a delivery of 4.5 second feet from the U. S. G. S. station to the Naf Ranch diversion. As a rule, per cent loss was found to be inversely proportionate to stream flow quantity.

"As so heavy a loss was encountered to make delivery to the Naf diversion and with only a peak flow of 12.75 c.f.s. measured at the U. S. G. S. Station, no attempt was made to deliver water to the lower district as it was evident that no stream of beneficial quantity could have been made to reach the irrigated lands in the lower district as an additional 14,760 feet of dry porous channel would have to be traversed from the Naf ranch diversion to the closest irrigated lands of the lower district."

"The top soil of the lower district consists of a fine clay loam beneath which is a very thick bed of clay which accounts for the fact that no so much water is needed on these lower lands to produce heavy crops. Also as a rule, water table is close as shown by the general meadow appearance of these fields. It is claimed by Mr. Matheson, of the Albion-Idaho Land Co. that in normal years more profit is made in the growing of the natural meadow and bunch grasses than if this land were seeded to alfalfa or grain. It is claimed by the lower users that one good thorough irrigation is sufficient to produce a full first and second crop of alfalfa hay or meadow hay. This was demonstrated at the McGill Olson Ranch where 2 good crops of hay were harvested from 1 good irrigation of the land by Raft River water. Although no water was put on

the *Gunnel* place, young alfalfa plants stayed alive and green as late as August."

On January 24, 1935, the court's commissioners filed with it their report containing certain recommendations for a trial period of distribution of the waters of the stream introductory to which recommendation they stated:

"The percentage of conveyance loss can be considerably reduced without depriving either the Utah or Idaho divisions of their rights by distributing the entire flow in Utah while the stream is small and then turning the entire stream when large to Idaho users until their lands are supplied as herein after set out."

For the year 1935 Mr. Hamming was appointed by the court's commissioners as their assistant. At the close of his season's work Mr. Hamming made a detailed report of his operations concluding with the following:

"Conclusion.

"The waters of Clear Creek were distributed, in conformity with the recommendations of the commissioners to the court, during the irrigation season of 1935 as a trial period. This method seems to be about the best that can be devised to distribute the waters of Clear Creek.

"During the early part of the season the discharge of Clear Creek is small, from 2 to 15 second feet, only a small part reaching the lower division and no part reaching the lower end of the lower division. If all were to go there, it would all be lost, but if used in the upper division the loss would be comparatively small. When the discharge was more than 20 second feet all the water was diverted by the users of the lower division until 560 acre feet had been taken. During this time, the users in the upper division received no waters but this was not so long as to cause the crops to suffer for want of water. After this, both divisions took water at the same time until the total diversion dropped to 36.2 second feet or less, when the user of the lower division again diverted all the water until the discharge was 17 second feet. This also was a short period and caused no water shortage in the upper division. After the discharge had decreased to 17 second feet all the water was diverted by the users of the

SUMMARY

The following questions need to be resolved before the water season starts.

- (1) Does Sessions have a right to the Settlers right?
- (2) If he does is it for 4.3cfs, 3.2cfs, 40 inches for the 40 acres under the pivot, or is it for whatever his ditch will hold whenever there is 40cfs in the creek, regardless of who else might have water rights?
- (3) Does Ray have to make a bigger ditch so that Jeff can take his Settlers water?
- (4) Should I just let the creek go when there is 40cfs, to anybody that wants it, or should I measure it to the existing water rights?
- (5) Should I deliver water according to the Dietrich decree and the list which Guy Sundberg used or should I deliver it to all of the rights in the Jobe Adams decree, including 9600 acres listed under the Settlers right and the other rights which have not been recognized for 65 years?
- (6) Will Ray use his share of the 560 acre feet to keep crops alive like Judge Johnson and the Commissioner of Reclamation have ordered, or will the 560 acre feet be used to develop new land and water crested wheat on the upper place?
- (7) Do the water users on Clear Creek still have the right to put streams together and trade water, or are we going to put each little stream in a separate ditch this year?
- (8) Do Joneses have to run their upper place water out the West side of the creek?
- (9) Is it my duty to see that Ray's Naf Irrigation Co. water is delivered to Idaho, or should we just hope that Kemptons let it go?
- (10) Without an automatic measuring device the only way I could tell if the proper amount of water is going to Idaho would be to measure every stream in Utah. In my experience Vern Kempton has not told the truth when we have asked him how much water is in the creek. What should I do?
- (11) Larry Kempton, Mont Campbell, Steve Scoffield keep saying they are going to kill me or otherwise get rid of me if I interfere with their new water rights or try to measure the water. They, along with Sessions are continually waiving phony court orders in my face saying that I can not measure the water. Is there any way to get protection from them?

*not his concern*

*called on - de. basis to SR right*

*Some good what had Humboldt*

*?*

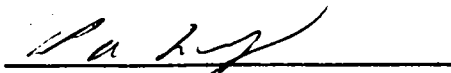
*retention of Humboldt?*

*?*

*Not sure if included*

*Taxes will limit work*

*most producers*



DAVE SUNDBERG

These problems and others, possibly, need to be resolved before the water season begins, and will probably require an order from the court to resolve them.

water earlier by reason of the character of the soil and the methods used and as a matter of practical effect under the division as recommended by the commissioners they would get that water anyway before there would be any available for the lower users and in quantity sufficient to give the lower lands irrigation and then leave an amount to give the lower lands where conditions are different, the hay land where the method is just flooding, and appeared to us from the practical experience we have had there to be the most effective and most efficient use of the water. On the rising stage we have recommended that the upper users have all the waters of the stream until it reaches a flow of 20 second feet at the U. S. G. S. station. We arrive at this by experiment since we find that when there is less than 20 second feet it would not go down to the lower section in quantities to do any good or to be an economical use of the water.

With respect to the 1878 right of Ospial and the April 1, 1881, right of Naf Irrigation Company they are out of a small stream and do not really come into the picture at all. It is *irrigable* in quantity and we have disregarded it. I think the recommendation contained in our report is an equitable one. I think a measuring station equipped with an automatic measuring device should be installed at approximately the point of the old U. S. G. S. gauging station because I do not see how the water can be properly distributed without it. The stream is a flashy one, comes down out of the mountains and fluctuates from day to day and hour to hour. I do not see how there will ever be any satisfactory handling of that water without some permanent recording device and I think Mr. Jernan and Mr. Humphreys would join with me in a recommendation that a permanent recording gauge be established there.

The Court: I understand your report recommends a departure from the gaugeage employed in previous decrees involving this stream in that you recommend the division of water on the basis of acre feet applied to the surface instead of second feet running in the stream.

The Witness: Yes; the one controls the other.

Under our recommendation when the flow reaches 20 second feet it all goes to the lower users until they have received enough water for the irrigation of their land, which is 5650

acre feet. Turning the stream down for the lower users when it is less than 20 second feet wouldn't do any economic good. I have not made any detailed determination myself of losses in the stream except just from observation. Was there frequently during the time the experiments were carried on. Mr. Hamming's report was made to the commissioners. We adopted some of his suggestions and rejected some of them, arriving at our own conclusions. On page 13 of Mr. Hamming's report is shown a determination of losses made on the 9th day of June by him and Mr. Connel and Mr. Olson and Mr. Madison of the Albion-Idaho Land Company. But we have other figures running through other reports. This one might have been at a particular time after the ditch had been in operation. Those losses will vary as to the time and as to the climatic conditions and will also be dependent upon whether the ditch has been in use so as to become soaked or whether it is dry.

Examined by Mr. Bowen, Mr. Farris stated:

We had before us the reports of Mr. Lawrence and his successor prior to Mr. Hamming's report. They also made determinations of losses in transit between the gauging station and the Albion-Idaho land. Our recommendation represents our final conclusion based upon all the information available both from all previous reports, our own examinations and investigations on the ground. The lands in the upper division are gravelly and of a perrous nature while the lands of the lower division are flat, swampy, not cultivated, just hay land. The conditions and requirements are entirely different in the two areas.

Reed Jernan was sworn and upon examination by Mr. Bowen, testified as follows:

My name is Reed Jernan. I am Deputy State Engineer of the State of Utah and the particular person in that office who had charge of this experiment that has been conducted under the order of the court. I heard the questions asked Mr. Farris about the figures 20 second feet on the rise and 17 second feet on the fall as being the points at which the water would not go down to the lower users for beneficial use. Referring to the pages of Mr. Hamming's report which Mr. Bissell called attention to, if I get Mr. Hamming's report correctly, his determination was at the Albion weir. Our recommendation