

1940

Sigurd v. State of Utah, George W. Nebeker, Emily Nebeker : Abstract of Record

Utah Supreme Court

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N. J. Bates; T. G. Hunt; Attorneys for Respondents;

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No. 6303

In
The Supreme Court
of the
State of Utah

SIGURD, a Municipal Corporation,
Plaintiff and Appellant,
vs.

STATE OF UTAH, GEORGE W.
NEBEKER, EMILY NEBEKER,
Defendants and Respondents.

Appeal from the Sixth Judicial District Court in
and For Sevier County, Utah.
Hon. Lewis Jones, Presiding Judge, Sitting For
Hon. Henry D. Hayes, Resident Judge.

ABSTRACT OF RECORD

WM. A. HILTON,
Attorney for Plaintiff and
Appellant.

JOSEPH CHEZ, Attorney General,
E. J. SKEEN, Special Asst. Atty.-General,
Attorneys for State of Utah,
N. J. BATES,
T. G. HUNT.

Attorneys for Respondents Nebeker

FILED

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In
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NEBEKER, EMILY NEBEKER,
Defendants and Respondents.

Appeal from the Sixth Judicial District Court in
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Hon. Lewis Jones, Presiding Judge, Sitting For
Hon. Henry D. Hayes, Resident Judge.

ABSTRACT OF RECORD
COMPLAINT

(TITLE OF COURT AND CAUSE).

1. Comes now the plaintiff above named and for
cause of action against the defendants, and
each of them, complains and alleges:

1.

That for and during all the times hereinafter
mentioned defendants George W. Nebeker,

sometimes known as George W. Nebeker, Jr., and Emily Nebeker have been and now are husband and wife.

That plaintiff is now and at all times hereinafter mentioned was a municipal corporation organized and existing under and by virtue of the laws of the State of Utah, and brings this action under and pursuant to the provisions of Section 15-7-4 and Sections 104-61-1 to 104-61-20, Revised Statutes of Utah, 1933.

2.

That within the boundaries of the Southwest Quarter of the Southeast Quarter and the Southeast Quarter of the Southwest Quarter of Section 28, Township 23 South, Range 1 West of the Salt Lake Meridian, in Sevier County, State of Utah, the said legal subdivisions being a part of the open public domain, there are certain springs and seeps, the exact number of which plaintiff is unable to state, the waters of which flow into a small natural creek bed known sometimes as Ross Creek and at other times as Rosses Creek.

3.

That the waters issuing from said springs and seeps have been and are now needed by the plaintiff and its inhabitants for culinary, domestic and other purposes, and that the use of said waters and the taking thereof by plaintiff for said purposes is absolutely necessary for the health, peace, safety and public good of the inhabitants of the said Town of Sigurd. That the use of said waters by the State of Utah, if it in truth and fact uses the same, is a use far inferior to the public use to which the

plaintiff is now putting and will forever continue to put said waters.

4.

That prior to the time plaintiff diverted the waters from said springs and seeps into a pipe line for the use of the inhabitants of the Town of Sigurd, as hereinafter more fully set forth, the said seeps and springs did not generally or normally yield a combined flow in excess of one-sixth (1-6) of a second foot. That said Ross Creek unites with a certain natural channel known as King's Meadow Canyon Creek (sometimes known as Peterson Creek). That the quantity of water issuing from said Ross Creek has at all times, except in occasional unusual heavy winter or spring precipitations, been too small to constitute a flow sufficient to reach the bed of said Kings Meadow Canyon Creek.

5.

That prior to the 26th day of December, 1938, plaintiff was without water for culinary, domestic and other purposes and was unable to obtain any water for said purposes from any adequate or proper source other than the springs and seeps flowing into said Ross Creek within the area hereinabove mentioned. That prior to the 26th day of December, 1938, plaintiff constructed and completed works necessary for the diversion of said waters and also constructed and completed a pipe line system for the conveyance and distribution of said waters to the inhabitants of said Town. That since the 26th day of December, 1938, the inhabitants of the Town of Sigurd, have been and are now using the waters of said springs

and seeps through said diversion works and pipe line distributing system for culinary, domestic and other purposes.

6.

That on the 7th day of June, 1938, plaintiff duly filed with the State Engineer of the State of Utah an application to divert .5 of a second foot of the waters of said springs and seeps and to apply said water to a beneficial use, that is, for the use of the inhabitants of the Town of Sigurd for culinary, domestic and other purposes. That the said State Engineer duly published notice of said application as by law required. That the defendants each filed with the State Engineer within the time allowed by law therefor written protests to the granting of said application, and that plaintiff made and filed with the State Engineer its written answer to each of the said protests.

That thereafter, to wit, on the 26th day of October, 1938, the said State Engineer duly approved said application of plaintiff for the diversion and use of said waters for and during the period from October 16 to June 15, inclusive, of each year. That the said State Engineer on the 26th day of October, 1938, duly mailed to the defendants copies of his said decision so approving the said application of the plaintiff. That the defendants have not at any time since then instituted proceedings in any court of the State for a review of said decision of the State Engineer.

7.

That defendants State of Utah, acting by and through its State Land Board, George W. Neb-

↑
eker and Emily Nebeker have or claim to have some right, title, interest or estate in or to the waters flowing from said springs and seeps hereinabove in paragraph two described. That the rights or claims of said defendants in and to the use of the waters flowing from said springs and seeps, if any exist, are based upon the ownership by the State of Utah of the West Half of the Northeast Quarter, the Southeast Quarter of the Northeast Quarter, and the North Half of the Southeast Quarter of Section 20, Township 23 South, Range 1 West of Salt Lake Meridian, the sale of said lands, together with any and all water and ditch rights of every nature, however evidenced, used upon or in connection with said lands, by the State of Utah to one Murwin Bradfield for the sum of Twenty-five Hundred (\$2500) Dollars under an executory contract providing for the payment of said purchase price in semi-annual installments extending over a period from July 19, 1933 to January 19, 1933, the assignment of said contract of said Murwin Bradfield to George W. Nebeker, one of the defendants above named, and the claim that the waters issuing from said springs and seeps are appurtenant to said land.

8.

That plaintiff has herein set out the names of all the owners and claimants or pretended owners and claimants of the property or rights hereby sought to be condemned, or any part or parcel thereof, as far as the same are known to it, and that plaintiff is informed and believes and therefore upon information and belief, alleges that there are no other persons interested in

the use of the waters flowing from said springs and seeps, or any part thereof.

9.

That plaintiff at various times prior to the commencement of this action has endeavored to purchase from the defendants whatever right, title, interest or estate they may have in and to the use of the waters flowing from said springs and seeps, and has offered to pay the defendants a sum far in excess of the value of the waters issuing from the said springs and seeps, but that defendants have refused and still refuse to sell or transfer whatever right or claim they may have to the use of said waters to the plaintiff.

10.

That on the 5th day of May, 1939, at a special meeting of the Board of Trustees of the Town of Sigurd, duly called and held as by law required, the Board of Trustees of the Town of Sigurd duly passed and adopted an ordinance, number A-4, and entitled:

“Ordinance authorizing and directing the commencement of condemnation proceedings in the Sixth Judicial District Court in and for the County of Sevier, State of Utah, to acquire the waters of all springs and seeps tributary to Ross Creek arising in the Southwest Quarter of the Southeast Quarter and the Southeast Quarter of the Southwest Quarter of Section 28, Township 23 South, Range 1 West, Salt Lake Meridian, in Sevier County, Utah, for use by the inhabitants of the Town of Sigurd, Sevier County, Utah, as a water supply

for culinary and domestic purposes, and authorizing and directing the employment of legal and other services in connection therewith and the payment of the value of said springs and seeps to persons entitled thereto, as ascertained by said court, and declaring an emergency.’’

That by said ordinance the Board of Trustees of the Town of Sigurd, plaintiff above named, declared that it was necessary for the public good that the springs and seeps hereinabove mentioned and described be condemned and the waters thereof appropriated for the use of the inhabitants of the said Town of Sigurd. That said ordinance was duly passed and published on the 5th day of May, 1939. That the condemnation of said springs and seeps by said Town was not protested by any resident tax payer or any other person whomsoever within the time allowed by law therefor or at all.

Wherefore, plaintiff prays judgment as follows:

That an order be made by this Court permitting the plaintiff to occupy the premises and use the water or water rights sought to be condemned and hereinbefore described pending this action, and to do such work thereon as may be required for the construction, completion, preservation and maintenance of a water works diversion system and a pipe line distributing system; that the said defendants, and each of them, be required to produce and bring forward any and all claims that they or any of them have or make to the use of said water or water rights, or any part thereof; that the

respective interests of said defendants in and to said water or water rights be adjudged and that said water or water rights herein particularly described and sought to be condemned be condemned for the use of plaintiff for the purposes and to the extent herein set forth; that the value of the water or water rights to the extent of the defendants' interest therein be ascertained in the manner provided by law, and when so assessed and ascertained, the plaintiff hereby offers and agrees to pay the same to the party or parties who may be entitled thereto; that the defendants, and each of them, their respective agents, servants and employees, be enjoined from in any manner interfering with the plaintiff in the occupancy of said premises and water or water rights sought to be condemned and the doing thereon of the work required for the purposes for which it is sought to condemn the said premises and water or water rights, and that plaintiff have such other and further relief in the premises as it is by law entitled to, including its costs herein incurred.

WM. A. HILTON,
Attorney for Plaintiff.

Duly verified.

Filed June 1, 1939.

-
- 8 Order permitting plaintiff to divert and use water. Dated June 15, 1939. Filed June 22, 1939.

-
- 9 Demurrer of defendants George W. Nebeker and Emily Nebeker to complaint of plaintiff.

- 10 Motion of defendants George W. Nebeker and Emily Nebeker to strike, and separately state.
-

- 12 Demurrer of defendant State of Utah to complaint of plaintiff.
-

- 13 Order denying motion to strike of defendants Nebeker.
-

- 14 Order overruling demurrer of defendants Nebeker.
-

- 15 Order overruling demurrer of defendant State of Utah.
-

ANSWER OF DEFENDANTS GEORGE W.
NEBEKER AND EMILY NEBEKER.

(TITLE OF COURT AND CAUSE).

- 20 Come now the above named defendants, George W. Nebeker and Emily Nebeker and answering plaintiff's complaint on file herein, admit, deny and allege as follows:

1.

Defendants deny each and every allegation in said complaint contained, not herein specifically admitted.

2.

Defendants admit the allegation contained in Paragraph One of said complaint, down to the

word "Utah" in the sixth line thereof. Answering the remaining portion of said Paragraph One, defendants allege that they have no knowledge or information as to the truth or falsity of said allegations and for said reasons they deny each and all of said allegations.

3.

Defendants admit the allegations in Paragraphs Two, Three and Five of said complaint contained.

4.

Said defendants admit that Rosses Creek unites with King's Meadow Canyon Creek and deny each and every other allegation contained in Paragraph Four of said complaint.

5.

Answering Paragraph Six of said complaint, defendants admit all of the allegations in said paragraph contained, down to and including the word "protests" in the eleventh line. Defendants deny each and every other allegation in said paragraph contained and in respect thereto defendants allege the fact to be that the State Engineer approved said application in said paragraph referred to for the diversion and use of one-half cubic foot of water per second from Rosses Creek from the sixteenth day of October until the first day of April of each and every year, but that said application was approved by the State Engineer, subject to the prior rights of these defendants.

6.

Answering Paragraph Seven of said complaint, defendants admit that they claim an interest in

the water referred to in plaintiff's complaint and admit that they claim an interest in said water under a contract of purchase entered into by Murwin Bradfield and the State of Utah, and the assignment of said contract of purchase by said Bradfield to the defendant George W. Nebeker and admit the said Bradfield contracted and agreed to pay the State of Utah \$2600.00 for said premises and water rights and that the defendant George W. Nebeker has assumed and agreed to pay said obligation. But defendants deny that the rights acquired by them to said water by virtue of said contract and assignment is their only right or title to the described water.

7.

Defendants admit the allegations contained in Paragraph Eight of said complaint.

8.

Defendants deny the allegations contained in Paragraphs Nine and Ten of said complaint.

Further answering said complaint, these defendants allege as follows:

1.

That more than fifty years ago plaintiff and his predecessors in interest were the owners of and in possession of the following described premises, to wit:

The East Half ($E\frac{1}{2}$) of the Northeast Quarter ($NE\frac{1}{4}$) and the East Half ($E\frac{1}{2}$) of the Southeast Quarter ($SE\frac{1}{4}$) of Section 7; and the Northwest Quarter ($NW\frac{1}{4}$) of Section 17 and the Southwest Quarter ($SW\frac{1}{4}$) of the Northwest Quarter ($NW\frac{1}{4}$)

of Section 21; and the Northeast Quarter ($NE\frac{1}{4}$) of the Northeast Quarter ($NE\frac{1}{4}$) of Section 21; and the North Half of the Southwest Quarter ($SW\frac{1}{4}$) and the Southeast Quarter ($SE\frac{1}{4}$) of the Southwest Quarter of Section 21. All in Twp. 23 South, Range 1 West, Salt Lake Meridian.

2.

That the said lands without artificial irrigation, were barren, sterile and without material value, but that if water was applied to said land artificially, they would produce large and valuable crops of hay, grain and other vegetation and that by the application of water they became highly valuable for agricultural purposes.

3.

That more than fifty years ago the defendants, George W. Nebeker and Emily Nebeker, and their predecessors in interest went upon a stream of water known as King's Meadow Canyon Creek and by means of dams and ditches diverted all of the water of said stream and conveyed it to and upon said land and applied the water of said stream to the irrigation thereof, and thereby produced large and valuable crops of hay, grain and other vegetables. Defendants further allege that at all times since they and their predecessors in interest so diverted said water and applied it to the irrigation of said lands, the said waters have been constantly used by said defendants and their predecessors in interest, during each and every year from January 1st to December 31st for the irrigation of said lands and are now, ex-

cept for the acts of the plaintiff, being so used by these defendants.

4.

That Rosses Creek referred to in plaintiff's complaint and the spring area described in Paragraph Two of plaintiff's complaint, is a tributary of King's Meadow Canyon Creek and the water arising in and flowing from said spring area amounting to approximately one-half of one cubic foot of water per second of time are tributary to and part of the waters of King's Meadow Canyon Creek, which waters were as aforesaid appropriated by plaintiff and his predecessors in interest more than fifty years ago for the irrigation of the land described in Paragraph One hereof, which lands and said waters being appurtenant thereto, do now and for more than twenty-five years last past, have belonged to these defendants.

5.

That more than forty years ago plaintiff and his predecessors in interest were the owners of and in possession of the following described premises, towit:

The West Half ($W\frac{1}{2}$) of the Northeast Quarter ($NE\frac{1}{4}$) and the Southeast Quarter ($SE\frac{1}{4}$) of the Northeast Quarter ($NE\frac{1}{4}$) and the Northeast Quarter ($NE\frac{1}{4}$) of the Southeast Quarter ($SE\frac{1}{4}$) of Section Twenty (20), in Township Twenty-three (23) South, Range One (1) West of the Salt Lake Meridian, containing 160 acres more or less.

Also, the Northwest Quarter ($NW\frac{1}{4}$) of the Southeast Quarter ($SE\frac{1}{4}$) of Section Twenty (20), Township Twenty-three (23)

South, Range One (1) West of the Salt Lake Meridian, containing forty (40) acres more or less. Containing in all Two Hundred (200) acres, more or less.

6.

That the said lands without artificial irrigation were barren, sterile and without material value, but that if water was applied to said land artificially, they would produce large and valuable crops of hay, grain, and other vegetation and that by the application of water they became highly valuable for agricultural purposes.

7.

That more than fifty years ago the defendants, George W. Nebeker and Emily Nebeker, and their predecessors in interest, went upon a stream of water known as King's Meadow Canyon Creek and by means of dams and ditches diverted all of the water of said stream and conveyed it to and upon said land and applied the water of said stream to the irrigation thereof; and thereby produced large and valuable crops of hay, grain and other vegetables. Defendants further allege that at all times since they and their predecessors in interest so diverted said water and applied it to the irrigation of said lands, the said waters have been constantly used by said defendants and their predecessors in interest, during each and every year from January 1st to December 31st for the irrigation of said lands and are now, except for the acts of the plaintiff being so used by these defendants, excepting that the rights of these defendants to use the waters of King's Meadow Canyon Creek are subsequent, inferior and subject to the rights of these defendants to use said water for culinary, domestic and

stock watering purposes and for the irrigation of the lands described in Paragraph One of these defendants affirmative defense hereof.

8.

The King's Meadow Canyon Creek arises about ten miles south of the lands so owned by these defendants and flows in a northerly direction to said lands. Because of the length of the channel carrying said water, a portion is lost by seepage and evaporation. When plaintiff diverted the waters of Rosses Creek, as set out in plaintiff's complaint, it lessened the flow of water in King's Meadow Canyon Creek in excess of one-half cubic foot per second, which diversion, together with the evaporation and seepage, so reduced the amount of water available for the irrigation of plaintiff's lands that it has become, and is, impossible to irrigate and cultivate them as to produce valuable crops thereon.

9.

That these defendants and their predecessors in interest, for more than fifty years last past have cultivated and grown large and valuable crops upon 126½ acres of the land described in Paragraph One hereof and for more than forty years last past said defendants and their predecessors in interest have grown large and valuable crops upon the forty acres of lands described in Paragraph Five hereof and that because of and by virtue of the said cultivation, defendants and their predecessors in interest have irrigated and built a home upon the lands described in Paragraph One hereof, where these defendants now reside with their family and by means of the irrigation and culti-

vation of said land with the said waters, they have during all of said time supported and maintained themselves and their said family in comfort upon said premises.

10.

That by the taking of said water by plaintiff and because of its direct effect upon the amount of water available for use from the other tributaries of King's Meadow Canyon Creek, it will be impossible for these defendants to longer provide support and maintenance for themselves and family upon the described lands and that they together with said home will have to be abandoned.

11.

That because of the taking of said water by plaintiff and its consequent and necessary effect upon the remaining portion of the waters of King's Meadow Canyon Creek and because of the waters of said other tributaries being by themselves insufficient to flow through said canyon to defendant's said lands, other persons have now applied to appropriate said other streams and to deprive this defendant thereof. All of which defendants allege is a direct and necessary result of the taking of the aforesaid waters by plaintiff for all of which these defendants should be compensated in damages in such sum as may be determined by the Court.

12.

Defendants further allege that in addition to the value of said water for irrigation purposes

as aforesaid and in addition to the damages to other waters and the said lands that will flow from the taking thereof for irrigation purposes, that said waters did and do now have a special and additional value for culinary and domestic purposes for all of which defendant should be compensated in the total sum of \$10,000.

Wherefore, the defendants, George W. Nebeker and Emily Nebeker, pray that they be awarded such sum as damages as will compensate them for the taking of the water, for the injury to the other waters caused by sinking and evaporation; for the injuries to defendants' lands heretofore irrigated by said waters; for the injuries to defendants' home as a residence and for the value of said water for culinary, domestic, stock-watering and irrigation purposes and for the costs of court hereby incurred and for such other and further relief as to the court may seem just and equitable.

N. J. BATES AND

T. A. HUNT,

Attorneys for Respondents
Nebeker.

Duly verified.

Filed October 23, 1939.

Paragraph 12 and the prayer of the foregoing
answer of defendants George W. Nebeker and

Emily Nebeker were twice amended during the trial as follows:

FIRST AMENDMENT

- 26 12. The Defendants Further Allege, that in addition to the value of said waters for irrigation purposes as aforesaid which the defendants allege to be Two Thousand and no/100 (\$2,000.00) Dollars and in addition to the damages to other waters and the aforesaid lands that will flow from the taking thereof for irrigation purposes which the defendants allege is One Thousand and no/100 (\$1,000.00) Dollars, that the said waters did and do now have a special and additional value for culinary and domestic purposes of Seven Thousand and no/100 (\$7,000.00) Dollars for all of which defendants should be compensated in the total sum of Ten Thousand and no/100 (\$10,000.00) Dollars.

Wherefore, the defendants, George W. Nebeker and Emily Nebeker, pray that they be awarded such sum as damages as will compensate them for taking of the said water, for the injury to the other waters caused by sinking and evaporation in the sum of One Thousand and no/100 (\$1,000.00) Dollars, for injuries to the defendant's land heretofore irrigated by said water in the sum of Two Thousand and no/100 (\$2,000.00) Dollars, for the injury of the defendants' home and residence and for the value of the said water for culinary, domestic, stock-raising and irrigation purposes in the sum of Seven Thousand and no/100 (\$7,000.00) Dollars, and for the costs of court hereby incurred and for such other and further relief as to the court may seem just and equitable.

SECOND AMENDMENT

- 25 12. The Defendant Further Alleges, that in addition to the value of said waters for irrigation purposes as aforesaid which the defendants allege to be Two Thousand and no/100 (\$2,000.00) Dollars and in addition to the damages to other waters and the aforesaid lands that will flow from the taking thereof for irrigation purposes which the defendants allege is One Thousand and no/100 (\$1,000.00) Dollars, that the said waters did and do now have a special and additional value for culinary, domestic and municipal purposes of Seven Thousand and no/100 (\$7,000.00) Dollars for all of which defendants should be compensated in the total sum of Ten Thousand and no/100 (\$10,000.00) Dollars.

Wherefore, the defendants, George W. Nebeker and Emily Nebeker, pray that they be awarded such sum as damages as will compensate them for taking of the said water, for the injury to the other waters caused by sinking and evaporation in the sum of One Thousand and no/100 (\$1,000.00) Dollars, for injuries to the defendants' land heretofore irrigated by said water in the sum of Two Thousand and no/100 (\$2,000.00) Dollars, for the injury of the defendants' home and residence and for the value of the said water for culinary, domestic, stock-raising and irrigation purposes in the sum of Seven Thousand and no/100 (\$7,000.00) Dollars, and for the costs of court hereby incurred and for such other and further relief as the court may deem just and equitable.

ANSWER OF DEFENDANT STATE OF
UTAH.

(TITLE OF COURT AND CAUSE).

28 Comes now the defendant, State of Utah, and in answer to the plaintiff's complaint herein, denies, admits and alleges as follows, towit:

1.

Admits the allegations of Paragraphs 1 and 2.

2.

In answer to the allegations of Paragraph 3, this defendant alleges that it has no knowledge or information as to the truth or falsity thereof and for said reason, denies each and every allegation therein contained.

3.

In answer to Paragraph 4, this defendant admits that Rosses Creek unites with King's Meadow Canyon Creek, but denies each and every other allegation of said paragraph.

4.

In answer to Paragraph 5, this defendant alleges that it has no knowledge or information as to the truth or falsity of the allegations of said paragraph, and for said reason denies the same.

5.

Admits the allegations of Paragraph 6.

6.

In answer to Paragraph 7, this defendant admits that it claims some right, title, interest o

estate, in or to waters flowing from said sources therein described, which rights or claims are hereinafter better described. Admits the allegations of said paragraph as to the execution of a certain contract of sale therein described, but denies all other allegations of said paragraph.

7.

Admits the allegations of Paragraph 8.

8.

In answer to Paragraph 9, this defendant admits that there have been negotiations for the purchase of rights to the use of water flowing from said springs and seeps, but denies each and every other allegation of said paragraph.

9.

In answer to Paragraph 10, this defendant alleges it has no knowledge or information as to the truth or falsity of said allegations and for said reason denies the same.

For Further Answer to the plaintiff's complaint, this defendant alleges that it is the owner of a right to the use of water from King's Meadow Canyon Creek and other sources described in the complaint, which said right was adjudicated by decree of the District Court of the Fifth Judicial District in and for the County of Millard, State of Utah, in a case entitled Richlands Irrigation Company, a corporation, plaintiff, v. West View Irrigation Company, defendant, Case No. 834, in a decree dated the 30th day of November, 1936.

That the said water right is described on Page 58 of the printed decree as follows:

“REVERE LAND & STOCK COMPANY

(a) Priority: 1895. Acreage: 3.2. Period of Use: April 1st to October 15th. Amount 0.08 c. f. s. maximum, and 0.05 c. f. s. minimum. Claim No. 413. Diversion No. 427. Point of Diversion: Diversion from King's Meadow Creek at a point 650 feet South and 200 feet West of the South quarter corner Sec. 20, Twp. 23 S., R. 1 W., into an unnamed ditch.

(b) Priority: 1895. Acreage: 44.5. Amount 1.11 c. f. s. maximum, and 0.74 c. f. s. minimum, from April 1st to October 15th. Claim No. 413. Diversion No. 428.

(c) Priority: 1895. Domestic. Amount 0.01 c. f. s. Period of Use: January 1st to December 31st. Point of Diversion: as described in Paragraph (a) and used for domestic purposes of three persons and for stock watering purposes for thirty head of horses and cattle.”

That said water was, at the time of the entry of the said decree, and has since, until the taking thereof by the order of the court in this case, been appurtenant to and used in connection with the following described real estate, to wit:

“The West half of the Northeast quarter; Southeast quarter of the Northeast quarter; Northeast quarter of the Southeast quarter, and the Northwest quarter of the Southeast quarter of Section 20, Twp. 23 S., R. 1 West, Salt Lake Meridian.”

That without irrigation, said land is barren, sterile and without any substantial value, but when water was applied to said land, it pro-

duced large and valuable crops of hay, grain and other crops.

10.

That on the 19th day of January, 1933, this defendant made and executed a contract by the terms of which it agreed to sell to one Murwin Bradfield for the sum of \$2500, the land and water rights hereinafter described and the said purchaser agreed to pay the purchase price over a period extending from July 19, 1933 to January 19, 1953. That said contract has been assigned by the said Murwin Bradfield to the defendant, George W. Nebeker, who has assumed and agreed to pay the balance of the purchase price of the said land and water.

That said contract is in good standing and that there is now payable thereon the sum of \$1,350.00.

11.

That without water said land has little or no value, and that the taking of the water has damaged this defendant to the extent of the balance due on the said purchase price of said land and water right, to wit: \$1,350.00.

Wherefore, This Defendant Prays that it be awarded such sum as damages as will compensate it for the taking of the water right, and for the consequential damages to the said land, to wit: \$1,350.00. This defendant prays for such other and further relief as the court may deem equitable, and for costs of this proceeding.

JOSEPH CHEZ,

Attorney General,

S. D. HUFFAKER,

E. J. SKEEN,

Duly verified. Attorneys for State of Utah.
Filed November 6, 1939.

REPLY OF PLAINTIFF TO ANSWER OF
DEFENDANTS GEORGE W. NEBEKER
AND EMILY NEBEKER.

(TITLE OF COURT AND CAUSE).

34 Comes now the plaintiff, and for reply to answer of defendants George W. Nebeker and Emily Nebeker, says:

1.

Replying to Paragraph Three of the further answer of said defendants, plaintiff admits each and every of the allegations in said paragraph contained insofar as they relate to the King's Meadow Canyon Creek proper and do not involve the waters from Rosses Creek or from the spring area mentioned and described in plaintiff's complaint, and insofar as they relate to the said waters of Rosses Creek or the said spring area, plaintiff denies the same.

2.

Replying to Paragraph Four of the further answer of said defendants, plaintiff denies that the said Rosses Creek or the spring area mentioned and described in plaintiff's complaint is an immediate tributary of the said King's Meadow Canyon Creek, but alleges that said Rosses Creek or the said spring area is only remotely tributary to said King's Meadow Canyon Creek and that the waters of said Rosses Creek or said spring area seldom, if ever, flow into or reach the creek bed of the said King's Meadow Canyon Creek.

Further replying to said Paragraph Four, plaintiff denies that the waters flowing from

said spring area, during all of the times mentioned by said defendants, ever approximated one-half of a cubic foot per second of time, and alleges that said spring area, in its condition before plaintiff improved the same, never yielded more than one-sixth of a cubic foot of water per second of time, except in occasional periods of excessive precipitation.

Further replying to said Paragraph Four, plaintiff denies that the waters which issued from the springs in said spring area, prior to the time plaintiff diverted the same, were ever used for agricultural purposes or any other purpose or ever reached the lands described by said defendants in paragraph one of their said further answer.

3.

Replying to Paragraph Seven of the further answer of said defendants, plaintiff admits each and every allegation in said paragraph contained insofar as they relate to King's Meadow Canyon Creek proper and do not involve the waters from Rosses Creek or from the spring area mentioned and described in plaintiff's complaint, and insofar as they relate to said waters of Rosses Creek or said spring area, plaintiff denies the same.

Further answering said Paragraph Seven plaintiff denies that the said defendants and their predecessors in interest ever used or were entitled to the use or owned the waters which issued from said Rosses Creek or from said spring area from October 15th to June 15th of

each year prior to the time plaintiff diverted the same.

4.

Replying to Paragraph Eight of the further answer of said defendants, plaintiff denies each and every allegation in said paragraph eight contained.

5.

Replying to Paragraph Nine of the further answer of said defendants, plaintiff alleges that it has not sufficient knowledge or information upon which to form a belief as to the truth of the allegations set forth and contained in said paragraph nine, and basing its denial upon that ground, plaintiff denies each and every allegation therein set forth.

6.

Replying to Paragraph Ten of the further answer of said defendants, plaintiff denies each and every allegation in said paragraph ten contained.

7.

Replying to Paragraph Eleven of the further answer of said defendants, plaintiff alleges that it has not sufficient knowledge or information upon which to form a belief as to the truth of the allegations set forth and contained in said paragraph eleven, and basing its denial upon that ground, plaintiff denies each and every allegation therein set forth.

8.

Replying to Paragraph 12 of the further answer of said defendants, plaintiff denies each

and every allegation in said amended paragraph twelve contained.

Wherefore, plaintiff prays judgment as demanded in its complaint.

WM. A. HILTON,
Attorney for Plaintiff.

Duly verified.

Filed November 28, 1939.

Paragraph 8 of the foregoing reply was amended during the trial to read as follows:

- 28 8. Replying to Paragraph Twelve of the further answer of said defendants, plaintiff denies each and every allegation in said amended Paragraph Twelve contained, and alleges that the defendants are entitled to recover only the fair market value of the water taken and the actual damages resulting therefrom to the remaining or other lands, established in the manner provided by law.

REPLY OF PLAINTIFF TO ANSWER OF
DEFENDANT STATE OF UTAH.

(TITLE OF COURT AND CAUSE).

- 38 Comes now the plaintiff, and, for reply to answer of defendant State of Utah, says:

1.

Replying to the "Further Answer" of the State of Utah, being a part of Paragraph No. 9, denies that the waters occupied, taken and used by the plaintiff under the order of this court made and entered in this cause on the

15th day of June, 1939, are the same waters as those mentioned, described and claimed by the State of Utah in its said Further Answer, a part of Paragraph No. 9, and admits each and every other of the allegations in said Further Answer, being a part of Paragraph No. 9 contained.

2.

Further replying to said Further Answer of the State of Utah, being Paragraph No. 11, plaintiff denies that the State of Utah has been damaged to the amount of \$1350.00 by the taking of said water by the plaintiff, and alleges that the State of Utah, if in fact it owns or has any interest in or claim to the said waters so taken and used by the plaintiff, is damaged only to the extent of the actual market value of said waters.

Wherefore, plaintiff demands judgment as prayed for in its complaint.

WM. A. HILTON,
Attorney for Plaintiff.

Duly verified.

Filed January 26, 1940.

BILL OF EXCEPTIONS

(TITLE OF COURT AND CAUSE).

- 1 This cause came on for trial at Richfield, Utah, February 29, 1940, before Honorable Lewis Jones, Presiding Judge, sitting at request of resident Judge, Honorable Henry D. Hayes, and a jury; Wm. A. Hilton, Esq., appearing for the

plaintiff; E. J. Skeen, Esq., appearing for the State of Utah; T. G. Hunt, Esq. and N. J. Bates Esq., appearing for defendants Nebeker.

THE COURT: Two cases are here involved — Nebeker v. Sigurd, and Sigurd v. State of Utah etal. The understanding is, we are trying the last case first; I am going to require a stipulation between the parties, if they are going ahead with the damage case.

MR. HILTON: No, we are going ahead with the condemnation case.

- 2 THE COURT: The court will make findings of fact on the title to the water, and based on those findings the court will instruct the jury as to how they are to proceed to ascertain the damages, or loss, if any.

A jury was duly empanelled and sworn to try certain issues in the cause.

- 6 THE COURT: It is stipulated between the defendants, and no objection by plaintiff, that one verdict only be submitted to the jury: a special verdict on the question of amount of compensation for the taking of this alleged water.
- 7 THE COURT: The record may show that the defendants waive the question of necessity, since that is statutory.

What about this other matter; I assume that it will be satisfactory for the jury to sit here and listen to the evidence relating to the title to the water, and the court make findings of fact on the ownership of the water,

and after making findings, submit the question of damages to the jury on written instructions, they, in turn, will have to pass on the facts, as you understand the practice.

MR. BATES: With reference to the question of title, Your Honor might, under our agreement of the facts, determine that question in advance. I am not sure that I understand just exactly what the position of the plaintiff is on the question of title. If he saw fit to make his statement — what do you claim to be the owner of?

MR. HILTON: Under the pleadings, the ownership of the so-called water coming down there during the non-irrigation season is not questioned. Nebeker didn't own the water under the decrees; that is the Sevier River Decree, known as the Cox Decree, and as to the so-called non-irrigating season water, the State Engineer awarded it to the city. Of course, it is subject to any vested rights. That is our contention on that; that our appropriation and approval by the State Engineer gives us that water, because he can't use it, and that from October 15th to June 15th of each year that water has been awarded to Sigurd City through the State Engineer. On the evidence, as to his applying that water to its own use, and showing his title to it, whether he can use it, we claim that he can't use it. From June 15th to October 15th, our claim is that very little, if any of it, ever reaches the Petersen Creek, where he could put it to use. We are only pay-

ing him here for what he could have made use of.

MR. BATES: In this regard, just what is your claim with reference to the ownership of the water from April 1st to June 15th?

MR. HILTON: We claim that under the State Engineer's ruling, that he has not used it; and as to that, we are entitled to divert that water. We don't take all that water; we take only part of it out of two small springs up there. It was only part of their water that we take. The evidence will show that.

MR. BATES: Is it your claim that the State Engineer's decision, and your application to appropriate, gave you a right to any water between the 1st of April to the 15th of June?

MR. HILTON: That is a question of use, now, how much we have interfered with that. We will have to take evidence on that question.

MR. BATES: On the question of the right to the use of water from October 15th to April 1st, is it your contention that you have a prior right to the use of water during those times?

9 MR. HILTON: As to the use of it, yes, we claim so.

MR. BATES: There will be a question of fact to be determined as to the ownership of the water during the months of or from October 15th to the month of April.

MR. HILTON: No, to June 15th.

MR. BATES: To June 15th.

MR. HILTON: Each year.

FEBRUARY 29TH, 1940.

THE COURT: For the purpose of the record, what was the result of the conference of counsel?

MR. HILTON: The result was that we have agreed to go ahead and present our evidence both on the title and as to the compensation at the same time, and the court will determine the question of title from that evidence and the jury determine the question of compensation and damages, upon proper instructions from the court.

MR. SKEEN: That is correct.

MR. HUNT: That is right.

THE COURT: The stipulation may be entered. We will make a minute entry to that effect. The jury may remain during the taking of all testimony in the matter.

- 10 The plaintiff may go ahead and make a prima facie showing on title only at this time.

MR. HILTON: I doubt that we can separate it that way, because we have got to call the witnesses at different times.

THE COURT: If you have an engineer you can put him on.

MR. HILTON: We have the engineer that prepared this map, and he can identify it, and will tell the story. If counsel is going to make

arguments to the jury, we can refer to it. It is made to exact scale and it is accurate.

(Plaintiff's exhibit A marked — the map).

THE COURT: Now that counsel are all here, what are your suggestions as to the manner of procedure. It is my opinion that the burden is on the defendants as to the question of damages.

MR. BATES: Yes, and for ownership.

MR. HILTON: I think that is right, Your Honor.

MR. BATES: There is one other question that maybe we can decide on, the question as to the quantity of water. I don't know whether the plaintiff had in mind the actual quantity of water, or whether it is asking for whatever water there is in that spring area, let it amount to what it will.

MR. HILTON: As to the quantity of water right at this time I don't care to stipulate on that. I think that will come in on the proof of the plaintiff. That can be determined later.

MR. BATES: I want to make this request; that we have an order of permission to go into the water system that they have built to make the necessary measurements to determine the water.

- 11 MR. HILTON: No, Your Honor. I would say it is wholly different water, because it is not a question of the water we are now taking or diverting; it is a question of what is the value of that water, what it would have been in their native state before the court made any order

whatsoever — to show the value of that water, or quantity of water, now being diverted through the system that is put in there.

THE COURT: Let's see, we agreed that the trial judge here made an order of temporary occupancy.

MR. HILTON: Yes.

THE COURT: Apparently made ex parte.

MR. HILTON: The order was made on June 15, 1939.

MR. BATES: That was after you had completely taken possession of everything — put it under lock and key.

MR. HILTON: I think it was.

MR. BATES: What they have taken is what we want to know.

MR. HILTON: That is what the evidence will show.

MR. BATES: For that reason we ask for permission to go and make the necessary measurements of water, to see what water there is there.

THE COURT: I am just wondering if we cannot save time by requesting the plaintiff to put their engineer on to identify the map and for the record describe the general characteristics of the country, and have him testify how much water there is going down the pipe-line there without throwing too much burden on you in any way.

MR. HILTON: If the court please, is counsel going to make an opening statement to the

jury? I would like to hear what that statement
12 is, or if he is going to waive it and go right
ahead with the proof. And also, if there is no
objection to this map, which is plaintiff's ex-
hibit A, it is offered in evidence.

THE COURT: It may be received.

MR. HILTON: As to this quantity of water
that is in our pipe-line, that it is the quantity
of water taken from those springs, and if
measurements are made of that at this time
by the defendants, I think it is wholly differ-
ent water. Furthermore, at this time it has no
bearing upon the case. It is wholly outside the
issues. There is no issue as to it, at all.

MR. BATES: It is vitally material.

THE COURT: You filed a condemnation
action, and you are asking for certain things.
What are you asking for?

MR. HILTON: We are asking the value
of certain water that has been taken. It will
take evidence to go to prove those things. Now,
we have an allegation here that some of this
water does not even belong to the defendants,
at all. How should that be measured and
fixed now? That question comes up later on.
The issue here is, does he own that water, and
the burden is on him to prove that he owns it.
Let him prove that he owns it, before there is
any measurement of it.

THE COURT: You have asked for certain
things. You have asked that you be permitted

to occupy the premises and to use the water. You do not describe the water.

MR. HILTON: Yes, the water is described in the complaint from two springs.

- 13 MR. HILTON: The question is how the taking affected the land, the value of his land by taking the water from those two springs.

MR. BATES: That is not the question, at all. The question is what is the reasonable value of the water that they have taken from us. What incidental damage has the other property sustained?

THE COURT: We can go ahead on that matter of value as we go along. But now the question is whether the plaintiff will offer some proof as to how much water they claim they took, or whether the court will let the defendants go up there and measure some water. In some way, we have got to get that into the record.

MR. BATES: As to what they have taken, that is another question, but certainly the water that is running in the pipe, is a fact that will help Your Honor to arrive at what the facts are. That is all we are asking for.

MR. HILTON: The statute says that in all condemnation proceedings, the value of the land affected by the taking, must be considered in connection with the water taken.

THE COURT: Are you proceeding under the general condemnation, or under the city or town statute?

MR. HILTON: Both. It says in all condemnation proceedings the value of the land

affected must be considered in connection with the water right taken.

- 14 **THE COURT:** Gentlemen, if this complaint were before the court on demurrer it would be a different situation, but here we are in the trial of the cause. There is some question in the mind of the court as to whether or not the complaint is definite enough to grant what you are seeking.

MR. HILTON: We are seeking the water from those two springs. The court has already ruled that it was definite enough. It was raised on demurrer. Judge Hayes has ruled on it. We have taken all the water that is issuing from those springs.

THE COURT: What is your position with regard to permitting them to go and measure that water?

MR. HILTON: That that water that is going through the pipe line now — it is wholly immaterial.

THE COURT: From these two springs?

MR. HILTON: The only water that goes through the pipe is from the two springs.

THE COURT: Do you object to their measuring the two springs?

MR. HILTON: Except that it would be wholly immaterial. The question is, how did it affect the value of his land by the taking of the water. That is our contention. I say it is wholly immaterial at this time to measure the water that

is going through that pipe line now. It is not evidence in this case.

THE COURT: Do you care to offer any testimony as to how much water you took under that order of occupancy?

MR. HILTON: I would not say that we would not care to. I still say that it is immaterial. It is not evidence in the case.

THE COURT: I do not want to discuss it in the absence of the jury. The court is going to permit the defendants to get some evidence in the record on the amount of that water, either by your proving it, or permitting them to
15 measure it. Did you serve notice on these gentlemen when you obtained this order for temporary occupancy?

MR. HILTON: Yes.

THE COURT: Who did you serve?

MR. HUNT: He never served me.

THE COURT: If that is the situation, then, your order is probably void, unless you want to consent to that measurement. The court can set aside the order of temporary occupancy right now.

MR. HILTON: I don't think it is admissible at this time as to whether the court wants to go out and measure the water.

THE COURT: Unless you want to consent to an inspection by the defendants of this water, the temporary order of occupancy will be set aside, and the possession of the springs awarded to the defendants pending the outcome of this litigation.

16 MR. HILTON: Well, if that is the order of the court, all right. Would the testimony of

that water of Rosses Creek, Mr. Bates, be satisfactory to you, the measurements made by Mr. Hardy, the engineer, on the measurements of the water in 1937?

MR. BATES: I don't believe I would want to be bound by the measurements of Mr. Hardy. He was the engineer for the town through all these proceedings, when it was arbitrarily taken away from us. I don't believe we would want to be bound by it.

MR. HILTON: I am willing to do this, say we amend paragraph two of our complaint, where we say water in the amount of .15 of a cubic foot per second, or approximately fifteen hundredths of a foot per second — seventy gallons per minute.

THE COURT: Would that be the amount of water you are seeking to condemn? That is one of the questions we are getting into? It is up to the plaintiff whether he wants to amend the complaint, or not. I am convinced that the complaint should be more definite, so that we can tell what you are taking here. Who is your witness that you want to go up?

MR. BATES: Oscar Anderson.

THE COURT: What hour do you want to make the measurement? The town will send a man up there; let the man with the keys unlock the box, and let the engineer make his measurement.

MR. HILTON: Mr. Hardy can go up there with him.

FRANS PETERSEN, for defendants, testified:

DIRECT EXAMINATION:

By Mr. Bates.

- 17 Age 66. Reside at Salina, have lived there 25 years; before that lived at Koosharem.

Q. Do you know the drainage area lying over to the east of Richfield, in those hills known as King's Meadow Creek?

A. Yes. I traveled along that creek all the way down from the head of it; a good many times; summer and winter.

Q. Did you know a stream of water that is tributary to King's Meadow Canyon Creek, that comes in from the hills on the east of the canyon, about opposite where the road comes over the west hills there, a dug-way road, which creek has been frequently referred to and known as Rosses Creek?

A. Yes, sir.

- 18 How far back in your life do you remember of first seeing that stream?

A. Well, I could not tell you the year, but almost all my life, fifty years, going back as far as the '80's.

Q. Going back as far as the '80's, what has your memory been of those years you would travel up and down and see that stream from time to time?

A. I could not tell you the years, but I have known that stream ever since I was a small boy.

Q. During your early life did you travel up

and down this drainage area of King's Meadow Canyon Creek?

Yes, sir. I was interested in the canyon, in driving cattle there; that experience goes back to my boy-hood days.

- 19 Q. You may state whether or not you are familiar with the topography of the ground, this canyon, down through which Rosses Creek goes, to the main King's Meadow Creek; have you been up through there?

A. Yes, I have been up through there; am acquainted with the canyon that Rosses Creek goes in; has been several years since I was up and down the creek, maybe eight or ten years, since I was up over the creek.

Q. Do you have a general memory of its condition as it was when you were up and down the creek?

MR. HILTON: I was going to object to that on the ground that it was too remote. This relates to title?

A. Yes, I have.

MR. BATES: Q. Describe to the court, as you remember, those early conditions?

A. It seems that the creek in early days, and even the last time that I remember anything about it, the amount of water in there varied some. Sometimes there was a lot more water than there was at other times. I don't remember that I have seen the stream dry. There was always water where the stream emptied into the main channel.

- 20 Q. Up to this place labeled the Petersen ranch, and on up stream, and finally to a point where a blue mark shows a union of two creeks,

one bearing over towards the left of the map and the other going straight on toward the southern portion of the map; are you acquainted with the various positions?

A. I believe so.

MR. HILTON: Which would be north?

MR. BATES: I assume that up here would be north, and the bottom south. The arrow points to north.

Q. Now, there is a road going along that meadow, Mr. Petersen, following in general the same course as the dark colored lines near King's Meadow Creek and Petersen Creek. There is a line almost parallel with it, two lines close together, going up stream and crossing the creek at the point where I am now pointing, and then staying on the easterly side of that creek until it crosses Rosses Creek. That, if you understand, is representing the highway?

A. Yes, sir.

Q. Do you know how long that highway has crossed the creek between the Petersen ranch and Rosses creek. How long since that road was built there?

A. I recall — my recollection was that road stayed on the west side all the time, with the exception of a forked road that used to go there and went down to the old Petersen ranch, the way I remember, until recent years. It is just four or five years; up until that time the road when it came to the point, now crossed the creek and continued on the west side of the creek.

Q. Is that the route you usually traveled

when you went up and down that road, or in the moving of livestock?

A. Yes, sir. I also used freight outfits up there, on the west side of the creek.

Q. Is the point here, as you understand the map, and remember the conditions, about the true point where Rosses Creek and Petersen Creek join?

A. It looks about right.

Q. So that when you traveled up and down that road in those days, the point where you say the water joined from Rosses Creek to the Petersen Creek, would be down near that point?

A. Yes, sir, that would have been on the east side of the road as it was in the early days.

23 Q. What is your memory as to the time of year, if you have a memory, that you would see the stream very small there?

A. It seemed that the stream varied considerably, according to the heat and the water conditions. Some times no stream of water in there on Rosses Creek and other times it was quite small. I refer to the water conditions, long dry spells, it seemed to be short. When we had water, there was a bigger stream.

Q. Are you able to describe accurately the physical conditions aside from the water in the Rosses creek canyon?

A. The bottom of the canyon is quite narrow, with a sort of wash running up and down right through the bottom of the canyon, that the water runs in; here and there along the line vegetation grows along the creek bed, so that

the water that comes down is confined to a narrow channel, all the way.

- 24 Q. Do you remember the area up in the head of of the canyon where the water arises?

A. Yes, there is not much difference all the way up. It widens out there a little more.

Q. What is your memory in reference to the place where the water comes from the ground — springs or seeps, or anything of that kind?

A. It seems that the water seeps up along back quite a little piece there. I would not call that much of a spring. More of a seep.

Q. Have you been up in that canyon since the town of Sigurd diverted the water into the pipe line?

No. sir.

Q. You haven't been up since then. Do you remember a place up there as you traveled through the canyon where there was just a small flat on the north side in the creek bed that was inclined to be a little more marshy, a little more swampy, with a little more evidence of water?

A. Yes, sir.

Q. Can you give the court a fairly accurate description of the physical conditions there, about how large this spot is?

A. Well, it is a little flat up in the canyon, not very large. It is covered with grass, used to be, and water seeped out of it. The water went down Ross creek.

- 25 Q. Are you able to give the jury a judgment as to the amount of water you have seen there from time to time coming down there?

A. Now, I don't know — as far as — not too

many inches or feet. I could not tell you; well, I seen plenty of water there to go in five or six good furrows, and I have seen it — first, I would like to ask where do you want me to see this water was, at the mouth or up in the canyon?

Q. I am going to ask for both. Where are you referring to now?

A. Up in the canyon. I have seen the stream where there was five or six furrows of water, good furrows of water, and I have saw it where there was not more than one furrow.

26 Q. Tell me whether or not there was a stream of water coming from the south down through the channel that is referred to as the Petersen creek, and uniting with Rosses creek?

A. Yes, sir, there is a stream of water all the way from Meadow Valley down to Old Petersen ranch; over by the Brimhalls; all the way down to the Petersen ranch?

Q. When those streams united, how far down the canyon did they go during the major portion of the time?

A. The Rosses creek and Petersen creek were united, going on down the canyon, down toward the Petersen ranch country; there has always been a stream there.

27 Q. So that after these streams united, the stream would be serviceable for irrigation purposes?

A. Yes, sir.

Q. I will ask you whether or not during those years you know of this water being used for irrigation purposes on any of the places on down the stream?

A. Yes, that water was used on what we call

the Petersen ranch in early days; I mean when I first knew it; possibly as early as 1890.

Q. So you recall definitely there was usually a stream of water flowed out of Rosses creek and united with Petersen creek?

A. And these two streams as a rule went on down, and were used for irrigation purposes on the Petersen ranch.

Q. Do you know anything about the amount of ground that was irrigated in those days with that water?

A. No, I could not tell you just how much ground that was irrigated.

Q. Do you have any knowledge as to whether or not ditches were made so as to carry that water on down stream further than the Peterson ranch from time to time and used on what we know as the Nebeker ranch?

A. Yes, sir, and that also dates back to the early days.

28 Q. Do you know of this water being used on any other place at any time other than on either the Petersen or the Nebeker ranch?

A. No; it was used before this time on the little flat above the Petersen ranch, below the reservoir.

CROSS - EXAMINATION:

By Mr. Skeen.

Q. You have referred to the Petersen ranch and the Nebeker ranch. Those ranches are the

two that are indicated on the map, exhibit A, are they?

A. Yes, sir. The Petersen ranch is the one indicated in purple; I don't know just the quantity of land that was irrigated on the Petersen ranch, possibly twenty or twenty-five acres; crops grown in the early days, in the '90's or thereabouts were hay, grain and potatoes; they constructed ditches to carry water out onto the Petersen ranch for irrigating the alfalfa and grain; they diverted the water; it is several years since water seems to have been taken down below.

29 Q. But prior to that time for quite a number of years, at least, you saw it used on the Petersen ranch?

A. Yes, sir.

Q. Are there any actual meadows on the Petersen ranch?

A. Yes, sir. (Indicating on map, exhibit A, about where meadows are located). House is indicated by a little square pencil mark; one meadows come up right north of the house; there was a hill running down to the point of the hill, and then cornering, has always been a meadow since I can remember, from the house down to the green part of the map marked pond; there has always been a meadow on the ranch since I have known it; it stayed wet during the summer period.

30 Q. Any hay cut, at all, or was it just used for pasture?

A. They used to cut hay there from 1890 down to 1925 or 1930, that is when the Petersens owned the ranch, and then the years that the Ander-

sons owned the ranch, too, they cut hay a good many years, too.

Q. Were those springs that you saw, did those springs arise where the ground was damp, and water percolated through the ground?

A. Yes, they were up at the head; they were not merely springs gushing out of the ground; it seems that the head where the water springs out, there is quite a meadow up there, and a little boggy, and the water just seeps out of them, and little seeps below — I don't know whether it is just spots or little seeps below again; little damp spots where the water seems to increase, a little more water, and finally finds its way from this spring area and gathers in Rosses creek and joins Petersen creek.

31 Q. Now, could you indicate on the map the Petersen ranch, what land approximately was under cultivation devoted to raising alfalfa and grain at the times you have mentioned?

A. Here is where the home was, and they farmed this land out here, indicating the portion that is meadow; they farmed this; they took water out here and farmed this ground here, and then they farmed a piece out around here, indicating east of the meadow; they farmed out here, both east and west of the meadow.

FRANS PETERSEN, recalled:

CROSS-EXAMINATION:

By Mr. Hilton.

Q. Now, Mr. Petersen, when you say you traveled up along the canyon road there, you

had reference to traveling up and down the Petersen creek, didn't you?

A. Yes, sir, the canyon is one that extends further south from Rosses creek.

- 32 Q. I mean by that, at the junction with Petersen creek, that Petersen canyon extends further south, and isn't it true King's Meadow Creek canyon is really below the Petersen ranch. It has always been understood in that community that these springs and wells that are on the Petersen ranch are usually called the King's Meadow springs, are they not?

A. Yes, the only name is King's Meadow canyon. These springs were always called the Petersen springs; Petersen creek is fed by a number of streams on the way down south; am acquainted with Chrises creek, that empties into Petersen creek further south.

Q. You are acquainted with the Brimhall springs?

A. Yes, sir. Brimhall springs sink before they get to the Willow Patch springs. At Brimhall there is quite a stream of water, and it runs down for a mile or such a matter and sinks, then when you get down to the Willow Patch, then you have got this other stream that comes in, a little more springs, they develop right at the Willow Patch; we have the Brimhall springs and then run for a mile or such a matter and then sink, and then we get down here, we have a little draw, and then a stream at the Willow Patch. We have these other streams that come in below here, they all form Petersen creek.

Q. Now, you observed the water in Chrises creek?

33 A. Yes, sir.

Q. Did you observe it in Chrisses creek at all times as you say you observed it in Rosses creek?

A. Yes, sir.

Q. Well, state whether or not there was more coming from Chrises creek than you ever saw coming from Rosses creek?

A. Yes, I think it is a bigger stream; well, I could not say how much, but it is a bigger stream; not four or five times bigger, no, not that much, but considerably bigger.

Q. How far is the old road from the junction of Rosses creek and Petersen creek? Do you know what I mean by junction? According to the map, there is the Rosses creek and the Petersen creek. How far to the west is this junction?

A. Oh, possibly anywhere from twenty-five to fifty yards.

Q. What is the situation right at this junction? Isn't there a large depression right there at that junction of these two creeks, that is a large hole?

A. No, not particularly; I don't know that there is any hole at all. I don't think much of a hole.

34 Q. You think it is a level country there, do you?

A. No, it has plenty of fall.

Q. Now, as you observed the conditions here,

you observed willows or trees growing on Rosses creek up from Petersen creek?

A. Not very many.

Q. Some distance up Rosses creek isn't there some growth there right in the bed of the creek?

A. Not to speak of. On the sides of the creek bed there are bushes of different kinds growing there, sarvice berry bushes along there.

35 Q. Going up Rosses creek, how far do you go before you find willows or grass?

A. There is not much grass nor willows till you get up where the water starts.

Q. Well, as you were driving along there on this road that was twenty-five to fifty yards west of Rosses creek, did you ever stop at that junction for any purpose?

36 A. Yes, sir, used to get water there; I stopped there and went over to Rosses creek to get good water many a time; at the mouth that runs into it.

Q. How big would the stream be?

A. Sometimes quite a stream of water; other times it was smaller; the channel where it came out was mighty small channel, a narrow channel; well, maybe eight inches wide.

Q. Did you ever water your horses there?

A. Yes, sir.

Q. Did you have to puddle it to water your horses?

No, sir.

37 Q. Did you ever water your horses in Chrises creek?

A. Yes, sir.

Q. Now, when you were driving up there, did you drive your wagon right up to the head of the springs, up to the top of the spring in Rosses?

A. No, sir, did not drive the wagon up there at all; either went afoot or horse back.

Q. I see. Now, you said that you estimated the amount of water at the main spring, didn't you, you said there was probably enough water there for five or six furrows?

A. I don't think I said at the head of the spring; I said there was, possibly had seen water enough for five or six furrows in the stream; other times it was down less than that; I would not say right at the head of the spring; I said in below; I don't know just exactly what there was at the head, because that water was spread out, and the seeps mixed below.

Q. Now, if there was enough water for five or six furrows at the spring, just below the spring, how much water would you say there would be down below the junction of the two creeks?

A. I could not say exactly how much there would be; my observation was that it would sink and raise all the way down the creek, and some places there would be quite a source of water, and it would escape and come up below, and then raise again, and sink again. That is what I mean by the water sinking and raising up again. That is my observation in that little canyon.

38 Q. If there were five or six furrows of water from this main spring, there would have to be some evaporation —

A. There would be unless there was some water accumulated down the stream. I do know that the stream seemed to be a good deal the same size all the way down, only where, as I said before, where it sunk in the sand, and then raised again maybe below.

Q. Did you when you saw it up there at the spring, just below the spring, when you estimated five or six furrows, did you on the same day see the water at the junction of the rivers, or the junction of the creeks?

A. I do not know that I can recall of any time when I noticed both places the same time.

Q. You said that sometimes you had seen that creek when there was more water in it, and other times you had seen it when there was little water in it?

A. Yes, sir there was a good deal of evaporation; there was less in it during the heat of the day than there was at any other times of the day; I said I laid it to that thing.

39 Q. On those times when there was less water, where was it; at what point on the Rosses creek?

A. I could not tell you what point, because I may have been from one end of it to the other. When I was on Rosses creek, I usually rode through the creek, from the bottom all the way up, and maybe back again.

Q. Can you tell us what the situation would be say in the month of June on the creek?

A. Generally a very good stream of water through June.

Q. You noticed it would increase some in rainy weather, in a rain storm?

A. Certainly.

Q. Now, have you seen Petersen creek dry?

A. Yes. I could not give you the time of the year, but I have seen Petersen creek when there was a good stream at the head of the ditch, and when you got down to about where the two streams come together I have seen it sink again, right in the heat of the day I have seen that, but not very often.

40 Q. Have you seen it dry below Rosses creek?

A. I have never seen Rosses creek dry, but it may have been, but I never saw it when it was.

Q. Would you not say that the majority of times that you drove up there, you didn't pay any attention to Rosses creek or Petersen creek?

A. No, I think I generally paid attention to them, because water was some object to us, to me. Generally for our teams to water; it is a long ways between water when you are driving stock, too. They were mighty anxious to find those creeks.

Q. Now, as to the cultivation of land on the Petersen ranch, as I understand you, you said that this water from Petersen creek was used on the Petersen ranch?

A. Yes, sir.

41 Q. You stated that so many acres were under cultivation. Now, did you ever see the water from Petersen creek actually flowing on the land on the Petersen ranch?

A. Yes, sir.

Q. Now, you are familiar with this Petersen ranch. You know, don't you, on this Petersen

ranch that there is a large pond here, don't you?

A. Yes sir, there is now; no pond there years ago.

Q. Isn't it a fact that most of that meadow was watered there from sub-irrigation, or from the waters of those springs?

A. No, the whole thing was actually boggy and wet, and these springs, my recollection was, that they run down through a channel into the Nebeker ranch.

42 Q. There is a good deal of that that was actually a meadow, wasn't it?

A. Yes, sir, they cut hay from that meadow; any water that come from Petersen creek would have to be used on this higher ground.

Q. How many acres would you say was irrigated from Petersen creek water?

A. I estimated before from fifteen to twenty-five acres, but I am just guessing at that.

Q. That was the combined flow, wasn't it, of Petersen creek, that went in there?

A. Yes, sir. I didn't actually measure that acreage.

Q. When was the last time that you saw twenty-five acres of land irrigated from Petersen creek water?

A. I could not give you the year, but when the Anderson people run the farm. They farmed, I think, about that much land.

43 Q. Was the diversion ditch right on the farm?

A. No, it is a little above the farm where they took the water out.

Q. There is some of that farm there, directly east of the Petersen creek, that is much higher, isn't it?

A. Yes, it is a little higher. They brought the ditch above, struck around here, and run it down through the farm. There is a little fill that they constructed.

Q. What kind of soil did it go through?

A. Well, they have got a sandy soil there, sandy loam, and some clay.

Q. Isn't it true that a great deal of water was lost through evaporation and seepage in those ditches?

A. I don't think they lost much water from the main channel around onto the farm. It wasn't far enough to lose much.

GEORGE PETERSEN, for defendants, testified:

DIRECT EXAMINATION:

By Mr. Bates.

44 Age 63; reside at Glenwood. Lived in this county all my life; engaged in agriculture and livestock.

Q. Do you know of a place over across the hills east of Glenwood that has been spoken of here and is commonly known as the old Petersen ranch?

A. Yes, sir, I think so.

Q. Do you know who originally owned that place?

A. There has been different parties. My father used to own that a few years back.

Q. When did your father own that property?

A. He owned that particular country, I think, in the '70's, 1870, up until about 1899.

Q. To what extent were you there during those years?

Well, when I got large enough to ride, in fact, before I was large enough to help and to work, we lived there in the summer time, and father took care of the place.

45 Q. Did they grow agricultural crops on the property?

A. Well, we raised corn, grain, potatoes and hay; the water came right off the meadow; he had springs right there on the place. They could take it around that, on the east of the creek and irrigated that wild hay. On the west of the creek we got the water down the King's Meadow canyon. That come down. We irrigated the high ground and part of the meadow. We put up wild hay.

Q. There is a rock house, an old rock house standing there on the property?

A. At King's Meadow. We used that on the west, just west of the house and north, north and west, on the east of that big wash.

Q. Do you remember about what amount of ground was irrigated from the King's Meadow creek?

A. Well, I don't know just exactly how many acres, but it was, I should judge, around about thirty acres, perhaps a little better.

Q. Is there a tributary to that stream that is referred to as Rosses creek?

A. Yes, sir. There is a spring by the name of Rosses creek, Rosses spring, that was one of

the tributaries to that water that we irrigated with.

46 Q. Was the water from Rosses creek, part of the water that was used in the irrigation of those grounds in those days?

A. Yes sir, there was hardly a summer there for years but what we would go up during the summer and clean out that ditch and bring all the water we could get from that spring.

Q. Did you clean out the rocks and brush that gathered in the channel?

A. Yes, we would go up that narrow channel, we would keep it as narrow a channel as we could to get as much water as possible.

Q. Do you have a judgment as to the quantity of water that was in the stream up towards the head?

A. I don't know much about the measurement of water. I don't know, but I would say, I believe there was close to a half a second foot of water at the head of the spring.

MR. HILTON: I object to that. He has stated that he didn't know how to measure water, and could not measure it, yet he would estimate a half of a second foot of water.

MR. BATES: Q. Have you been using water for many years?

A. Yes, sir.

Q. Have you seen streams and been around people who know streams and have you heard estimates made by users of water. quoting the number of feet in streams?

A. Yes, sir.

47 Q. Let me ask you a little further. Was that

portion about the amount of water that was usually found in the upper portion of that stream?

A. By keeping the channels cleaned out, I would judge about that, yes, sir.

Q. What if anything would happen there to change the quantity of water?

A. If those channels were not cleaned, they would fill up. The sediment would fill it up, so the water would not come down.

48 Q. As you come on down the stream, was there some fluctuation or varying in the quantity of water?

A. Yes, unless it was made clean. Rubbish gathered there, and it would check it up. There would not be as much water as you come down lower, towards the point of the hill. There wasn't as much water as there was at the head; that is where it empties into the King's Meadow Canyon, or into the Petersen creek.

Q. Would the quantity that flowed into the Petersen creek vary from day to day depending on how well the channel of the stream was kept open?

A. Yes, sir, it checked up in the month of July and August. There wasn't as much water as there was during the other months, I don't think. It seemed to vary quite a bit.

Q. What was the condition at the head of the stream with reference to those months, July and August?

A. I could not see much difference in the water at the head. A little less in June, on the coming of the warm weather.

Q. Have you in your testimony given us a general description of that stream and the use of that water during those years, during the years from 1885 to 1896?

A. Yes, sir.

49 Q. To what extent have you observed the conditions since that time?

A. Since that time I don't know much about it, only that is extensively, up to the last six years. I don't know as I have crossed the creek, but different seasons I used to haul wood there every fall.

Q. In hauling wood, did you go up and down this Rosses creek canyon?

A. I have crossed it right at the junction. I have never been right up into the creek since I left the ranch.

Q. An old road goes up and down that canyon there?

Yes, sir.

Q. You went right up Petersen creek canyon, did you?

A. Yes sir; in wood hauling.

Q. Well, what was your observation with reference to the water flowing at the junction of the creek during those periods when you crossed with your wood hauling work?

A. I don't believe there is as much water there as there used to be a few years back. I think the water has decreased.

Q. What years do you say that the water seemed to have decreased?

A. From the time we left the ranch, about

'99, up until the last twelve years I have crossed there in the fall of the year.

50 Q. Did the water that came from that section in part serve for the irrigation of the land that you have testified about?

A. Yes, sir. It is up and down. In the summer it varies considerably, but when we used to own the range there, and we took care of it, we had a very good stream of water. There is a cut there perhaps twenty feet deep in places, and that water has not the same chance to evaporate.

CROSS - EXAMINATION:

By Mr. Skeen.

Q. Mr. Petersen, during the '80's and '90's when you say you put up hay on the Petersen ranch, do you recall how many acres you had in hay?

A. Well, no, not exactly. I would judge that there was around thirty or thirty-five acres of hay that we put up there, besides farming purposes another twenty or thirty acres.

Q. What did you raise on the part that you were farming?

A. We raised oats, potatoes and corn; never had any lucern in there when we owned the place only one year.

51 Do you recall about how many tons of wild hay you put up there?

A. I should judge around a ton to the acre — twenty-five to thirty tons of wild hay during each year.

Q. This meadow on the Petersen ranch indicated on the map by the green between what

is marked pond and the place marked spring is that the center of the area that you grew wild hay on?

A. Yes, sir, right around in there. Some years we took it out at the southeast corner of the ranch, and finally the wash got a little larger there, and we changed the diversion up perhaps a quarter of a mile up the canyon and took a ditch down through the brush; when we watered this high ground on the west side of the creek, the seepage would come right in

CROSS-EXAMINATION:

By Mr. Hilton.

52 Q. About how old would you be in 1899, when you were on the place?

A. I was born in '76; about twenty-three years old when I left the place.

Q. Now, you lived on the Petersen ranch, didn't you?

A. We sold out there. We moved into Glenwood school in the winter time; we would be there for the school months, for two or three months, or three or four months in the year and then went back after school. Sometime father would move back before the school term was out; not the full term then — practically only until I struck the 8th grade.

Q. You were in Glenwood during the whole school period, were you?

A. Sometimes we were there the full year; good share of the time, yes, sir.

53 Q. Then you worked on the farm just in the summer time?

A. Yes, sir.

Q. When you went up and down the canyons it was in the summer time, wasn't it?

A. Practically. I was on the place there some seasons all summer long.

Q. Now, when you talk about the cultivation of thirty acres on this Petersen ranch, did you do the farming on that yourself?

A. I helped. I didn't do it all alone. I had another brother younger and I have three brothers older.

Q. Now, the water that you used to irrigate this thirty acres with came from Petersen creek?

A. Petersen creek here, and Rosses creek.

Q. Well, you were here below Rosses creek, so that what you took was from the combined flow?

A. Yes, sir, of all the creeks there. All the water that came down Petersen creek.

Q. Now, you are familiar with Chrises creek aren't you?

A. Yes, sir.

Q. Did you go up that creek as much as you did Rosses?

A. No, it was a further distance.

Q. How much larger was Chrises creek than Rosses creek — as much again?

A. Yes, it seemed to be. We generally had a very good stream of water.

Q. Were there times when the combined flow of Petersen creek didn't reach your ranch in the summer time?

A. Not at that time I don't believe there was a day but what the water reached there, but

there has been years since that that the water won't reach down there.

54 Q. And then you had reservoirs to water the place?

A. No, sir. We kept — we had a smaller dam to collect the water in it. Now, the washes is wide.

Q. You widened the wash?

A. That is, the high water broke the reservoir. There is a reservoir built up there. The widening of the channel was partly the cause of the loss of water.

Q. And then there is more evaporation by reason of the widening of the channel, you think?

A. That is my idea for it.

Q. You say there have been times since you left the place that the Petersen creek has been dry?

A. There has been times there has been very little water coming down to reach the place, but not very often, I don't think.

Q. What is your observation as to how many times the water failed to reach the ranch out of Petersen creek?

A. I could not say more than once or twice that I saw the creek dry, up where the bridge crosses the creek. I was trailing over in Grass Valley and I crossed there.

Q. You could not use it for irrigation purposes; they hadn't enough?

A. Not from the main channel that come from Chrises creek. Then they would have this from Rosses creek. That would help them out.

Q. You said that Petersen creek was dry since you left the place —

A. I have seen it dry once or twice, right at that bridge.

Q. That is close to the ranch?

A. That was a mile and a half from the ranch, about a mile, anyway.

55 Q. Well, it was dry at the ranch, wasn't it?

A. From that creek, no doubt. Just before Rosses water come into it, I saw it dry there, yes sir. I would judge it was dry there. I saw it at the bridge above. I would say that it was dry there.

MR. HILTON: When you have been there you have seen the Petersen creek dry two or three times?

A. When I have crossed the bridge to go to Grass Valley; that is a quarter of a mile from where the Rosses creek comes in. I have seen the water dry there, the ditch dry there.

56 Q. When you say you have seen Rosses creek dry, you refer to times prior to 1899?

A. I have crossed that creek since that time hauling wood in the fall of the year up until twelve years ago. I haven't been down on the creek at all, but I have hauled wood there.

57 Q. Well, you understand that the old road that went up there was twenty-five yards west of the junction of Rosses creek with Petersen creek, as the gentleman before you testified, Mr. Frans Petersen?

A. Yes sir.

Q. All right, after you went across the bridge

up in Rosses creek, how far above that bridge there?

A. No bridge down at that crossing — an old road that crosses down there where this water from Rosses empties into the Petersen creek, or ditch. There is a crossing there I have crossed with the wagon hauling wood across, right where the water goes into Rosses creek.

Q. You stated that you were required to clean the channel on Rosses creek several times each summer?

A. Sometimes we went up three or four times in the summer; sometimes not so many, according to the way it filled up; big rains washed in sediment, rubbish and gravel up towards the head. Unless it was cleaned out, it would spread.

58 Q. Did the rubbish that washed in there ever stop the flow entirely?

A. No sir.

Q. Was there any reason in Rosses creek that would cause the flow in the creek to vary besides the rubbish?

A. Well, there is the sandy loam ground there, I suppose, that seeps.

Q. Hold it back?

A. Hold it back some.

Q. That held it back until evaporation took place?

A. A good sized wash in the bed of the creek, where the banks caved in, that caused it to evaporate more, and hold it back.

59 Q. When would you expect the high water period on Rosses creek?

A. During the summer months — I mean during the summer storms, a great deal of storms in the spring of the year till along, oh, when the snow was melting, along that time of the year.

Q. Now, there would be considerable water during this period coming from the mountain sides that flushed it down into Rosses creek bed, wouldn't there be?

A. When there is heavy storms and melting snow, water would run in there.

60 Q. You have no definite idea as to the amount of water that has come out of Rosses creek, have you?

A. Not them periods, I haven't exactly, but I know that I have never seen it but what there has been water there.

Q. But from the combined flow of water from Petersen creek, you never irrigated in those early days more than thirty acres, did you?

A. There may have been a little more — there was.

Q. Wasn't that wild hay irrigated from the springs, and the early spring sub-irrigation on the land itself?

A. On the east of that creek that runs through the Petersen property there, that is the area that gets water from these springs and seepages, but on the west of the creek some pasture ground along below the farm, they could water from this irrigation water.

61 Q. As to your springs that were on the Peter-

sen ranch here, they were known as the Kings Meadow springs, were they not?

A. Yes sir; a large quantity of water came from those springs; a pretty good stream, enough for irrigating, and these seepages they run in there.

62 MR. HILTON: A half a second foot. What would you say would come from these springs in this King's Meadow area there?

A. I could give you my estimate. I would say down where they come out, close to a foot and a half of water. That is one and one-half second feet.

Q. That water didn't belong to the Petersen ranch?

A. No sir. That went on down to the Nebeker below, as I understood it.

Q. All water during the late season belonged to the Petersen ranch from these areas into the King's Meadow creek?

A. Yes, sir.

RE-DIRECT EXAMINATION:

By Mr. Bates.

Q. Do you have any memory or any personal knowledge as to when the water was first appropriated by the people of these respective ranches?

A. No, I don't.

63 You said something about the water that was applied from irrigation being used to irrigate the meadows on the west side down near the spring?

A. Yes sir, that was the water that came from this Rosses creek and Petersen creek.

Q. There is not a large surface run-off of water?

A. No sir, as a rule there is not; the major portion of that stream is a comparatively constant stream, constant spring flowing from that area.

Q. What is the reason for irrigating in the winter?

64 A. Well, we didn't have enough water to satisfy us for the irrigation altogether. We used it to make grass and produce grain, etc.

Q. You found that an advantageous use of the water?

A. Yes, sir.

RE-CROSS EXAMINATION:

By Mr. Hilton.

Q. You were not there in the winter time; you were going to school?

A. I worked up there after I was grown, after I was out of school; I was seventeen years old when I was out of school, so I went on there and irrigated that ground. That ground was watered when I wasn't there, too. I had other brothers, and father taught us that, and that is the reason father had me go and do it at times; there is no more snow up there than there has been down here; sometimes we have had a foot of snow there and other times we haven't had any.

65 Q. How long would the snow last?

A. It would go through the winter, just as it happens; sometimes it would not; it has never laid there till May.

Q. There was snow on the ground when this water came down Petersen creek. The snow on the ground would stop this water coming down, if it was spread out on the ground?

A. It would run there; the whole stream that came down the canyon — spread out there on the place, sometimes all during the winter. Two feet in Chrises creek.

Q. You say there were two second feet of Chrises creek flowing there in the winter time?

A. Spread down there, sometimes irrigating yes sir. I believe Mr. Nebeker uses it in the winter time too.

RE-CROSS EXAMINATION:

By Mr. Skeen.

66 Q. When you spread that water out in the winter time, did you run it through the upper canal from Petersen creek out onto that land and turn it down your furrows that you used in the summer?

A. Yes, it would come right down, a little
67 further down than this, perhaps down the side here a little ways, from the old dam. We had a dam when we had the place right at the corner right in here, anyway, and down about half way. The lower part would be down next to where that old reservoir dam is, on the west side.

Q. Could you describe this King's Meadow canyon?

A. It is a narrow canyon; it is a south and north canyon, a little wider in places than others, but it is not so wide; there are hills or

both sides, yes sir; it has a natural drainage area for conducting the water falling in the form of snow and rain down into the channel of the creek.

68 MARCH 1ST, 1940.

69 MR. HILTON: I now ask a view on the part of the court and jury of the premises.

THE COURT: Let us have this understanding, then, gentlemen.

70 MR. HUNT: If the court please, the defendants propose the following amendment to their answer, amending paragraph twelve and the prayer. We ask leave to amend the answer by substituting that amendment for the original.

THE COURT: In other words, instead of it being one amount, you are seeking here to segregate it.

MR. HUNT: Yes sir.

THE COURT: If there are no objections, the amendment may be made.

JOHN D. ZELALIS, for the defendants, testified:

DIRECT EXAMINATION:

By Mr. Hunt.

Live in Richfield.

Q. Are you acquainted with King's Meadow Canyon ranch?

A. Yes sir, I lived there for four years, I moved there in 1927 and pulled out in 1931.

Q. Did you farm the King's Meadow ranch?

A. Yes, sir.

Q. Are you acquainted with the creek that is known as Rosses creek?

A. Yes, sir.

- 71 MR. HILTON: You say the King's Meadow ranch. You have been referring to the upper ranch there as the Petersen ranch, and now when you say the King's Meadow ranch, do you mean the same one as the Petersen ranch?
MR. HUNT: Yes.

THE WITNESS: Just the same.

MR. HILTON: Let me indicate that on the map, when you refer to the King's Meadow ranch, you refer to this one in purple?

A. Yes sir, two hundred acres.

Q. That first year you were there, did you use the water from the Petersen creek or this water from Rosses creek?

A. Both of them.

Q. Was there any time when you used just the waters from Rosses creek alone?

A. I used Rosses creek alone that spring till in August, alone.

THE COURT: You took out of Rosses creek till August?

A. Yes, fetched it down to the house with it.

72 Q. Was it mixed with the water from the other creek?

A. Yes, I watered lucern below, down below on the west side of the channel there. They have some lucern there.

Q. How much ground did you water?

A. I watered about twenty acres.

MR. HILTON: You say you watered five acres from Rosses creek?

A. Yes sir, by changing the water.

MR. HUNT: What do you mean by changing the water.

A. I went there and stayed there and changed it all the time every day.

Q. As long as you got there you changed it, alternated?

A. Yes sir, I had about two or three furrows at the time.

Q. While you lived there was there any time when the water from Rosses Creek didn't reach down over to the ranch or to the place where it ran into the Petersen creek, or King's Meadow creek?

73 A. Sometimes my water stopped for an hour or two in the heat of the day, and this water come down again to watch towards night, about three o'clock.

CROSS-EXAMINATION:

By Mr. Skeen.

Q. What years did you say you were there?

A. I was there in 1927, and pulled out of there in 1931. I raised some lucern hay; I

raised some wheat, corn and potatoes, and some barley.

74 Q. Were there springs around the Petersen ranch at that time?

A. Yes sir, some springs and flowing wells; three or four flowing wells there.

Q. Do you have a recollection as to how many furrows you could water from the Petersen and Rosses creek?

75 A. Sometimes in the morning I can water about six or seven furrows; that was in July, June and July, and May.

Q. Do you have a recollection as to the water flowing at the head of the creek; is it constant, about the same all the time?

A. Yes, it seemed like it is about the same all the time.

Q. When you watered from Rosses creek without using the water of Petersen creek, as you said you did on direct examination, how many furrows could you water with Rosses creek?

A. Oh, about three or four.

Q. While you were on the Petersen ranch, did you use all the water of Petersen and Rosses creek on your farm?

A. Yes sir.

Q. While you were using the water you didn't permit any of it to go down the canyon?

A. Some of it, waste water goes down the canyon — the water that runs off after you irrigate with it.

76 Q. Was there also water from the wells and these springs below the house that would go down into King's Meadow creek?

A. I never used that; that belongs to Mr. Nebeker.

CROSS - EXAMINATION:

By Mr. Hilton.

Q. You stated that you diverted the water from Rosses creek?

A. Yes sir, and took it over to the Petersen ranch.

Q. Now, about where on the Rosses creek did you divert that water; can you indicate on the map there about the place of diversion?

A. About half way up, following the old ditch that used to be there; it would be a half a mile.

77 Q. Did you more or less lose the water in this ditch by taking it down?

A. No, it seemed like it hold the water pretty good.

Q. How long did you operate that ditch?

A. Oh, about, while I was there, about four years.

Q. All the time you were there you didn't allow the water to go down into Petersen creek, is that the idea?

A. Yes, I kept that stream on that ditch all the time.

Q. Now, what time of the year did you take the water through this special ditch?

78 A. Well, at times in the summer; that would be in the months of August, of June and July.

Q. Now, the water that came from Petersen creek; did you use that on the Petersen ranch at the same time?

A. Yes sir. When I got them together there where the creeks come together, I built a dam from that to water.

Q. You built a dam right where the two creeks come together?

A. Yes sir; then a ditch from the dam off west north and connecting with the other water, two waters together.

Q. You did that all the time?

A. All the time. For the first year; for a while I irrigated with the Rosses creek water.

Q. For the other three years you used the combined flow?

A. Yes sir, I used that water together; that water come down below the house to Petersen creek, and then crosses it to the west side and went down where I have lucern.

79 Q. And then you had the two ditches join further down and then took the combined flow down?

A. Took it straight down to the house.

Q. Is the creek very large — Petersen creek — it flows there?

A. Quite deep in places; down below the house it flattens out.

Q. How much would you say of this north half of the southeast quarter of section twenty, township twenty-three, south, range one west, is high land?

A. Oh, about, I should imagine, fifteen acres. That is high, but it is cultivated ground.

80 Q. You didn't use any water from Petersen creek or Rosses creek on any farm except this north half of the southeast quarter of section twenty, did you?

A. I used that water on that land just north of the pond, in the southeast corner.

Q. Quite a bit of water comes from these springs and wells?

A. Yes. The channel is quite deep there.

Q. How far apart were those wells?

A. Oh, just a little ways, maybe twenty feet, twenty-five feet, or something like that. I never measured it.

81 Q. How much land was really under cultivation while you were there on the whole farm?

A. I don't know exactly, about thirty or thirty-five acres; that included the wild hay.

Q. Did you have any grain?

A. I had about four acres of barley down below the house there.

Q. You used the water from Petersen creek on that also, didn't you?

A. After I took it out of the main channel.

Q. The water from Rosses creek when you used it alone, you said three or four furrows; about how much land would that really water, this three or four furrows?

A. About five or six acres, hay land.

82 From Rosses creek alone that first year, from Rosses creek alone, you said three or four furrows?

A. Yes.

Q. About how much land did that cover, a half an acre?

A. Oh, about a half an acre, something like that.

Q. I see. Now, the water stopped during the heat of the day?

A. Yes, sometimes it stopped for a while in the heat of the day.

Q. Then there would not be any water from eleven in the morning till three in the afternoon?

A. Not on that creek.

Q. And that condition prevailed the whole time you were there, the four years?

A. Yes sir, I cleaned it out once or twice I said. I was up there more than several times.

84 Q. Did you observe the condition of the creek bed in Rosses creek?

A. Yes, there was kinda, where the spring is at, quite a big meadow there and grass, willows and a few cottonwoods around the canyon, cottonwoods and trees.

Q. You say there were cottonwood trees in the canyon quite a ways?

A. Yes, pretty near to the mouth; a few down at the mouth; up the canyon by the spring there is a lot of willows.

85 Q. Now, I was talking about willows or grass growing in the creek bed and on the sides where the water was running in Rosses creek, up from Petersen creek; you said there wasn't any up to the State road?

A. Oh, yes, I think you meant the other creek; it has water cress all along there all along up to the springs from the mouth.

86 Q. And as to the bed of Rosses creek, did you ever clean it out?

A. Once or twice; cleaned all the moss out of it.

Q. You would take the dirt that would drop off, and all the other refuse that would get in there through the rains or the floods?

A. Yes, I did it nearly twice every summer.

89 MR. SKEEN: What was your practice up there as to using the water during the winter time when there was very little snow or rain, and the ground was dry?

A. Oh, I hardly ever used it in the winter time; let it go down the creek

RE-CROSS EXAMINATION:

By Mr. Hilton.

Q. I think you said before that five acres were irrigated from the flow of both creeks?

A. Yes, it was more but when I irrigated with the Rosses creek alone I watered about, that other land five acres with it, by changing the water all the time.

Q. Now, as to the Rosses creek water, when you used it alone, could you fully irrigate it, that is, have plenty of irrigation?

A. It did sometime. I irrigated that five acres with it; started about in April, usually.

HAROLD C. NIELSEN, for the defendants,
testified:

DIRECT EXAMINATION:

By Mr. Bates.

- 90 Reside at Gunnison, Utah; was born and raised in that vicinity with the exceptions of being away three or four years.

Q. Do you know of a place over east of Richfield, or east of Glenwood, in what is known as King's Meadow canyon that was at one time called the Bastion place?

A. Yes sir, that is the same place that is referred to as the Petersen ranch.

- 91 Q. Do you know where the George Nebeker property is over there?

A. Yes sir, that is up the canyon, on the upper end of George's and the lower end of the Bastion ranch are practically together.

Q. Are there some springs on the lower end of the Bastion property that furnish water supply that goes down onto the Nebeker ranch?

A. The springs would be more up in the center part of the ranch.

Q. Do you know where the water came from that was used for the irrigation of that Bastion ranch when you were there?

A. At the time I was there we tried to gather all the water up, springs as far as Bear valley. They were called the Willow Patch springs and Rosses creek springs. I used the flowing well some at the time I was there, on that lower part in 1917.

Q. Now, referring directly to the spring that you have referred to as the Rosses spring, state

whether or not during that time that you were there the water from that spring or canyon was used for the irrigation of those lands?

92 A. Yes it was.

MR. HILTON: You mean the Bastion ranch?

A. Yes sir.

MR. BATES: Calling your attention to this map here on the board, there is some property marked in pink, which is identified as the George W. Nebeker, Jr. ranch. And then here is a green tracing going almost in a southerly direction. This is identified as the King's Meadow creek; and this is the Petersen ranch, lightly colored. Can you identify that as being the property that you refer to as the Bastion ranch?

A. Yes sir, that is it.

Q. And then as you go south up the canyon, on the map there is a place where there is a junction of a stream referred to as the Petersen creek extending toward the south, and one bearing to the south and east identified as the Rosses creek; does that, in your judgment, represent a fairly accurate picture of the location and courses of those creeks?

A. It looks right, so far as I can remember:

Q. With reference to Rosses creek, state whether or not during the time you were there you did any work by way of conserving, or gathering the water and carrying it on down towards the Petersen ranch for irrigation purposes?

A. I remember being in there with my team and plow around the point of the hill.

93 Were you successful in getting any water from that stream carried down onto the Bastion ranch to use it for this irrigation?

A. Yes sir, we had good water. I raised a good crop up there, mostly alfalfa. I had a little grain.

Q. About how much alfalfa did you raise?

A. I should say between seventy-five and a hundred tons.

Q. The waters of Rosses creek were the waters that went to contribute to your supply of water?

A. All those streams, yes. We tried to gather them all up.

Q. You mean the Rosses creek and Chrises creek, on up as far as the Brimhall springs, you got them all in together and used them to irrigate that ranch?

A. Yes sir.

CROSS-EXAMINATION:

By Mr. Skeen.

Q. How many acres of land did you raise the seventy-five or a hundred tons of alfalfa on?

A. I don't remember the acreage, but I would say, I think there was better than forty acres of alfalfa hay at the time I was there.

Q. When you were there did you use all the waters that came down the Petersen creek and from Rosses springs and those springs above the Petersen ranch for irrigation purposes?

A. I tried to gather them all up.

CROSS - EXAMINATION:

By Mr. Hilton.

Q. Referring to the map, where was this alfalfa land? Refer to it by legal subdivisions, if you can, so the reporter can get its location.

A. At the time I was there we had alfalfa down the bottom part of the farm on both sides of the creek there.

95 Q. You had alfalfa in about the center of the west half of the northeast quarter of section twenty. Was it all there?

A. I don't understand all these descriptions, but that was the alfalfa, on both sides of the creek down there, and there up towards the house, and then mostly in there; and then just off the Bastion house, alfalfa, and also along this side of the highway here.

96 Q. On what land did you use the water from the combined flow of Petersen creek?

A. It would be this land in between here.

Q. How many acres here?

A. Oh, at the time I was there I had ten acres of alfalfa on that side.

Q. You said you got from seventy-five to a hundred tons of alfalfa from this forty acres?

A. Yes. There may have been over forty acres. I would not say.

Q. Now, which part of that land produces the heaviest crop of alfalfa?

A. I would say west of the house, this ten acres I mentioned there last, about the best of the alfalfa. Some good soil there.

Q. Now, was there any wild hay growing on the place when you were there?

A. I said that I never mowed any wild hay. I used to use it as grazing.

97 Q. Now, when did you start irrigating this alfalfa with the waters from Petersen creek?

A. I used to start irrigating as soon as the snow melts; the year I was there, as near as I can remember, was in March.

98 Q. Is there such a thing up there as flood waters from Rosses creek?

A. When I was there I could not tell you which direction they came. I imagine they came from all directions, this spring I was there; you could not control that flood, no.

Q. How long would that flood period last?

A. I would say about a week, the year I was there.

Q. Did you use any waters from Rosses creek alone?

A. No, we tried to gather all these springs together; this Rosses creek was the closest one to the farm. It would reach the farm quicker than the other.

99 Did you ever measure the water in Chrises creek?

A. No. I measured the spring of water down there; I would say there would be about a fourth of a second foot of water at the Willow Patch, up at the spring.

100 MR. BATES: When you expressed your judgment about the comparative sizes of the streams by the Willow Patch, Chrises creek and the streams in Rosses creek, you were

thinking in terms of amount of water at the head of those streams?

A. Yes sir.

O. A. TOOLEY, for defendants, testified:

DIRECT EXAMINATION:

By Mr. Bates.

Reside at Vermillion — it is Sigurd; that is the north end of the present Sigurd town in the territory that was formerly known as Vermillion; age seventy.

Q. Are you one of the users of the water that is involved in this action?

A. Yes sir, they have it over there in Sigurd. None better.

101 Q. Do you know that area in King's Meadow canyon where the George Nebeker ranch is located? And the Petersen ranch on up above?

A. Yes sir.

Q. Do you know of this creek known as the Rosses creek?

A. Well, I am acquainted with it.

Q. How many years since you first became acquainted with that territory?

A. Well, I can't exactly tell, but it was the year that Ben Carter killed that officer here in Richfield. It must have been in 1923, somewhere in there.

102 Q. Do you know who was operating the Bastion place at that time?

A. Carl Hunt; he lives in Green River now.

Q. Do you have a memory as to whether crops were being grown there at that time?

A. Yes sir, by Mr. Hunt; I used to pass through there; he had seven hundred and forty bushels of wheat.

Q. Do you know the source of the water supply that produced that crop?

A. He had it on this ground west of the house, and down below the house, and clear down to the reservoir.

Q. Where did the water come from that irrigated that ground?

A. George Nebeker had all the other, but Petersen creek and Rosses.

103 Q. Do you know Johnny Zelalis?

A. Yes sir. Two or three years.

Q. Do you recall of an incident where Mr. Zelalis was accused of flooding the roads?

A. Yes sir, I was a witness in that case; it was down west from where he took the water, where the water come out from the mouth of Rosses creek, where the road went around the hill next to the Bastion ranch, and it was about four or five steps from the county road off against the hill where that ditch went around.

Q. Do you know where the water came from that the flooding was done with?

A. It could not come out of any other place than Rosses.

105 Q. Other than those two times do you have any knowledge of the use of the waters of Rosses creek for any purpose?

A. I never used it for any other purpose.

CROSS - EXAMINATION:

By Mr. Hilton.

106 Q. What were the waters involved in that suit that you speak of where Mr. Bastion lost his water?

A. All of them.

Q. You mean the water from Petersen creek and Rosses creek?

A. The springs there at the house, and the flowing wells.

Q. He lost all the water then?

A. Yes sir, he lost all the water.

THE COURT: We just as well take our recess. We will be back here at two o'clock prepared to take the trip up there.

MR. HILTON: There will be no further hearing after that today?

THE COURT: No.

MARCH 1ST, 1940.

THE COURT: Now, gentlemen of the jury, we are going to view the premises involved in this action. The record may show this is two P. M. We are going up there to view the premises, but the law is very insistent that we do not go up there to act as detectives, to make measurements, or discuss the testimony, or discuss the case in any manner. The prime purpose is to get a general view of the situation up there, so that we can better understand what the witnesses say. We are going to look
107 at the general situation there, and then come

back and listen to the witnesses. You realize that you should not make up your minds with reference to the facts in the case, but simply go there to view the premises, as I understand it.

WEDNESDAY, MARCH 6TH, 1940.

108 THE COURT: The record may show this case was continued until this time, and that during the afternoon of the last day the court was in session, the jury in company with the bailiff, together with counsel for the respective parties, and the judge of the court, went up and viewed the waters involved in this proceeding, and that no improper act was done or committed, and that nothing improper was said at that time.

MR. HILTON: I don't know whether I made myself clear, when the defendants Nebeker offered their amendment, I think it should be denied by the plaintiff.

MR. BATES: You have reference to the amendment?

MR. HILTON: Yes, your amendment. I would like to amend, if I didn't do it before, paragraph eight of the reply of the plaintiff to the answer of the defendants George W. Nebeker and Emily Nebeker, so as to read as follows: Replying to paragraph twelve of the further answer of these defendants, plaintiff denies each and every allegation in said amended paragraph contained, and alleges that the defendants are entitled to recover only

the fair market value of the water right taken and the actual damages resulting therefrom to the remaining or other lands in the manner provided by law, in substance.

109 THE COURT: The amendment may be made.

MR. HILTON: I will do it.

WILLIAM PETERSEN, for defendants, testified:

DIRECT EXAMINATION:

By Mr. Bates.

Live in Glenwood; age sixty-one. Have lived in or near Glenwood most of my life .

Q. Do you know where the property over in King's Meadow creek canyon is located that is involved in this trial as the Petersen ranch?

A. Yes sir.

Q. Do you know where the Nebeker property is over there?

A. Yes sir.

Q. Do you know these springs involved here, the Rosses spring or Rosses creek?

A. Yes sir.

Q. How many years is it since you first became acquainted with that vicinity and these springs or properties?

A. Oh, ever since I was about twelve years old, around in there.

Q. Do you know whether or not the waters of Rosses creek have in years past been used for

the irrigation of any part of that property known as the Petersen ranch?

110 A. Yes sir.

Q. When did you first know of the waters being used for this purpose?

A. That would be along in the '90's.

Q. Was your father the man who originally occupied and cultivated that ranch?

A. Yes sir; worked with father in connection with it; that gave the knowledge and information with reference to the property.

Q. Have you seen that stream frequently since that time?

A. Quite frequently, yes sir.

Q. Do you have a judgment as to whether or not the quantity of water in that stream from year to year down through the period that you have known it remained approximately the same?

A. About the same.

111 Q. Do you have a judgment as to the comparative quantity of water flowing in that stream as you saw it, as compared with your memory in years gone by?

A. That is about the same, I would judge.

Q. Did your brother Brigham Petersen own the ranch sometime after your father disposed of it?

A. He owned it a few years.

Q. Did you have anything to do with the operation of the ranch during the years that Brigham was there?

A. I helped him quite a bit.

Q. And did you have occasions to see this water in this stream in those days?

A. Yes sir; during those years it was used for the purpose of irrigating that same ranch

112 Q. What was the work you were doing at that time?

A. We were on the road work.

Q. While you were working on the road did you have occasion to observe this stream and this ranch?

A. Yes sir, we was up and down the road, the county road, the State road, past the ranch.

Q. During that period of time what observations did you make with reference to this water?

A. We camped right on the stream. That is where we watered our horses; we camped on that little saddle at the forks of the road at Rosses creek.

Q. That would be a little ways up the stream from where it joins with the King's Meadow canyon?

A. Yes sir. I would judge two or three hundred yards, something like that.

Q. You used that stream, you say, for the purpose of watering your livestock?

A. Yes sir.

Q. Are you able to describe to the court and jury the area where these springs are in the vicinity of where you saw this work done with a view to gathering those waters, with reference to those various conditions, and whether or not the conditions are such there that the

water would readily drain from that ground into the wash that carries it on down the canyon?

- 113 MR. HILTON: He has not shown that he is qualified to answer such a question, and I object to it on the ground that the witness is not qualified to answer.

THE COURT: He can answer yes or no.

A. No sir.

CROSS-EXAMINATION:

By Mr. Hilton.

- 114 Q. When you were first on the Petersen ranch I think you said it was in the '90's?

A. Yes sir. I was born in '78. Probably I was around twelve years of age, or such a matter.

Q. How long did your father own the place?

A. Well, he owned it till about '97, or '96.

Q. Did you live on the place?

A. We lived there in the summer time.

Q. How often would you go to the farm in those early days?

A. I generally went up there nearly every day.

Q. What months were you up there in the summer time?

A. It would be from the first of May on till after the crops were gathered, and then the folks would move back to Glenwood.

- 115 Q. What was the occasion for traveling up there after your father sold the farm in '97?

A. I run a few cattle and horses and sheep.

Q. What time of the year?

A. In the spring of the year along about in May, and June.

Q. When were you there after driving them up?

A. We would go up to see them later on, and push them further up on the range.

Q. What months would you go there to push them further up?

A. June; maybe three or four times in the spring.

116 Q. Now, just when did you observe the water in Rosses creek?

A. We would go up several times and clean the ditch and keep the water together to try to get it down; that is where we watered our cattle.

Q. What was the condition of the creek bed then?

A. It was quite high, washed out quite a bit.

117 Q. Are not the canyon sides pretty steep going up there?

A. A little steep, a little narrow.

Q. How much water would you say you saw flowing from the main spring down into the creek bed?

A. I would say there is enough water to water four or five furrows.

118 Q. Was there any times in the year you saw no water running from Rosses creek into Petersen creek?

A. It was running every time I was there; I never seen the creek dry.

Q. How much water was running out of Rosses creek into Petersen creek?

A. Enough to water three or four, two or three, three or four, four or five furrows.

119 Q. Tell us what months during the summer you noticed it?

A. From the first of May till along in October and September.

Q. When you were there in July and August how much water did you see flowing through Rosses creek into Petersen creek at the junction?

A. It would be less than in the spring and fall — very little.

120 Q. How far up Rosses creek do you go from Petersen creek before you find willows?

A. You go right nearly to the head, maybe seventy-five yards from the head of the spring, from there to the spring; there are no willows seventy-five yards below.

122 Q. The banks of the creek bed, or the slopes into the creek bed, were they subject to caving all the time?

A. Yes sir, all the way along except probably right near the spring.

123 Q. When you said that the water in Rosses creek remained the same from year to year, you only had reference to the times you saw it, when you were there in the spring time?

A. Yes sir; it would be from June to May.

Q. How many times did you go to that junction and observe that water?

A. I was working on the road. We would pass there quite often; sometimes we would

work there a week. I camped there, sometimes a month.

124 Q. 1927. Were you there at the junction in 1928?

A. Well, from then on.

Q. Answer the question; were you there in 1928?

A. I would not say for sure whether I was right on that junction.

Q. Do you say that you were there in 1930?

A. Not at the junction.

Q. You can't remember when you were right at the junction to observe that water after 1927, can you?

A. No sir.

Q. From your observations there in the spring time, when would you say the water in Rosses creek was higher?

A. I would say there is more water in the spring; it would be May and June, along in there; I would say it is not so hot. There is more than in the hottest part of the season.

125 Q. Is there such a thing as flood water, high water in Rosses creek?

A. Yes; high water comes down when the snow melts.

Q. When is the peak of the runoff after the runoff starts, about how long would it take to run it off?

A. The peak, only two or three days; these waters come down with pretty good force during that time.

Q. While you were on that farm, did you ever use these flood waters on the farm?

A. Not only what washes out. It would go wherever it wanted to; didn't use it for irrigation purposes.

126 Q. This Petersen ranch, by the way, it is also known as the Bastion ranch, isn't it?

A. Yes sir.

Q. When they refer to the Bastion ranch and the Petersen ranch, it means the same thing?

127 A. Yes sir.

Q. The Bastion ranch contained the southeast quarter of the northeast quarter of section twenty; and the northeast quarter of the northeast quarter, southeast quarter of section twenty — there were four forties? Those four forties were known as the Bastion ranch or the Petersen ranch? The Petersen ranch first?

A. Yes sir.

128 Q. Isn't the cultivation of these lands or the raising of crops limited to hay and grain?

A. Pretty much, yes sir; except you raise a little corn and a few potatoes.

Q. The only waters you used on the Petersen ranch were the waters of Petersen creek?

A. Yes sir, and Rosses creek, what will come down.

129 Q. Did you ever use the waters from Petersen creek for drinking purposes while you were on the ranch?

A. No sir, we had springs there; they are right north and east of the house.

Q. Those springs that you have reference to there from which you got drinking water, flowed

down into King's Meadow canyon and off the Petersen ranch?

A. Yes sir.

Q. You didn't use this for irrigating purposes on the Petersen ranch, did you?

A. No sir. They belonged to the Nebeker ranch.

Q. Where did you divert the water from the Petersen creek for use on the Petersen land?

A. Where we took it out? It was the time my father owned it, one ditch was diverted right at the southwest corner of the Petersen ranch.

Q. At the southwest corner of the Petersen land where Petersen creek entered the Petersen
130 land?

A. Yes sir, we took it out of the main channel right to the southwest corner, running into the ranch; the old channel run through the Petersen ranch to the west here.

Q. About where on the Petersen ranch did you irrigate it, locate it according to this map; it would be between the creek bed and the road, on the west half of the northeast quarter of section twenty?

A. It would be about the west half.

131 Q. Didn't that wild hay get any moisture from King's Meadow creek, and the water flowing down there?

A. Not so much; whenever we irrigated the grain, we let it run off the grain onto the meadow. They joined.

Q. How many acres did you have in grain?

A. It would be around, maybe eight or ten acres, something like that.

132 Q. With your naked eye, now, and compare it with that standard, how big a stream would flow down King's Meadow creek from those springs on the Petersen ranch, compared with what would flow in Petersen's creek where you diverted it, and used it on Petersen's ranch?

A. There was quite a bit more water that come out of the meadow or springs; a great deal more water.

Q. Was there any time while you were there that you saw Petersen creek dry?

A. No sir, generally water there all the time.

RE-DIRECT EXAMINATION:

By Mr. Bates.

133 Q. Counsel asked you something about whether or not there were any willows growing along this Rosses creek down to the lower end?

A. No, there was no willows.

134 Q. Was the water that comes down Rosses creek, that you used in those days, was that from the spring, or the water from this snow runoff?

A. Water from the spring, yes sir.

Q. Considerable time has been taken with reference to how frequently you saw the water where it joins with the water or with the ditch from Petersen creek. Whenever you happened to be there during the year was the water in

Rosses creek running down and joining with the water from Petersen creek?

135 A. Yes sir.

Q. What have you understood during all the years to be meant by "King's Meadow Canyon;" what have you understood the term to mean around this country?

A. I think the man that father got the ranch from was King. It used to go by that name. It was called King's Meadow canyon clear to Brimhall springs.

Q. After you get down to where Petersen creek and Rosses creek unite, what is the condition of the bottom of the creek, as to whether or not it is wide, flat, or whether it is confined to a narrow channel?

A. It is now, and has been for years past quite a wide channel.

RE-CROSS EXAMINATION:

By Mr. Hilton.

136 Q. Now, you never used the Rosses creek water or the water in these springs for household purposes, did you?

A. No sir.

Q. All the drinking water you had was on the Petersen ranch from the springs on the Petersen ranch?

A. Yes sir.

Q. And the waters in Rosses creek had no value as drinking water on the Petersen land, did it?

A. No sir.

MR. BATES: We object to that as improper cross examination.

MR. HILTON: Now, how did the Petersen creek get its name, if you know?

A. It would be from my father.

137 Q. It was because he claimed all these waters on Petersen creek?

A. Yes sir

Q. This King's Meadows referred to were really all that meadow land where the springs are located, on the Petersen ranch, were they not?

A. Yes, the meadows are on the Petersen ranch.

Q. Didn't the name King's Meadows really come from the natural meadows there?

A. I could not tell you that, but it seemed like Mr. King owned the country, or something like that.

Q. Now, while you observed the water conditions from both Petersen creek and also Rosses creek, how much larger was the stream coming down Petersen creek than the stream down Rosses creek?

138 A. I would say it was twice as much, maybe a little more. It is a little more water down the canyon than Rosses.

Q. Now, the water that flows from the spring near the house on the Petersen ranch, does that stream run down to the Nebeker ranch?

A. Yes sir.

Q. Were you there when the reservoir was constructed on the Petersen ranch?

A. No sir; that is after we give the ranch up.

MARION CASE, for defendants, testified:

DIRECT EXAMINATION:

By Mr. Bates.

139 Live at Annabella; age sixty-eight.

Q. Do you know this property over here in King's Meadow canyon that is referred to as the Petersen ranch?

A. Yes sir; it has been known as the Bastion ranch

Q. Do you know these streams of water over there spoken of as the Petersen creek, King's Meadow creek, and Rosse's creek?

A. I know them streams; have been on them.

Q. State whether or not you have at any time in the past had anything to do with the irrigation or cultivation of the Petersen ranch?

140 A. In 1907 I and Mr. Anderson and companions in the month of April, we come down here and had a livery stable, and we run that ranch here with the others.

Q. How late in the fall were you there?

A. All winter, you might say.

Q. During some of those years you were living in Burville?

A. Yes sir.

Q. In coming from Burville you passed up and down that highway?

A. Yes sir. I always stopped there. He was a friend of mine.

Q. This stream known as Rosses creek, do you know whether or not during that year the

waters of that stream were used in part for the irrigation of the Petersen ranch?

A. Well, it was used on the Anderson ranch, yes, or the Petersen ranch.

Q. That water was used there?

A. Yes sir, it would flow down and connect with the stream coming from the south and then was carried on and was used onto the ranch.

142 MR. BATES: Something has been said with reference to there being willows growing in the vicinity of where you say you got the water; was there willows there, or not?

A. No sir, I don't believe there is down at the bottom.

Q. Was there any willows over in the Petersen creek section?

A. No, the channel is so deep there is no moisture left in the ground — nothing grows there.

CROSS-EXAMINATION:

By Mr. Hilton.

143 Q. As I understand you, you were first on the Petersen ranch in 1907?

A. No sir, I didn't say it that way; years before that, at different times, I worked in partners with the man that owned the place.

Q. What did you do on the Petersen ranch then, 1907?

A. I usually just came there after my horses, maybe turned them in the pasture, to feed the horses.

Q. What work did you do on the Petersen ranch in 1907?

A. In that year I helped dehorn a few cattle, and helped around a little bit; pitched a little hay.

144 Q. How long a period of time would you stay there when you were there?

A. Sometimes two or three days, sometimes one night, and sometimes just drive by; along in April, 1907.

Q. Between 1907 and 1911, did you have any occasion particularly to stop at the Petersen ranch?

A. Yes sir, I would pull in there and stay all night; I did that many times. There used to be a wash on this side, when he didn't take care of that water, I saw that water go over a little too fast. We could not cross with our wagons to the house.

145 Q. But after 1911, how many times were you there?

A. I haven't been back only two or three times.

Q. What times of the year would that be when you were there then?

A. That would be in the summer months; only two or three times since 1911 to the present time that I have been there.

Q. How far would you say this place called the saddles is up Rosses Creek from Petersen creek?

A. I don't think it is over two or three hundred yards.

146 Q. You say they built a reservoir at the Willow Patch?

A. In below the Willow Patch; it would be right in Chrises creek. They dammed it off, as I understand — then the water from Chrises creek or the Willow Patch you ran into the reservoir?

147 Q. How big would that stream be according to your estimate?

A. I used to figure a little better than a half second of water.

Q. That is at what time of the year?

A. This would be in the summer months that we were up through there.

148 Q. And this shows Petersen creek there. The old road went around here somewhere. Here is Rosses creek. You said that the old road is west of Petersen creek, and it is about two hundred yards from the old road up to the saddles in Rosses creek; is that right?

149 A. Down where the water is, two or three hundred yards. I never measured it.

Q. Between two or three hundred yards. Now, my question is, how far would it be from Petersen creek to the saddles?

A. You see, in that little flat there is where we stopped.

Q. Yes.

A. We didn't always do that.

Q. Just tell me, if you can, about that distance.

A. Somewhere about two or three hundred yards from water to water.

Q. From water to water two or three hundred yards. All right.

A. You will give me a little bit of rope there to choke on?

Q. You bet. You didn't notice any growth on Rosses creek of any kind, did you, from where it joins Petersen creek up to the saddle?

A. No, I don't believe I did, if I get you right.

Q. I mean by that, there is no grass, is there?

A. No, not a good deal. A little sage brush and such.

150 Q. Do you know of any other streams in Rosses creek below the main channel?

A. I don't know that I do, no; only just a few around that little meadow.

151 Q. As to the use of water on this Petersen ranch, you know very little about that, isn't that true?

A. Yes, very little, you might say. I might not call it so little; I call it quite a bit. They had to use that water in order to make that ranch; that water really belonged to Nebekers, I guess, because they had trouble over it; I know they had trouble with Nebekers over the water.

GUY JENSEN, for defendants, testified:

DIRECT EXAMINATION:

By Mr. Bates.

Reside in Munroe.

Q. Do you know a canyon and stream of water over east of Glenwood and east of the King's Meadow canyon that has been commonly known as Rosses creek?

A. Yes sir.

152 Q. How long have you been familiar with that area?

A. Well, up until the fall of 1926 I was quite familiar with it for I should say fifteen years.

Q. What were you doing in that country?

A. I herded sheep there in the fall; I was there from about the 15th of November until just about Christmas.

Q. During that period of time that you were there as you describe, did you from time to time see the waters flowing in Rosses creek?

A. Yes sir; am familiar with the spring area up near the head where these waters arise.

Q. During that period of time that you were there did you make observations as to whether or not the waters in that spring area remained approximately constant in quantity?

A. I believe the same, as near as I can tell. There wasn't any difference.

153 Q. What do you know as to whether or not during that period of time that you were there the waters of this Rosses creek united with the branch that came from the south referred to as Petersen creek?

A. Yes it did; when I was herding sheep I had occasion to cross on the road which comes just above where they come together. I rode around that on the saddle horse during the time that I was herding sheep; never crossed there that there wasn't water.

Q. Have you been there from time to time other years than when you were there herding sheep?

A. Before I started to herd sheep I went up there occasionally during the summer and fall. I hauled wood there, and crossed the stream at the junction where the road crosses; as near as I can remember, it would be in the latter part of August that I would haul wood there, and also later in the fall.

154 Q. How far from the junction of Rosses creek and Petersen creek does that road that you have referred to cross Rosses creek?

A. I could not say for sure; fifteen or twenty steps I would say from where the road goes across to where they come together, but I don't know how far it is now.

CROSS-EXAMINATION:

By Mr. Hilton.

155 Q. As I understand you, the only occasions you had to go in that country was hauling wood or herding sheep?

A. Yes sir.

Q. When you were hauling wood you would come up the old county road; the county road running west of Petersen creek?

A. From Glenwood, we crossed the bridge and then went north.

Q. And then you would cross the bridge and go on the east side of Petersen creek?

A. Yes sir; just above where the two creeks come together.

156 Q. All the testimony you have given here as to the water in Rosses creek relates to the time when you went across Rosses creek at those times?

A. Yes sir; we would go over there along in

the latter part of August and also later; in October.

157 Q. When you crossed Rosses creek at those times hauling wood, what occasion would you have for stopping?

A. Water the horses; that is in August and October.

Q. And didn't the horses go to the holes?

A. No sir, I led them over and they stood, one on each side and drank.

Q. When did you herd sheep in there?

A. We usually figured on hitting the ranch about the 15th of November; from the north. We came north and east from what we called the Bastion ranch at that time, or the Petersen ranch.

159 Q. About how much time would you spend there in the Rosses creek canyon?

A. That would be hard to say, because when a man is herding sheep, he usually takes in a pretty good sized territory. I crossed it, I would be safe in saying, I crossed the creek with the sheep, oh, on an average of twice a week.

Q. How early in the year would you go up in Rosses creek?

A. We went back to the Bastion ranch about the 15th of November; that was about as early in the year that I would go up there.

160 Q. But you say you hauled wood in the fall, too, didn't you?

A. Yes sir; in October. And these water conditions that you observed were either the latter part of August, and then up until some time in November.

J. LARUE OGDEN, for defendants, testified:

DIRECT EXAMINATION:

By Mr. Bates.

Reside in Richfield; civil engineer; graduate of school of engineering, University of Utah.

Q. State whether or not since that time you have generally been engaged in the practice of your profession as a civil engineer?

A. Yes, most of the time.

161 Q. Does your training as an engineer qualify you with reference to stream flow and water measurements?

A. Yes sir; since graduation have had some experience to do with the variation and measurements of streams of water.

Q. To what extent have you had experience and training with reference to the geological conditions that are found in connection with water problems of our country?

A. Well, I have found that in a certain kind of wells and water seeps, they are particularly different than in the measurement of wells.

Q. Did you make a measurement of water that is collected in the spring area up in the head of Rosses creek in this county and diverted into the pipe line that carries it down to the town of Sigurd?

A. Yes sir.

Q. Explain what conditions were there when you made your measurements?

MR. HILTON: We object to that on the ground

that it is immaterial, irrelevant to the issues here.

MR. BATES: Whether or not water was there?

THE COURT: He may answer.

A. On February 29 I was there in the evening and measured the spring, number one, or the upper spring, which had been collected and was flowing in through a weir in a concrete box. I measured at this weir 58.4 gallons per minute, .11 cubic foot per second.

Q. Did you make other measurements there?

A. Down about a quarter of a mile below this spring number one, there was another stream that had been collected that had entered a concrete box, that was flowing into the stream that came from the first spring. I measured that as 55.6 gallons per minute, or .24 cubic feet per second.

Q. Did you make some measurements there with reference to water in that same general channel that had not been collected?

A. I made measurements somewhere around, about fifteen feet below the second main concrete box in the channel. I measured that 15.3 gallons per minute, or three and a fraction hundredths cubic feet per second.

Q. Were you able to say, from your observations there, whether or not the water flowing in spring number one, and in spring number two were a part of the waters that prior to the collection would have made up the stream flowing down the channel where you made your measurements?

162 MR. HILTON: I don't think the witness is qualified to answer that question.

THE COURT: Whether or not he knows — a yes or no answer.

THE WITNESS: Yes.

MR. HILTON: You have an opinion as to it?

A. Yes sir.

MR. BATES: What is your opinion?

MR. HILTON: I object to that on the ground that it is not properly supported by any facts for which he has shown his qualifications to state the reasons for the flow of water.

163 THE COURT: I think I will require you to qualify the witness further as a geologist.

MR. BATES: State what your observations were that day, Mr. Ogden?

A. I noticed that there had been some big excavation made. I noticed the general direction that there would be no question but what that water came from that area.

MR. HILTON: Tell what you know. I object to that, and move to strike it out — that from his observations it seemed this, that, or the other.

THE COURT: Yes, we are interested in his experience, his qualifications, upon which to base his conclusions. The general experience, I am talking about.

MR. BATES: Where have you lived during your life, Mr. Ogden?

A. Mostly in Sevier County.

Q. During your entire life, state whether or

not you have had occasion to be in the vicinity of spring areas so as to give you an opportunity to form judgments or opinions as to the nature of the spring areas?

A. Yes, I have had that experience.

164 Q. Have you had occasion to observe the tendency of water movements through different types of soil textures?

A. Yes, somewhat.

Q. Have you had occasion to observe springs situated along the edges of mountains or canyons or ravines as to what the general course of the water is that arise from springs in or near the bottom of the elevations or on the sides?

A. Yes, I have noticed that quite a lot.

Q. Did you make any observations there that day at Rosses creek, or Rosses springs with reference to the general soil formation and general topography of the country there?

A. Yes.

Q. Did you make any observations there that day at Rosses creek, or Rosses springs with reference to the general soil formation and general topography of the country there?

A. Yes.

Q. Describe to the jury the general physical condition that exists there?

MR. HILTON: I object to it that he is still not qualified to answer as to the physical conditions existing there. If he wants to limit it to soil conditions, soil surface, that is all right.

THE COURT: Overruled.

A. I noticed that Rosses creek was a mountain country right through what appeared to be an igneous formation there. The soil in the bottom of the canyon appeared to be sandy loam. I noticed where there had been an excavation, and back filling done. I noticed the pipe came out of one end of this excavation that carried the water. If that pipe were not there, the water would be going to the surface and flowing down the canyon. I noticed two pipes.

Q. You say the soil is a sandy loam?

A. That is the way I observed it, yes sir.

165 Q. How far is it from where you saw this big excavation and these pipes from the bottom of this channel where this water would naturally run?

A. It seemed like they came from the bottom of the channel, the lower one especially. The upper one I am not so well acquainted with that, except right near the box. They apparently came from the bottom of the channel.

Q. So that the pipe intercepted the water that had been flowing in the bottom of the natural ravine?

A. Yes sir.

Q. How far was that lower box from the bottom of the natural elevation?

A. I imagine somewhere around fifty to seventy feet, maybe. Somewhere around there, I guess. I am not right clear.

Q. Was there anything there of a surface condition where the ground appeared to have been moved to indicate the curve of that pipe as it

extended from the box back toward the elevation?

A. They apparently came from the bottom of the channel.

MR. HILTON: As to the construction of the water works system, that is pleaded and admitted.

THE COURT: Do you admit you put one of these boxes in the bottom of the channel to intercept all the percolating water?

MR. HILTON: We intercepted the water. We don't describe it in great detail.

THE COURT: Do you admit you intercepted all the percolating water that comes down there?

MR. HILTON: We don't' admit that.

THE COURT: Proceed.

MR. HILTON: The objection is only that he is not qualified to tell a true story of it.

166 Q. MR. BATES: With reference to this upper box, do you have a judgment as to how far that upper box is from the bottom of the elevation?

A. Well, I would say it was from fifty to a hundred feet. Maybe I had better say forty to a hundred feet.

Q. Did you make any observations whether that opening in the box where the water flowed into it was above or below the level of the wash opposite the location of the box?

A. It was above the wash or the bottom of the canyon.

Q. What is the condition of the soil between this area where the box is and the bottom of the elevation, as to whether or not it is the type of soil that if the water were not interrupted that it would readily pass through the soil and into the ravine?

A. It is sandy loam, water would pass through the soil toward the ravine.

CROSS-EXAMINATION:

By Mr. Hilton.

167 Q. Isn't it true that loam soil is heavy enough to constitute a reservoir to hold water?

A. Yes sir; it will really hold water, and while holding it, it is subject to evaporation.

Q. Now, you went up to measure the water in this box at the instance of Mr. Nebeker, did you, and all that you know about the water works, their installation, and present operation is what you saw up there on February 29th?

A. Yes sir.

Q. What was the nature of the weather when you went up there?

A. Quite stormy, snowing.

168 Q. Well, when you went down to measure the water that was in the channel, you did it in the snow storm?

A. Yes sir.

Q. You could observe the surface conditions through that snow storm that far?

A. Not the details; you could see somewhere.

169 Q. You did not observe the underground conditions of the water works, at all, could you?

A. No sir; could not even see the place of diversion of the water.

WEDNESDAY, MARCH 6TH, 1:30 P. M.

CATHERINE ZELALIS, for defendants, testified:

DIRECT EXAMINATION:

By Mr. Hunt.

Q. Are you the wife of John Zelalis that testified here the other day?

A. Yes sir; am familiar with the place that is known as the Bastion or Petersen or King's Meadow ranch.

170 Q. Do you know anything about the waters of Petersen creek and Rosses creek?

A. All I know is that we were using it; we used it on the garden, right on the garden. I had a garden.

Q. Was there any time during the time that you lived there when the water didn't run down?

A. Not the last three years we lived there. The first year we didn't have much water, just a little while, but the last three years we had plenty of water all the time.

CROSS-EXAMINATION:

By Mr. Hilton.

171 Q. You didn't have any water the first year you were there?

A. No sir; because the spring was clogged with the weeds, and brush and rubbish, and then there wasn't no water to run; the water was sinking in the canyon.

172 Q. Now, did you know actually that the water came from Rosses creek or from Petersen creek?

A. No, we could not get that water to the garden: that is, we could not water the garden because it was high where the garden was, where the fields was. They have turned it on the fields, you know — run there, but it wasn't very much.

173 Q. Now, from this ditch that you said that you watered your garden, did the water ever quit running in the summer time?

A. No, we had it all summer. We had water all summer. Sometimes they had it on the garden. When we got through with the garden, they turned it on the fields.

ORSON CROUCH, for defendants, testified.

DIRECT EXAMINATION:

By Mr. Bates.

174 Live at Richfield; know George Nebeker, the defendant here; I worked for him in 1936 and 1937.

Q. Do you know whether or not during the times when you were there, when you were on this creek, whether or not the waters from Rosses creek connected with the waters from this stream that came down from the south. Petersen creek?

A. Yes sir, they did.

175 Q. If you know, state whether or not during the summer months the waters of Rosses creek flowed down and united with the waters of Petersen creek?

A. Well, every time that I have been up to where the water was, I knowed that there was

always a stream of water running into Petersen creek.

CROSS-EXAMINATION:

By Mr. Hilton.

176 Q. Now, Mr. Crouch, you say you were there during the summer time of 1937?

A. Yes sir; I could not say, no definite time, or how often. I just had occasion to go up the canyon there; worked there part of the time and down on the lower ranch part of the time on the lower fields; was working on the dam there, building the dam where it now sets.

Q. Why did you build that pond or dam?

A. To store water for the lower ranch.

178 Q. Did you use any water from Petersen creek on the Petersen ranch that year?

A. We used the water off from this land. We run the water down and it filled up, and it went on each side of the dam. This is just about fifty or sixty feet wide. We would pond the water in there. We run it back into the pond above the dam. We used that water for irrigation.

Q. Can you tell me what the water condition was on the Petersen creek on that date?

MR. BATES: We object to that, this witness has told him he does not remember dates. There is no use spending time on that. He said he didn't remember any dates.

179 THE COURT: He may answer if he can.

THE WITNESS: I don't remember any dates, but I do remember that there was water coming down the canyon all the time.

MR. HILTON: Do you say there was water coming down the Petersen creek on July 10, 1937?

A. The dates don't take no weight with me. I don't remember dates. I don't remember of seeing the water; I don't think I was out there on the 24th of July.

Q. About how much of the time were you there?

A. We would have occasion to go up once in a while. I can't say what dates we were up there; once or twice a week.

186 Q. How much water did you find going out of Rosses creek into Petersen creek?

A. I never noticed how much there was. We figured that we could get the water out there, that we could water the upper piece of ground on the place there.

Q. You didn't observe the water conditions there after 1936, when you were there with your automobile, at the junction, did you?

A. Don't know definitely that the waters ever passed the State highway where it is now located, except once when I went down there with the automobile in 1936.

187 Q. Isn't there a little open space right there on Rosses creek just above the State highway?

A. Yes, right at Rosses creek; there is quite an open space in there.

188 Q. Did you have any knowledge in 1936 and 1937 that Sigurd town was contemplating diverting the waters of these springs?

MR. BATES: I object to that as being immaterial.

THE COURT: He may answer, if he knows.

A. I don't remember the time that George said something about it, that Sigurd was going to take the water. I don't remember the time that he told me.

190 MR. BATES: We offer in evidence defendants' exhibit 1 and defendants' exhibit 2, being the abstracts of the title to the Petersen property for the purpose of showing its general title and present ownership.

J. LARUE OGDEN, recalled:

MR. BATES: Mr. Ogden, at the time you made these measurements, I think you said was the 29th of February; did you also make measurements of a stream further up, of Chrises creek?

A. I did, the next morning. On the first of March.

Q. What amount of water did you find flowing in Chrises creek?

A. 125 gallons per minute, or .28 of a second foot.

Q. Were those measurements made where Chrises creek crossed the road to come down toward Willow Patch?

A. Yes, right at the highway.

RE-CROSS EXAMINATION:

By Mr. Hilton.

Q. You don't mean that last answer, that the measurements you made on Rosses creek on

February 29th was up at the head waters; you mean right near the main spring?

A. Yes, right near the main spring, where the collection works was made into the main pipe line.

191 Q. How much water did you find flowing in the creek?

A. 15.3 gallons per minute. And that was .034 second foot.

FRANK ANDERSON, for defendants, testified:

DIRECT EXAMINATION:

By Mr. Bates.

192 Live in Richfield.

Q. Do you know of a stream of water over in the mountains east of here known as Rosses creek?

A. Yes sir, I was there. It has been years ago; I should judge ten or twelve years. I would not say just when.

193 Q. How early in the fall would you be there?

A. Well, it would not be very early. It would be after we brought the sheep out of the hills, we started hauling wood in October or November; yes, it would be before that, I should judge. But when we hauled our winter supply of wood, we generally go in through that direction.

Q. You may state whether or not when you did pass that point you observed water in that stream?

A. Yes, there was some water coming down the canyon. We went after wood clear to the head.

Q. Do you have any memory as to whether or not water would come down to the mouth of the canyon?

A. Oh, yes, it would come down, I can't say now, but I know it would cross the road. We would travel in lots of places it would cross.

CROSS - EXAMINATION:

By Mr. Hilton.

Q. You don't know anything about Rosses creek
194 below the road you mentioned, do you?

A. No, I don't know anything about it below the road.

Q. You don't know much about Rosses creek or the water in there except as you observed it when you were in there with a load of wood?

A. When I have crossed it, I have got stuck in there lots of times with a load of wood.

195 Q. You found bogs quite frequently when you were hauling wood?

A. Not necessarily — just a place or two.

Q. Have you been there in the last twelve years?

A. No, well, it has been the year I last run sheep, about eight or nine years ago, I would judge; fall and spring. Of course, it would be kinda early. That would be along in April, the last of April, the 1st of May, that we would go to our lambing grounds. Tenth or twelfth of April or May.

GEORGE W. NEBEKER, one of defendants,
testified:

DIRECT EXAMINATION:

By Mr. Bates.

196 Q. Do you reside on the property that is referred to as the Nebeker property over in King's Meadow canyon?

A. Yes sir; occupation, farming and stock raising.

Q. Did you enter into a contract to buy what is referred to as the Petersen ranch, being the ranch where you reside, from the State of Utah?

A. Yes sir; about 1934 I think it was.

Q. Did you make your contract direct with the State, or was there some other person that was in between you and the State that purchased, and then assigned the contract to you?

A. Yes sir; Murwin Bradfield.

197 Q. Was there a time when one Carl Hunt was there, preceding Mr. Bastion?

A. Yes, sir.

Q. During all the time that all these people have been there, have you been residing on your ranch?

A. Yes sir

Q. Have you from time to time had some trouble and disputes with reference to your water rights there?

A. Yes sir.

198 Q. During all these years have you frequently gone onto Rosses creek so as to observe that stream and do you know whether or not these waters of Rosses creek have been made use of

all the years you have been there, together with the waters of Petersen creek for the purpose of irrigating your ranch or this Petersen ranch?

A. Yes sir.

Q. No one has claimed, during all the years, that water, other than the claim made by either Nebekers or the State of Utah and its predecessors in interest to the Petersen ranch?

A. No sir.

Q. And is this claim of the town of Sigurd the only adverse claim that has ever been made of any kind to any of these waters in all those years?

A. Yes sir.

199 Q. What has been your observations whenever you have been near that junction as to whether or not the waters of Rosses creek were in fact flowing into and commingling with the waters of Petersen creek?

A. I have never seen it when it didn't reach there.

Q. At the present time are you familiar with and have you been during all those years familiar with the stream of water where the springs are?

A. Yes sir.

200 Q. Do you have a judgment as to the comparative amount of water that was flowing from those springs and from that area in the years 1936, 1937, and 1938, as compared to the amount that flowed from those springs in the earlier years?

A. I would say they were about the same.

Q. Have you seen that stream of water since

whatever work the town of Sigurd has done; what is your judgment in that regard?

A. I could see no difference in it.

201 Q. What was the condition of the ground in that area with reference to moisture, vegetation, prior to the time the work was done?

A. Well, there was a lot of moisture around there; some grass, some oak trees.

Q. Is there a deep ravine which is on either side of this swampy place you have described?

A. Yes sir; just a guess, I would say it was about six or seven feet deep.

Q. Do you know where the town of Sigurd put in that box up there for their diverting works, and how the point where the water enters that box compares in elevation with the elevation just opposite with the bottom of the ravine?

A. I would think the box would be a little bit lower.

203 Q. Are the waters that flow down Rosses creek or ravine, in the main, waters that come from the springs, or is it in the main flood waters that come from the snows and rains that fall in that area?

A. There is no large rain or snow water comes down there.

204 Q. What would you say as to whether or not there is any degree of permanence in that run-off that would be of value for irrigation purposes down on the Petersen ranch?

A. In the spring of the year, it would be all right.

205 Q. Since you have been in possession of all

these properties since 1934, I think you said, have you cultivated or produced cultivated crops on the Petersen ranch?

A. Yes sir. I did raise potatoes one year.

Q. Those waters that you are referring to from Chrises creek and Petersen creek, what became of them during the years that you have been there occupying both places?

A. It has always come down to me.

206 Q. How many acres of ground did you cultivate there?

A. About a hundred and seventy-five.

Q. How did the amount of ground you were able to cultivate and irrigate last year, 1939, compare with the amount you were able to cultivate and irrigate the preceding year, 1938?

A. I didn't have enough to cover what I had been used to farming.

Q. How much less were you able to irrigate and cultivate in 1939 as a result of taking the spring than you were able to irrigate in the preceding year?

207 A. According to my crops I figured I had about twelve acres, about fifteen acres; I put in about the same amount of ground I had been farming, and I had about fifteen acres of barley that I could not irrigate sufficient to make a crop of it.

Q. What has affected the ground, and your being able to water it?

A. Taking out that spring makes it so I could not hardly get it down over the ranch; less water above.

208 Q. What effect did the shortage of water from Rosses creek have?

A. I didn't get any good of that, at all; I was injured, lost all my crop on fifteen acres.

Q. Was the shortage of water that you have spoken of occasioned by the water that was taken from Rosses creek by the town of Sigurd?

A. Yes sir.

209 What is your judgment as to the total crop loss you suffered last year on your farm as a result of this water being taken from you?

A. About fifteen acres.

210 Q. How much in your judgment will the difference in the amount of ground you can cultivate from now on?

A. Well, fifteen acres, anyway.

211 Q. Under present conditions, with the water there the way it is, is it of any value to you for purposes of irrigation?

A. No sir; because it can't get down there.

Q. Do you have a judgment as to whether or not their diverting this water into their system has decreased the amount of water that you should have had for irrigation purposes by at least as much as the water they have actually taken?

A. I think a little more.

MR. HILTON: I object to that — nothing to show that he personally had any knowledge of that water.

THE COURT: Overruled.

212 Q. How much would it be, considered in dollars and cents?

A. Fifteen hundred dollars, or the value of the land; I mean, talking of the fifteen acres of land, with the water that I could handle. I figure that way; depreciation of the land, because of the taking of the water.

Q. Were there people in that community or in that vicinity where that water is, or may have been used for culinary purposes, to whom that water would have been necessary or advantageous?

A. Yes sir, Sigurd.

213 Q. What was their condition with reference to a supply for culinary waters — necessity for this water?

MR. HILTON: I object to it.

MR. BATES: Going to the question of value. Whether or not there is any market value for the water.

MR. HILTON: That is not the basis of valuation.

THE COURT: I will be glad to see your authorities. Overruled.

A. They didn't have very good culinary water; they got it from wells.

214 Q. What, if any effect, did the taking away of this water have on the pasture lands on the Petersen ranch or property or the State property that you bought from the State?

A. It would have quite a bit; you can't water it.

215 Q. Did the extent of your use of these waters

depend in any degree on the nature of the winter or storm conditions?

A. Oh, yes; if it was right stormy or cloudy I would not have so much use for the water. I just generally turned it onto the land and soaked up what I was figuring on plowing unless it was too wet.

CROSS - EXAMINATION:

By Mr. Hilton.

Q. Now, I think you stated in the early part of your examination that all the waters that came down Petersen creek were used on the Petersen ranch before you acquired title to the Petersen ranch?

216 A. With the exception of waste water.

Q. You always recognized that the Petersen ranch was entitled to that water, did you?

A. Yes sir.

Q. I mean prior to the time you acquired title to the Petersen ranch you recognized that the owners of the Petersen ranch had the right to use all the waters of the Petersen creek.

A. Yes.

Q. In what way did you claim title to that water?

A. Because I had it all my life.

217 Q. Didn't you file your claims to water in King's Meadow creek with the court in that Richlands Irrigation Company case?

A. No.

Q. I show you a paper here and ask you if you have any remembrance of filing a claim of

that kind in the Richlands case with the court?

A. I don't remember anything about that.

MR. HILTON: Your Honor, I offer a certified copy, certified to by the clerk of the District Court in and for Millard County, Utah, of the claim filed by Mr. Nebeker in the case of the Richlands Irrigation Company v. West View Irrigation Company, and ask that it be received in evidence.

MR. BATES: We object to it as being incompetent, irrelevant and improper cross examination.

THE COURT: What is the purpose of this offer, Mr. Hilton?

MR. HILTON: On the question of title.

THE COURT: You claim some admission?

MR. HILTON: Yes, there is an admission.

THE COURT: It may be received for that purpose.

MR. HILTON: In the matter of the title, I offer a claim filed by the Revere Land & Stock Company, and that has reference to the right claimed by the State of Utah, for this Petersen land. It is marked plaintiff's exhibit C, duly certified by the clerk of the District Court of Millard County, Utah, as a full, true and correct copy of the paper filed there. Any objection to that?

218 MR. HUNT: You offer it as part of the cross examination of this witness?

MR. HILTON: I can impeach the witness by this offer, for what it is worth, to the court,

on title. Let me ask Mr. Nebeker a few more questions.

A. Yes sir. No sir, acquainted with the parties that was on the ranch.

Q. Yes, at the time that company owned part of this land?

A. I wasn't acquainted with them.

Q. Did you know that the Revere Land & Stock Company was claiming some of this water out of Petersen creek at any time?

A. No sir.

Q. You never heard of that?

A. Not out of Petersen creek.

Q. Well, out of any water right in the neighborhood of this Petersen creek?

A. No sir.

Q. Do you know what land they claimed to own?

A. This Revere Company?

Q. Yes.

A. The Petersen ranch as near as I can tell from that.

Q. You know that they owned the Petersen ranch or part of it at one time, then?

A. All I know is what Mr. Bastion said. I never paid any attention. I don't know anything about it.

219 Q. Isn't it true, Mr. Nebeker, that you based your title to all the waters of King's Meadow Canyon creek upon that decree of court in the Richland Irrigation Company v. West View Irrigation Company, involving a determination

of all water rights on the Sevier River water shed; isn't that so?

MR. BATES: We object to that.

THE WITNESS: I don't know anything about it.

MR. BATES: We will take the position that the decree has nothing to do with this case; immaterial, and does not bear on the testimony of this witness.

THE COURT: The witness has answered that he does not know.

MR. HILTON: You mean to say you know nothing about this case of the Richland Irrigation Company v. West View Irrigation Company involving all the water rights of the Sevier River water shed?

A. No sir.

Q. You never made any claim for water in that case?

A. Only through the State Land Board; I supposed I bought all the water right of this Petersen ranch from the State Land Board.

Q. They owned all the water rights in the Petersen creek, Rosses creek, Chrises creek, Brimhall springs, and all that came down here into the Petersen creek?

A. Yes.

220 MR. HILTON: I want to offer this decree in evidence or the parts of it that refer to the water rights delivered to Mr. Nebeker in King's Meadow Canyon creek as a muniment or evidence of title, what he claimed, what he was awarded in that case. Now, there is plenty of

authority, Your Honor, to the effect that a decree or judgment affecting title may be so received.

THE COURT: This is a matter affecting the court only, and has nothing to do with the jury.

MR. BATES: No question but what that decree refers to this man.

MR. HILTON: You admit that the water right described in this decree was water right that he claimed when that decree was granted.

221 MR. BATES: There is no need of making any admission along that line. We will admit that what it says refers to this ranch property in King's Meadow creek canyon.

MR. HILTON: It says, "priority 1870, acreage 126.5, amount 3.16 c. f. s. maximum, 2.11 c. f. s. minimum. Period of Use, April 1st to October 15th, point of diversion, from King's Meadow creek 2900 feet south and 1800 feet east of the northwest corner of Section 17, Township 23 S., R. 1 W into Nebeker ditch to irrigate lands thereunder. (b) Priority 1870, domestic, amount 0.01 c. f. s., Period of Use, January 1st to December 31st, point of diversion, from King's Meadow creek as described in paragraph (a), and used for domestic purposes of five persons and for stock watering purposes of 100 head of horses and cattle."

THE COURT: What is the page?

MR. HILTON: Fifty-eight of the decree made by Judge Leroy H. Cox, in case number 843, Richland Irrigation Company, a coropration, plaintiff, v. West View Irrigation Company, et al, defendants.

THE COURT: Page 58 may be deemed read into the record and is received in evidence. Gentlemen of the jury, I want to remind you again that this matter we were just talking about is for the court. I have in mind asking you about three questions, and I will indicate to you and to counsel now what they are. First, we want to know the quantity and flow of the waters which the town has diverted up there; second, we want to know the value of it; and third, we want to know the damages, if any, which the defendants suffered by reason of the severance of this water put in the pipe line
222 from the other water which flowed down the canyon. Those are the only three matters that I am going to submit to you. These other matters are for the court to thresh out, so try to disregard these other matters that do not affect you.

MR. HILTON: Now, Mr. Nebeker, as to the waters in Rosses creek, when you bought the land from the State, or from Mr. Bradfield, was it?

A. Bradfield.

Q. Have you since that time measured the waters in Rosses creek; have you never measured them?

A. No sir.

Q. Have you ever measured the waters that come out of the springs on Petersen creek that go into your ditch and down to your land?

A. No sir; never have measured them.

223 Q. Were you up on Rosses creek after 1936?

A. Yes sir; along in the spring, about April.

Q. How long were you in Rosses creek then?

A. Just rode through.

225 Q. About how many times have you been on Rosses creek since 1934, since you acquired that Petersen ranch, up to and including 1938, those four years?

A. Very few. Very few times have I been at the junction of Rosses creek and Petersen creek; I have been right at the junction several times.

Q. Do you have any remembrance of being on Rosses creek near the State highway or anywhere else on August 4, 1937?

A. I don't remember about that. 1937, I would not say whether it was 1937 or 1938 that I was up there.

227 Q. Are you familiar with Chrises creek?

A. Yes sir.

Q. Were you familiar with the amount of water that comes down there, comes down Chrises creek?

A. Only to look at it.

Q. How did the water in Chrises creek compare with the water in Rosses creek as to quantity?

A. I should judge it about the same.

Q. You are familiar with Brimhall springs?

A. Yes sir.

Q. How much water comes from the springs — compared with Chrises creek?

A. That runs a little bit different. It will raise and then sink, and comes out below.

228 Q. Are there any trees or shrubs growing down at the mouth of Rosses creek, say from the mouth, up above where the State highway is now?

A. I don't think there is any trees, no.

Q. Now, can you give us an idea as to how much water in the combined flow, flowed down Petersen creek, say in June of the year you were there?

A. I would not attempt to say how much.

229 Q. Did you ever make a statement, Mr. Nebeker, that the combined flow, that is all the water, flowing down to the Petersen ranch, or above the Petersen ranch was less than one-quarter of a second foot?

A. No sir, not that.

Q. Would you say that the combined flow of water in the Petersen creek above the Petersen ranch was less than a quarter of a second foot?

MR. BATES: I object to that. The witness has repeatedly said that he didn't measure the water.

MR. HILTON: I am asking him if he made that statement.

THE COURT: He may answer if he can.

THE WITNESS: I told you I don't remember of ever making that statement.

MR. HILTON: You remember that the town of Sigurd filed an application to appropriate waters from these two springs in Rosses creek?

A. Yes.

230 Q. You remember you filed a protest to that application?

A. Yes sir.

Q. You swore to it, didn't you?

A. Yes, I think so.

Q. I am reading paragraph three of your protest.

MR. BATES: What is the date of the protest?

MR. HILTON: It was sworn to on August 22, 1938.

Q. You said that "King's Meadow creek or Petersen creek has its source in Brimhall springs. Chrises creek, Rosses creek, and a number of unnamed springs. The general course of said creek is in a northerly direction from Brimhall springs. Chrises creek joins King's Meadow creek at what is known as the Willow Patch and Rosses creek unites with said King's Meadow creek at a point slightly southeast from the junction of the Glenwood dugway road with the State highway from Sigurd. Said Rosses creek has its source in the hills about one and one-fourth miles west of its junction with the King's Meadow canyon creek. All of said creeks and springs in normal low water season flow less than a quarter of a second foot of water." Do you remember of making that statement on August 22, 1938, when you filed your protest with the State engineer?

A. No sir, I don't remember that.

Q. How much time have you spent up there on this Petersen ranch?

A. I haven't spent very much time up there.

232 Q. Did you ever see a time when the waters

of Petersen creek failed to reach the Petersen ranch, at the ranch?

A. Not unless there was a flood or something then I have seen it when it didn't come down — if there is a heavy flood that washed in rocks or sand, I have seen it when it would be checked for a few hours.

233 Q. Have you noticed it at any other time when there wasn't a flood, but just in hot weather, that it would not reach the Petersen ranch?

A. I have seen it when it was pretty low; so the stream was enough for a few furrows, right in the heat of the day; that would be the combined flow. It was so low, it would only be good for a couple of furrows.

Q. Isn't it true that the main water supply for your farm down below is really from the springs and wells on the Petersen ranch?

A. Yes, that is a larger stream than the other.

234 Q. Would the waters coming from the springs and wells on the Petersen — Bastion ranch come down in the heat of the day?

A. Not so much. It does at the lower place.

Q. How much would you say that it affected it down at your farm where you use it?

A. Oh, just a furrow.

236 Q. On your lower farm, what kind of soil have you got?

A. It is a kind of a clay.

Q. What do you raise on it?

A. I can raise anything on it.

237 Q. What is the maximum amount of alfalfa you have growing on your place?

A. About, between thirty and forty acres.

Q. What is the maximum amount of grain land you have cultivated?

A. About thirty-five.

Q. Now, all that is down on what you call your farm, or the lower farm, isn't it?

A. Yes, and that has no reference to the Petersen ranch.

238 Q. Do you know whether or not the waters from the Brimhall springs ever had flowed down in Petersen creek during the years you have been there?

A. Yes sir

Q. Do you know that all the waters of Chrises creek have come down to you for your use?

A. Yes, sir.

239 Q. Didn't you say on direct examination that you had cultivated a hundred and seventy-five acres?

A. I meant to say I had about a hundred and seventy-five acres under cultivation.

242 Q. How much land do you claim you have water right for?

A. I don't know just what it would be — oh, a hundred and seventy-five acres.

Q. Have you ever irrigated a hundred and seventy-five acres?

A. No sir.

Q. How much have you irrigated; on an average around from eighty-five to ninety acres, all told?

A. Yes

Q. Do you remember of saying that the maximum amount of acreage you could cultivate

upon your farm was 126 and a half acres ; did you ever remember of saying that to anybody?

A. I might have done.

245 Q. Now, did you notice any increase in the flow of the waters from Petersen creek when there is a rain storm up there?

A. Always a little more water when there is rain if it lasts enough ; it comes down there in such a stream you can't control it.

Q. Did you notice that the water in Rosses creek increases when there is a rain storm?

A. Sometimes, when there is a rain storm.

Q. Well, did it affect the ground or acreage that you could irrigate?

A. Not much.

246 Q. Mr. Nebeker, I think you said that by reason of the taking of this water by Sigurd out of Rosses creek, your crop area was reduced about fifteen acres?

A. Yes sir ; because the barley just would not mature the same. I never had it done that way before.

247 Q. How many acres of alfalfa did you have on your ranch in 1939?

A. I got about thirty or thirty-five acres, something like that.

248 Q. How many acres did you say you had in barley in 1938, 1939?

A. I had about twenty-five acres.

249 Q. You claim that during the time you have been owning that place down there, you had under cultivation the first years a hundred and

seventy-five acres; have you cultivated, Mr. Nebeker, a hundred and seventy-five acres?

A. No sir, not all at once.

250 Q. Do you mean to say that so far as dry and wet years are concerned, it didn't affect your water right, at all?

A. No.

252 Q. When did you notice the water went down in the year 1939, in the spring of the year?

A. After the first watering, from then on.

Q. Do you value your grain land on your farm at a hundred dollars an acre?

A. Yes sir.

253 Q. So, the extent of your loss, if any you have had, would be that fifteen acres of barley, would it not?

A. I figured on fifteen acres.

254 Q. Now, when you bought the land from Bradfield, how many acres did you buy?

A. I was supposed to have got two hundred acres.

Q. What did you pay Bradfield for the whole farm?

A. The whole thing cost me about twenty-five hundred dollars, somewhere near that; that is with all the water right that came from Petersen creek and Rosses creek and Brimhall springs and Chrises creek.

Q. Taking the two hundred acres, that would figure about twelve and a half an acre, would it not?

MR. BATES: How much?

MR. HILTON: Twelve and a half an acre.

Q. You are still paying for the Petersen ranch to the State of Utah?

A. Yes sir.

Q. How much have you paid off?

A. About a thousand dollars, I imagine.

Q. You are still owing the fifteen hundred dollars on the Petersen ranch and on the waters that you bought from Bradfield?

A. Something close to that.

255 Q. Now, as to the Petersen ranch, you say you have about forty acres subject to cultivation?

A. It could be; the balance of the land has some value for pasture.

Q. I think you said that you knew of no one making any claim to any of the waters going into Petersen creek until Sigurd made its appropriation; is that true?

A. I guess that is what I said.

Q. Do you know whether Dr. Dewey makes any on those springs?

A. To water sheep.

256 Q. Did you protest his claim to the State engineer?

A. I wrote to him, yes.

Q. Then you do know of someone else besides Sigurd making a claim to these waters that is a part of the waters flowing into Petersen creek?

A. Yes. That is all I know is by hearsay. I could not say that I cared much if they watered sheep.

257 Q. Didn't you observe the State engineer's publication of notice of Dr. Dewey's appropriation?

A. I never seen it, no; I heard that he had made application to water sheep.

Q. Did you do anything about that?

A. No.

THURSDAY, MARCH 7TH.

MR. HILTON: I now offer plaintiff's exhibit D, being the decree in the Richland Irrigation Company v. West View Irrigation Company, which was offered and accepted yesterday in evidence.

THE COURT: Very well.

GEORGE W. NEBEKER recalled:

MR. HILTON: Mr. Nebeker, as to the culinary water on your ranch below, where do you get it?

A. I have been hauling it lately.

258 Q. Where from?

A. From the ranch; from the springs on the upper ranch.

Q. From what spring would you haul this culinary water?

A. Flowing well.

Q. You are acquainted with the waters in Chrises creek?

A. Chrises, yes sir.

Q. Is that water good for culinary purposes.

A. I think it would be.

Q. Did you ever drink it?

A. Yes.

259 Q. You know it is, don't you?

A. Yes sir.

Q. You never had any illnesses from the use of this water for culinary purposes?

A. I don't know of any.

Q. Now, you are well acquainted with the territory and neighborhood around Sigurd, aren't you?

A. Yes sir.

Q. How long have you lived on this ranch up where you live now?

A. I was born there.

Q. In this mountainous country here there are many mountainous streams and springs through this entire territory, aren't there?

A. Quite a few; I would not attempt to count them.

Q. And these mountainous streams, good water flows from them?

260 A. Some of them.

Q. You stated in your testimony yesterday that you irrigated for crop raising an average of eighty-five to ninety acres of land on your farm below?

A. That is what I said.

261 Q. Now, as to your crop failure of fifteen acres in 1939, do you think or suppose that was due some to water conditions in 1939?

A. I don't think so; would say that 1939 so far as water conditions was concerned was about the same for the last ten years.

Q. Did you attribute that failure to soil conditions?

A. No.

265 Q. Always during all the ten years you have mentioned you had plenty of water for your eighty-five or ninety acres, except 1939?

A. Yes sir.

RE-DIRECT EXAMINATION:

By Mr. Bates.

Q. Mr. Nebeker, what is the situation with respect to whether or not any portion of the waters that are in King's Meadow creek canyon goes off into the Sevier river?

A. Nothing but the waste water; on these farms it is all the flow of the entire stream, the flow from all sources that is used.

Q. Has that been true during all the years as far back as you remember?

A. Yes sir.

Q. What do you mean by the expression "waste water?"

A. I mean after I have used it, and it goes through the land. You can't hold all the water back. There is some waste water that goes through.

Q. Do you have a judgment, Mr. Nebeker, as to what would be the reasonable value of the water in that stream up at the head, for culinary purposes?

A. About three thousand dollars.

RE-CROSS EXAMINATION:

By Mr. Hilton.

266 Q. Wasn't there times in the springtime when the high waters were flooding that you didn't put those high waters to use on your farm?

A. If there was a flood come down, call that flood waters.

Q. What time of the year would these flood waters come down?

A. Sometimes during the summer.

Q. Wouldn't they come in the springtime when the snows were melting?

A. We never had much flood in the spring.

Q. Did you have any high waters from the King's Meadow creek, the water coming from the springs and wells on the Petersen ranch?

A. Not very much from there; it was early in the spring time, around June, or the latter part of May when the melting would take place in that locality.

J. OSCAR ANDERSON, for defendants, testified:

DIRECT EXAMINATION:

By Mr. Bates.

267 Reside at Salina, Utah; have lived there most of my life; age sixty.

Q. Did you make some water measurements last year at Mr. Nebeker's request?

A. Yes sir; up on Rosses creek, confluence

of Rosses creek with King's Meadow, with the Petersen creek.

Q. When was it you made those measurements?

A. On the 20th of May, 1939.

268 MR. HILTON: What are you reading from, Mr. Anderson?

A. This is my note book that I had with me at the time.

MR. HILTON: Did you make that memorandum at the particular time?

A. Yes sir.

MR. HILTON: Just a minute. He is not qualified in any way to show that he knows how to make measurements of water. I will object to him.

THE COURT: Qualify him.

Q. Do you remember an action that was pending in this court a number of years ago, known as Bastion against Nebeker?

A. Yes sir; I was court commissioner at the time to measure the waters in King's Meadow canyon.

271 Q. Do you know anything about the number of people, the approximate number that reside there?

A. I have never counted them.

MR. HILTON: I object that; that is not the best evidence, but still, if the man knows, let him tell.

THE WITNESS: I don't know. Two or three hundred people, is what I would guess it to be.

272 Q. Do you know whether or not they have any facility in that community for supplying themselves with culinary water?

A. Yes, I know they have now.

Q. Do you have any information, Mr. Anderson, general information, as to what has been necessary, or what the communities have to do in agricultural areas in this country, in order to secure culinary water for their purposes?

A. Yes.

MR. HILTON: I object to that. He is not qualified to answer such a question. It does not show in his qualifications, at all. I will move to strike it out on the ground he is not qualified.

THE COURT: I want to find out what his information is.

MR. BATES: What communities, Mr. Anderson, in this county, have found it necessary to acquire water for culinary purposes?

A. Salina City, one of them, and the people south of Monroe, and Central is another place.

Q. Central, that is a little community?

A. South of Richfield, yes sir.

Q. The same general conditions exist in these different communities with respect to the necessity for culinary water; the general economic requirements in general are as exist in Sigurd?

A. Yes sir.

273 MR. HILTON: I object to that as his conclusion.

THE COURT: Have him state the facts on which he bases his conclusions.

MR. BATES: State a little more in detail the conditions with reference to Salina?

A. I am president of the Lost Creek Irrigation Company, and we sold Salina their culinary water. Several years ago they bought a third of a second foot or thereabouts, and then in 1938, they decided they didn't have enough water, so they bought more from the Lost Creek Irrigation Company, bought a second foot of water, so I know the transaction there and know what they paid.

Q. Tell us what it was?

A. They paid Lost Creek Irrigation Company five thousand dollars for a second foot of water from the Twin Springs up near the head, on old Lost Creek about eighteen miles from Salina.

MR. HILTON: I object to that; he is not qualified to testify at all. I move to strike out the answer.

THE COURT: All right, the motion may be granted, until we hear from you on the law on the matter.

MR. BATES: You say they got one second foot of water?

A. Yes sir.

MR. HILTON: I object to that on the ground that it is not qualification for the witness.

THE COURT: That may remain.

MR. BATES: How far was the water that they purchased from the town of Salina?

A. Approximately eighteen miles.

MR. HILTON: I still object to it; it is not qualification.

274 THE COURT: It goes to show his knowledge of conditions in a given community. I will be

glad to hear from you. We will let the witness proceed to describe the conditions in the various communities, and then finally rule on it.

MR. BATES: You say that was about eighteen miles from the town of Salina?

A. Yes sir.

Q. How many people are there in the town of Salina?

A. Approximately fifteen hundred.

Q. You are familiar with the water on Rosses creek, are you, and the quality and quantity of water that is used by the town of Sigurd now?

A. No, I don't know anything of the quality of it, only that I have heard it is good.

Q. What would you say as to whether or not this water that Salina purchased was good, clear water for culinary purposes?

A. It was extra good; that is the reason they bought it.

Q. You said something of the town of Central; Do you have any idea as to how many people there are there?

A. Between three and four hundred.

Q. Do you know how much water it was they got?

A. I don't remember the amount that they got, but I remember the approximate amount they paid for it. I remember that. I don't remember the exact amount they got there.

Q. Monroe; what do you know about that situation, south of Monroe?

275 A. The farmers south of Monroe had some irrigation water in the Monroe Irrigation Com-

pany, and they exchanged their irrigation company rights for the use of some of the culinary water of Monroe.

Q. Do you know what that exchange was, mainly?

A. They exchanged a share of water for use of one tap, and the price they put on the water would amount, and the amount of water that they appropriated was approximately five thousand dollars a second foot.

Q. Do you have any information as to what has happened in a broader field in the State of Utah?

A. I have always been interested in the amounts that different communities have paid for culinary water. Whenever I have read anything in the papers about it, I have paid attention to it, so that in that way I have a general idea of the amounts that have been paid.

Q. From all those facts and factors, and assuming now that the water under discussion in this case, being used by Sigurd for culinary purposes, is good water, bearing in mind the condition of the community of Sigurd, and its location, and your information with reference to these other communities in this immediate vicinity, your general knowledge that you have acquired with reference to value of culinary water and prices paid for it in general throughout the State, do you have a judgment as to what is the reasonable value of the water of the kind involved in this action for culinary purposes?

MR. HILTON: I object to that on the ground that he has said he does not know the quality

of the water of the Rosses creek here in question. He can't answer that question when he does not know the quality of water.

276 THE COURT: One other matter that should be included, that is the availability of other water.

MR. BATES: What do you know, Mr. Anderson, as to whether or not there is other water in that immediate vicinity of the town of Sigurd of good quality suitable for culinary purposes that might be available for their needs?

A. I don't know of any; I don't know of clear water, but I know there is water near the flat knolls, that is near the city. I don't know whether it could have been bought, or not.

Q. What is the situation of that water with reference to elevation so as to give them the fall?

A. That would have to be raised, of course, in order to get the force for the system.

Q. That would affect its convenience and availability?

A. Yes sir.

Q. What do you know as to whether or not there are other communities in the vicinity that may have found it desirable to use this water for culinary purposes —

MR. HILTON: Which water?

MR. BATES: The water involved in this action.

A. There are other communities that could use it if they desired.

Q. And who are needing culinary water?

A. So far as I know.

MR. HILTON: From his answer, Your Honor, I can't see that there is any qualifications of this man, whatsoever, to testify as to the value of this water. He does not know the quality of the water, and he does not know the needs of the community.

277 MR. BATES: I would like to incorporate a few more elements in the question.

THE COURT: Proceed.

MR. BATES: Bearing in mind the general information you have, that you have gotten from time to time with reference to availability, and the prices paid for water in different parts of the State of Utah; the information you have with respect to the town of Salina; the information you have with reference to the town of Central, and the people in the vicinity of Monroe, and different communities, and your knowledge of the conditions in Sigurd, the number of people that live there, their necessities for water, and all those things, do you have a judgment, assuming that the water in question in this action is good water and in every way suitable for culinary purposes, do you have a judgment as to what that water would reasonably be worth at Rosses creek spring, for said purposes?

A. Yes sir.

Q. What is it?

MR. HILTON: I object to that on the ground he is not qualified to answer the question.

THE COURT: Overruled.

A. In my opinion it should be worth at least

five thousand dollars a second foot, the same as these other communities.

Q. Assuming that they are taking one quarter of a cubic foot per second, what in your judgment would be the value of the water?

A. Place my judgment on it, on the parcel?

Q. That they are taking the water.

A. Well, decrease the value of the whole stream —

278 Q. That is not —

MR. HILTON: Let him answer it. I object to counsel leading the witness.

THE COURT: The answer is not responsive — no objection on that ground. The question is what is the reasonable value of the water for culinary purposes.

THE WITNESS: At the rate of five thousand dollars a second foot, that would be one thousand two hundred and fifty dollars.

CROSS - EXAMINATION:

By Mr. Hilton.

Q. When you went up to make your measurements on Petersen creek on May 20, 1939, you went at the request of Mr. Nebeker?

A. Yes, Mr. Nebeker through Mr. Bates; I expect to be paid for it.

Q. On what basis do you expect payment?

A. Just what I think is reasonably fair for going up there.

279 Q. For your services?

A. Yes sir.

Q. Are you a registered engineer?

A. No sir. I was county surveyor for Sevier County for six years.

Q. You know that the law prohibits engineers from doing such work unless they are registered?

A. No sir.

Q. You don't know that?

A. No sir.

Q. The law has been in existence for quite a number of years, Mr. Anderson.

A. That is bad.

Q. If you had known that law was such, would you have accepted this employment?

A. I am not a registered engineer.

MR. HILTON: I think, Your Honor, that in view of the law requiring registered engineers to do this work, that this testimony is incompetent, and I move to have it stricken.

THE COURT: Is it your contention that only engineers can give measurements of water?

MR. HILTON: On an engineering project and matters of this kind, yes.

THE COURT: If you can present some reputable authority for that, I will act on it.

MR. HILTON: I will present some authorities on that later.

THE COURT: Then I will hold the motion under advisement.

MR. HILTON: You say that the measurements you made on May 20th were at the junction of Petersen creek and Rosses creek?

280 A. Yes sir, just before the water enters Petersen creek; on Rosses creek I made the measurements.

Q. Now, did you at the same time measure the water in Petersen creek a little above Rosses creek so as to determine the amount of water in Petersen creek above Rosses creek?

A. No; didn't measure that.

Q. Any water coming down Chrises creek at that time of the year, do you know?

A. Usually.

281 Q. And when you made these measurements on May 20, 1939, in Rosses creek, you didn't observe the water conditions of the Peterser creek above it?

A. I can't remember the exact conditions so as to give them in evidence here; I came up in an automobile.

282 Q. Have you made measurements on King's Meadow creek below the Petersen ranch?

A. Yes; around 1907, or '8 or '9. I think it was during those years, in that neighborhood some time.

Q. Where did you make those measurements on King's Meadow creek?

A. Just a short distance below the pond where all the water from those springs come together and flow down a little creek towards the Nebeker ranch, oh, four or five rods below where the flow, where all the springs come together in one common stream; we measured seven different wells, but I think there were more than that. We finally did get a flow of

water that we did measure. There was seven different wells.

283 Q. Do you have a recollection of what your figures were of those measurements you made in 1907?

A. No, it has been so long, I don't remember the years.

Q. What year was it you made those measurements in that case?

MR. BATES: I am going to object to this as not proper cross examination.

THE WITNESS: I can't remember the exact year. As I remember about 1908, 1907, 1908 or 1910, in that neighborhood. I can look it up.

THE COURT: I will have to overrule your objection. It goes merely to his qualifications.

284 MR. HILTON: Is that your signature, Mr. Anderson; is that the report you made in that case?

A. I can look it over. I assume that it is. My signature is here.

Q. Have you noticed this was dated in 1917?

A. I was off ten years.

Q. You were just off ten years in your memory?

A. Yes sir. That was 1917 when the report was submitted, but it began perhaps three years sooner than that.

MR. HILTON: I want this report marked. We offer in evidence the report made by Mr. Anderson in the case of Bastion v. Nebeker, to

which he has testified, on file in that case, marked plaintiff's exhibit E.

THE COURT: What is the purpose, to show dates?

MR. HILTON: Yes, and measurements of water in King's Meadow creek to which he referred.

THE COURT: It may be received. We will let you make a copy to substitute for the original.

MR. HILTON: I will ask the clerk to make a certified copy and file it.

THE COURT: All right, it may be received.

MR. HILTON: Did you make any other measures of the King's Meadow creek water?

A. No, except what I measured the other time in May of last year.

285 Q. Since 1917, the measurements reported in the report and the measurements you made on May 20, 1939, are the only measurements you have made?

A. Yes sir, in that canyon.

Q. You mentioned something about culinary water bought by Salina. They bought it from the Lost Creek Irrigation Company, didn't they?

A. Yes sir.

286 Q. As to Monroe, from whom did Monroe buy its water?

A. From the Monroe Irrigation Company; water rights in the Monroe Irrigation Company was evidenced by certificates of stock.

288 Q. Do you know the value of a share of water in the Monroe Irrigation Company?

A. It used to be around forty dollars a share.

Q. Now, when you stated that this culinary water or this water coming from Rosses creek had a value for culinary purposes of \$1250.00, assuming there was one-quarter second foot, on what did you base your conclusion? How did you arrive at your conclusion?

A. Because of what water has costs other communities in this neighborhood. That is the only way anybody could arrive at it. I believe there is very little on the market, or has been on the market.

Q. Do you know what the Sigurd City water works cost?

289 A. I don't know exactly. I know in other places what it cost. I know the cost of appropriating water in many cases. I know what it cost in Salina to appropriate their water.

Q. You said here that you had never investigated the water works, at all?

A. I hadn't investigated the extent of the water. I knew it was running into Sigurd.

290 Q. Then this estimate that you made of \$1250.00 is the same kind of an estimate as to the cost of Sigurd City water works, on the further assumption that there was one-quarter of a second foot of water diverted?

A. I think you will notice that I said before, if there is a quarter of a second foot, and buying it at the rate of five thousand dollars a second foot, that amount of water would be worth \$1250.00.

Q. And that estimate of five thousand dollars is based upon the cost of the Salina water works?

A. No, not by any means. I have been interested in the amounts that the different communities have paid in general over the State, and that five thousand dollars is about the lowest that any community has paid for a second foot of water.

292 MR. BATES: Assuming the fact that there is already a public system ready, available and ready for the delivery of water, would that in any way affect your judgment as to the value of the water?

A. No sir; because of the location of these other springs the cost would be greater.

293 MR. HILTON: Further assuming another condition, Mr. Anderson, assuming now that there is probably one-fifth of a second foot of water available to Mr. Nebeker in Rosses creek and that was all that he could use or put to a beneficial use, would you say then that the price of the culinary water to him would be reduced accordingly?

MR. BATES: We object to that. There is no evidence on which the assumption can be based.

THE COURT: He may answer.

MR. HILTON: Now, you have based your estimate of \$1250.00 on the definite assumption or proposition that Mr. Nebeker owns now one-quarter second foot, don't you?

A. I believe I said that.

294 Q. Do I understand also that you fixed this estimate of \$1250.00 as the value of that water right as culinary purposes to Mr. Nebeker?

A. I think it is worth a great deal more than that, if you want my candid opinion.

Q. I am not asking you that. Didn't you base your estimate of \$1250.00 on the proposition that Mr. Nebeker owns one-quarter of a second foot?

A. No.

Q. What did you base it on?

A. On the quantity of water under the situations that I have mentioned here, that is at the rate of five thousand dollars for one second cubic foot, if there is a quarter of a second foot, that it would be worth \$1250.00, that is what I said.

Q. No matter who owned it?

A. I don't care who owned it. I haven't taken into consideration the ownership. I feel sure that Nebeker owns it; I know he does.

Q. You know he owns it?

A. Yes.

MR. HILTON: I move to strike out the answer on the ground it is not responsive to the question.

THE WITNESS: He owns the land. He bought the water with the land.

THE COURT: The answer may remain.

MR. HILTON: How do you know that he owns it?

A. Because he has had possession of it for several years. I know he owns it. I know that he is living there, he and his family, and that he owns it.

295 Q. Do you know that Mr. Nebeker has applied it to a beneficial use, that one-quarter second foot from Rosses creek?

A. I don't know where he has got his water from as a positive fact.

Q. You say you don't know positively that he owns one-quarter second foot from Rosses creek?

A. I have never been on Rosses creek except one time and measured one-fifth of a second foot there.

Q. In May, that was down at the foot, at the end of the creek?

A. Yes. Anyone would naturally assume that there would be more at the head, considering the kind of soil there is in that neighborhood, and knowing that water coming down through that Petersen creek would be more during certain times of the day, and less water than there is at other times; in the early mornings there is a good deal more than there is in the middle of the day.

296 Q. Did you ever see Petersen creek dry?

A. In the afternoons, yes.

Q. About what time of the year?

A. I don't remember just any particular time, now, but I went up there a great deal during those years and I observed the condition of the creek in a number of places. Nearly every time I went up we have traveled along the King's Meadow creek canyon for many years. I know the water from Chrises creek has been very little during certain times of the day and then there would be a big flow of water com-

ing down early in the morning or during the cooler part of the twenty-four hours. I noticed that when I was measuring water there during the times I said, that often I would go up, and in the early part of the day, there would be considerable more water than there would be when I went up later in the day. And then you could tell by the condition of the banks that the water had been higher at that particular morning before I got there. During those observations I know that the water was higher in the early mornings than in the late afternoon.

297 Q. When was the last time other than May 29, 1939, when you were there?

A. I don't remember. I would not attempt to say.

Q. But you say that there were many times you were up there and saw Petersen creek dry above the springs and wells on the Petersen ranch?

298 A. If you will permit me to explain it, I believe I can explain it this way, that during the hot part of the day the water that is flowing from Chrises creek comes down and sinks into or disappears into the soil or into the bottom of the creek or the channel, and the flow from Chrises creek apparently does not vary; I think, or would say definitely, that that water that runs down during the day does not evaporate but goes into the soil. It is my theory that the hot weather, the heat from the sand causes the particles of earth to expand to a larger particle, or crack open, and the space between these particles, the water is absorbed into this gravel or sand, and then during the night the temperature falls again, the weather gets

cooler, the temperature is less, so that these particles gradually contract, and the water that has accumulated there during the day comes out at night.

Q. Wouldn't the spring flow vary according to the precipitation from year to year?

A. Oh, yes. The flow that is supposed to be running today, the springs were flowing today, and the rainfall was not enough to make a runoff, that the present runoff would not affect materially the present flow of the spring.

299 Q. You are familiar with the irrigation laws of the State of Utah, are you not; and if there is water that is not being used, or might go to waste, that one has a right to come in and take that water —

MR. BATES: I object to that question, not proper cross examination of the witness.

MR. HILTON: Now, I want to know about that question of value. A while ago I think you said that the value of that water right as culinary water right was based upon the assumption that Mr. Nebeker owned one-quarter of a second foot.

A. I am sure that he owns that much water.

Q. Now, assuming that the water from these springs up there as it naturally flowed didn't reach Petersen creek, only a small amount reached it, and some one goes up there and takes the water at the springs, which would be a little more than was coming down below, would that in any way change your value?

300 MR. BATES: I object to that as improper cross examination.

THE WITNESS: No, I would not care who owns it. That much water would be worth that. I assumed Mr. Nebeker owns it. I think, furthermore, he is entitled to that water.

MR. BATES: What do you think this water is really worth?

MR. HILTON: I object to that question as improper re-direct examination.

THE COURT: He may answer.

THE WITNESS: I think it is worth about twenty-five hundred dollars, because, if you want me to explain.

THE COURT: I think I will excuse the jury for a short time, while we discuss certain matters.

MR. BATES: With the exception of one witness we are through. That witness we cannot put on right now. We wonder if we might have permission to put him on out of order on one question, and let the plaintiff proceed with their side of the case.

THE COURT: What do you say, Mr. Hilton?

301 MR. HILTON: You say you rest, with the exception of the testimony of one witness?

MR. BATES: Yes. He will be available for testifying early in the afternoon.

MR. HILTON: How long will it take to examine him?

MR. BATES: My judgment is his testimony won't exceed fifteen minutes.

MR. HILTON: I don't want to stand in the way. I would like to make this motion now on

the testimony of Mr. Anderson, that his theory of the value of the culinary water, and its bearing upon the compensation or damages that should be allowed Mr. Nebeker, and I move the whole testimony be stricken for the reason that it is not pleaded, and it is not an element in the case; and is not a theory in the case, as it has been presented by the defendants' entire pleadings.

THE COURT: The motion is denied.

MR. HILTON: Under those circumstances, Your Honor, I am inclined to ask the court to permit the plaintiff, Sigurd Town, to amend its complaint so as to show and permit us to put on evidence that we have, by our development here, and installation works, developed water in that location in addition to any water that Mr. Nebeker has ever used or put to a beneficial use, and that we have saved all the water that we have taken there by this pipeline from loss by seepage, evaporation or otherwise.

THE COURT: What do you say, Judge Bates?

MR. BATES: I suppose it is discretionary with the court. I imagine it may over-turn everything in this case to amend at this stage.

THE COURT: I am inclined to let him amend. The town board officers can explain the situation when they get on the stand.

302 MR. HILTON: I think by reason of bringing in an element that they haven't pleaded, that I want to meet it. I think it is only fair.

THE COURT: I say, I am inclined to let you make your amendment.

MR. HILTON: I will present it later.

MR. BATES: The defendants would want an entire denial of that pleading.

THE COURT: Yes.

MR. HILTON: That would be understood, that I consent to their amending their answer to so deny it. As I understand it, the defendants, both the Nebekers and the State of Utah will rest their case subject to the testimony of one more witness, only.

THE COURT: Subject to any new matter that you may bring on this theory that you are now stating that you want to amend on.

MR. HILTON: Yes.

MR. BATES: If it be understood that the defendants may meet that new issue.

MR. HILTON: Yes.

MR. BATES: The burden will be on you on those issues in any event.

MR. HILTON: I think so.

THE COURT: That brings up something else, with that amendment, whatever it is, I don't see how we can get through tomorrow night.

MR. HILTON: I don't see how we can go forward without it.

THE COURT: It will be about the third or fourth week in March before I can come down here again. What do you say about that situation?

303 THE COURT: I think we can come down here on the 26th of March.

MR. HILTON: Tuesday, the 26th of March? We will have to adjust our affairs. We have got to get this thing behind us.

THE COURT: I am very sorry about the situation, gentlemen.

MR. HILTON: So am I, but we can't help it.

SESSION RESUMED: JURY PRESENT

THE COURT: Gentlemen of the jury, and counsel, we have agreed that we will run till about four o'clock this afternoon, and then recess until the 26th. The record may show a stipulation on the matter.

MR. HILTON: We will agree to it.

THE COURT: All I care about is a stipulation in the record that we may take a recess at four o'clock until the 26th.

MR. BATES: I guess we will have to consent.

MR. HILTON: I so agree.

THE COURT: All right, proceed then.

MR. HILTON: Gentlemen of the jury, I will make statement of the position of Sigurd City in connection with this water, especially inasmuch as a statement was not made to you by counsel for the defendants at the opening. I don't know whether you know yet what this thing is all about, in lieu of that statement, especially having to gather it from the testimony of witnesses who have thus far testified. Now, as you have gathered here from the evidence that has been put before you of the

situation of that canyon here, known as the King's Meadow creek canyon, that canyon is quite extensive, and in going up the canyon, we find the ownership referred to by different parties; certain parts of it have been known by different names.

- 304 For instance, the part covered by the line that you see there in green is marked "King's Meadow Creek." I think the proof shows that that creek received its name from the springs and the wells that flowed or was in existence on the Petersen ranch and flowed down. From that source of water, as has already been shown, there is a large amount of water compared with the amount of water flowing in Petersen creek above it, above the King's Meadow on the Petersen ranch where a good deal of water raises from those meadows and flows down into the creek and is used by Mr. Nebeker below, and furnishes the principal water right to the Nebeker land; and prior to 1934 the water right for the Nebeker land was confined to the wells and springs flowing on the Petersen ranch.

Of course, any water that might have been accumulated above the wells and springs on the Petersen ranch is known as the Petersen creek, and it has been testified to and described as such by all the witnesses the defendants have put on the stand, emptying into Petersen creek. Up that canyon there are a number of canyon streams and small streams there. The one particularly indicated here is Rosses creek. Above Rosses creek is Chrises creek, and above Chrises creek is what they call Brimhall springs. This Petersen ranch was once owned by the State of Utah, and the State of Utah acquired

for water right on that ground all of the waters of Petersen creek, Rosses creek, and Brimhall springs — all of them. All the evidence thus far put in by the defendants, shows that the water was used on that Petersen ranch, and the Petersen ranch owns it now. Mr. Nebeker said that he bought it from the State of Utah, with all the waters out of Petersen creek, Rosses creek, Chrises creek and Brimhall springs.

- 305 The question here is the waters in a couple of springs up in Rosses creek. The town of Sigurd was in need of a culinary system and good water, and it sought a place where it could obtain some water for that purpose. After a good deal of investigation they decided to divert the waters in two springs up in Rosses creek, and they built a rather expensive water works system to divert it, and they have been using that water from these springs since December 28, 1938. We filed our condemnation suit to condemn that water in those two springs on June 15, 1939, and by that I mean that investigation showed that Mr. Nebeker and the State of Utah had some claims to the waters flowing down Rosses creek in this, that all the waters of King's Meadow Canyon creek and of Petersen creek were awarded over to Mr. Nebeker or to this Petersen ranch by a decree, between certain dates, that is of the crop growing season or irrigation season of each year.

Now, as to the waters flowing during the irrigation season of each year we are not here seeking to acquire rights of those who might claim them; we are not claiming that Mr. Nebeker owns all of the water that flows from those

306 springs, but there is, we claim, some small amount probably that has gone down in Petersen creek and probably used on that Petersen ranch if it got there. It is that small amount, whatever that is, that we are seeking to condemn. The rest of that water is water that he never used, or attempted to use; he never developed it; never did any work on those springs to do so; we will show that the condition is such that the water remains in the soils in Rosses creek, and very seldom reaches Petersen creek; we will show that these waters evaporate and seep away; he never has used them during these times for agricultural purposes or any other purpose only as he has gone up there to water some sheep as the public went up there to do. Now, you will be called upon to fix the value of that small amount of water that Mr. Nebeker may have proved that he owns, and it will be for the court to advise you what amount of water, that is what his title to that water may be, and that from all this testimony the court will advise you you will base your verdict of value. With that statement we will proceed to put on our evidence.

CLIFF M. POWELL, for plaintiff, testified:

DIRECT EXAMINATION:

By Mr. Hilton.

Age forty-six; reside in Richfield; lived there twelve years; prior to that lived at what is commonly known as Cedar Ridge, it is about eight miles north of here, about fifteen years.

307 Q. How long were you a farmer?

A. Well, I would say fifteen years; we were

in the sheep business, I and my brothers together; I think about thirteen years.

307 Q. Have you held any position with an irrigation company?

A. Yes sir; Richfield Irrigation Company; I was water master six years.

Q. What territory would that work take you into?

A. From Richfield to Sigurd; approximately eight miles.

Q. Have you held any position with the County of Sevier?

A. Yes sir; County Assessor five years.

Q. State whether or not you are acquainted with the area east of the town of Sigurd known as the King's Meadow canyon?

A. Yes sir.

308 Q. State whether or not you are acquainted with the area in that same locality known as the Rosses creek?

A. Yes sir.

Q. And Chrises creek?

A. Yes sir.

Q. And Petersen creek?

A. Yes, sir.

Q. When did you first become acquainted with this Rosses creek area?

A. I don't know. I was just a boy about twelve or thirteen, I would think; that would take me back around 1905.

Q. During what years did you run sheep in the Rosses creek area?

A. I think from 1920, maybe along in 1918 to 1925; it would be in the spring and also in the fall, that is east of Rosses.

309 Q. Now, what part of Rosses creek would you go into in hauling wood?

A. Well, the early part, as I remember, we would go up the canyon, and then the road washed out, and we went around Cotton Wood over the hill and into Rosses spring.

Q. During what years did you go hunting in Rosses creek, if you did?

A. I think I have been in Rosses creek every fall for twenty-five years.

310 Q. Now, when you went up there, state generally what the condition was around that main or higher spring?

A. There was a little bog there when I was in there. We had a little pond there. This spring would seep, south of the spring, the water was backed up, so that it filled the pond with water, and we watered our sheep at the pond in the creek.

311 Q. During all the time that you were up there and noticed it, both in hauling wood and running sheep, and hunting, did you notice any particular changes in the spring from year to year?

A. No sir.

Q. Describe what you noticed as to the water conditions at that junction during those times?

A. Well, it would vary. We tried to use the water on the ranch at that time, and sometimes there would be enough water coming down to the ranch to go down two or three furrows —

two o'clock in the afternoon it was gone, and then it would come back some time in the night time.

- 312 When you were at the junction of the two creeks in 1924 and 1925, state what the water condition was in Rosses creek?

A. I have been at the junction when there was a little water which was hitting Petersen creek. I have been at the junction when it was dry. It was dry more times than it was wet.

- 313 Q. If Rosses creek water at the junction could be applied to agricultural use, about how many furrows would it irrigate?

A. I would say one.

Q. Would you say that on this Rosses creek or Petersen creek that there were such periods as high water, or flood water periods in the spring time?

A. I would say there was some runoff in the spring, yes.

- 314 Q. Would you say that the runoff water could be applied to an agricultural use up on the Petersen ranch during that time?

A. Yes, I think it can; if you can control it, you can water some land with it. It is hard to control because of the fact it has always flooded a lot of sand and rubbish.

Q. Did you observe in your travels in Rosses creek during this time about how far the water naturally would flow down Rosses creek bed?

A. I think I have never seen it when it didn't flow to where the stream crosses the highway at the present time. I never saw it dry there.

Q. Now, how moist would it be there when you have seen it?

A. A small stream of water; I would say possibly there would be enough for two furrows where it crossed the State highway.

315 Q. What time of the year would you see it when it would only irrigate a couple of furrows?

A. Say in June and July, or May and June, that is when I was there.

Q. During all your travels up there did you notice the condition of the creek bed, itself?

A. Well, from the spring down to the junction there is a canyon that the wash comes down fairly deep all the way, most of the way, till you get down towards the lower end, then it is more shallow. The upper part of the canyon is quite deep and washed.

316 Q. Are you acquainted with George W. Nebeker and with the farm that he owns below the Petersen ranch in King's Meadow creek canyon?

A. Yes sir

Q. Now, during what years did you own or operate or lease this Petersen ranch from the State of Utah?

A. I would say either 1924 or 1925 or 1926 and 1925. I would not say which. I haven't the dates on it; we leased the water right that flows down Petersen creek; all the waters that came down Petersen creek.

Q. Will you state what your experience was with the use of these waters in Petersen ranch during that time?

A. We tried to use the water. It was there

to the extent that we would put it in three or four furrows in the morning, and then it would stop in the afternoon, and we didn't have anything until the next day.

Q. Briefly describe your duties as county assessor?

A. Well, it is the assessment of property within the county.

317 Q. Now, as a farmer, you have had experience with the use of water for irrigation purposes?

A. Yes sir.

Q. Now, are you acquainted with the farms in existence in King's Meadow creek canyon and Petersen creek canyon?

A. Yes sir; there is what we call the Petersen ranch and the Nebeker ranch.

Q. You are familiar with the water on both of those farms in King's Meadow creek canyon?

A. I know about what there is there; also acquainted with the farm land down in the valley around Sigurd and Glenwood and those localities.

318 Q. What is your judgment in connection with the raising of crops on the Petersen ranch?

A. I think you could raise crops there if you had the water; I think you could raise hay and grain.

319 Q. Now, would this Petersen ranch have any value for agricultural crops other than the raising of grain and hay?

A. I guess you could raise potatoes there, or something of that kind.

Q. So, you say the farm without water would

not have any value for any agricultural purposes?

A. I would say no, without water it hasn't any.

Q. Would the Petersen ranch have any value as a grazing proposition for sheep or cattle?

A. Yes, sir.

Q. Would it have a value for grazing during the entire year?

A. Well, I would say very little value during the summer months. There are some wells in there. That is sheep or cattle will browse there on the meadows, the grassy spots there.

Q. From your experience on the Petersen ranch, after leasing it, and having known it since, would you say that it should be considered as strictly a dry farm?

A. I would not say strictly, because in times there is a lot of water that comes down.

Q. Are you familiar with the market values of farm lands in the community where these farms are located, down in Sigurd and Glenwood?

A. Well, I am quite familiar, yes.

320 Q. Well, now, what would you state in your opinion the land of the Petersen ranch, with the full water right, would be worth, that is, the market value per acre? That is, assuming it had a water right.

A. With the water right, I would say forty to fifty dollars an acre; and that would be the value of the ground for hay raising.

Q. What would you say the same land would be worth if you took the water away from it?

A. It is almost valueless.

Q. Now, as to the lands down near Sigurd and Glenwood, what would you say the fair cash market value of the land down there was with the water right?

321 A. Ordinarily, I would say from \$125.00 to \$150.00 an acre.

Q. Explain why there would be the difference in the market value of land down near Sigurd and Glenwood compared with the Nebeker and Petersen ranches?

A. In my opinion, the difference would be, its soil is better soil, and it is adapted for the raising of sugar beets. I don't know of a crop failure, as it is up in the canyon. It has more water. It is adaptable for the growing of sugar beets, being about the only cash crops. I would attribute the difference to those things.

322 Q. State whether or not in your opinion this market value of the Petersen land on June 15, 1939, had been decreased because of the taking by Sigurd town of the waters of the two springs up in Rosses canyon?

A. A very small amount.

Q. Could you fix that amount?

A. If I was determining any value, I would say that the amount of water that comes out of Rosses channel would not be enough to irrigate one acre of ground.

Q. Can you give us an estimate of about how much you think that market value had been decreased by the quantity of water taken by Sigurd City?

A. My personal opinion is it would not be a hundred dollars.

Q. Well, can you tell us whether or not in your opinion the quantity of water available to the Petersen ranch under the conditions you observed it has been reduced by reason of Sigurd City taking the water in the two springs in Rosses canyon?

323 A. To a very small extent, yes.

Q. Do you think this slight reduction in water from Petersen creek for the Petersen ranch would affect the market value of the Petersen ranch?

A. Very little.

Q. Could you estimate what extent it would affect its market value on June 15, 1939?

A. Well, from my knowledge, I think it would be less than a hundred dollars.

Q. State if you can whether or not the quantity of water available to the Nebeker ranch from the King's Meadow creek canyon has been reduced any by the taking of the water by Sigurd City of these two springs?

324 A. I guess it would be reduced, yes.

Q. That would be providing any water got beyond the Petersen ranch to it, wouldn't it?

A. The combined flow of the Petersen creek that was there, would make no difference to the Nebeker ranch, because he never got any of ours, we never got any of his.

Q. That is just the point. In view of all these conditions, from that source, would you say that the water rights for the Nebeker farm below had been affected any by Sigurd City taking these springs of water?

A. I would say not — through its regular channel.

Q. Under those conditions, you would further say that the market value of the Nebeker ranch down below on June 15, 1939, was not affected at all by Sigurd City taking that water?

A. In my judgment, I would say it was not.

325 Q. In connection with that farm, did you have any dealing with the State Land Board with respect to the purchase of it; I mean the Petersen ranch?

A. We leased with the understanding the first year that if we wanted we had an option of buying it.

Q. Did you investigate the water conditions at that time in connection with the option to buy?

A. Yes sir, observations of what water there was in the canyon.

Q. And from what you could see through leasing it, I presume?

326 A. About the same conditions as now. There has not been very much change in Petersen creek since that time.

CROSS-EXAMINATION:

By Mr. Bates.

327 Q. Isn't it a fact, Mr. Powell, that we had a very dry spell in our country that lasted from about 1922 and down to 1936, a long time when everybody was complaining; everybody recognized that we were short of water all over this southern country?

A. We did have a time when there was a shortage of water, yes.

Q. And that ran approximately over a period

of years, about twelve to fourteen years — a long time?

A. Of course, during that time we know our conditions are much different. If a year found us dry, we have been building reservoirs to take care of us in dry seasons.

328 Q. Don't you remember that in 1922 there was a heavy rainfall in this southern country, and that we went into a drouth period that lasted for many years?

A. I know that we had some drouth.

Q. And as a general condition of that, all over the country, did you observe whether or not that drouth period had some effect on the flow of springs that were ordinarily looked upon as permanent springs, whether or not they didn't decrease in some amount almost all over the country?

A. Some of the springs did and some didn't.

329 Did you observe whether or not there was any change with reference to the flow of the creek depending on whether or not it was cool and cloudy or stormy weather, or whether it was hot and dry?

A. Yes sir.

332 Q. I think you said that the water that would come from the Rosses creek from time to time down in the Petersen creek, that your judgment would be about equivalent to what would run in a furrow?

A. Yes sir.

Q. You think the Petersen place would be

worth between five to seven dollars per acre for pasture purposes?

A. In my judgment.

Q. If it had water then your judgment is it would be worth maybe fifty dollars an acre?

A. I would say the land that could be irrigated on the place.

Q. When you get down onto the Nebeker ranch it is materially better soil?

A. No.

Q. How would you value that?

A. The same way; about forty or fifty dollars an acre.

333 Q. This water supply is limited to the Petersen ranch?

A. It is limited, but he still has enough water.

334 Q. And during those months when you were there you say the water would quite generally come down in the nights and in the afternoon it would have a tendency for it to dry out?

A. Yes sir.

Q. With reference to these periods in the spring of the year when you say there is then a little natural runoff, in the season when the snow melts, there would be a little more runoff and more spring water would come down than in a hot, dry period?

A. Yes sir. That is when the other water mingles with it.

CLIFF M. POWELL resumes:

CROSS - EXAMINATION:

By Mr. Bates.

A-1 Q. What was your observation as to whether or not the water in Rosses area ran about constant?

A. In my opinion it did; the water would accumulate there in boggy, swampy areas and run in the ravine described and on toward the other creeks.

GEORGE E. POWELL, for plaintiff, testified:

DIRECT EXAMINATION:

By Mr. Hilton.

Reside at Richfield; 12 years; fifty-three years old.

A-2 Q. Where did you reside before coming to Richfield?

A. Down northeast of Sigurd — what we call Cedar Ridge — it is northwest of Sigurd; fifteen or sixteen years.

Q. State whether or not you are acquainted with the area southeast of Sigurd known as King's Meadow creek?

A. Yes sir; and with the area farther up known as Petersen creek; and Chrises creek; and the place they call the "Willow Patch;" and Brimhall Springs.

Q. When did you first become acquainted with Rosses Creek?

A. Quite a few years ago — thirty-five years anyhow.

A-3 Q. Did you have occasion to go up to Rosses creek for any commercial purpose?

A. Yes I was there after wood; all the years about that time for several years; I hauled wood for ten or twelve years.

Q. What time did you run sheep there?

A. We ran sheep over in that country over in 1916 — somewhere along there, we started running sheep in that country; we ran our sheep there up until I think it was 1928 or 1929 — I will not state for sure; went hunting up there.

A-4 Q. For how many years would you say you went in there hunting?

A. Twenty years.

Q. During what seasons of the year did you haul wood?

A. Along in the summer and fall; probably some time in July, some times in August and September and October.

Q. What seasons of the year did you run sheep in there?

A. In the spring and fall in that particular area; in May and June in the spring and in October and November in the fall.

Q. Are you acquainted with the springs in Rosses creek?

A. Yes sir.

Q. State whether or not there is a spring right to the head of the canyon?

A. Yes sir, it is — the upper spring.

Q. Did you go to that spring frequently in your traveling up there?

A. Well I will say along in June, around there, quite often.

A-5 Q. While traveling in that canyon did you observe the water condition in the creek bed and spring?

A. I do not know the exact quantity of water but it flowed down the creek bed part of the time clear to the canyon; in the spring of the year, mostly.

Q. When you were there in the summertime how far would it flow down, if you observed it?

A. Just a ways beyond the junction and the State highway of the present time.

Q. Did you notice any water or any times when Rosses creek bed was dry where the present State highway crosses it?

A. No sir.

Q. Did you notice it dry at any time down to the junction?

A. Yes sir; along in May and June.

A-6 Q. Have you any idea as to the quantity of water?

A. There wasn't a very large stream; I don't think I ever seen more than enough water to run out of there to run in one furrow if it ran the length of a ten acre piece.

Q. Did you ever see Petersen creek dry at that junction?

A. No sir, not right there; but I have lower down — down on the Petersen ranch.

Q. You have seen a time to your knowledge and observation when there was no water at the Petersen ranch at some time of year?

A. Yes sir; I have noticed it in June.

A-7 Q. How many springs have you noticed up in Rosses creek?

A. There is some little boggy earth there but what I would call springs, there was only two that I have examined. One was at the head and one was further down the creek.

Q. Did you notice water flowing from both of those springs?

A. Yes sir.

Q. Now about how large a stream would you say was running from Rosses creek into Petersen creek in the spring and when you observed it, in width and depth, would you say?

A-8 A. In the morning there would be more water and in the afternoon sometimes there would not be any water whatever; practically every time I was there.

Q. You are acquainted with the ranch known as Petersen's ranch?

A. Yes sir.

Q. When did you first become acquainted with that?

A. I have seen it so many times when I have traveled up and down the canyon; I think it was in 1925 and 1926 or 1924 and 1925, I am not sure which.

A-9 And the Willow Patch is known as Chrises creek and flows through it?

A. The Chrises creek spring is above the Willow Patch.

Q. Did you use the combined water from Petersen creek on the farm when you leased it?

A. We tried to; we put it on some lucern on there and I guess when I would put it on in the

morning it would be in four or five furrows and it would last until getting toward noon.

A10 Q. Now would you state, (Mr. Powell, that the condition as to water in Rosses creek and Petersen creek as you have described it would be the situation from year to year?

A. According to my best judgment, it would.

Q. When you were at the junction of Petersen creek and Rosses creek did you observe water flowing in Petersen creek?

A. Yes sir.

Q. Can you state the difference in the quantity of water that was flowing in Rosses creek and the amount flowing in Petersen creek at the time they were both flowing?

A. That would be a little hard to do. It was scattered out over a five foot space on the bottom of the wash and it is hard to judge the amount there; I think there was four times as much. There was quite a lot more in Petersen creek.

Q. Now from your knowledge of conditions up there and especially the water conditions and the use of water on the Petersen ranch, from the combined water of Petersen creek, would you say the quantity of water available for Petersen ranch was much less because of Sigurd taking the water of Rosses creek?

A. Very little; I do not know how much but any time I have been there there has not been a great deal of water flowing from Rosses creek, and sometimes not any.

Q. What time did you find no water running in Rosses creek?

A. Along in June when it started to get dry.

A11 Q. How far did it come down in Rosses creek?

A. Between a place on the State highway and the junction of Petersen creek and Rosses creek.

Q. Did you ever see it dry above the State highway where it is now located?

A. No sir.

Q. Did you ever water any horses at Rosses creek where the State highway is now located?

A. I have watered horses there, yes sir; it would be along in the latter part of June or July or in the fall; as a general rule the gravel would be scraped back and there would be a little hole there and the horses would drink out of that; they drank out of puddles.

CROSS - EXAMINATION:

By Mr. Hunt.

A12 Q. Do you recall times that you have been up at the junction of Rosses creek and Petersen creek, what time of day it was?

A. I would say in the middle of the day, in the afternoon at different times.

Q. And at times when you were there was little water running?

A. In the first part of May I have seen water running in there, yes sir.

Q. When you hauled wood did you go around over toward Cottonwood to get wood and come back?

A. Sometimes.

Q. But most of the time when you were hauling wood it was late in the fall?

A. Well, August or September, those months we used to haul wood to sell and if we found anybody that wanted wood we would haul it.

Q. A number of years before you leased this place you have been familiar with Petersen ranch?

A13 A. I had seen it, yes sir; passed right by it; there has been a little crop raised quite a few years ago just north of the house there.

A14 THE COURT: I will limit you to four witnesses on the same period of time.

JUNIUS POWELL, for plaintiff, testified:

DIRECT EXAMINATION:

By Mr. Hilton.

Live at Glenwood; forty-one years old; born there; resided there practically all my life; have been farming the larger part of my life.

Q. Do you hold any position with any commercial institution?

A. Yes sir; State Fish Hatchery attendant; four years.

A-15 Q. All times prior to that you have been a farmer?

A. Yes sir, practically.

Q. Are you acquainted with the area known as King's Meadow, Petersen creek, Rosses creek and Chrises creek?

A. Yes sir; I have known it was there since I was large enough to go out after wood; I ran sheep through there.

Q. What year did you run sheep through there?

A. In 1924 and 1925, to start with; in 1925 I was there in July and back again in August — we moved off the ranch once in that time.

A16 Q. In what seasons of the year 1924 did you herd sheep there?

A. I watered at the Rosses creek spring in 1924; in the spring of the year; in March or April.

Q. In 1931 what season or months of that year were you there with your sheep?

A. I was there in the early spring months until the latter part of June and in September and October and in through there.

Q. You are acquainted with Petersen ranch?

A. Yes sir; through handling sheep and I had a lease on it; in 1931 and 1932, from the State of Utah.

A17 Q. During all times you were up there in Rosses creek did you observe the water conditions in the creek itself and in the springs?

A. I have observed them in the spring quite a lot; there was a nice little spring there and a little pond made so we could water sheep — I do not know who built it. That was my main purpose there at first.

Q. Now did you notice water flowing from the springs?

A. Yes sir; it would go on down the canyon clear to the junction, at times; the spring of the year; along in March and April.

Q. Were you at the junction at any other times of year?

A. I remember one day in particular — it would be the month of — that was in the latter part of June, 1931; I had my sheep camp just above the upper part of the ranch toward the mouth of Cottonwood and I went up there to water my horses; there wasn't any water.

Q. Did you follow up Rosses creek to a point where there was water?

A. Yes sir; I would say at about where the State highway crosses the creek at the present time.

Q. Now when you saw water flowing from Rosses creek into Petersen creek it was at what time of year?

A. It was in May, 1931.

A19 Q. Did you notice water flowing in Petersen creek at that time?

A. Yes sir; the stream was largest in Peterson creek; from two to three times larger.

Q. While you were on the Petersen ranch as lessee, did you use water from Petersen creek — the combined flow there for irrigation purposes?

A. I tried to but with very little success; it was so irregular I gave it up. I tried to water a little piece to the left of Petersen creek channel and I couldn't get any results and I quit trying.

Q. What time of year did you quit trying?

A. It was in 1931 — that would be in the spring of the year.

Q. Did you try to use water at all after that?

A20 A. No sir.

Q. Now did you ever notice any water running from Rosses creek into Petersen creek in the summertime?

A. It is this one particular time I noticed, but I didn't go up to the junction very often — I know very little about the junction; I worked on the road; the old State highway, or county road, I guess it was at that time.

Q. Did you notice water conditions at that time?

A. To some extent, I noticed a dam at Rosses creek; right at the saddle where the State road goes through at the present time.

Q. Did you have to go that way to find water?

A. Our camp was right in the saddle and we didn't only have to go to the creek; we made ponds to water our horses.

A21 Q. At the saddle were water conditions any different in the fall or summer when you were there?

A. They would vary, yes; if the weather was warmer it would vary — I imagine the water would go a less distance down the creek but I didn't follow it up.

Q. Did you notice the water of Rosses creek at times ceased to flow?

A. In hot weather in the middle of the day, this one time I know of.

Q. Now did you have occasion to notice the creek bed as you came along Rosses creek canyon there?

A. Yes sir; well as you go up into the canyon

the wash becomes deeper and as you go to the north of the canyon it is of a lesser depth.

Q. As to any condition that would interfere or impede the flow of water, what would you say?

A22 A. There is a lot of sand in the bottom of the wash.

Q. You are acquainted with Chrises creek?

A. Yes sir.

Q. Compared with the water in Rosses creek, were the waters of Chrises creek larger?

A. Yes sir

Q. When you leased the farm from the State what water rights did you lease with it?

A. The flow of Petersen creek.

Q. Now from your observation and experience as a farmer, of conditions up there in Rosses creek, especially the water conditions, did you find the quantity of water from Rosses creek had been decreased any by Sigurd City appropriating water of those two springs?

A. Very little.

Q. Would you tell us about how much?

A. The water would run down there in the early morning, and in the afternoon about noon, from then until night there was no water during warm days.

A23 What effect would that condition have on crops?

A. Just couldn't raise any.

CROSS - EXAMINATION:

By Mr. Bates.

Q. Do you remember in those early years any individuals on the ranch?

A. Yes sir; Marion Bastion, Cy Ellis.

A24 Q. Do you remember a man on a ranch in those years at least attempting to cultivate the property.

A. Marion Bastion did.

Q. Your brothers were there in 1924 and 1925 and you were with them?

A. I was back and forth in the spring of the year; in 1924 and 1925 was in the vicinity of these springs, on the head waters of them.

A25 Q. You spoke of time when you came to the junction to water your horses and didn't find any and rode up the stream to where you could water the horses. Do you remember what time of day it was?

A. It was along in the afternoon.

A26 Q. You do not know what time of day the water would cease to flow?

A. About noon.

RE-DIRECT EXAMINATION:

By Mr. Hilton.

A27 Q. During the summer period usually and especially during the latter part of June, July and August, it is pretty hot and dry, isn't it?

A. Yes sir; as a rule the climate in that area is sunshiny and dry.

RE-CROSS EXAMINATION:

By Mr. Bates.

Q. Isn't it rather a climatic characteristic of our country through June the climate is dry and when July and August comes we have summer storms?

A. I have seen our biggest floods in June.

RE-DIRECT EXAMINATION:

By Mr. Hilton.

A28 Q. In all your experience up there was the flow of Rosses creek dependable at all for crop raising?

A. No sir.

Q. Would you say there is a flow from Petersen creek that is dependable on this ranch?

A. No sir.

Q. The combined flow would not be dependable.

A. No sir.

RE-CROSS EXAMINATION:

By Mr. Bates.

Q. Do you mean it would not be a constant flow?

A. No it would not be a constant flow.

RE-DIRECT EXAMINATION:

By Mr. Hilton.

A29 Q. But the quantity was small?

A. Quite small.

Q. And not such as would raise crops of any value?

A. I would say very little crop.

MR. SKEEN: May I interrupt and suggest that we put our last witness on for the defendant? Have you any objection?

MR. HILTON: No.

B. F. LOFGREN, for defendant, testified:

DIRECT EXAMINATION:

By Mr. Skeen.

Live in Salt Lake City and the immediate vicinity, since 1922, in Ogden valley.

Q. That is a valley up East of Ogden?

A. Yes.

Q. What is your occupation, Mr. Lofgren?

A. I am an engineer.

Q. Do you have a degree as an engineer?

A. Yes.

Q. And are you a duly registered and licensed engineer in the State of Utah?

A. Yes; University of Utah.

A30 Q. Since getting your degree from the University of Utah have you had any practical experience in engineering?

A. I have for the State of Utah. It has been particularly with reference to water matters. I was engineer for the Brown & Sanford Irrigation Company and Big Fellow Irrigation Company of Salt Lake County, and I did some contracting work in installation of pipelines and have been water commissioner of Utah Lake and Jordan River and the Lower Jordan River, and since 1934 have been assistant State Engineer in distributing the water of the State.

Q. Describe what your duties have been as the assistant State Engineer?

A. My assignment has been particularly in regard to water supplies, determining whether there is unappropriated water of any source,

particularly with reference to underground water and to test for interference between wells and springs, and wells and tunnels, to see whether one diversion interfered with a prior diversion.

Q. In doing that work do you have occasion many times to study the characteristics of underground water?

A. Yes.

Q. I will ask you, Mr. Lofgren, whether during the day you have been up to Rosses creek canyon and King's Meadow creek?

A. Yes, I have been there today.

A31 Have you been up to King's Meadow creek canyon before?

A. I do not know it by that name, but I have been up Petersen creek many times.

Q. You have known it as Petersen creek?

A. Yes.

Q. And not King's Meadow creek?

A. Yes.

Q. When you went up Petersen creek and Rosses creek canyon today did you make an observation of the terrain, particularly with reference to Rosses creek and the vicinity immediately below?

A. Yes, Rosses creek is in a canyon formed in lava rock, in the upper part and right at the intake of this pipeline the canyon is comparatively narrow except where a wide canyon enters Rosses creek, at which point there are alluvial fans running out into the main Rosses creek and this forms a wider bottom to the

canyon. The upper end is a comparatively steep slope, from six to eight feet per hundred. The bottom is filled with comparatively coarse angular segments of lava rock and with the interstitial spaces filled with finer material where the creek has been shifted. Toward the lower end of Rosses creek the bed rock rests back from the canyon and the flow is much wider, and from all appearances, the unconsolidated fill in this canyon is deeper at the mouth of the canyon but up where the ledge rock is exposed near the head of the pipeline this condition is true.

A32 As you come from Rosses creek into Petersen creek the canyon widens out considerably until there is a wide valley floor from one to two hundred yards across the bottom of the valley floor. As you go down towards this ranch the formation changes into a shale formation, which, instead of forming coarse angular rock, forms a fine comparative clay deposit in the bottom of the valley.

Q. Mr. Lofgren, while up Rosses creek canyon, did you make an observation as to the water in the creek itself?

A. Yes, I measured the flow entering the pipeline at two points and also walked up the wash at the bottom of Rosses creek, from the State highway until we meet the first water coming on the surface of Rosses creek. From there I got out of the bottom of the wash, but I could observe the flow in the bottom of the wash from there up to a few hundred feet above the intake of the pipeline.

Q. About how far did you walk up Rosses

creek before water in the bottom of the canyon appeared?

A. From the north of the canyon I would estimate now, one thousand feet. It was a few hundred feet below the last point at which ledge rock shows on the side of the canyon.

Q. Explain the significance of that ledge of rock?

A. This is the action of the edge of the underground canal of water. Wherever the valley fell, the unconsolidated rock is deep and wide and large quantities of water can go through it. As soon as the valley fill becomes narrower, the water is forced to the surface so you can see it, otherwise it is sub-surface flow. The ledge rock merely renders the cross section of this valley fill so if you take a cut off drainage you would not have to go very deep or wide until you would have all valley fill excavated and there is not very much material through which this underground water has to go. But where the valley gets wide and the fill is deep, the surface flow disappears and is an underground flow where previously it was surface flow.

A33 Q. Have you a judgment from your observation, what happens to the underground water when it goes over that impervious rock and sinks into the valley fill?

A. In my judgment, it continues down Rosses creek. There is evidence of a water table some place about ten to twelve feet — I judge from the rabbit brush and willows that are in the bottom of the creek, and the cottonwood. All three are dependent on a comparatively high water table and some points the willows

will not thrive, and at other points the willows are very thrifty, and if I were going to water my horses I would go to a place where the willows indicate a high water table. My judgment is, it moves in that coarse fragmental rock at Rosses creek until it meets the main canyon of Petersen creek.

Q. You have made also observations I think you said of Petersen creek — of King's Meadow creek, and do you have a judgment of the course of any underground water after it passes through the valley fill?

A. Yes, I think it is familiar to the people of Petersen creek that the gradient is not steep and the rock is segregated completely. It is sandy and the water disappears into the fine and coarse materials and here in between the hills they have a wide valley and you find there is rather definite layer of coarse and fine in Petersen creek which you do not find in Rosses
A34 creek. As you see, this first range and valley flatten out. The gradient is not only half of what it is in the Petersen creek. It becomes wider and flatter and it is approaching the hills where the valley fill is made up of clay. In fact we found a wash twenty feet deep and it was clay all of the twenty feet, and looked at from the hills on the side and at that point there is evidence this underground flow comes up to the surface, both from the willows and from the springs. There are springs observable at that first ranch below Rosses creek. Bunches of willows indicate a high water table and the water comes to the surface at that point. That is not due to ledge rock, but to the fact the valley is filled with that material where the ranch is located.

Q. Where is the tillable area and springs observable with reference to the farm house on the upper ranch, known as the Petersen ranch?

A. Toward the north and west of the old house there is a fence and right in the corner of the fence line there is one spring, and there is another that is out three or four hundred feet northwest of the old house.

Q. What is the general characteristics of the ground around those springs?

A. Below the springs I didn't do any digging, so I am judging now from the surface evidence. Below the springs it is fine texture clay. From the southwest side of the canyon there is alluvial fill that is coarse angular rock that comes in from the side canyon and above the old house where the creek has washed a bed over ten hundred feet until there is coarse and fine, showing there is a deposit from the material up above.

A35 Q. Now what, in your judgment Mr. Lofgren would be the effect of withdrawing, assuming for the purposes of this case a quarter of a second foot of water from Rosses creek withdrawing it at the place it enters the pipeline, what effect would that have on the water table?

A. If you were to ask as to the quantity, it would be hard to estimate it but this would be the trend up where the ledge rock is evident in Rosses creek, it would reduce the surface flow so you could measure it as soon as it comes below the ledge rock and where there isn't a surface flow it would lower the water table instead of the water moving from bed rock to twelve or fifteen feet — I am just making an

estimate how deep it is — it will lower it enough to permit a quarter of a second foot to move through that gravel. If the valley is wide and the gravel is coarse it may only make a difference of a few inches in the height of the water table but if the material is fine and the valley narrow it may make a difference of several feet.

Q. Under some conditions it might make a difference having surface water and not having surface water?

A. Yes, between the surface water and the underground flow it would take all the surface water, and so little water would be the under flow.

Q. Assume the water taken out of the drainage system by a pipeline system from Rosses creek only in the winter time, would that have any effect on the water running down Petersen creek in the summertime?

A. That would depend whether we have sufficient precipitation in the immediate vicinity to fill the gravels in the spring. Taking water out of Rosses creek in the winter would unwater that gravel. If you have a heavy water the precipitation would not have to be great, but if you do not have it, then when you turn the water down Rosses creek you would have to fill all the gravel before you got the water moving.

A36 Q. If water were taken out in the winter time it would have to be replaced in the spring or early summer to bring about the same condition as if the water had been allowed to run in the winter time?

A. Yes, from natural precipitation or rain fall.

Q. While you were there today did you measure the quantity of water in the pipeline?

A. Yes at two points.

Q. Have you those measurements with you?

A. At the lower box there was flowing into the lower pipe from one pipe, sixty gallons per minute, and the upper box there is a one foot fill and there was flowing over that 103-1000 of second feet, that varies from about forty-six or forty-seven gallons per minute. The combined flow is 236-1000 of a second foot and that would make about 106 gallons per minute.

Q. Did you make any estimate of the quantity of water flowing in Rosses creek below this diversion works?

A. That stream was rather constant from the lower diversion box down to the point where this ledge rock disappears and I made an estimate of between fifteen and twenty gallons per minute — it would vary at different points.

Q. Where were you when you made the estimate of from fifteen to twenty gallons per minute?

A. Right by the lower diversion box and then again not far south from that ledge rock where the ledge rock crosses into the canyon.

A37 Q. Do you have a judgment, Mr. Lofgren, as to whether but for carrying the water in the pipeline, the water in the pipeline would have run through Rosses creek?

A. No sir, at this time —

Q. I mean running through into the channel of Rosses creek?

A. Yes, undoubtedly it would have come down Rosses creek, but whether it would have shown

as surface flow all the way down, it is questionable, but it would have been surface or sub-surface flow.

Q. Describe what is sub-surface flow of a creek?

A. Where the bottom of the channel is porous so water can go through it, whether water is poured into the channel from some higher source or moves in from the side canyon, all that porous gravel must be saturated with water before there is any flow if there is a gradient down the canyon and there is any angular rock, until the underground movement in the same direction reaches the surface flow. It is really part of the flow, because if you take water out of the gravel it is replaced, so they are interchangeable, depending on the distance between the rocks, and the coarseness of the material and the gradient down the canyon. They are all part of one flow and appear at the surface where pressed up by bed rock or fine material.

Q. Going back to the spring area near the ranch house on the Petersen ranch, have you a judgment whether the water from Rosses creek being carried up in the pipeline would contribute to the flow of any spring or any boggy places in that area?

A38 A. Yes, due to the fact that the channel is continuous and all the way through and the evidence that there is water moving down Rosses creek and Petersen creek, and that the springs are located right in the course of that channel, I would conclude that part of that spring water is coming from higher up in Petersen creek, and Petersen creek is really contributed

in part from Rosses creek. Just what proportion, would depend on how many tributaries there are to Petersen creek, but Rosses creek would bear its proportions depending on what other tributaries there was.

Q. I will ask you whether you have a judgment whether in view of your explanation you can say the placing in the drainage channel of boxes and pipelines results in the development of any new water in the Rosses creek canyon?

A. Development of new water, is a little ambiguous. I might say this, if it hasn't brought any new water in, the only water that could be considered new water is the saving of some loss and the only loss I would consider important in there would be the loss of water pumped up by vegetation but the surface evaporation would be negligible, but the evaporation would take part of the water from where it disappears in Rosses creek to where it comes out as surface water at the ranch. Suppose that taking Rosses creek out would lower the water table a foot, it may reduce that loss some appreciable amount but it would be hard to estimate.

Q. Have you investigated, in connection with your work as the assistant State Engineer, or during your previous experience, the value of water in the State of Utah?

A. Yes, there has been two particular instances where that has been a special objective and I have had access to the files of the State Engineer in which files there are reports of sales that have been made of water.

A39 Q. You have personally investigated the price of water then in Utah?

A. Yes, a ditch company in which I was a director sold some water to Salt Lake City and prior to that sale I made an investigation of what water was worth.

Q. Do you have a judgment of the value of culinary water in the State of Utah or a range of values?

A. Yes, a range would be easier.

Q. I do not expect to tie you down to any particular figure, but have you a judgment of the range of values?

MR. HILTON: Objected to on the ground it was not pleaded and is not in issue in this case.

THE COURT: Objection overruled.

A. Based on sales that have been made in Salt Lake County and that are now being made under each one of the reservoirs under construction — at Hyrum, the big south reservoirs, Deer creek and Echo Reservoir all have definite sale values —

MR. HILTON: Just a moment, we object on the ground conditions in Salt Lake Valley, 165 miles away from this point, is too remote to have any application to this part of the country down here where everybody knows the conditions are different, and I move that the answer be stricken.

THE COURT: You may ask the ultimate question how much this water is worth.

MR. SKEEN: Mr. Lofgren, what in your judgment is the value of culinary water per second foot in Sevier Valley?

A40 MR. HILTON: Objected to on the ground the

witness has shown no qualification to apply that down here.

THE COURT: Objection overruled.

A. Depending on the constancy of the stream, a constant stream being worth more than one that fluctuates in high water or low water, it will vary from \$8,000 to \$30,000 per second foot.

Q. Assuming for the purpose of this question the flow of water if constant, would you state what the value of that would be in the city of Sigurd or in that vicinity?

A. There are other elements coming in and so I would make a rough estimate of approximately fifteen to twenty thousand dollars per second foot.

Q. Your answer is based on the assumption it is good, potable water?

A. Yes of a quality that does not require treatment before it is potable.

Q. Assuming for the purpose of this question that the flow of water from Rosses springs is constant, and judging from your observation made today, what would you say as to the possible source of those springs?

A. Well taking the statement that you made that they are constant, that of course I was not able to judge today but assuming they are constant, my judgment would be they are rather deep seated. The water is warmer than that derived from surface seepage, and that in connection with the constant flow would indicate they are rather deep seated in source — just where that may be, I have no idea.

Q. Did you take a drink of water when you were up there today?

A. Yes.

A41 Q. What comments have you to make as to whether the water is potable?

A. It is a good quality of drinking water as far as flavor is concerned. The mineral content cannot exceed from 700 to 1000 parts per million and so you cannot tell by drinking the water, the mineral content, but tested by the flavor and potability, it is a good quality, but not as cool as that coming from melting snow.

B. F. LOFGREN, recalled:

336 MR. SKEEN: Mr. Lofgren, taking the figures you gave us as the quantity of water flowing into the pipes, have you computed the quantity of water in the pipes per day by gallons?

A. Yes sir.

Q. How many gallons of water per day run through those pipes, according to the measurements you made?

A. 157,240.

CROSS-EXAMINATION

By Mr. Hilton.

Q. How much time did you spend at these springs in Rosses creek canyon there this morning?

A. Three quarters of an hour, I would estimate.

Q. That three quarters of an hour you mea-

sured the water running into these two boxes of the Sigurd water system?

A. I measured that in about two minutes.

Q. Is that all the time you gave to the preliminary things?

A. That was all the time at the springs. We spent some additional time in Petersen canyon and at the ranch below.

337 Q. You stated you were an engineer; what kind of an engineer?

A. Civil engineer; have a degree from the University of Utah in civil engineering.

Q. Have you ever studied geology?

Yes sir; geology was one of the parts of the civil engineering course that I took.

Q. Isn't the study and description of this territory now really confined to geology?

A. This particular business, yes, the study of geology is particularly the business of a geologist.

338 Q. Now, do you claim to be such a specialist?

A. Not as an expert or as a man who has specialized particularly in geology.

Q. What experience have you had in geology?

A. Pertaining to underground water, where it has involved the development of underground water in the State, I have made particular studies of those formations through the State, more or less.

Q. I think you said in your testimony here that water will sink in these gravel beds and then reappear; is that true?

A. That is right.

Q. Why did you line these gravels with concrete, you mention?

A. Because the gravel beds was a part of a delta over at the mouth of the canyon, and that delta, as we found, went to a depth of three or four hundred feet. There is no bedrock there, and after it has once disappeared into the gravel it does not reappear. It was in a delta and the water disappeared into the gravel and came out in springs at the foot of the terrace.

339 Q. Now, did you find a situation like that existed up here in Rosses creek?

A. Not possibly like that, but in Rosses creek it is a close canyon so far as it drains any amount of water into the stream from the sides. Whereas, in a delta field, in a delta there is no contribution whatever from the sides, because you are out a distance away from bedrock. Your underground flow and your surface flow run right parallel. After you get out of this canyon then you would have it similar to what you would have in a delta canyon.

Q. Have you examined other side canyons there flowing into Petersen creek?

A. Not with as much detail. I have examined some of them. I have been out on trips in the State on runoff and snow cover. On some of the trips, one, just about a year ago, I was on a stream up above the mouth of Rosses creek; that would be Chrises creek.

Q. Does the water flow into the creek bed here from the sides?

A. No, I found no inflow. I didn't see any surface inflow, only which issued from the south exposure, or has issued from the north 'ex-

posure. There was no surface inflow from the sides through the stretch that we examined.

340 Describe that movement of water down there, as you understand it?

A. The water being a fluid moves in the direction of least pressure. So that, if you have a gradient, and that gradient would mean that the water surface at one point is lower than the surface at another point, water will move from the point of high surface to the point of low surface, and if the gravels in the canyon slope, and if the water surface in the gravels slope in the direction the canyon slopes, there would be a movement in that direction, the speed of movement is determined by the porosity or coarseness, or their permeability of those gravels.

341 Q. Now, you made some reference to the water table, Mr. Lofgren; did you refer to a water table up in Rosses creek canyon?

A Yes, in Petersen creek and also down at the farm; water table may be tilted in gravels. Stationary water table is flat. To move waters, the table must be tilted, or they would not move. If you have a tilted water table, the gradient on the water table forces the water to move down the gradient. A water table need not necessarily be flat.

Q. Under those conditions, then, there must be a bottom to that, if it caused the water to flow down the canyon. wouldn't there?

A. Bed rock bottom; I would conclude that there is a bed rock bottom down there at some distance. The water table I refer to is all the water in the gravel -- underground surface.

If you dig a series of test holes until you struck water, you could test all these points out where you first strike water; get them all together; that would form a plane, or percolating space, sloping down the canyon, and that plane is referred to as the water table.

Q. What investigation did you make up there to determine that?

342 A. The first I knew that the water table was above the ground surface. I could see evidence of the ground flow. The water table is above the ground surface. The vegetation, some of the vegetation indicates, is some evidence of, the level of the water table — cottonwood trees, rabbit brush and willows, they are very sensitive to a very deep water table, and as the water table recedes they would make a scrubby, stunted growth, whereas, when the water table raises, they would make a luxuriant growth. I observed that the vegetation has indicated that.

Q. Didn't make any specified test up there by digging holes to determine those things?

A. No, but I noticed a hole that somebody else had dug, but I didn't dig any holes; about half way between the mouth of Rosses creek and where the water last disappears.

Q. Sloping downward; must there not be some kind of a bed rock formation that would hold, does hold, or did hold this water back in several places in order to make this box?

A. You mean by this alluvial material which continues constant all the way down, I think that is true. Well, it may be for forty or fifty feet, and the compilation would be slide rock or bed rock.

343 Q. Describe the character of bed rock in Rosses canyon; that fractured part of that bed rock the water seeps into?

A. It moves down the gradient. It moves down the gradient where the rock is fractured. There is evidence that there is some solid rock beneath, that this hard shells and sandstone were in all that bedrock, on the surface, and it breaks off; there may be some water goes into the fractures; the fractures that are evident are superficial. The ones that you can see are surface fractures. If there are any of any depth you can't see. We don't know whether there are, or not, but we do know that the water that is evident up at the head of the pipeline is also evident down where the bed rock is exposed — evident that the fractures were large enough to absorb that water — would absorb every foot, and the fact that it is evident indicates that this lava rock does not take the flow that is going down the creek.

Q. That would be evidence that the water then does not become absorbed by the bed rock in Rosses creek canyon, but flows as much as it can through the alluvial material and accumulates on down to Petersen creek?

344 A. That is correct. These fractures have been filled; the fractures are filled, just as the interstices of the alluvium have been filled, and after they are once filled and saturated, the water then moves on down the creek.

Q. The flow down Rosses creek under those conditions is very slow?

A. Yes that flow is slow.

Q. Now, if that water flow was not so diverted and flowing in this pipe in Rosses creek and

under the conditions you found, could you form a judgment as to how much of that water would reach the bottom of Rosses creek?

A. Without more detailed examination, which would include water borings to the water table, it would be difficult to form an estimate of that flow that would have any accuracy.

Q. You can't put an estimate on the amount of deposits there, and character of bed rock, and those things, can you?

A. No.

345 Q. You said that there would not be enough information at your disposal to determine the quantity of water that might come down to Petersen creek if this pipeline was not there?

A. No, my conclusion would be that Rosses creek is contributing to the water at this inflow that arrives at the farm, but as to what proportion of it it might actually have contributed to the supply at that farm, without more detail and more examination — I would not make an estimate?

Q. Do you know whether it would be insignificant, or larger than that, or what?

A. I would say it would not be insignificant — one-fourth of a second foot of water that is so far removed from this underground flow.

Q. In the light of the testimony that has been given here, that very little water comes down Rosses creek into Petersen creek during the year — a little more in the cool weather; sometimes none in the summertime; sometimes none in the fall; and sometimes in the daytime from noon until about three or four o'clock there is no water, at all; in the light of such testi-

mony as that, would you say that much of this water could come down before this pipe line was put in there; would you say that there would be much water in its actual condition, under those circumstances, coming down into Petersen creek?

346 A. As to whether there is much, I could not form a judgment. As to what it might be, I would say yes. Because, if your gravels are deep, and the valley is actually three or four hundred feet wide; there is still the movement through these gravels; the movement is evident on the surface. We don't know how deep. The gradient fluctuates. It forms a sort of a meadow in there, in the valley field, and actually springs that produce the water come right to the surface of the ground and flow over the surface.

Q. Where would these springs that you mention be with respect to Petersen creek?

A. They are near the bottom of the valley of Petersen creek.

Q. What would you say about the conditions that some of these witnesses have testified to, that Petersen creek would be dry at times before this water system was put in there?

A. When they said Petersen creek was dry, they meant the surface flow, as to the surface flow, but the underground flow was there; depending on how deep the bed rock is.

Q. You could not say with any certainty, at all, the underground effect of water in Rosses creek on the water table down there?

347 A. Only that it has a contribution in comparison with the other tributaries.

Q. You didn't notice any growth on either side of Rosses creek of trees and willows and things at the mouth of Rosses creek, did you?

A. There are a few scrubby willows all the way up Rosses creek. I don't think there is any great length along that where there are not some willows, but some of them appear scrubby, indicating the water is down rather deep, and there are others more luxuriant, with a more luxuriant growth, indicating the water table is up.

349 Q. Did you notice the appearance of water out where this bed rock appears?

A. Yes, there is water there.

Q. And then in that, there is quite a large alluvial deposit that is backed up to hold the water?

A. Not necessarily. No, it may only be a few feet deep. It indicates that the alluvial deposit is not as deep above as it is below. Then it appears below, because all the way you see alluvial deposit below that bed rock.

350 Q. In reaching your conclusions here, have you taken into consideration how much of the surface water would come into that creek from all the sides of the canyon and country above it that would drain into it?

A. I made observations for surface drainage, and there was none. It appeared to me that the only surface inflow is from heavy rains when they cannot seep into the ground, they make a contribution.

351 Q. Did you say that the bed rock coming to the surface caused the inflow to appear on the surface as springs?

A. I don't recall that I made that definition of

springs. When the underground flow has run into materials that won't contain the flow, it reaches the surface. Ordinarily that is known as a spring, even though it disappears and reappears, that is a definition of a spring, but actually it is part of the same flow, whether it be deep, whether it be above or below the surface or below the bed stream; in Rosses canyon the water is evident up at the head of the pipeline and remains at the surface or near the surface until about half way down and then it disappears and that is the last appearance you see of it until the water comes out near this farm down in Petersen creek.

352 Q. Where is the upper spring there with relation to the channel in Rosses creek?

A. From my recollection, the wash in the bottom of Rosses creek makes an angle that approaches this upper intake box, I would estimate it to be two or three hundred feet. I didn't make a special note of it at the time. Approximately, I would say two or three hundred feet. It may even be four hundred. I walked over to that. There had been some road work done on that channel up through that wash, but I don't recall just how far it is.

Q. You didn't go up to the main spring up in the canyon, at all, did you?

A. If there is a main spring, I didn't go up more than, I would say a thousand feet — eight hundred feet above the upper intake box.

353 Q. All your testimony has been made without any relation to a spring up there, at all, hasn't it?

A. It was made with relation to the amount or

water down Rosses creek and the diversions of any of that water which forms a part of the flow of Rosses creek; if you have reference to a particular spring above eight hundred feet, an estimated eight hundred feet above that box, then I didn't.

Q. Did you see any actual spring there?

A. There is water seeping in, as I said, where the spring is. There was water seeping into Rosses creek.

Q. Did any of that water get into this diversion plant of Sigurd City?

A. No, it was going in. But without knowing where the pipeline runs for the lower diversion box, my conclusion would be that it was going into the lower one. I don't know where your pipeline runs with sufficient accuracy to know whether any of that water could possibly get into the pipeline, after it reaches Rosses creek.

Q. You don't know what waters are being diverted, do you?

A. Yes, subject to surface flow, it is moving parallel with Rosses creek, is the water that is being diverted; because I followed the trench that was freshly dug that followed all the way up the canyon to measure this diversion box and measured the water that was flowing from this pipeline into the intake box.

354 Q. I think you gave an estimate that this water diverted by Sigurd for culinary purposes would have a value of from fifteen hundred to two thousand dollars?

A. That would be my estimate.

Q. What do you base that on?

A. On purchases that were made by Salt Lake City, as well as on water that is being taken under the Deer creek and Pine View, for irrigation water. I assume that culinary water would have as high or a higher value than irrigation water.

355 Q. Deer creek water is going to be sold up in Salt Lake?

A. Part by Pleasant View, and Provo, and Lehi, American Fork, and Linden. Each of these communities have subscribed for part of the Deer creek water. There was some difficulty in selling the last of it. They each subscribed for a certain amount. There wasn't any question about reaching the supply, but the price is fixed within certain limits, definite price, depending on the construction costs, but it is fixed.

Q. How large is the Deer creek project?

A. A hundred and fifty thousand acre feet.

Q. Do you have any idea as to the cost of the project?

A. It will cost approximately fifty dollars per acre.

Q. I mean the cost of the entire project?

A. Between eight and ten million dollars.

Q. Your judgment on the value of this water down here then is based wholly on your knowledge of the Deer creek project up there and other projects up in Cache county, and from information in the State engineer's office?

A. Yes, and also in Morgan county, and the

Hyrum reservoir — all the projects that have been directing these reservoirs, and from my general information.

Q. Do you know anything about the price of good irrigated farm land up in Salt Lake valley?

356 A. Depending upon the water supply, farm land is selling from a hundred and twenty-five to two hundred dollars per acre where it is used for farm land.

357 Q. What will be the cost in the Pine View dam per acre?

A. I think slightly under. I don't recall exactly. It is between forty or fifty dollars; that is my recollection.

Q. Now, are you familiar with the cost of water down here per acre foot — do you know the cost of it?

A. Last year the Bullion Creek Irrigation Company had turns that could be purchased to be moved up and down the river, I know of those turns; one dollar for the season plus the assessment costs for one acre foot for one year; that is near Marysville, the water was to be moved up and down the river so that it could have been delivered at any point up on the river or down.

MR. SKEEN: Mr. Hilton asked you about where you got your information as to your testimony on the value of this water, and I think his question referred to tabulations in the State engineer's office; I will ask you to state whether defendants' exhibit 3 is that tabulation, or one of the tabulations?

A. That is one of the tabulations that was put together after particular study was made.

359 MR. SKEEN: Do you know whether this tabulation was taken from one of the official files of the State engineer's office?

A. Yes, it was — of matter being recorded in the State engineer's office.

MR. SKEEN: We offer it in evidence.

MR. HILTON: We object to it as being wholly immaterial.

THE COURT: I will sustain the objection.

MONDAY, APRIL 1ST, 1940, 9:00 A. M.

360 THE COURT: The jury is present; you may proceed, Mr. Hilton.

MR. HILTON: I offer in evidence the record of proceedings of the town of Sigurd in connection with the passing of an ordinance declaring a necessity for condemning these water rights, marked plaintiff's exhibit 3.

THE COURT: Do you gentlemen admit the necessity for the taking?

MR. HUNT: Yes, Your Honor.

MR. BATES: I thought we did all the time.

THE COURT: Well, it may be received for the court only, and not for the jury.

MR. HILTON: I now offer in evidence a certified copy of the proceedings before the State engineer duly certified by the State engineer relating to the application of the town of Sigurd

for appropriation of waters from the springs in question, marked plaintiff's exhibit 4.

MR. SKEEN: That would also be admitted for the purpose of the court.

THE COURT: That is all. It may be received to the court, only.

MR. HILTON: I now offer in evidence certified copies of application of the town of Sigurd for the diversion of the springs upon which the other exhibits bear, with regard to the proceedings had pursuant to its application, marked plaintiff's exhibits 5 and 6.

361 MR. BATES: One of these applications we do not believe belongs to the water in this action. The other we believe to be an entirely different spring area, and is immaterial in the case and ought not to be brought into the case — a mile or two away.

THE COURT: That is plaintiff's exhibit 5 that is objected to?

MR. BATES: There is only one application filed, Your Honor.

THE COURT: The one is for winter water. They are both for winter water.

MR. SKEEN: The one filed the 7th of June, 1938, is the only one they have pleaded.

MR. HILTON: They didn't protest this one, at all.

THE COURT: The court will receive it for the information of the court only, subject to the right of argument and discussion by counsel. The exhibits 5 and 6 are received to the court only.

HARVEY SORENSEN, for plaintiff, testified:

DIRECT EXAMINATION:

By Mr. Hilton.

Resided at Glenwood all my life; forty years old; occupation, farming.

Q. You are pretty well acquainted with the surrounding country of Glenwood, are you?

362 A. Yes sir; acquainted with the area over east known as Petersen creek, and the stream that enters into it known as Rosses creek.

Q. Are you acquainted with the locality around the little town of Sigurd?

A. I know that country; have hauled wood there all times of the year.

Q. In hauling that wood just where would you go with reference to Rosses creek?

A.. I would go in all those hills around Rosses creek

Q. Would your travels take you up where you observed the water conditions?

A. Many times. I have hauled wood there since I was a boy; last time the first part of February of this year.

Q. What route would you take in going up Rosses creek?

A. There is a a road about half a mile up Rosses creek canyon; from the mouth of Rosses creek canyon that is connected with the State highway that goes up through Petersen creek. When Sigurd put their water system in we made a road up there — oh, thirty years ago. That caved in or washed out; we could not travel it

with a wagon, but we drug wood out of there
363 with horses. I have been at the upper spring
by going around up through Cotton Wood with
the wagon.

Q. Are you acquainted with the springs up in
Rosses creek?

A. Yes sir, the one known as the main spring
or head spring.

Q. Now just how many springs or seeps are
there up there that you are acquainted with in
Rosses creek?

A. I am acquainted with two up at the head.

364 Q. Explain to us the water conditions as you
observed it then at the spring?

A. I have always observed water there.

Q. Did you observe how far the water there
would flow down the creek bed?

A. The water went clear down the canyon.
I have crossed the mouth of Rosses creek in
going after wood and I always seen a little
trinkle of water there — at the mouth of Rosses
canyon. In the spring of the year there would
be more.

365 Q. Were there times when you noticed it dry
there?

A. I have seen it dry in the afternoons, when
we have had to puddle it or pond it to water
my team, when we have been coming back from
getting wood. I have seen it when the creek
bed has been damp. I have crossed there and
there has not been water running.

Q. At what times of the year would that be?

A. That would be in the summer months.

Q. Did you ever observe the water conditions at the junction, that is as to whether or not any water was coming from Rosses creek?

A. I have seen water coming into the Petersen creek

366 Q. Have you observed times when the water wasn't sufficient to flow down Rosses creek beyond the State highway into Petersen creek?

A. Yes sir; in the summer months; July and August, I would say.

Q. Would you say that those were the conditions that existed there during all the years that you have been acquainted with Rosses creek?

A. There has been years when we have had a lot of rains, of course, then there would be more water.

Q. About when would this additional water increase the flow you mentioned in the spring time

367 when would that commence?

A. I should say in March and April, and last until the first of June.

Q. How about higher up in Rosses creek canyon there, what was the condition of the creek
368 bed as you observed it as to rubbish and earth and things of that kind in the creek bed?

A. I have always seen rubbish and earth cave off from the wash; that is the condition up the creek bed by the wash.

Q. What would be your opinion as to the practical use of the water for farming purposes, from your observations of the water conditions on Rosses creek?

A. If he was to use it close by the spring, I would say it would have some value to a farmer;

it would depend on how far it would have to run for value to a farm; if it run very far, I would say it would not be of any value.

Q. From the conditions as you observed it and the water flowing as far as it did, what would you say its practical value was for farming — I am limiting it to Rosses creek, and your observation?

A. In the spring time, I imagine it would be of some value to a farm, a little value anyway, up to the first of June; then it has got no value if it had to run that far, because there wasn't enough to run very far for a farmer to use.

CROSS-EXAMINATION:

By Mr. Bates.

Q. Who have you talked with with reference to what your testimony would be?

MR. HILTON: I object to that as wholly immaterial.

THE COURT: He may answer.

MR. BATES: Who have you talked to with reference to what your testimony would be in this case.

A. I haven't talked with anyone outside of just common conversation about this case, is all.

MR. HILTON: I think these questions have a design in them. I object to this line of testimony and to the inference that it is improper. Of course he has talked to counsel. We have to go over that. We had to; we did it as a duty to the court.

THE COURT: Proceed..

MR. BATES: Have you told us all the people that you have talked to with reference to what your testimony would be in this case?

A. No, I haven't told you all I have talked to; it has been the topic of discussion in these little communities; quite a wide interest manifest with reference to this case.

371 Q. In the spring of the year when the high waters or flood waters are there in Rosses creek, they increased the flow of the springs?

A. Yes sir; it has increased in the spring time, I will say, due to melting snow.

372 Q. Your observation is that in the summer months, the flow of water down in the vicinity of the present State highway and from there on down is less than it is in the spring months?

A. Yes sir.

Q. It is not so much a question of the time of the year that you have observed it, as it is a question of the condition of the weather; isn't that the situation, really?

A. I would say not.

Q. Do you say that, like Petersen here, that the two months were the months when you have seen less water; you also say that it is during the summer months when it is dry and hot — you tie them together?

A. Yes sir.

375 Q. So that there was always water running there that you could get by cleaning out a hole and let your horses have a drink?

A. Yes sir.

Q. By going up a rod or two from the road,

you found water there percolating through the gravel, or trickling through the gravel?

A. Yes sir.

Q. With reference to the general water conditions there, those are low hills, just cedar hills?

A. I would say they were; the entire area that Rosses creek drains from is just low cedar hills.

376 Q. There is no heavy snow in that area any time?

A. I have seen it where a team could not go through it in the winter time.

Q. Have you seen the spring flood water running out of there in any quantity in the spring of the year, so as to make a big freshet of water?

A. I haven't seen any big streams; I have seen the water come out roily in the spring time.

377 How frequently in your judgment could you observe the stream in the past years?

A. It would vary, some years I would be there more than others. Other years, only once or twice.

Q. During all the years that you have traveled up and down there, were the conditions about the same year in and year out?

A. Yes sir.

378 Q. So that in your judgment there were times in every year when this water would run down and join with the Petersen creek?

A. Yes, there would be times in every year.

MR. HILTON: Counsel asked you about seeing the water running from Rosses creek into Petersen creek, and the general condition, that was the usual situation. You would not say that that was the usual situation during all times, water running in there?

A. I didn't say that. He asked me if I had seen it emptying into Petersen creek. I told him I had; in the spring time.

379 MR. HILTON: Isn't it true that when you get a heavy rainstorm, even the ditches on your own farm clog up and sometimes overflow?

A. Yes sir.

JOHN H. PAYNE, for plaintiff, testified:

DIRECT EXAMINATION:

By Mr. Hilton.

Reside at Glenwood; age seventy years; occupation, farming all my life.

380 Q. How long have you lived in Glenwood?

A. Sixty-five years.

Q. Are you acquainted with the area known as the Petersen creek area?

A. Yes sir; I would say for fifty years.

Q. Would you have occasion to go up there into Rosses creek?

A. I hauled wood out of there forty years ago.

Q. How frequently would you go there during all that time to haul wood?

A. Some years I would not go on Rosses creek at all. Some years we would go there during the season, for a few loads.

Q. How many times during the year would you go up in Rosses creek for hauling wood?

A. In 1936 and 1937 I went in there about six or seven trips; we went up — there would be times we went up Cottonwood creek and over the hill into the head of Rosses creek.

381 Q. Would you stop at the spring frequently when you would go up there for wood?

A. Always stopped and watered my horses. That would be at the spring.

Q. In the earlier days, about how frequently would you go into Rosses creek?

A. Along about 1900, 1901, I hauled all my winter wood from Rosses creek. I would make frequent trips at that time. And then a number of years I didn't go in there at all. In 1906 and 1937 I hauled my wood out of there.

Q. When you were in Rosses creek, tell whether or not you observed the water conditions at the spring?

382 A. As I remember it, I never saw any difference in the water flowing from the spring, the upper spring. I don't know anything about any other.

Q. State whether or not you observed whether the water flowed from the spring down Rosses creek bed?

A. It flowed down into the creek bed; right where the State road crosses now. An old road crossed there — has been as long as I can remember.

Q. What time of the year would you be in there when you observed those things?

A. I hauled my wood usually in September,

the latter part of September — the latter part of August or the first part of September.

383 Q. Could you give us an idea about the quantity of water that you observed at the place where the State highway now crosses Rosses creek?

A: I would judge there was enough water at that time to run not more than two garden furrows.

Q. Did you have to make any preparations for watering your horses at the point where the State road crosses?

A. I have moved a rock or two from the bottom of the creek to let the horses get a drink.

384 Q. From your observations there of water conditions on Rosses creek, what would you say would be the practical use of this water for farming purposes on that Petersen ranch?

A. Well, at the time that I have observed it, it would be of no use whatever. That water would never reach the Petersen ranch that time of the year.

CROSS - EXAMINATION:

By Mr. Bates.

385 MR. BATES: You have no information with reference to this stream except during the months of August and September?

A. No sir.

Q. Do you believe that your observations of that stream included conditions existing during the stormy weather?

A. I have been up there when it has stormed during the time, and other times when it has not.

Q. What, if any difference, did you observe with reference to the water flowing down that

creek in a stormy period and in a dry, hot period?

A. I never observed any difference.

386 Q. You think the amount of water that would be flowing in the stream, itself, without being increased by high water accumulations from the side hills, would be about the same right at the road, whether it was a stormy period or hot, dry weather?

A. We know that water evaporates more when it is dry than wet; I think there would be some increase in a rainstorm.

Q. In your judgment, the flow of that water from that spring would be constant year in and year out?

A. Yes sir.

388 Q. Did you ever see any water in that ditch?

A. No, I haven't.

Q. You said that you had crossed the Petersen creek below its junction with Rosses creek and observed no water there?

A. I would say whenever I crossed way down by the springs on the Petersen ranch in the afternoon that ditch would be dry, that is the Petersen creek that runs down right by the springs.

Q. What time would that be?

A. In August and September.

Q. So your observation was that it was dry most of the time that you went there, or was it all the times?

A. I say every time that I crossed it during that time of the year in the afternoon there would be no water running in it.

Q. How frequently did you cross there?

A. Well, as I said, I would haul during 1936, 1938, I crossed there about eight days; in August and September.

MR. HILTON: You traveled up the Petersen creek canyoun a good deal, did you?

389 A. Yes sir, sometimes I have traveled up and down quite a little.

Q. Did you observe any obstruction or diverting works above where Rosses creek and Petersen creek join, that diverted that water or obstructed its flow any time you were there?

A. Years ago when there was a reservoir they took the water out, and then there was no water running down the wash, at all; I should say that reservoir was in there about, I would say, about three or four years.

390 Q. Just tell us the route you would take so far as the Petersen ranch is concerned, when you crossed these creeks?

A. In 1936 and 1937, if I recall right, we crossed the creeks, we crossed Petersen just below the rock house.

391 Q. Have you ever observed any obstructions in the Petersen creek or in Rosses creek or any diverting works to divert that water, during that time, did you?

A. No sir.

Q. You would have noticed any such thing if they were there, would you?

A. If it was close enough I would have noticed it.

MR. BATES: We object to that as leading.

THE COURT: It is leading.

THOMAS E. CHAPPELL, for plaintiff, testified:

DIRECT EXAMINATION:

By Mr. Hilton.

Reside at Sigurd; occupation, farming; resided there about 25 years, I guess.

392 Q. How long have you been farming?

A. All my life.

Q. Are you familiar with the area known as the Petersen creek, and the area known as Rosses creek?

A. Yes sir.

Q. I will ask you if you are acquainted with the ranch up in Petersen canyon known as the Petersen ranch, and sometimes referred to as the Bastion ranch, and also as the State ranch?

A. Yes sir.

Q. Have you ever had any occasion to go upon the Petersen ranch?

A. Yes, I lived there one year, 1912.

Q. Who owned the property at that time?

A. Bastion.

Q. When were you first in Rosses creek?

A. I guess 1912, the first year.

Q. State whether or not you have been up there since?

A. Yes, I have been there since.

393 Q. State what you noticed as to the flow of that water from the spring?

A. Well, it flowed down the canyon from the head of the spring. However, there was a little reservoir on the head of it, or pond, rather.

Q. What was the occasion for your traveling up and down Petersen creek?

A. Well, different occasions. I have hauled freight up the road and down it, from Richfield to Salina, to Wayne County.

394 Q. Tell us what you observed as to the water conditions in Petersen creek near the Petersen ranch during all the times you traveled it there?

A. There was a little reservoir up the canyon there that shut it off three or four days and then turned it loose and water maybe six or seven hours a day, and turned it loose.

395 Q. State how long that reservoir ever remained there, is you know?

A. Well, I don't know as to just how long it was there. We built it up in 1910, raised it, and it was there for a few years afterwards, I would say.

Q. After 1910. Do you know what happened to it?

A. There was a flood that flooded it out; was there in 1907, 1937, I guess.

Q. Tell us what you observed as to the water conditions on that trip?

396 A. Why, I observed that there wasn't much, very little water running down the canyon, at the mouth of the canyon; I could not say how far; it run down to the road, I would say, now.

397 Q. From your observation there, and from your experience as a farmer, and your use of water, so far as that stream coming from Rosses creek is concerned, state whether or not

in your opinion, that is any practical use to the farm?

MR. BATES: We object to that. The witness has testified that he didn't observe it, so I cannot say that he would be able to testify to that.

MR. HILTON: He said he was there all during 1912.

THE COURT: Reframe your question so as to relate to surface waters, and I will let him answer it.

MR. HILTON: I will say as to surface waters, that is the waters flowing on the surface from Rosses creek?

A. I would say none in that year, none whatever.

CROSS-EXAMINATION:

By Mr. Hunt.

398 Q. Then the only time that you ever observed either of these creeks was in 1912?

A. No, I have observed Rosses or Petersen creek quite regular.

Q. Where have you made those observations on Petersen creek?

A. Where the Glenwood road joins the other road is the place.

399 Q. You never crossed the creek below where Rosses creek came in during that year, you never crossed Petersen creek?

A. Yes sir; down opposite the house.

Q. You don't know whether Rosses creek ran into Petersen creek that year, or not?

A. Yes sir; because I shut the water off of

that ditch that the high water coming out of Rosses creek would empty into, if there was any coming into it.

Q. Where did you take the water out of the Petersen creek when you diverted that on the ranch in 1912?

A. Above the Richfield road; above the ditch.

400 MR. HILTON: Did you ever observe Petersen creek dry before you had that reservoir put in there?

A. Yes sir; we raised the reservoir there. There was a little reservoir there before 1910. I don't know how long it had been there. We raised the dam. It was there for several years afterwards. I could not say just when.

Q. In doing this freighting after 1912, after that dam went out, I would like to know whether you observed Petersen creek dry?

A. Yes sir, I have; it was practically every year I would say, in August, July — I mean August, in the afternoon.

Q. About what time would it commence to be dry in the spring time earlier than August?

A. I would say it started to slack up in June,

402 Q. When did you see it dry after the reservoir went out, approximately the year?

A. About 1937?

Q. What months was this in?

A. In August.

Q. You said the only time that you were ever up through Rosses creek was in 1937, and then you were in company with Mr. Harding. Is that right?

A. I was with him, yes sir, in 1937.

CLAUDE SAMPSON, for plaintiff, testified:

DIRECT EXAMINATION:

By Mr. Hilton.

403 Resided at Glenwood practically all my life; will be 62 next birthday; occupation, cow puncher, driving cattle.

Q. Are you acquainted with the area south-east of Sigurd town known as the Petersen creek and with the area there known as Rosses creek?

A. Practically all my life.

404 Q. What was the occasion for your becoming acquainted with those areas?

A. I rode for Mr. McMillan handling cattle through that country, on Rosses and up King's Meadow canyon; I started working for Neil in the year 1903 and I kept it up till 1922.

Q. Now, tell us when you were first on Rosses creek, if you can?

A. Oh, it is way back; I was on Rosses before I started to work for Mr. McMillan at different times, but it was way back, 1903, along in there; during the spring and summer months we used to run quite a few cattle in them hills. We would be in there quite often for those cattle; some springs we would turn them out in March, and some springs we would turn them out a little later, in April, along in there. It
405 would just depend on the weather; a little in the fall time, not a great deal in the fall, but in the spring time, with the cattle, we had them in that country.

Q. Were you up Rosses creek after 1922?

A. Only just where it came through; where the State road is.

Q. Now, did you observe the water conditions there, while you were on Rosses creek?

A. Yes, I practically seen the water quite often while I was there; I was up at the springs at that time.

Q. Tell us what your observations were with respect to the water conditions in Rosses creek?

A. I have seen the time that the water didn't run into Petersen creek more than it did go in Petersen creek; it would be in May and June, the first part of the summer season; I don't remember ever seeing it go into Petersen creek in the fall of the year, but I have in the first part of the summer time.

Q. Would you say that that condition existed during all those years that you traveled through there?

A. Yes, I would say as a rule.

406 Q. Now, did you observe the water conditions at the junction of the Rosses creek and Petersen creek?

A. Where Rosses comes down into it, yes — I saw a little water coming out of Rosses and emptying into what you call the King's Meadow, that you now have called Petersen; in the spring of the year when I was there with these cattle.

Q. Did you ever notice Petersen creek dry?

A. Along in the latter part of July and August when it got warm weather that water would disappear some place and come up possibly in the morning. You could see a little water in there in the afternoon. I don't know where it went.

Q. Well, at the junction there where Rosses

creek empties into Petersen creek, could you tell us about how large a stream was running from Rosses creek into Petersen creek?

A. I would say maybe four or five garden rows.

407 Q. Did you observe the water conditions at the place where the State road is now?

A. Yes sir, a little water there; I have watered my saddle horse.

Q. Now, tell us whether or not from your observation of the quantity of water that you have noticed coming down Rosses creek into Petersen creek, that it would have any practical value for farming on the Petersen ranch?

MR. BATES: We object to that, as the witness has not shown that has formed any judgment on that question.

THE COURT: The objection is sustained.

MR. HILTON: Are you acquainted with the Petersen ranch?

A. Yes sir, I have been in there quite a lot.

Q. Have you ever handled water for irrigation purposes?

A. In different farms over in Grass Valley for Mr. King; am acquainted with the use of water on farms.

CROSS - EXAMINATION:

By Mr. Bates.

408 Q. The watering you have done, you have a large stream of water and a large area to irrigate — you did that in a comparatively big way?

A. Yes sir.

Q. During those years that you were working for Mr. King, you would not be down on this King's Meadow country a good deal?

A. I was mostly all the time, that is, quite a lot of the time. When I worked for Mr. McMillan I drove cattle back and forth.

409 Q. You always found water there at the road, coming in from Rosses creek where the present road is now where you watered your saddle horses?

A. Not always, Mr. Bates, no.

410 Q. You didn't have very much occasion to be in this country in the months of June, July and August?

A. Not a great sight, that is right at the head of the spring. We would be up and down the canyon, and in King's Meadow canyon; and passed the place and saw water.

MR. HILTON: When you would go back for stray cattle that you had left, would you always find some of them?

A. Once in a while there would be a few that we had missed there.

411 Q. Now, as to the water in Petersen creek separate from Rosses creek, in the spring time there when you were there did you notice water in Petersen creek running?

A. Oh yes, going down the canyon.

Q. Did you have occasion in the spring time to notice how much more water there was in Petersen creek than in Rosses creek — I mean Chrises creek?

A. I would say there is just about three times

as much water coming out of Chrises creek as there was out of Rosses creek.

Q. And did you observe the condition right at the Junction of Rosses creek and Petersen creek?

A. As near as I can tell, there would be, it looked to me, four or five rows of the Rosses empty in here at times, and at other times, there wasn't any that is emptying into this Petersen creek, as you call it.

JOHN B. CARTER, for plaintiff, testified:

DIRECT EXAMINATION:

By Mr. Hilton.

412 Resided at Sigurd about thirty-six years; age fifty-one; occupation, mostly farming.

Q. Are you acquainted with the area known as Petersen creek, southeast of Sigurd, and with the area known as Rosses creek?

A. Yes sir; since 1909 I have been acquainted with them.

Q. What was the occasion for your going up into those areas and becoming acquainted with them?

A. The first occasion was, I was working for a man that either owned the Petersen ranch or had an option on it. I was up there trying to find some water for the place; that was 1909; there wasn't any water coming out of Petersen creek in that spring; that was the last of March
413 or the first of April, and we drove from there up to what is called Brimhall springs to find if

there was any way of getting that water, getting it all, into the channel, and to put more water on the field. There was a small reservoir built just below the soil ditch, just a small dam there at that time, and so we tried to hold all water from coming down the canyon to get a flush to put on the field.

Q. During that time did you observe the water at the junction of Rosses creek and Petersen creek?

A. There wasn't any water coming into the ditch. They had a ditch taken out about a mile southeast of the forks of the road out of that wash, and this ditch then would accumulate all of the water that come out of Rosses or that would empty into Petersen creek. I followed that ditch, if any water was coming and there wasn't any water coming from Rosses creek at that time.

Q. You did follow along the ditch and observed that?

A. Yes sir; that would be, I would say, around eight or nine o'clock in the morning.

414 Did you observe that condition during the whole fifteen days you were there?

A. Yes sir. That is what I was there to do, to get water together and try to get some on the farm; there wasn't anything done; there wasn't any water there in any way.

Q. What work did you do on this Bastion ranch that year?

A. I plowed a few ditches, cleaned the ditches, rode this ditch from there up to where we dammed the water out of the main wash, repaired

the ditch, and then repaired this reservoir dam. That had been washed out, a small portion of it on the west side of the dam.

Q. Now, during the time that you were there, state whether or not if any water would have come down Rosses creek you would have observed it?

A. I would.

Q. You didn't observe any during all the time you were there?

A. No sir.

Q. Now, did you follow up this ditch to where it connected with the Rosses creek?

A. Yes sir; that would be just a mile south and east of where the highway bridge is of the wash now.

415 Q. Now, during that year did you use any water out of Petersen creek on the Petersen ranch?

A. Very little. It was just a small stream used that is when I left. We tried to collect water — it come right through the hole. It helped, but there wasn't enough to do any irrigating with.

Q. How about Rosses creek?

A. I don't remember of any water there. That water wasn't considered at all then, in the spring time.

416 Q. Tell what you had to do, if anything, to assist the horses in drinking?

A. We had to back the water up to make a pond enough for our horses to drink; I don't have in mind any more than this, that I don't think it would have reached the Petersen creek.

Q. When were you next on Rosses creek?

A. It was 1932; right on the same place, right due east of where the highway crosses it; that was October, and first part of November.

417 Q. What did you find as to water conditions then?

A. Less than the year before.

Q. When were you next there after 1932?

A. 1937. I was working on the State highway that is there now; right where the road crosses; that was in June, the last part of June.

Q. What were the water conditions then as you observed it?

A. It was very little water there, just as I expected, as I recall it; there wasn't any running water on the surface at that point.

Q. Now, did you notice the creek bed of Rosses creek while you were up there?

A. Just loose gravel formation, the water would spread maybe four feet, if there was enough, maybe four feet over the surface; that is as far as I was up the canyon.

418 Q. From your experience, from your observations of water conditions on Rosses creek, what was your opinion as to its practical use for farming, this surface water?

A. Well, I would not think it would be of any.

CROSS - EXAMINATION ·

By Mr. Bates.

Q. What was your reason for camping there just east of the road?

A. I was working on the road; about the best camp ground there is around there for two rea-

sons, one was the wood was really handy, and it wasn't far up Rosses when we ran out of clear water, to get water.

419 Q. Was it hard to make holes to hold it, or to make dams to hold it there?

A. It was sometimes, because of the loose formation of the soil; you had to back it up; it would go through our dams. I don't think any went below, because when we dug our dams, our ponds, we didn't increase any stream.

Q. When you did that, you would have water for your horses?

A. If we didn't water them too often — give it a chance to fill up from the side.

420 Q. How far up that creek have you been, with reference to the upper spring?

A. I have been clear through there a few times; observed the amount of water in the springs prior to 1937.

421 Q. You knew where they were going to get the water at Sigurd, didn't you?

A. I knew where they were going to try and get it.

Q. Mr. Dastrup exchanged this Petersen ranch to Mr. Bastion for a place over in Wayne county — it was on a trade?

A. Yes sir, I understand they made some trade.

Q. And your duties were to go with Mr. Dastrup looking around for water?

A. Yes sir; went up the canyon here sometimes called King's Meadow; including Chrises creek.

Q. But you never made any examination, at all, with reference to Rosses creek?

A. Well, the only reason why, there wasn't any water in that to make an investigation of it.

422 Q. What were you referring to when you said there wasn't any water from Rosses creek?

A. It was not between the Bastion ranch and where we had taken the water out of the wash, Petersen creek wash.

423 Q. Where was the ditch taken that you took the water in that you diverted, where did you go with the ditch?

A. Taken along the east side of the wash.

424 Q. And that ditch intercepted the place where the water would pass out of Rosses creek into Petersen creek, if there was any water there?

A. Yes sir.

425 Q. Did you in 1910 again follow that same ditch going up to the Willow Patch creek canyon?

A. I don't know that I followed the ditch all the way that year, but I followed it most of the way up. I would not just say definitely that I followed it all the way up; I would say I followed it up from down near the ranch up around that point past Rosses creek. The rest of it we could see pretty well from the road, we didn't need to follow it.

MR. HILTON: Kindly refer to that map behind you, and tell us about where this water was that you have reference to, and the condition that existed as to these creeks, and about where that ditch would come from Rosses creek

down to the Petersen ranch that you have been talking about; can you do that?

A. Yes sir. As near as I can place it right here from the forks of the road up here. It would be about a mile up this way; that would be south and east. This creek bed should make a turn from where this point is marked. This creek bed should make a bend and come back in here somewhere, make a big bend in there, and then come out across this flat, through there, and over and around a point somewhere right in here, and then back around here and on towards the ranch property.

427 Q. With reference to watering horses, do you know how much a horse will drink at once?

MR. BATES: I object to that as immaterial.

THE COURT: He may answer, if he can.

A. Well, I would say a horse would drink about seven to eight gallons.

2:00 O'CLOCK P. M. — APRIL 1, 1940

SAMUEL GURR, for plaintiff, testified:

DIRECT EXAMINATION:

By Mr. Hilton.

B1 Reside at Sigurd, Utah; lived there all my life; sixty-four years old; occupation, farming.

Q. Are you acquainted with the area south-east of Sigurd known as Petersen creek and with Rosses creek that enters there?

A. Yes sir; for better than fifty years I lived on Petersen creek.

B2 Q. You are acquainted with the Petersen ranch on Petersen creek that everybody has been talking about here the last few days?

A. Yes sir; lived just about a mile further up the creek.

Q. About what years was that you would run your cattle in Rosses creek?

A. It would be along in 1889 and 1890 — right along in there when I was seventeen or eighteen years old.

B3 Q. What time of year were you in Rosses creek?

A. That would be anywhere from spring until winter and fall. I have been there when there was snow and when there wasn't snow; for ten or fifteen years.

Q. When you were in Rosses creek did you observe water conditions there?

A. Yes sir; in the spring of the year there would be a lot more water than later on in the season. In the fall of the season there was less water; usually in the spring there would be water to run to the ranch. Along in the latter part of May to the first of June it would decrease, and the last of June there would not be any. Along in July and the last of July and the first of August and the first of September when there was more rain the water would increase a little in that small creek.

B4 Q. Were you acquainted with water conditions in Petersen creek?

A. Yes, because we used to cross right at the junction of the two creeks and Petersen creek would dry up in the latter part of the summer;

I do not know how far up from where we crossed, but when we lived up there it dried up above where we lived for half a mile.

Q. How long will you say it would remain dry?

A. From the last of June until cool weather set in. Occasionally when it would rain the water would run down, but other times it would stay dry until the weather got cool.

B5 Q. What time of year would you say it flowed in there?

A. That depends on the condition of the weather. When it was cool it would run to the junction of the creek and other days it would dry up between the road and the creek. I have seen it run into the earth all the way down there.

B6 Q. What did you notice as to the condition of the spring as to variations in the spring?

A. It deepnded on how the cattle tramped in it. If they tramped in it, there would be less water. It was swampy there and the rushes and the grass hurt the water so it would depreciate there and there would not be so much come out.

Q. What times of the year would you say you drove cattle there?

A. It was always in the fall of the year. When getting our stock off from the mountain we would generally come down Petersen creek or Rosses creek and pass out below on the Salina road.

B7 Q. In 1937 what months of the year were you there then?

A. I went up in July, August and September — those three months I was there more than any other time.

Q. Did you observe water conditions in July, August and September of 1937 at certain places in Rosses creek?

A. Well, not so much as I did in 1938.

Q. Where did you observe the water in 1937 in Rosses creek — what points?

A. Well just above the road. First the water was sinking when I was there and another time it was below and in August it was running down to the junction of the two creeks.

Q. How much of the stream was running there then?

A. Not a very big stream, there wasn't enough to run in a furrow.

B8 Q. What is your experience or observation as to the water conditions of Rosses creek?

A. I believe one of the sons was with me, and I stepped the water down the creek about eighty steps from the State road, down toward the other creek. According to this note I believe it was September 20 — yes, September 20, 1937 — twelve o'clock noon.

B9 Q. When you were in Rosses creek did you notice the water condition of the creek bed?

A. Walking down Rosses creek to where it goes over a bunch of ledges and where it leaves them, is fifty to seventy-five yards, you can see it diminishing and it runs in and out of the ground and finally it fails to come back any more.

Q. Did you see during all the years you have

known Rosses creek, the water conditions you have described here generally prevailing?

A. Yes sir.

B10 Q. Now as to the water coming down Rosses creek, what would you say for practical use on the farm, what practical use would you say it has on a farm as you observed it?

A. I couldn't say it would have any use, because in farming condition it would be so small that a man couldn't afford to waste his time with such a small stream and there would be so little water that he couldn't get nothing done and he would burn up waiting for it to come.

Q. Was water running into Petersen creek from Rosses creek in the spring, then what would you say as to the value of that quantity of water in a practical way for use on that farm?

A. In the spring, early, they might use it a little when water comes down the canyon, maybe during April and May, but after that I don't think it would have any value.

Q. Are you acquainted — have you had knowledge of sales of land around Sigurd?

A. Yes sir.

Q. Are you acquainted with the lands of Mr. Nebeker, the defendant here, that are further down Petersen creek than this Petersen ranch?

A. Yes sir.

B11 Q. As to the value of lands, say the Petersen ranch, where water could be used on it, what would you say would be the value per acre of land on that Petersen ranch with a full water right?

A. Oh, I imagine it would be worth fifty or sixty dollars.

Q. What would you say that same land would be worth if you took the water from it?

A. It would be useless without any water.

Q. Wouldn't it have some use there?

A. There would be a little of it maybe down by the springs, but where there is no water and no feed it would not be any account for farming conditions at all.

Q. As to lands down around Sigurd, what are the value of lands there?

B12 A. It would sell anywhere from seventy-five dollars to one hundred and fifty dollars.

Q. What kind of crops are raised on lands near Sigurd?

A. Hay and grain, and beets — those are the main crops there.

Q. Explain this, the higher price of land near Sigurd, than up in the canyon?

A. That land in the canyon is not valuable for beet ground, and that makes it less than where you can grow beets on it. I suppose hay and grain could be raised although I do not know much about that land because I have not been on it much. It may produce hay and grain but it is not valuable for beets. It is heavy clay solid ground and would not grow beets as well as the lighter ground.

CROSS-EXAMINATION:

By Mr. Bates.

B-13 Q. Were you a member of the town board

during the time these proceedings were taken to get control of this water?

A. Yes sir.

Q. These observations you have been testifying to of having been made, were made at or about the time the town of Sigurd was taking steps to secure this water?

A. I don't remember the year, but it was in the latter part of 1936 or the first part of 1937.

B14 Q. After you considered all these things, you determined to get the Nebeker water and you did get it?

B15 A. Yes that is what we determined, because that is what we did.

Q. It was during all that time you were vitally interested in the success of this project while you were making these measurements, you were interested in the success of this irrigation scheme when making measurements?

A. I was opposed to that water myself because I said it was not sufficient water.

B16 Q. You do not know of any other sale than this one made of lands in the King's Meadow canyon, do you?

A. That place where we lived, was sold. That is further on up the canyon between the Willow Patch and Petersen ranch; it was in the 80's, a long time ago.

Q. There is no other water which is available for use on this Petersen ranch other than the water of Rosses creek and King's Meadow creek?

A. No I think not.

B17 Q. Your judgment would be, when they bought that ranch for \$2500 they made a bad buy?

A. Yes sir.

Q. I call attention to — I will have it marked, if you want it, Mr. Hilton, the contract of sale between the State of Utah?

MR. HILTON: We object on the ground the contract is the best evidence. The State didn't put that in and what the terms or conditions of that particular contract are, it is not shown to be proper cross examination and we object to it.

MR. BATES: It goes to knowledge of valuations.

MR. HILTON: No, he is going into the contract between the State of Utah and Mr. Bradfield. They pleaded it and the State of Utah pleads it. Now there was nothing on direct examination with reference to that contract at all.

B18 MR. SKEEN: You pleaded it too.

MR. BATES: This man testified about the value of lands.

THE COURT: What is the question, and we will rule on the matter.

MR. BATES: You indicate, Mr. Gurr that you didn't know whether or not water was included in that sale and I presented the document before you to satisfy yourself on that?

MR. HILTON: It is not the same question we objected to at all.

THE COURT: I don't think there is any question.

MR. BATES: There is no question propounded to the witness so far.

THE COURT: When he asks a question I will rule on the matter.

MR. BATES: Do you know now whether or not the water rights were included in that transaction.

A. It says "water" but not how much.

B19 Q. What Mr. Nebeker and his predecessor, Mr. Bradfield, got for this Petersen ranch, whatever water there is there for \$2500, is the situation?

A. Yes sir

Q. I have here a paper Mr. Gurr, marked defendants' Exhibit A. Have you seen that paper or one like it?

A. I guess I have.

MR. HILTON: I would like to know what this instrument is that they are talking about. We object to it as improper cross examination, it was no part of the direct examination.

B20 THE COURT: It would not be cross examination of any particular subject except going to the credibility and interest of the witness.

MR. BATES: It is the interest of the witness.

THE COURT: Council may proceed and identify the handwriting.

MR. BATES: Do you know as a matter of fact the statements made in the lower end of that document refers to amendments made in this court in this case, with Judge Jones sitting on the case?

A. I don't remember it.

Q. But you do remember seeing it posted around the town of Sigurd in numerous places or one like it, a few days prior to the commencement of this action?

A. I do not know whether it was a few days prior or month prior.

Q. Did you personally have anything to do with the posting of those papers?

A. No I did not.

B21 Q. You said this stream, because of its size, would be worth very little, didn't you?

A. It wouldn't be worth anything for farming facilities because you would starve to death trying to use it.

Q. You said this Petersen ground would be worth fifty to sixty dollars with the water and valueless without?

A. I said down on the grassy part it would be valuable but other than that I don't think it is worth anything, but with water, it would be worth fifty dollars an acre.

B24 Q. Which time was it you stepped down the stream from the highway?

A. On September 20, 1937.

B25 Q. On your visit July 24th you say the water reached to the new State highway?

A. And on August 15th it reached to approximately 20 feet below.

Q. And the more rainy, cloudy weather there is, the more constant the water will be moving down stream, wouldn't it?

A. If a certain amount, it would run a little farther but I don't think it would increase.

B26 Q. And in the spring of the year how much would you say you have seen there?

A. There was no great amount of water; I would say there was only sufficient for one furrow at that place.

Q. But you did say if you confined the water in the channel you could get more good out of it than if it took the meadows first?

A. Yes sir.

Q. Was there any reason why Mr. Nebeker could not have cleaned out the channels as he used to?

MR. HILTON: Objected to.

THE COURT: Objection sustained.

MR. BATES: But you said something about sometimes when it was cool you would see water running into the earth. Which stream do you refer to when you said that?

B27 A. I said you could follow down that canyon on Rosses creek and see water sinking into the ground and coming out and finally quit coming out.

Q. So the observations you have made with reference to the water, and its value, are based on surface conditions and what you could observe?

A. Yes sir.

RE-DIRECT EXAMINATION:

By Mr. Hilton.

Q. Mr. Gurr, when you said that land on Petersen creek with water would be fifty dollars an acre and without water would be valueless, you

had reference to the flow of Petersen creek — the water that can be used from Rosses creek and also Petersen creek?

A. Yes sir.

B28 MR. BATES: Objected to on the ground it has already been covered.

MR. HILTON: I have a right to explain.

THE COURT: The answer may remain.

MR. HILTON: So that you meant by that if the water coming from Rosses creek would irrigate probably a few furrows that that water would be — the land with the water — would be worth fifty dollars an acre, but without water would be practically valueless?

A. Yes sir

Q. Is it your understanding that the water issuing from these wells and springs on Petersen ranch are primary water rights for the Petersen ranch below?

A. Yes sir.

Q. Would you say by reason of the fact that those springs are there, and that was all the water rights used on the Petersen ranch or Nebeker ranch, would that give the owner of Petersen ranch —

B29 THE COURT: That is not re-direct examination.

MR. HILTON: Counsel's last question as to the value of that entire farm would cast inferences that the farm without water was valueless or that this land then without water was worth \$2500.00 as mentioned in that contract.

THE COURT: Didn't this witness testify the land was worth nothing for farming purposes?

MR. HILTON: No, he said this particular land with water and this particular land on which water from Petersen creek could be used, but counsel enlarged that to cover the whole farm. I have a right to correct that impression as they make this land especially valuable to Mr Nebeker.

THE COURT: You have a right to explain anything on cross examination which was brought out on direct examination

MR. SKEEN: That is a leading question.

THE COURT: Objection sustained.

MR. HILTON: Well then let me ask you this, is there anything on that Petersen ranch you know of in the way of physical conditions that would give it a special value to Mr. Nebeker for his ranch below?

MR. SKEEN: We make the same objection

THE COURT: The last phrase is not germane to the issue before us, "that ranch below." I understand we do not test value of land below. If you leave the last phrase off, you may answer the question.

MR. HILTON: Read the question (question read). Cut out to Mr. Nebeker for his ranch below.

B30 A. It would be worthless to anybody else. You might get a little good out of the pasture around those springs, but when you get back a ways from the spring I cannot see that it makes any value to the ranch below.

Q. Now on that ranch alone, would you say

that with those springs and wells and reservoirs there would give it a value to some owner of the water issuing from the spring and wells?

MR. SKEEN: Objected to as leading.

THE COURT: Objection sustained.

MR. HILTON: If you owned a farm in that locality from which you obtained water for another farm above it and all your water for your farm below came from above, would you say that a farm above would have special value to you under such circumstances?

A. Not if all the water came to me anyhow.

Q. It would be the same, as it would be desirable for any man to own the land, the source of which he gets his water?

MR. HUNT: Objected to as cross examining his own witness.

THE COURT: State your next question. The answer may remain.

B31 MR. HILTON: Counsel asked you another question about the acquisition of this water for Sigurd and your negotiations or your discussions and conclusions which decided you to take the water from Rosses creek. Do you know of any other cities that want water from Rosses creek beside Sigurd?

A. No sir.

Q. Do you know of any cities or town or communities around here other than Sigurd that wants to get that water for a water supply?

MR. BATES: Objected to as repetitious.

THE COURT: Objection sustained, it is not re-direct examination.

RE-CROSS EXAMINATION:

By Mr. Bates.

Q. With reference to that answer that it would have peculiar value to Mr. Nebeker, you know that condition there very well with reference to the water supply and that it comes to the Nebeker ranch below, and the location of the spring on the Petersen ranch?

A. Yes sir.

Q. You know there is no possibility of that water going anywhere else but to Mr. Nebeker?

A. No, that could be converted other places.

B31A Q. You know as a matter of fact he didn't buy that ranch with the idea of controlling that water in that spring area and he didn't need to do it anyway — you know that, do you not?

MR. HILTON: Objected to as not within the issue in this case and it makes no difference about this man knowing it.

MR. BATES: If you will concede your examination along that line was out of place, I will withdraw the question.

THE COURT: It may go to the credibility of the witness.

MR. BATES: You know that (read the question)?

A. I do not know why he bought the ranch.

Q. You know there was no occasion for him to buy the Petersen ranch to protect his water right that came out of the springs on the lower end of the Petersen ranch to irrigate the Nebeker ranch?

A. Yes sir.

Q. It is your best judgment, whether he made a good or bad buy, he bought it for the sake of the intrinsic value of the Petersen ranch and could not be anything else?

MR. HILTON: Objected to.

B32 THE COURT: Objection sustained.

R. P. HOWARD, for plaintiff, testified:

DIRECT EXAMINATION:

By Mr. Hilton.

Lived at Sigurd, Utah, since 1927 — thirteen years; occupation, railroad station agent.

Q. Calling your attention to the area known as Petersen creek and Rosses creek, southeast of Sigurd, are you acquainted with that section?

A. I have been over it a number of times, yes sir.

Q. Are you acquainted with certain springs on Rosses creek?

A. Yes sir.

Q. You at one time held office for Sigurd, did you not?

A. Yes sir; was councilman and town clerk and town treasurer and general town flunky.

B33 Q. What years did you hold the position as town clerk and trustee of Sigurd?

A. From 1935 until the spring of 1939; that was during that time that Sigurd City was conducting its program for the acquisition of water rights.

Q. Now when were you first in Rosses creek?

A. In September of 1935 was my first trip up there for observation purposes; I went there to see the amount that was coming out of there that might be secured for the town of Sigurd as a municipal water system.

Q. Coming out of where?

A. Out of the mountain. It was very small. It was coming out into a kind of slough or frog pond. It was not cleaned out, but was a space of ground where cat-tails and one thing and another had grown and it was about a mile up from the State highway.

Q. Is that the main spring?

A. I believe it is. It was in that area of a half acre.

Q. Tell what you did up there in regard to observing the water?

A. We looked at the thing and decided if they thought there was a possibility of getting sufficient water to supply the municipal needs of Sigurd we would try to get it; and after looking around there we decided after getting together that there was a possibility of being enough water there.

B34 Q. When were you next up there?

A. In July of 1936; I went up there to see whether it had enlarged or dried up or whether about the same as it was on the previous occasion and I found it practically the same as it was the year previous.

Q. Did you observe how far down the creek bed the water was flowing at that time?

A. It seemed to seep out of the ground and

come down into a creek; it was what we might call "dampness" and it dug in the sand and gradually worked down the canyon and there wasn't much of any flow there.

Q. How far down the canyon did you observe it traveled?

A. Half or two-thirds of the way.

Q. When were you next up there?

A. In May, 1937. I went up to about the head of the spring and came down again, checking on that very same thing.

Q. Had the water changed any from your previous observations.

A. No sir.

Q. When were you next there?

A. I do not know whether I was up there for any special observation after that or not. I have some observation of the water coming down to the State highway, but not up to the head of the springs.

Q. Were you up any time at the junction of Petersen creek and Rosses creek?

A. I was over there on June 26, 1937. There was about enough flowing from Rosses creek into Petersen creek at the junction to water two short furrows; it was in the afternoon.

Q. When were you next at that junction?

A. On July 10, 1937 at 5:00 P. M., and found water of Rosses creek coming to a point about fifteen yards short of its junction with Petersen creek.

Q. When were you next there?

A. On July 19, 1937, at 10:20 A. M.; there was

about enough water running in Rosses creek to put on one short furrow at the point where the canyon runs under the new State highway eleven hundred and fifty feet from its junction of Petersen creek. N. E. Anderson and Alfred Nelson were with me at that time.

Q. When were you next up there?

A. On July 24 at 5:30 P. M., 1937; the water in Rosses creek reached only to a point about thirty feet above the new State highway which point was approximately eleven hundred and eighty feet from its junction of Rosses creek and Petersen creek.

Q. When were you next at Rosses creek?

B36 A. July 25, 1937 at 10:45 P. M. The water of Rosses creek did not reach to a point where the new State highway crosses Rosses creek. Mrs. Howard was with me at that time.

Q. When were you next there?

A. I was there August 1, 1937 at 3:00 P. M. Water did not reach to a point where the new State highway crosses Rosses creek. Mrs. Howard was with me.

Q. Were those notes you are reading from made by you at the time you were up there and made those observations?

A. Yes sir; made these various observations and examinations, for Sigurd City; and looking toward Sigurd City acquiring a culinary system for a water supply.

Q. Now were any other sources of water supply considered beside Rosses creek?

A. Well there was four springs that Sigurd town had filed on north of Rosses creek — vari-

ous distances apart, I do not know how far they were. Mr. Nebeker thought that was running into his basin and feeding his water supply and he was put out about that, and we thought we would move to another point where it would not be so bad, but apparently he objected to that too, and we went to Indian creek over above Venice and there was plenty of water there, but it would take a larger pipe to get the flow down for the use of the town, and Mr. B37 Lloyd Jenson wore out two pairs of shoes north of Richfield trying to find water and there was some there but not very much.

CROSS - EXAMINATION:

By Mr. Bates.

Q. You had some kind of well system at your place didn't you, before you decided to take this water?

A. Yes but it was very hard; it was not satisfactory.

B38 Q. As early as September of 1935 you began making observations in regard to this spring?

A. Yes sir; the purpose was to secure a suitable culinary water supply for Sigurd City.

Q. You continued making those observations until late in the year 1937?

A. Yes, sir.

Q. You said something about another source of supply of four little springs?

A. Yes sir.

Q. They are in a little valley that this Petersen ranch is located in and up on the side hill?

A. Yes sir.

Q. And when you began talking about that you found that Mr. Nebeker felt the taking of that water would interfere with his water in the spring?

A. Yes sir.

Q. You made applications for that water in the spring?

A. Yes, sir.

Q. You made applications for that water in the State Engineer's office, didn't you?

A. Yes sir.

Q. And while Mr. Nebeker didn't protest in the State Engineer's office, he said he felt it would be taking his water from him?

A. Yes sir.

Q. But when you found that objection you decided to go look at Rosses creek, and take the water?

A. Yes, sir.

B39 Q. You knew at that time that that water you were then going to take from Rosses springs was tributary to Petersen creek?

A. I believe it was supposed to be.

B41 Q. Do you have a memory whether or not when you made these particular measurements it was on a sunshiny day or a cloudy day?

A. One time was in the evening, after sun-down.

Q. Are you a member of the town board down there?

A. No sir.

Q. Do you know anything about this document

marked Exhibit A, when and how that happened to be posted in the town of Sigurd?

MR. HILTON: I would like that thing to be turned over to us to see what it is before there are any questions asked on it. He is keeping us in the dark and I do not know what it is.

MR. BATES: You know all about it.

B42 MR. HILTON: May we see what it is?

MR. BATES: Yes you can, there is nothing to it (hands paper to Mr. Hilton).

MR. BATES: When you spoke of the situation out at the head of the spring —

MR. HILTON: This is all true, Your Honor.

MR. BATES: I wasn't raising any question about it.

MR. HILTON: Then I want to examine on that.

MR. BATES: I want to take that document — I haven't offered it yet.

MR. HILTON: There is quite a story behind it.

MR. BATES: I do not know whether there is or not.

MR. HILTON: Oh yes you do, that is your purpose.

MR. BATES: You tell me what I know about it. I will wait while you do.

MR. HILTON: Your purposes are quite clear, but I think there will be a boomerang.

MR. BATES: We will find out.

THE COURT: I think the jury and the court will also find out after a while too.

MR. BATES: I was going to ask you to describe in detail that slough condition you first found at the spring when you were there in 1936, I think you said?

B43 A. That sloughy condition was on the left hand side of the canyon as you went up the stream; there was a kind of a shelf and on account of a cloudburst and heavy floods coming down there into the spring, water came out on the shelf and seeped down into part of the canyon supposed to be the creek bed.

Q. There was a sloughy condition ten or fifteen feet above the bottom of the canyon covering the half acre of ground, and that water worked out of that into the canyon bed and run down?

A. Yes, sir.

B44 Q. And you formed a judgment there if that water was gathered together there would be enough to take care of Sigurd town?

A. That was my judgment, yes sir.

3:55 P. M., APRIL 1, 1940.

FRED JACKSON, for plaintiff, testified:

DIRECT EXAMINATION:

By Mr. Hilton.

Resided at Venice about twenty-four years, I guess; age thirty-five.

B45 Q. What is your occupation?

A. Working on a farm and with cattle.

Q. Are you acquainted with the area south-east of Sigurd known as Petersen creek and Rosses creek canyon, and with a farm or ranch on Petersen creek known as the Bastion or Petersen ranch?

A. Yes sir.

Q. When did you first become acquainted with that farm?

A. In 1921, I believe; my step-father rented the ranch and we worked for him or with him. I think we had it three or four years.

Q. Did you ever have occasion to go into Rosses creek while there?

A. Yes sir, we tried to get water down to the ranch; in June, 1921.

Q. What did you do about getting water from Rosses creek?

A. We tried to clean the bed and dig a ditch along side of the canyon. We tried most every way we could to get water to water the country, but we didn't have any success.

B46 Q. Tell why you were unable to get water down?

A. We failed that year, and what little did come down, wasn't of enough value to bother with.

Q. How far did it come down this ditch you built?

A. We tried to make a separate ditch out along side, out of the canyon and keep it from going into the wash, but it never reached the ranch. I do not know how far it came down there.

Q. You were unable to get water from Rosses creek to the ranch?

A. Yes sir.

Q. After 1921, when were you on Rosses creek again?

A. Well all I remember of is crossing there or passing there at different times driving cattle by.

Q. Where did you pass Rosses creek driving cattle?

B47 A. We would drive along the old road most of the time and in around by the wash.

Q. Was the old road about where the new State highway is now?

A. It was west of the new highway.

Q. When did you observe water conditions in Rosses creek after 1921?

A. Oh I do not know exactly. There have been times I have passed there riding horses up through there and driven cattle down. I have driven cattle down through there every fall for twelve or thirteen years.

Q. During all of that time have you had occasion to notice the water condition of Rosses creek?

A. Yes sir; at the junction of Rosses creek and Petersen creek; about the 10th of October until the 10th or 15th of November.

Q. What water condition did you notice in May at the junction?

A. I have seen water flowing there. I do not remember just when I have seen water, but it was in the spring of the year I have seen water there, but later on it was dry.

Q. What time of year would you see it dry?

B48 A. Later on in the summer and in the fall

along through July, August and in the fall of the year.

Q. How many furrows could it water if used right there at the junction?

A. I would say maybe two, if not too long.

Q. Have you crossed Rosses creek at the point where the new State highway now crosses it?

A. Yes sir

Q. Have you observed water conditions in the Rosses creek at that point at that time?

A. Yes, but not so much in passing with car but I have with a horse; we have tried to water our horses there and it is kind of hard to get a drink. We had to follow the stream where the wash went around a rock or some such thing, so they could drink.

B49 Q. While there working on the place just what water at that Petersen ranch were you told or did you understand you had the right to use?

A. All the water that came down Petersen creek or that came from Rosses creek or about any of that water that came there we thought we could use.

Q. Well with what progress did you use all that water from Petersen creek?

A. The first year we had the ranch my step-father went there in May before we boys came and he tried to water a little piece of hay below the lower dam. He would water so we cut a little hay there and that was all the success he had. After that we tried to wet little places up to make feed for cattle.

Q. From your experience as a farmer in the application of water to a farm and the use of

water for raising crop, what would you say would be the practical value of this water from Rosses creek for farming purposes on the Petersen ranch?

A. Well I do not think Rosses creek alone has any value there.

Q. What would you say with the combined flow of Petersen creek on the farm?

A. The way we found it, you might herd it around and grow a little feed and catch it when some came down, mostly early in the spring.

Q. Its practical use would be limited to the springs?

B50 A. Yes sir .

Q. That would be the combined flow of Petersen creek and Rosses creek?

A. Yes sir

Q. Now as to that Petersen ranch, from a grazing standpoint, would you say it has any particular value?

A. Yes I would.

Q. How would you value it?

A. Well I do not know how sheep are — I think it would have a little more value for sheep as there is quite a little browse for sheep and there is a watering place for livestock and it would be a good place to build a yard or corral to hold livestock to shorten the distance where we have to drive. It is a long ways from Grass Valley down and we usually take that in a day, and it would be good for that.

Q. Would this Petersen ranch have a value from a grazing standpoint in connection with adjoining land?

A. Grazing lands, the more you have, the more value they all are.

Q. So that the larger the quantity of grazing land a cattle man or farmer has, the more value the whole tract would be?

A. Yes sir.

Q. But standing alone, it would not be worth much?

A. No, not much.

B51 Q. Is there any natural meadow on the Petersen ranch?

A. Yes there was when we paid any attention to it. When we worked there, there was a natural meadow.

Q. Would that add anything to its value?

A. Well I would, yes, for feed and grazing, I would say.

Q. Do you know from what source the water comes for that meadow land?

A. No, unless it is just swampy ground and seepage around the wells and springs.

Q. Now as to those springs, would they arise in the meadow on the Petersen ranch?

A. Not that I know of, they are usually right in the ditch — right through the ditch.

CROSS - EXAMINATION:

By Mr. Bates.

Q. Where is that meadow ground with reference to the location of the Petersen ranch?

A. Right down close to where a little reservoir is, and sloping back west and south from the water in the reservoir.

B52 Q. Now you made a statement to Mr. Hilton that you didn't think the water of Rosses creek alone could be used to any particular value?

A. Not the way it is, without putting in pipe.

B53 Q. What purposes was the ranch used for during that three or four years you were there?

A. Mostly for livestock and cattle and some horses or hogs; we grew a little hay there the first year and pastured it in the summer, after that.

Q. How did you irrigate that hay?

A. From the water that came out of Petersen creek or the combined flow of Petersen creek and Rosses creek.

Q. The Rosses creek and the Petersen creek furnished some water out on the ranch?

B54 A. Yes, what reached us, we used.

Q. Tell us why, if that water from Rosses creek would run down to the junction at times and united with Petersen creek, why it would not have been an advantage to keep on?

A. We wanted to get it on higher land near the house to see if we could raise some crops

B56 on that; at the Petersen creek — once in a while there would be water coming from Rosses creek.

Q. And that was in October and November as you were moving cattle?

A. Yes sir; sometimes saw water in Petersen creek alone and sometimes in both the Petersen creek and Rosses creek.

B57 Q. With reference to the value of that land, as a matter of fact there would not be very much value on that land for grazing purposes if

you didn't have any waters to use on it at all, would you?

A. Well now, I do not know.

RE-DIRECT EXAMINATION:

By Mr. Hilton.

B58 Q. So far as your experience goes, the Petersen farm was used for grazing purposes rather than farming, and its chief value lies in grazing purposes, doesn't it?

A. Yes sir.

MR. BATES: Counsel persists in planting the answer in the mind of the witness.

THE COURT: Yes, that was leading and the answer may be stricken.

EDWIN L. COLBY, for plaintiff, testified:

DIRECT EXAMINATION:

By Mr. Hilton.

Resided at Sigurd, Utah all my life.

Q. You were at one time trustee of the town of Sigurd?

A. Yes sir.

Q. Are you still a trustee?

A. No sir.

Q. During what years were you a trustee?

B59 A. From the time the town of Sigurd was first incorporated until this last year.

Q. How old a man are you, Mr. Colby?

A. Forty-two years old.

Q. Are you acquainted with Petersen creek and Rosses creek area southeast of Sigurd?

A. Yes, to a small extent; have been up and down the canyon and in Rosses creek.

Q. When were you first there in Rosses creek?

A. Well right at Rosses creek, in about 1936 was the first I was ever there in Rosses creek and there used to be a road when I worked for the State Road Commission, and there was a road there, and as it is laid at night I would pull my grader over and leave it and that was, oh, about 1936, working for the State Road Commission and working one of those power graders?

Q. Did you drive your truck into Rosses creek bed?

A. Yes our power grader; it was in the fall of the year when I first pulled in with the grader. I was there two times after that along in Novmeber.

B60 Q. In 1936 did you observe the water conditions in Rosses creek?

A. Yes sir; the reason I pulled the power grader was to get in so I could turn water out on account of being afraid of it freezing the radiator and I pulled in twice but had to pull higher up the creek to fill the radiator. That was in October and November.

Q. Did you observe the condition of the water in Rosses creek in 1937?

A. There was just a little seepage at Rosses creek that was coming down.

B61 Q. Were you there after that time?

A. I was there in July and August — that is

I have been in there up across in there at all months of the year, but I went up there and paid special attention to it in July and August. July 10th I was up there and stopped there about 1:00 P. M. I stopped there for noon; the water was above where the State road crosses, about twenty-five steps above the culvert that crosses the State highway. That is where the last water was running.

Q. When were you there next?

A. On August 9, 1937 at 2:00 P. M., and the water then was about — no — yes, the water then was about 100 steps before it sunk into the ground.

Q. When were you there next?

A. August 20, 1937 at about 3:00 P. M., and the water then was about fifty steps from the place the State highway crosses; up to where I went and stepped it was where the water quit running, but the ground was moist below, but the water had quit running and disappeared into the ground there.

CROSS - EXAMINATION ·

By Mr. Bates.

B62 Q. I suppose it was at the request of the board you took the notice you have been reading from?

A. Yes sir.

Q. Why did you think at that time it was necessary to be making all these careful observations?

A. I thought I might be questioned on the witness stand where I am now; it was done in my own good, so I could tell the truth.

B63 Q. When you made these measurements had you started to put the pipe in?

A. No. I knew we were planning trying to get the water from Mr. Nebeker.

Q. And when you took those measurements you knew at that time that you were likely to come into trouble with Mr. Nebeker and a law suit might be the result?

A. Yes that is the way I figured.

Q. When did your town file an application to appropriate water in the State Engineer's office?

A. I don't remember.

Q. Was it before or after you took the notes?

A. I do not know.

MR. HILTON: I object to this — the application speaks for itself.

THE COURT: It goes to the credibility and memory of the witness.

B64 Q. You knew that was done and made some affidavits to the State Engineer's office in support of the claim of the town of Sigurd, asking the State to give you this water, didn't you?

A. I asked them for the right to it.

Q. And when you did that you knew as a man and had known all your life that Mr. Nebeker and his predecessors in interest had always claimed the right to use that water in some degree in those ranches?

MR. HILTON: Objected to as calling for a conclusion and not proper cross examination.

THE COURT: It goes to his interest. He may answer.

A. Not always. I didn't know Rosses creek was there until I started to work for the State Road Commission.

B65 Q. And back in those days you even talked with Mr. Nebeker and told him he ought to let you have it for some kind of price and get through with it, and you knew and felt that Mr. Nebeker had some claim on that water?

A. Yes sir.

Q. Wasn't your approach to Mr. Nebeker the result of conferences in the Town Board?

A. No sir, it was just friendship between I and Mr. Nebeker.

Q. I want to call your attention to a paper marked Exhibit A. Do you know anything about that paper? I will be more specific. Do you know anything about that paper or one like it being posted in and around the town of Sigurd?

A. No sir.

FERN F. BORG, for plaintiff, testified:

DIRECT EXAMINATION:

B67 By Mr. Hilton.

B68 Reside at Sigurd; about fourteen years; fifty-seven years old.

Q. Are you acquainted with an area known as Rosses creek, southeast of Sigurd?

A. I am where it crosses the road — where

the road crosses over the creek where I worked on the road.

Q. What year was that?

A. 1937; along in May.

Q. You were there from May to June?

A. I worked on the road before that, but I was at that particular place in May, 1937 on Rosses creek where the State highway crosses it.

Q. Did you observe water conditions in Rosses creek then?

B69 A. Yes we had to dig a hole and back water up to water our horses and another day we had to make a hole and back water in order to get a drink.

CROSS - EXAMINATION:

By Mr. Bates.

Q. How far up from the road did you make those holes?

A. Probably twenty-five or thirty feet.

WILLIAM BORG, for plaintiff, testified:

DIRECT EXAMINATION:

By Mr. Hilton.

B70 Resided at Sigurd fourteen years; twenty-five years old.

Q. Are you acquainted with the area known as Rosses creek and Petersen creek?

A. Not particularly the springs, but just across the road there; I helped finish up the

road, making shoulders and cleaning the culvert that goes underneath the road — on Rosses creek.

Q. Did you observe Rosses creek at that time?

A. When cleaning the culvert there there was no water there and it was all covered up with rocks and dirt; we took out all the rocks and loose gravel that had been pushed down there in making the road; this was just an accumulation pushed in there and we cleaned it out.

B71 Q. What did you say the water condition was when you were there?

A. There was no water there then.

Q. Did you dig down any in that canyon; particularly around the culvert when grading there?

A. It took us several good spades to get to the bottom of the culvert as it was filled up with rocks and rubbish; it would be wet, but no water there.

CROSS - EXAMINATION:

By Mr. Bates.

Q. You cleaned dirt out of the ditch leading to the culvert?

A. Yes, sir.

B72 Q. Did you say it was in July you cleaned out that approach to the flume?

A. Yes sir; I said I started to work for the Construction Company all along the road there.

Q. About how long 'were you there during that cleaning out job?

A. Well that particular culvert, about a day,

B73 Q. When did you first talk with anybody about your evidence as to what happened that day?

A. Well, they just came along and asked if we had worked along the road and I told them

B74 yes, and the next thing they subpoenaed me.

CARL S. SEVY, for plaintiff, testified:

DIRECT EXAMINATION:

By Mr. Hilton.

B75 Lived at Sigurd approximately twenty years; thirty-nine years old.

Q. What is your occupation at the present time?

A. The last year I have been working for the American Keene Cement Company. Before that I was engaged in livestock and ranching principally.

Q. By "ranching" do you mean "farming?"

A. Yes, we put up hay to feed the livestock.

Q. Did you raise crops and irrigate them?

A. Yes, sir.

Q. Are you acquainted with the area known as Rosses creek and Peterson creek?

A. Yes sir.

Q. When did you first become acquainted with Rosses creek?

A. I do not know, I drove sheep from the time I was fourteen years old until about 1929, but I can remember from about 1920 distinctly because I and my brother rented the sheep from my father and shortly after that my brother

sold out to me and I had the responsibility after that time and I lambded my sheep about this area and the Bastion ranch.

B76 Q. When were you first at Rosses creek?

A. As near as I can remember, about 1920.

Q. Why did you go there then?

A. We were trailing sheep. We lambded further north and worked to that point and back up the canyon.

Q. In 1920 did you work through Rosses creek?

A. Yes sir.

Q. Did you observe water conditions there?

A. Yes sir; we camped there at that particular time and it was the first time I had driven through there with sheep and we aimed to come through there and meet the State highway, and the sheep were very thirsty and they tried to go to the Bastion place and I stopped on the trail that went over the ditch and figured on staying there that night. That was the mouth of Rosses creek and that night the sheep scattered and went through Rosses creek and that is the first time I can remember of having been there to my knowledge. They followed that creek bed because they were thirsty and they went to the State highway to what we called the "Cedar Mountain" area and there is a Cedar Ridge in that area and there is quite a basin or area above these little basins on Rosses creek and Cottonwood creek and toward the Bastion ranch; and the sheep scattered to the Cedar Mountains to the water of Chrises creek.

B77 Q. This was in June of 1920, and what were the conditions of water in Rosses creek?

A. There was sufficient for some camp purposes but not enough for the sheep to water, at the mouth of the canyon where the State highway now crosses Rosses creek; and so the sheep went up the creek that night for water because there wasn't sufficient for them and they trampled and muddied it up hurrying to find enough water to satisfy themselves, and they went clear up through the area.

Q. Did you follow your sheep up there during the daytime?

A. I followed them up the next morning just as soon as we could see I went to find our sheep and found some stragglers, as they do not go very fast.

Q. Tell about the water conditions there at that time?

A. I would say there was enough water to water two furrows if the furrows were not too long — that is, where the camp was.

Q. As you went up the stream, how about water conditions?

A. The water increased to where you could water six or seven furrows. That would be at the head of the stream where all these sheep gathered into the channel; we traveled that road after that time every year until 1928 — 1929 we left there and sold our sheep.

Q. During all that time you were there did you observe water conditions?

B78 A. Yes I did at the mouth, because we came in by the Bastion ranch and came to the highway because it was much easier to trail there; I would say that stream of water is about as near permanent or level as any stream of water

I know of. Those are much more permanent than the upper streams. Whether fed from better sources, I do not know, but the other streams go dry, but that stream is about the same both spring and fall, at the head.

Q. At the mouth or where the State highway crosses Rosses creek, did you notice any variations?

A. We used to go across in the spring and in the fall with the sheep, and then other times I went with automobile because we had a ranch in Grass Valley and the old highway used to go around a rocky point to the west of the wash and there used to be a lot of cave-off that kept sheep from going into the wash, and there you could observe whether there was water at this point; and I used to probe at various places to get water, and if I missed the creek at Bastion ranch I stopped above there because it would get hot, and I got there several times when I couldn't get water.

B79 Q. How many times would you say that condition confronted you there?

A. At least twice I did that thing in the middle of summer. We used to trail up there and the sheep would fall off into that wash and they would go up Rosses creek if we didn't get them.

Q. Did you ever observe water in Petersen creek?

A. Yes sir; practically all points.

Q. Are you acquainted with the junction of Rosses creek and Petersen creek?

A. Yes sir; well that junction you cannot see

exactly from the State highway in driving by because there is high brush and then below there twenty-five or thirty yards there is an old crossing that goes into an area where you can see the creek quite plain, and the sheep would be in this wash going up and coming down and usually in the fall of the year and summer months there was very little water in Petersen creek at that time.

Q. Did you during that time observe whether or not there was any water in Rosses creek at or near the junction?

A. I know it was dry several times; mostly in July and August.

B80 Q. Did you observe it in June?

A. No sir. There was usually a little water coming from Petersen creek at that time and you would see water in Petersen creek and I didn't notice water only at the mouth where the present highway crosses now.

Q. What times of the month in the spring would you say you would see Petersen creek dry?

A. In June, July, August and September.

Q. Are you acquainted with what is known as Bastion or Petersen ranch?

A. Yes sir, about 1920 when I and my brother were going into partnership, I had been feeding a bunch of old ewes for a man by the name of Mr. Hunt, and my brother and I went into together and we lambbed in the north part and finished at the Bastion ranch and we used to have good feed at the ranch and I made some investigation to get the ranch, but I think some.

one else had it at that time and shortly after that I figured I would get it, but Ed Erickson had it leased and run a few livestock there.

Q. You didn't operate the place?

B81 A. No, but I did think of it at one time about buying it but they were high on the place and they wanted \$8500.00, and they had some machinery and harnesses and a few other things, and I watched people go on the place and go busted, and I figured the only value it had was for grazing, and because of the land to the north being good grazing ground and having a water hole, we could get ground to the north and east.

Q. Did you observe the use of water from Petersen creek on the Petersen ranch while there?

A. We used to cross a good deal below and get a drink by the house, but I do not remember water going down into that wash only in the early spring and they would irrigate a little strip of alfalfa and they irrigated it with that high water.

Q. As to the water in Rosses creek as you observed it during all the time you were passing through there and familiar with conditions, would you say the water from Rosses creek had any practical value for farming purposes?

A. No sir, I don't think the Petersen creek and Rosses creek together were worth bothering with only for grazing purposes.

Q. What would you say the Petersen ranch was chiefly valuable for?

A. For grazing — as far as I can remember, since 1920, there has not been any crop put up

there to amount to anything, and several people have owned that place and gone busted and left; they tried to farm and they wouldn't get enough to pay for their labor.

B82 Q. Well from your observation have grazing people used it to advantage?

A. Yes, Ed Erickson did and I believe there was some sheep and cattle there, and by drifting in the hills to the west, it meant quite a lot, and they had a corral there and it was a natural watering place and they drifted there for water and it was a natural gathering place for them at that ranch.

Q. Just what characteristics make that valuable for grazing purposes?

A. It was surrounded by good springs and winter grazing ground and sheep and cattle can go in and get water and drift back and where it is surrounded by open ground that way it is more valuable than if surrounded by neighbors, and if he could have the area so he would be free from trespassing, it would be quite enough.

Q. You were acquainted with the Petersen ranch before Mr. Nebeker acquired it?

A. Yes sir.

Q. Would cattle and sheep in drifting across be helped because there was a watering hole there?

A. The fences were poor until Mr. Nebeker got it from the State Road Commission and there was cattle drifting in there from the mountain on Durfee's property.

Q. Do you know who built the fences?

A. The State highway.

B83 Q. Was that because they put the State highway there?

THE COURT: That is not material, is it?

MR. HILTON: The fences put in block it off.

THE COURT: The court will charge the jury that the State Road Commission is south of it.

MR. HILTON: I think that is general knowledge.

THE COURT: That takes care of it.

MR. HILTON: I think it does.

Q. From time to time the owners of Petersen ranch then were chiefly people who owned cattle and sheep?

A. Yes, so far as I can remember. Mr. Hunt was there quite a little while because he had sheep and cattle and could graze out that particular area. That is what they tried to interest me in, we could make a good ranch place and the sheep drifting into the hills would do well with what hay there was, but he went broke and we investigated why he went broke.

CROSS - EXAMINATION -

By Mr. Bates.

B84 Q. Did Carl Hunt use that for grazing purposes?

A. He did to quite a great extent — he had sheep and cattle.

Q. Do you remember Mr. Hunt raised comparatively large crops of hay and grain?

A. No, but I remember there was some alfalfa along the fence and we had to keep sheep from it and we tried to herd them off.

B86 Q. You are a member of the Town Board of Sigurd?

A. I am now; since January.

B87 Q. You do not know a thing about whether anything had been done at that time to secure a mortgage?

A. Only common talk; that doesn't mean anything.

B88 MR. HILTON: Objected to.

MR. BATES: I will change the question.

Q. You said something about Petersen creek being dry. When was that?

A. Along in the summer time; that would mean August and July?

FLOYD ANDERSON, for plaintiff, testified:

DIRECT EXAMINATION:

By Mr. Hilton.

B89 Resided at Sigurd, Utah all my life; forty years old.

Q. Are you a member of the Town Board of Sigurd Town?

A. Yes sir, and also trustee since August of 1935.

Q. Are you acquainted with an area known as Rosses creek?

A. Yes sir; we were looking for a culinary water system for Sigurd.

B90 Q. Did you observe the water conditions then?

A. Yes in September; I do not know just what

date it was, the water was not quite to where the new highway is now, and as you go up the canyon there apparently was a good stream.

Q. When were you up there next?

A. I think May, 1936; the water at that time was running just a little stream, and going clear into the Petersen creek.

Q. Did you observe conditions at the junction?

A. Not very much; I would imagine — I better not put it in gallons, I do not know enough about it, but there was a small stream.

Q. Was there water in Petersen creek too?

A. Yes, I would imagine Petersen creek was five or six times as large as Rosses creek.

Q. When were you next on Rosses creek?

A. It was May, 1937. There was a little water running into Petersen creek at that time; there may have been a little more than in 1936, but I imagine about the same thing — just enough for a small furrow.

Q. Could you tell us then in May, 1937 about
B91 water running from Rosses creek into Petersen creek, for a farm?

A. I imagine you could take care of one small furrow.

Q. When were you there next?

A. August 5, 1937, 8:30 p.m. Mr. Hart and Leo Mallory were with me. There was a little stream of water running in Petersen creek at that time. Mr. Hart estimated three gallons per minute in Petersen creek at that time.

Q. August 5, 1937, at 8:30, did you observe
B92 conditions at Rosses creek?

A. Sure, at the junction; about three gallons per minute emptying into Petersen creek from Rosses creek; and I was back at 7:20 P. M. that evening and the water was just to the road and no water west of the highway. It was just to the east edge of the highway.

Q. Were you there after that?

A. Yes I was there on Petersen creek at 7:20 P. M., August 5th, and the Petersen creek lacked 103 yards of crossing the new highway bridge, where the State highway crosses Petersen creek.

Q. How far was water in Petersen creek flowing at that time?

A. One hundred and three steps above where the State highway bridge crosses Petersen creek.

Q. Did you notice at that time whether or not there was any water in Rosses creek?

A. The water in Rosses creek was damp just to the east edge of the highway where it crosses Rosses creek.

B93 Q. When were you at Rosses creek again?

A. October 8, 1937, at 12:47 P. M., and the water was just crossing the new highway about 50 yards.

Q. When were you there next?

A. I have crossed that several times a week ever since then. That is all the data I have taken down. I have seen it when it was dry and I have seen it when water was in it.

Q. Now these particular observations made in

1935, 1936 and 1937 were for the purposes, for the purpose of acquiring a water supply for Sigurd?

A. Yes sir.

Q. Now you are acquainted with farming conditions in 1939 in this community were you; in 1938 and in 1937?

A. Yes sir; raised a crop during each of those years

B94 Q. As to moisture or rainfall, how did 1939 compare with 1937?

A. I think 1939 was way drier than 1937 or 1938.

Q. On what do you base that belief?

A. Well on our grain crop we had a difference in what we produced per acre in 1939 from what we did in 1938; I think it was the hot, dry, windy weather even though we had sufficient irrigation water, I still think it was the hot weather and wind that we had all summer.

Q. When did the winds start?

A. Very early in the spring right after we put in our crop. The land was very moist and I tried to bring mine up without water which I always do but the ground dried up more last spring than any time I can remember; I think we were very close to twenty percent or thirty percent short.

B95 Q. Now are you familiar with the water supplies that different cities in this locality have or the water supplies that are within certain distances of this locality?

A. Pretty much, yes sir; I think nearly every city has a water system except Venice — culinary system and Venice has flowing wells and hydraulic rams.

Q. Do you know any other cities wanting the water of Rosses creek?

A. I don't believe there was; don't know of any.

Q. Do you know of any sales of land similar to that for graizng purposes recently?

A. Well I know quite a bit about grazing land; I have been running sheep sixteen years and farming and I have been up past there, well every summer for that many years and about all I know is just what I have observed going up and down.

I don't think anything but grazing.

Q. What would you say from that, would you say Petersen ranch is chiefly valuable for?

B96 Q. Do you know of any land similar to that sold just for grazing purposes near by?

A. I know about what the State is asking for State land.

Q. Have you had any dealings with the State in acquiring grazing lands similar to this?

A. I have bought quite a little bit of grazing land; I have their letters or their price lists on their State school lands right around in this vicinity.

THE COURT: Why do you not do this: You ask what the market value of that place is and if they object to it I will let you go into the question by way of qualifying him, but until they object you can go into their market value without going into all this preliminary questioning and you may ask the ultimate question in regard to the value of the Nebeker place.

MR. HILTON: All right, tell us what the market value of the Nebeker place is just for grazing purposes?

A. It is worth a lot more to some people than it is to others, but I think it would be worth from fifteen hundred dollars to two thousand dollars for grazing purposes.

B97 Q. Why is it more valuable to some people than to others?

A. We have this Taylor Grazing Bill now and you have to have some property and that means real estate, and if equal or commensurate, they figure on feeding so many sheep on the public domain and you have to have land in order to get the rights on the public domain today.

Q. Now you might state what that State price is for grazing land?

A. Their price runs from three dollars to ten dollars per acre — in that vicinity.

MR. HILTON: As to the quantity of water, do you have any idea from what a horse would drink as to the quantity of water there would be at this place on Rosses creek near the State highway; does that give you any idea as to the quantity of water?

428 A. We watered eight to ten teams, and these ponds would all dry up, about.

TUESDAY, APRIL 2, 1940, AT 9:00 A. M.

FLOYD ANDERSON recalled:

DIRECT EXAMINATION.

By Mr. Hilton.

Q. Mr. Anderson, state whether or not the Board, or the President of the Town Board of Sigurd conducted any negotiations with Mr.

Nebeker relative to the purchase of his interest in this water?

429 MR. BATES: We object to that as being incompetent, irrelevant and immaterial.

THE COURT: It is sustained, on the ground that it is going into the compromise proceedings that were had between the parties to this proceeding.

MR. HILTON: Where is that piece of paper, Mr. Bates, you were examining the witness about, yesterday?

MR. BATES: I don't seem to find it. Haven't you got any more of them, Mr. Hilton?

MR. HILTON: No, I never seen it before you flashed it.

THE COURT: Is there any other subject on direct examination besides this that you want to go into, and give them a few minutes to find this document?

MR. HILTON: No, that is all I will have with Mr. Anderson.

THE COURT: I don't know whether it would be an impeaching question, anyway.

MR. BATES: I don't believe it would have any effect, Your Honor.

MR. HILTON: There certainly was a design in it of some kind, in this case.

THE COURT: Let us go ahead with the cross examination, while we find the document.

MR. BATES: I would like to find it, Your Honor.

430 MR. HUNT: That is the amendment that we were going to make, Mr. Hilton.

MR. HILTON: You have already done that, haven't you?

MR. BATES: What we are adding there wasn't in that draft before.

MR. HILTON: This is another amendment to their answer that is filed. That has not been heretofore discussed, and this presents a new situation here. I will object to the amendment being made at this time.

MR. BATES: That is the question that was suggested in the beginning of the proceedings and fully discussed.

THE COURT: I will be glad to hear from you on the matter. It is my recollection that both of these amendments were suggested.

MR. HILTON: No, they pleaded their amendment before. Now, the defendant comes in at this stage and asks to file another one.

MR. HUNT: As I remember, just at the time of adjournment, or at the time we were holding an evening session — I don't recall which it was — the matter was discussed, and the court then granted us the privilege to make that amendment.

MR. HILTON: You can't do it unless you serve a copy of it.

MR. BATES: It is only in compliance with the suggestion that was made in open court — merely adding that word municipal.

MR. HILTON: This is the first time I ever heard of it, Your Honor.

THE COURT: I am not going to read these pleadings to the jury, gentlemen. With that in mind, I am going to allow both of these amendments to be made at this time.

MR. HILTON: The one we have there was put in subsequent to their amendment, and to meet it. And now, this is another one. And now they are offering another amendment at this late date, after plaintiff's testimony is all completed.

431 THE COURT: There is testimony in the record to support this allegation.

MR. HILTON: But there are objections all the way through.

THE COURT: I think I will permit the amendments to be made.

CROSS - EXAMINATION:

By Mr. Bates.

Q. Is it your judgment that the property standing there as it is in its present condition is worth from fifteen hundred to two thousand dollars?

A. I would say it was; that is my honest opinion.

435 Q. I believe you said that in May of 1936 you went to the junction of Petersen creek and Rosses creek and you found a small stream from Rosses creek running into Petersen creek?

A. I would see water running there sometimes. I would see sometimes that it does not run there.

6 Q. These measurements that you have made

at particular hours may not be but little worth as to the general flow of the stream?

A. That could be possible, but I think the same thing would happen day after day.

437 MR. BATES: That paper has disappeared, Your Honor. I would like to satisfy counsel and Your Honor, if he desires, the jury, as to the nature of the document in any way that he may suggest, aside from the apparent inability to produce it

THE COURT: Do you want anything else in the record on that matter?

MR. HILTON: I want Mr. Anderson to explain why that paper got out, or how far it went around. He said it was passed all over the country. I want Mr. Anderson to tell how far, how extensive that sending was, if at all, and why.

THE COURT: All right, you may bring that out on re-direct examination.

MR. BATES: I have a little more examination.

Q. You remember the document that I referred to as Exhibit A?

A. Yes sir, I had it printed.

438 Q. Was it some quotations from the pleadings of the defendants in this case?

A. It was damages they were trying to sue us for; I suppose it is in the county clerk's records. That is where I took part of it off of.

Q. So that if it became material to know what

it was like, you could satisfy your counsel with a copy?

A. Yes sir.

Q. You had one of them up in the garage at Sigurd?

439 Yes sir. The fellow that runs the service station. I told him that if anybody wanted to find out what the case was about to let them read the paper over.

MR. HILTON: Explain why you gave it to him?

A. It was a center building in our town; anybody could tell that they was suing us for that much money.

MR. BATES: I object to that, because they went into it, and it is taking up a lot of time.

MR. HILTON: Counsel wants to try to take the significance of that thing out of it; I think it is very necessary for the witness to explain.

THE COURT: The only important thing is whether or not any of these jurymen frequent that place. I think I will ask the jury. Do any of you gentlemen habitually do business at this place of business, or did you see the paper there?

THE JURY: The service station at Sigurd of Mr. Mallory?

THE COURT: The service station at Sigurd.

THE JURY: No.

THE COURT: That satisfies the court. The objection is sustained.

MR. HILTON: Now, Mr Anderson, as to the

sales of grazing land, or land without or with water, let me ask you again, do you know of any sales in the community of that nature?

A. Down around our community or in this neighborhood?

MR. BATES: I object to that; this is not proper re-direct examination. They went into that in full. It seems to me it is unnecessary repetition.

440 MR. HILTON: Just following out this cross examination on the value of grazing land.

A. I know of a piece of ground down there, John McMillan sold to Oliver Anderson; about a hundred acres, over in the flat east of Sigurd, for twenty-five hundred dollars, for grazing purposes.

Q. How did that land compare with the Petersen ranch? How did it compare in grazing value?

A. It wasn't any better than the Petersen ranch because the district was shad scale and Russian thistles.

Q. Any part of that meadow?

A. A little piece of that meadow, there, too. I imagine thirty or forty acres of meadow, pretty close.

Q. As to the water flowing down Rosses creek, does not the quantity of water going in any stream have some effect upon how far it will flow?

MR. BATES: We object to that as being immaterial.

441 THE COURT: The objection is sustained.

MR. HILTON: Now, there has been a lot of talk here as to the water flowing down Rosses creek. Now, as to how far water will flow down that creek, depends upon the quantity of water in the creek?

A. Yes.

MR. BATES: I object to that question.

THE COURT: I don't think he touched that on cross examination.

MR. HILTON: Now, from your experience and examination of the quantity of water in there, tell us how far you think that water of its own accord would flow, as to quantity?

MR. BATES: I object to that as calling for an opinion he is not qualified to pass on, and immaterial.

THE COURT: Confine it to a particular time during the season. If he tried it, he may answer.

MR. HILTON: We have tried it on August 4, 1938.

Q. Tell us, as to the quantity of water there, you found there, what would you say as to how far down the creek it would flow?

MR. BATES: That is repetition.

THE COURT: He may answer.

A. In the middle of the season, there is never much water there.

MR. HILTON: Tell us in a little further detail, as to the quantity of water, and how far it would flow in regard to going into Petersen creek?

A. On a farm, I imagine that it would take

days for that amount of stream to go through a hundred yard furrow.

JOSEPH L. ANDERSON, for plaintiff, testified:

DIRECT EXAMINATION:

By Mr. Hilton.

442 Reside at Richfield, Utah.

Q. Do you have any official connection with the weather bureau?

A. Yes sir; weather observer at this section, Richfield.

Q. I would like to ask you if that includes the territory known as the Petersen creek or Rosses creek; would it include that territory?

A. There is no weather observer at that point that I know of; nearest station to that, Richfield.

Q. Would the weather conditions around Richfield pretty well reflect the weather conditions in Rosses creek and Petersen creek?

443 A. Well, I imagine it would fairly, fairly give the averages.

Q. State whether or not you are the keeper of the official records of the weather bureau down here?

A. Yes, I am.

Q. Are you the man who does the observations and the compiling of them?

A. Yes.

Q. Tell us as to the year 1937, whether it was

a normal or an unusual year, or an unusual or average year as to precipitation?

THE COURT: Do you have any objection to having the witness state the conclusion, subject to the right to examine him?

MR. BATES: No objection.

MR. HILTON: Whether it was a normal or sub-normal year; can you answer yes or no?

A. Was the year 1937 a sub-normal or a normal year?

Q. Yes.

A. I don't seem to have it for the full year of 1937 here. You see the records, whether it is a normal or sub-normal year for the year are compiled later in Salt Lake City. These records are sent down to me after Mr. Alter has had them compiled. It appears that in Richfield —

MR. BATES: Just a moment. Are you speaking now from records made by Mr. Alter in Salt Lake City?

A. I am speaking of records made by Mr. Alter compared with my own records. He can compile his records when I send him mine.

444 MR. HILTON: That compilation is the record, complete, from the information you send in there?

A. Yes sir. Otherwise they could not be compiled.

MR. BATES: Is that a compilation that is limited to this area, or is it a compilation of the rainfall over the area generally?

MR. HILTON: Give it as to this particular station, to this area?

A. It seems that the situation here is, for the year 1937, two inches above normal.

Q. What would be the normal, could you tell us about that?

A. Exactly, I don't know what it is, because one part is a different setup as to normal, but I believe it is around between eight to ten inches.

Q. Could you tell the excess there, and the normal?

A. The total precipitation for the year 1937 was 10.36, and so normal would be 8.36 inches.

Q. Now, as to 1938 — let us take up 1939 first.

A. These records that I have here are from my work sheets. They are where Mr. Alter gets his information from. I didn't have time to go through all my records to get each year.

Q. Can you tell us what the precipitation was for 1939 in this locality, the total?

A. It was below normal.

445 Q. During the year 1939 can you tell us during what months we had stormy weather? Give us the rainfall during the next months commencing with May.

A. May, 1.23 of an inch; June, 1.48; July, 1.63; August 1.48; September 1.61; October 1.22; November .05; December was about .29; April was .30; February .52; March .19.

Q. Would you say that that amount of rain-

a normal or an unusual year, or an unusual or average year as to precipitation?

THE COURT: Do you have any objection to having the witness state the conclusion, subject to the right to examine him?

MR. BATES: No objection.

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Q. Would you say that that amount of rain-

fall which you had here at Richfield would reflect about the condition over in Rosses creek?

A. I would say there would be more rainfall in Rosses creek than there is here.

446 THE COURT: Are they your official records?

A. The work is not mine, but it is checked by me.

MR. HILTON: I now offer in evidence the charts marked plaintiff's Exhibits 7 and 8, and ask that they be received in evidence.

MR. BATES: No objection.

THE COURT: They may be received in evidence.

MR. HILTON: Do your records show the presence or lack of wind storms of that locality?

A. Yes, I can give you the wind; take it from March on during July — we would not make a record of wind only when it is so severe enough to justify making observations. The direction of wind I can't give you day by day,
447 but the velocity of the wind, I can't tell you, only by stating whether it is a windy day or whether it is showing. During the month of March — it does not show any special high winds for the year 1939. The wind is usually from the southwest direction. In April it was proportionately high winds; otherwise it is not listed, for a small breeze. We didn't record it for the month of May. The 4th was windy; the 5th was windy; the 18th was windy; the 19th, the 20th was windy. Otherwise it would be none. For the month of July we show no high winds. Nor during the month of August nor September.

Q. Now as to temperature, were the temperatures during April, March and on in the year 1939 high or low, or what?

A. March is normal. The highest was 70 degrees. April, the highest was 84 and the lowest was 60 above. During the month of May the highest was 92 and the lowest in the day time appears to be 62. In the month of June the highest appears to be 98 and the lowest day time record is 70 degrees.

448 Q. Give us the temperatures there, if you can, in 1939?

A. You want both the maximum and the minimum? The maximum the first day is 95 and the minimum 51. The second 95, and 49.

CROSS - EXAMINATION:

By Mr. Bates.

Q. When you say high in July, do you mean high for the month of July, or simply high temperature?

A. High temperature.

ED H. WATSON, for plaintiff, testified:

DIRECT EXAMINATION:

By Mr. Hilton

449 Reside in Salt Lake City; occupation, geologist.

Q. State what the nature of your education is as a geologist?

A. Graduate of the Agricultural College and of the University of Utah in geology. I spent fifteen years as geologist for the Utah Oil Re-

fining Company in this intermountain country. I have worked for the State in locating water wells over the area. I have done a good deal of miscellaneous private work.

Q. Have you had any experience in connection with hydraulic water?

449 A. I have had experience in water wells and in studying the general geology of different regions, which takes in the waters and rocks, themselves, structural rocks, which has a good deal to do with the amount of water.

Q. The study of geology does include the flow of water under the different strata?

A. Yes sir, it includes the amount of water within the rocks themselves, because rocks are porous in some cases, and through the voids in the rocks — and water, gas and oil.

450 Q. State where your activities in that connection have really taken place?

A. In structural geology, in New Mexico, Arizona, Colorado, Utah, Wyoming, parts of Nevada and Idaho, and parts of Montana, and parts of Texas.

Q. Calling your attention to an area known as the Petersen creek and Rosses creek area southeast of the town of Sigurd, I ask you if you are acquainted with that area?

A. Yes; I went to the area in December. I spent a good deal of time in the fore part of December along Rosses creek, and the lower part of Petersen creek, and the region thereabouts; I went there to study the series of springs at Rosses creek, and the general structure of the region in determining the cause of

the springs, at the instance of the town of Sigurd.

Q. Now, will you in just a general way, and as quickly as you can, explain the general geologic history of that particular region?

A. This region here, which is, we will say, is in the vicinity of the Sevier river, and the area to the east was once a high country, before Sevier river started, before there was a Sevier river, and at that time in the long distant past there was an outburst of lava and volcanism of the lava in layers spread over the
 451 country covering a wide district, over many square miles of the country to the east of here, and at times the volcanism ceased to spout forth and that ash spread over the ground in layers, and in time that formed the various strata. That continued on for years and years, and later on there was a breaking of the country, there was a fault, a breaking along from a north to south direction; that dropped the Sevier valley, a dropping to the east, so that the area east of Petersen creek was higher where the strata was level, the beds are level. That area is the up-turned block, and the area to the south is the down-turned block, so that the country in which the Rosses creek is running, and parts of Petersen creek, down which small streams run into Petersen creek to the east, has dropped down in relation to the higher country to the east. That is the general geology of the country.

Q. State whether or not you noted the two springs up in Rosses creek which are indicated here?

A. Yes, there are a couple of springs and

seeps along Rosses creek, about a mile up the creek.

Q. Explain the cause of those springs?

A. I think if I can take part of that board I can do it a little better; if this were Rosses creek. This is just a cross section. Rosses creek may run here on this board in any direction you may wish to have it run, for illustration. It runs through porous volcanic beds that
 452 slope down to the west and to the southwest, and those beds naturally form the rock country, and above the porous beds, such as those up here, is located these gravels of volcanic ash. The water ran here in the higher levels, as indicated here on the board, and that bed, where it is exposed, as in here, will saturate that bed, the water will run down, except where it is cut by any medium of creek or by anything else, in this way as I illustrate, the water will come into the channel of Rosses creek from these porous beds, or it may also come down out of the bed, itself, from further up the creek where that gravel has accumulated, and in the creek bed these gravels carry the water at times, and that water seeps down, may also be a small source of water, but the main source of the springs is this porous beds through which the creek has cut.

Q. From that explanation where would you say these porous beds, so far as these springs are concerned, would gather the water?

A. These beds gather the water from the rain, snow that falls in the country above, and where they are exposed to transpiration, either melting snow or rain, they absorb the water, then

they carry it on down the slope, and finally where the bed is cut open the water bleeds out.

Q. You say that is the cause of these springs?

A. That is the essential cause; at the time I told you about before, about the breaking and faulting, that was ages ago, then the sharp cutting commenced, and the stream channels began to be made, and Rosses creek together with
453 Petersen creek, when those channels — first, we will say Rosses creek, take that first, this channel was a cutting into the rocks, and after the channels were cut by the power of the streams, Rosses creek and Petersen creek channels, later there was a period of deposition in Rosses creek, and finally the filling of the stream with gravel, the stream channel, to a certain thickness. I don't know how thick. Let us assume fifteen feet, or whatever it may be, and then later there was another development in the creek. As I illustrate here, these layers are parallel. They are not drawn to scale. After the creek had been filled, something happened which is necessary for me to detail here. This gravel was cut into by the creek, cutting back into a single channel, leaving the gravel in large blocks, so that the surface of the creek took a very narrow channel with gravel banks and also beyond the gravel with the natural cutting of the rock.

THE COURT: Now, these illustrations will have to be marked, Mr. Hilton, and identified, if you want your record.

MR. HILTON: We can have Mr. Watson make us copies of them.

THE COURT: We want them as the jury sees them now.

MR. BATES: Why not make them, the first illustration 1, the second illustration 2 and the third illustration 3.

MR. HILTON: I ask that these exhibits, appearing on the black-board, as they are to be marked 1, 2, and 3, and that they be received in evidence in connection with his testimony.

MR. BATES: I will object to that for the reason they cannot be preserved.

THE COURT: We will have the reporter copy the illustrations in the record and they may be deemed received for the purpose of illustration.

455 MR. HILTON: Tell us something more, if you can, of the nature of that cutting rock there; I wish you would tell us the nature of the stream channel of Rosses creek?

A. The stream channel of Rosses creek where the water itself runs is a gravel channel, made up of small particles of gravel and sand that was washed in the bed of the creek, that is the immediate channel, itself, where the water is running; the bed rock is made up of the cut rock itself, or this part lava and part volcanic ash, and where the volcanic ash crosses the bed of the creek, that being porous, the bed of the creek is porous at that point.

456 Q. Did you notice the gradient or slope of Rosses creek?

A. Yes, the gradient is between ten and twelve percent or ten or twelve feet to the hundred. That is in the steeper part of the canyon from the springs down, let us say.

Q. Let me understand about Petersen creek?

A. The flow of water in a gradient of ten to twelve percent makes the water flow faster. And in its flow, the water itself, running along that gradient becomes, or is a good medium and washes out the stream of the channel, and as the water runs along that gradient, or stream of the channel, the water becomes leaden with particles of dirt and rock, and as it rapidly moves it becomes a good medium, therefore it sweeps the channel clear of dirt quickly, or any debris that accumulates therein, and in time of freshets —

Q. Tell us more about the percentage of gravel in the channel itself, in Rosses creek — did you notice on Rosses creek that this water at times would appear to disappear?

A. Yes.

457 Q. Tell us where in your opinion that water would go?

A. That water from the springs, high water springs, runs down the stream channel. It feeds the vegetation that grows on the stream channel. It is subject to the forces of evaporation, the dryness of the air or the wind. What remains, finds its way into the gravel where it disappears in the gravel of the channel; if the canyon itself is porous, this bed rock porous, then the water can seep away under the layers of the channel itself through the porous bed rock.

Q. Now, as to the small amount of water diverted by Sigurd City there, how much of that, would you say, under the existing conditions, would reach Petersen creek?

A. I have no means of knowing how much there was, but I would say a small amount, a

very small amount; I am speaking of the underground water; I am speaking of the water as
 458 it begins to come to the surface, that is subject to the various forces of evaporation, and transpiration, and then it seeps down, courses down into the porous bed of the cut rock itself. Some of it, much of it will disappear into the cut rock, and the rest of it will go on down and form into Petersen creek, unite with Petersen creek.

Q. Assuming that this little water that has been diverted by Sigurd City, about how much of it would you say would reach Petersen creek, and how much of it would be available for this Petersen ranch?

A. I would rather say it would not be worth quibbling about. It would be small, indeed.

CROSS - EXAMINATION:

459 By Mr. Bates.

460 Q. I don't suppose there would be any way of knowing whether or not these waters coming down through Rosses creek channel and into Sevier river might assist making up some springs along that King's Meadow?

A. In a small way, theoretically, yes; it is just theoretical; it is a very small matter.

465 Q. Did you see any flow of water in the channel anywhere along the line while you were making your observations?

A. Yes, there is a small dribble of water running along the stream channel at the base, or below the springs for a certain distance.

471 MR. BATES: Mr. Watson, would there be in that deposition up and down the original canyon, in your judgment, such a thing as we call a water table?

A. Where the water comes to the surface different points, yes, if that be a water table; it would sink under the table to the floor as the water flowed into the gravel, and it would be, it would sluff away with the slope of the stream.

473 Q. What is your judgment as to whether or not when this water was taken out and put in the water system it had the effect of lowering the water table, at all?

A. I would say it would have to be lowered to a small extent by the amount that was taken out, yes; however, the water at the spring was spread out in a bog with a large amount of evaporation. There has been a lot of water developed there, water that otherwise would have been buried, so it could not have been used as a carrier because so much of it was lost.

475 Q. What would you say, Mr. Watson, as to whether or not as a result of the taking of this water there has been an increase or a decrease in the water that is lost through the porous material down under this original channel?

A. I would say that on the grounds of common sense, that if you diminished the supply of water running into the channel, you would naturally decrease some of the seepage.

ROBERT G. HARDING, for plaintiff, testified:

DIRECT EXAMINATION:

By Mr. Hilton

480 Reside at Bountiful, Utah; occupation civil and hydraulic engineer.

Q. State what experience you have had in civil engineering and hydraulic engineering?

481 A. I have practiced as an engineer since the year 1914 — approximately twenty-six years. I am a graduate of the University of Utah.

Q. In what States or communities have you worked in following your profession

A. All of the State of Utah; Idaho. Wyoming, Nevada, Minnesota, Montana and Washington.

Q. Any experience in installing water systems?

A. Yes sir, I have had many years experience in installing water systems.

Q. You are acquainted with the area around Sigurd, and Petersen creek, and Rosses creek?

A. I am. I was employed by the town of Sigurd as engineer for the construction and installation of a water, culinary water, supply system.

Q. You are acquainted with the springs in Rosses creek?

A. Yes. Sigurd has diverted what we call the spring, the upper spring, or Rosses spring. This spring area is a distance of about 4750 feet from the State highway at the mouth of Rosses creek, and another spring, which we call the midway spring, about 1260 or 1500 feet below Rosses spring.

Q. Do they constitute all the waters in the canyon?

A. No, At the upper spring there are some supplies that we haven't tapped. Those arise in the bed of Rosses creek and below the midway springs. Below the midway spring there

is some water there that we haven't tapped. The upper spring is coming out of the side hill, a distance of approximately seventy five to a hundred feet away from the stream bed, and at an elevation of ten to fifteen feet higher than the stream bed. The midway spring is tapped at a distance of eight to twelve feet west of the bed of Rosses creek?

Q. Did you make an investigation of the waters in Rosses creek before Sigurd diverted these two springs?

A. Yes.

Q. Did you notice the flow of the water down the creek — observe it carefully?

A. I did.

483 Q. Does the water sink and reappear in the bed of the channel?

A. We found no evidence that the water would reappear. There is considerable evidence that the water sinks due to the porosity of the bed of the creek, but I saw no evidence that the same water reappeared. Any springs that we have there, was definite springs that issued from the sides of the canyon, checking the water from deeper strata which intersected the canyon. Seeps or water still in the bottom of the creek, are simply, that is water coming in artificially from the sides of the canyon. That is not water flowing in the underground channel. We haven't tried to divert any surface flow that might come into Rosses creek; the bed of the creek is very steep. It is in some places quite narrow where the intersecting canyons drop some of their debris. The canyon widens out and has deposited quite a little gravel. Those gravels are considerable depth

in places, being about eight and twelve feet deep, and in many places it has scoured the canyon quite a bit in the bottom, especially where ledges are quite almost opposite the crest of the entire bed of the stream. The bottom of the bed of the channel is composed of a lot of quite porous rocks, the stream crest from a number of different strata, composed of volcanic ash and other porous beds, which would absorb considerable quantities of water.

484 Q. As to the under flow of water in Rosses creek did you make a study as to that?

A. I haven't been able to find any definite under flow in that stream. I can hardly see that it is possible that such an under flow exists; because of the porous character of the bed, and the extreme steepness of its grades. The under flow in a stream presents certain factors. However, we want to limit it to this case. If we had an under flow in that stream it would require an awfully dry bottom, otherwise the water that is flowing in the gravels would disappear. We have here a bottom that is porous. That would eliminate the water that has disappeared. Therefore, we can't have an underflow in that stream except in case where the bottom might be impervious.

485 Q. Assuming that there was some under flow in Rosses creek which may go down and reach the underground flows of Petersen creek, would you think that under flow could be gotten down and used for farming purposes or irrigation?

A. Farmers have been trying it, also the State of Utah, without success, without any success. It could not be used for irrigation.

Q. As to the under flow, do you have any information to show whether or not there is any flow retarded in Petersen creek channel?

A. I do have; the 4th day of August, 1937.
487 When the water had reached the Petersen ranch it had decreased to about eleven gallons per minute, showing a loss of about sixty-one percent. If there was any retarding we should have had an increase in the sediment instead of a decrease in the flow. On the 28th day of November, 1939 I made similar measurements at a point fifty feet above the junction of Rosses creek and Petersen creek where there was no water in Rosses creek. I found there .21 of a second foot in the Petersen creek. Opposite the west end of the Nebeker, of the Bastion ranch, I found there .06 of a second foot. The loss was .15 of a cubic foot. I think that is about a sixty-eight percent loss.

Q. How far distant would that be from this point, you said up above Rosses creek down to some point on the Bastion ranch?

A. Approximately one mile. In addition to that I refer to the measurements of J. Oscar Anderson, introduced in evidence at the time Mr. Anderson gave his testimony in this court, showing his measurements. I find the following facts:

MR. BATES: Just a moment.

MR. HILTON: What is that document you have there?

A. That is the document, plaintiff's Exhibit E, case number 3463, in the Sixth Judicial Court for Sevier County, in the case of Gearson S. Bastion v. George W. Nebeker, et al.

MR. BATES: That would be hearsay, Your Honor.

MR. HILTON: That was the report introduced in evidence in this case when Mr. Anderson was testifying. It was then introduced in evidence.

Q. He testified from that report and by his own testimony from that report, it was introduced in evidence?

A. Yes sir

487. Q. And you are now comparing the figures there showing the actual loss of surface waters between given points named by him and the figures given by him?

MR. BATES: It was under your examination that you proffered the paper as an exhibit.

MR. HILTON: He said he was giving testimony from that report. By reason of that we have had it introduced in evidence.

MR. BATES: He is basing his offer on the cross examination of a witness, with reference to some records made in another case, entirely different from this, and it is an attempt to bind us by testimony of this witness in another case.

THE COURT: I think we will let the witness proceed, not to read from the exhibit but to give his testimony based on his figures, together with his observation of the ground up there, and not quoting from the exhibit, itself.

A. From the study of the figures of the report, there is shown by the evidence here a loss in transit between the Bastion springs and the Bastion ranch and the Nebeker ranch on the 11th day of August of fifty-six percent of the

water, in 1918, the 10th day of November the
 488 loss was twenty percent. The 20th of November the loss was sixteen percent. In the year 1920, on the 28th day of June the loss was twenty-two percent. On the 24th of June, thirty-five percent. The third day of July thirty-two percent. The 13th of July, forty-one percent. 26th of July 61 percent.

MR. HILTON: What do these losses indicate to you?

A. This proceeding was nearly two seasons, that instead of any underground water that might be in Petersen creek, none of it was retarded for use, but instead of that we had a continuous loss of water to the underground channels, or to the underflows, or to somewhere. We had a loss of water in these various dates, the underground flow, as I have stated, the percentages varying. These figures prove that there is a loss of water, a constant loss, by evaporation and by seepage in amounts varying from sixteen to sixty-one percent. I cannot see how the underground flow, if any exists, is being reclaimed or could be reclaimed, or is involved, or has anything to do with this case.

Q. Did you make measurements on Rosses creek?

A. On the 15th day of April 1937, I measured .15 of a second foot in Rosses creek at a point approximately one thousand feet above the State highway crossing. On the 22nd day of August, 1938, I measured the total flow after the water had been put in the pipes, .19 cubic foot, which did not include the water that was coming in from what we call the lower spring.

On the 22nd day of September, 1938, the water measured in a similar manner in the two boxes amounted to .18 second foot. On the 28th day of November, 1939, I measured .25 second foot in the Sigurd pipe line.

489 Now, before this water was diverted by Sigurd, did you make an investigation of the quantity of water at the springs and the feasibility of Sigurd using it?

A. Yes sir, I did. I determined the quantity. I determined that it could be used by the city.

Q. Did you, for the city, figure on the feasibility of taking that water or other water?

A. I considered a number of sources of supply which might be suitable for the town to use, as a culinary supply.

Q. What other sources of water did you figure on?

A. I considered four springs lying immediately south and east of the Bastion ranch or the Petersen ranch which had been previously filed upon by the town, and which the State engineer had approved, and which filings are still in good standing. I also considered Chrises creek. I considered the Black Knolls springs. I considered the Indian creek springs. The seeps and springs known I think as the Herrons Hole, out from Glenwood. I also considered the proposition of pumping from underground wells in Sevier valley near Sigurd.

Q. How did you come to choose the Rosses creek water in preference to the others?

A. As to the quality of water Rosses creek had a slight advantage. Under chemical analysis it was more free from contamination

than any of the other waters. It was more expensive to pipe it down. It had slightly better advantages as to height and pressure, and it was free from rights of way difficulties, so that the cost of bringing Rosses creek water down would be somewhat less than the other waters.

490 Q. Before putting in your pipeline to divert this water, did you investigate the title conditions?

A. I did. As under the requirements of the public works administration, who assisted in the financing of it, and the water works building for the town —

MR. BATES: I don't see any connection in this. I object to it as incompetent, irrelevant and immaterial, and I move to strike it out.

MR. HILTON: That is a copy furnished by the clerk.

THE COURT: Let us lay it out on the desk here so that everybody can have access to it

2:00 P. M., April 2, 1940.

ROBERT G HARDING resumes stand:

CONTINUED DIRECT EXAMINATION:

By Mr. Hilton.

C1 Q. Now Mr. Harding, in connection with Rosses creek proper, tell us whether or not in your opinion there are any losses of water due to evaporation?

A. Yes in any stream flowing in a channel or wherever water spreads out in gravels or in marshes there is always considerable loss by

evaporation and loss by dispersion through plants, in addition to seepage losses, and on Petersen creek, the character of the stream bed has a lot to do with evaporation. As water spreads over gravels, the water coats every rock and the sand below and that wet surface makes evaporation greater than if the water is confined in one body. If there is clay present, they may prevent the losses by seepage, but I find there are no clays in the bed of the present creek channel in Petersen creek.

A. There are some clays and fine material in the gravels previously deposited along the sides or filling of the original channel at a previous geological age in the neighborhood of a few hundred to a few thousand years ago. The upper part of the channel of Rosses creek is flatter than the lower part. In general, the reverse is true. The upper parts of the bed are usually steeper, but the lower part of Rosses creek is steeper than the upper portion. That was brought about by an uplift of the upper portion of the stream bed and the mountains surrounding, faster than the lower portion is rising.

C2 Q. Is the slope greater at the upper spring than it is at the lower spring?

A. Yes, and the channel in Rosses creek above the upper spring is wide and flat and shows accomplished erosion showing quite a wide bed of gravel and a depression across the entire valley floor which is wider than it is below, and the slope of the channel; therefore any gravel — at that time there were clays deposited stratified with gravels — from coarse gravel to fine gravel and certain clays. The clay originated in the decomposed rocks which changed

it into clays and silicas and other sands which could wash away. Since with the present erosion cycle, approximately five thousand years ago, the creek bed has been incising a new bed in these old channels.

C3 Q. Now you are quite familiar with the quantity of water in Rosses creek, both before and after the diversion by Sigurd City. Taking into consideration the quantity of water diverted by Sigurd City, what would you figure that amount going down Rosses creek contributes to Petersen creek and then put to beneficial use on this Petersen ranch?

A. I have never seen more than about one-hundredth of a second foot enter Petersen creek from Rosses creek. There may have been more. Now that one-hundredth of a second foot enters Petersen creek at the junction and I would hesitate to say any of it could reach Petersen ranch for beneficial use, but if it did, it was by reason of the commingling with water of Petersen creek in which each of these other streams would have to suffer its proportionate share of the loss which takes place between the junction and Petersen ranch. The losses were sixty-one percent and sixty-eight percent, so that one-hundredth of a second foot of water should be depreciated by sixty-eight percent and sixty-one percent, or the average of them.

Q. Can you tell us the actual figure, about how much that would be — how much of it they would get for use?

A. Well if the loss was an average of sixty-five percent, there would be left about thirty-five one-thousandths second foot of water reach Petersen ranch.

C4 Q. Could you tell us, during the summer months, how much water Rosses creek might contribute to Petersen creek, if any — that is according to your knowledge of conditions there?

A. It would be from zero to a maximum of two-hundredths of a second foot.

Q. Now assume this little bit of water that was diverted from the springs by Sigurd City flowed underground down Rosses creek and into Petersen creek, how much would you say of this underground water would be available or could be used on Petersen ranch?

A. I would say none of it.

C8 Q. You installed the Sigurd town water system by which the waters of these springs are diverted?

A. Yes sir; the total cost of the system was \$41,205.63.

CROSS - EXAMINATION:

By Mr. Bates.

C9 Q. When did you first become connected with the town of Sigurd?

A. Approximately in July of 1937. It might be a month or two earlier than that.

C10 Q. So there was never any question in your mind but what the water you took belonged to someone else?

A. During the irrigation season we were certain a portion belonged to someone else.

Q. And knowing that, under your advice and

with your assistance, that water was arbitrarily taken from them and turned into your system?

A. No —

MR. HILTON: Objected to, incompetent, irrelevant and immaterial.

THE COURT: The answer may remain as going solely to the motive of the witness.

Q. What if anything, had you done when water was turned into the system, to secure these adverse rights?

A. We had filed personal notice. We found there was a protest to that filing and the State Engineer ruled against the protestant, except during the irrigation season, and at that time we had attempted to purchase that water from its owner, or who claimed to be the owner.

C13 Q. Then I will ask you this, did Mr. Anderson testify to any of those things you spoke about with reference to deficiency or excess rainfall in the months of the year 1939?

C14 MR. HILTON: We object to that question as irrelevant. Mr. Anderson's testimony is here.

THE COURT: I understand counsel is interrogating in regard to certain testimony given by Mr. Anderson.

MR. HILTON: It is in regard to what Mr. Anderson had to say.

THE COURT: Objection overruled.

MR. BATES: For instance, you testified and pretended to be reading from records that there was a deficiency of sixty-five percent of rainfall in May of 1939, didn't you?

A. I didn't pretend to read from the records, I actually read from the records.

Q. Did Mr. Anderson testify to that effect?

A. Yes; he read the figures from which I computed the deficiency.

C17 Q. I think you indicate you have been in the employ of Sigurd town most of the time in the development of this water system?

A. Yes; the gross amount turned over to me was in the neighborhood of eighteen hundred dollars.

C24 Q. You want to leave that with this jury, that the water under the stream flow down Rosses creek on the surface does not saturate the ground under the stream?

A. That is right, except in certain possibly impervious places.

C41 Q. I want to ask you again, is it your understanding that Mr. Nebeker has no interest in this stream of water except the amount that actually gets into his ground?

A. Yes sir.

C42 Q. And I am sure you recognize that when those two streams come together, whatever water was there, little or much, was water Mr. Nebeker had a right to?

A. Yes.

C43 THE COURT: I want to ask a question.

Q. Mr. Harding, what has been and is the normal average flow down that pipeline?

C44 A. About that time the average of the flow would be about nineteen-hundredths of a second foot at the head going down the pipeline.

GEORGE W. NEBEKER, recalled for defendants:

491 MR. HUNT: Mr. Nebeker, do you know where the water from the wells on the Petersen or Bastion ranch was being diverted during the time that Mr. Anderson made the measurements covered by Exhibit E?

MR. HILTON: We object to that on the ground it is not proper rebuttal. It was put in on direct examination.

THE COURT: I will let him answer.

A. Yes sir; Mr. Bastion had a ditch taken out from the main channel across the field. He took it on the west side and irrigated some ground just west of the lake, off down, and it run down just below the dam.

RE-CROSS EXAMINATION:

By Mr. Hilton.

492 Q. Now, you were having trouble with Mr. Bastion over this well water at that time, were you?

A. Yes sir; he thought he had driven wells and developed water. We done that, so he had insisted on using it on the alfalfa land.

493 Q. Did he use it a long while?

A. He used it whenever the wells were uncapped; any time.

Q. Did they drill any other wells besides those two?

A. Oh yes, they had driven quite a few wells.

494 Q. Were there any times when you stopped

him from using the water from these wells and required that it come down to you?

A. No sir.

495 MR. HUNT: What was the final determination of that case whether the well water was yours or Mr. Bastion's?

A. It was our water.

MR. HILTON: Now, when the wells were flowing and your springs were flowing you had so much water; when the wells were plugged did that change your water situation any?

A. Yes sir; when the wells were plugged these springs would flow more water.

B. F. LOFGREN, recalled for defendants:

496 THE COURT: I think I will charge the jury with regard to this Bastion case, that there was a suit filed by Mr. Bastion in this court about 1912, to restrain Mr. Nebeker, his son, and the father, from interfering with the flow of these wells, on the theory that Mr. Bastion had developed new water up there. The case was tried in this court and went up to the Supreme Court, wherein it was held in effect that a major portion of this well water wasn't developed water but was part of some underground system up there in that country, because the Supreme Court sent it back for a new trial, and apparently the figures and data which have been used by the witnesses were offered at the new trial, as I take it. Now, gentlemen, the only thing you are concerned about with regard to that subject, is this matter of under-

ground waters, and these other questions are collateral to the matter before you.

497 Q. You testified in general with reference to the geologic conditions in the vicinity of this Rosses creek, and the amount of water both above and below the ground?

A. Yes, sir.

MR. HILTON: I object to that on the ground that he didn't testify as to the geologic conditions because he said he wasn't a geologist, and didn't fully qualify as a geologist.

THE COURT: He did give some observations with regard to certain springs up there, to that extent the witness would be giving geological information. I don't recall that he qualified as an expert.

MR. BATES: I think he said exactly what Mr. Hilton said, that he hadn't specially qualified as a geologist, but he also followed that up by saying that his other studies required geological observations.

Q. I want to call your attention to some testimony in particular of Mr. Harding with reference to some measurements or observations that were made by him at a point marked 1 on plaintiff's Exhibit A, and at the junction of Rosses creek and Petersen creek, and other measurements made by him at a point marked 2 on the same exhibit to the west of the pond in the lower end of Petersen ranch?

A. Yes, I heard his testimony.

Q. Along that line his indications were that there was a material decrease in the surface
498 flow of waters in the channel of Petersen creek between the point identified 1 and the point

identified 2. I want to ask you to state now generally whether or not the measurements of those waters at those points in any way disagree with your testimony given the other day, and if so, in what particulars?

A. So far as I recall, Mr. Harding's testimony, there would not be any substantial disagreement.

Q. What would you say from your observations and experience, as to whether or not there is any relation between the waters in the vicinity of Rosses creek and generally up Petersen creek and these springs that you now are testifying to in the lower end of the Petersen ranch?

499 MR. HILTON: We object to the question on the ground that Mr. Lofgren is not qualified. It takes a person, not only a hydraulic engineer, but a geologist, in order to make such deductions.

THE COURT: I will let you qualify the witness further.

MR. HILTON: It is not proper rebuttal.

MR. BATES: I will ask you to state, Mr. Lofgren, whether or not in the course of your scholastic work you did any work or research with reference to the geologic conditions of the country?

A. I had courses in geology under Dr. Fred J. Pack, the regular university geologic examination and research.

500 And from those studies and experiences and observations that you have made, have you formed a judgment, or are you able to form a

judgment with reference to the question as to whether or not there is a relationship between the waters in these springs in the lower end of the Petersen ranch and the point referred to, or in the waters in the vicinity of Rosses creek?

A. Yes.

501 Q. What is your testimony in that regard?

MR. HILTON: I object to that because the man has not qualified himself as a geologist. He says he has only studied the unconsolidated fields, and that would indicate only surface conditions, and only alluvial deposits, and such as that; where it takes a geologist to answer this question, one who has had a great deal more knowledge and experience in connection with underground strata and structure.

THE COURT: Overruled.

MR. HILTON: I object to this question on the ground it is improper rebuttal, because that question has not been raised heretofore.

THE COURT: He may answer.

MR. BATES: Is there a relation between the springs down in the Petersen property near the pond, and the waters of Rosses creek?

A. This way, yes, these springs have their source in the unconsolidated valley field in Petersen creek, and the water that disappears in Rosses creek disappears into the coarse unconsolidated material lying on the top of the bedrock. We conclude that the water which disappears from the flow in Rosses creek flows down Rosses canyon beneath the surface of this coarse angular rock, commingling with a similar stream that flows down beneath the sur-

face of Petersen creek; that also contains the coarse angular rock as exhibited in the washes of water down that creek; and that water is continued under the surface until it meets the obliterated gradient in the meadows, and that finer material which is exhibited over in the wash there for fifteen to twenty feet this occurs through the meadows nearly all down the stream, over the meadows.

Q. When you get down into Petersen creek, down below the junction of Petersen creek and Rosses creek, did you make observation with reference to the water table and its reaction on the surface?

- 504 A. My judgment is that it is deeper than it is in Rosses creek, due to the fact that right at the springs, right now — I would not attempt to make an estimate as to what it would be in through the year — it may be a little higher now, due to some early spring melting.

RE-CROSS EXAMINATION:

By Mr. Hilton.

- 505 Q. You say there is vegetation on Petersen creek down over this Petersen ranch?

A. Yes sir; both along the top of the bank there is a sedimentary wash, as was indicated on the diagram, and both down in the bottom of the wash, and up on where it was washed, and then back from the wash over to the foot-hills, there is vegetation.

Q. Well, do you know that people have testified here that they farmed this Petersen ranch right along, and no tall brush and vegetation except the raising of crops, is there?

A. Did they testify that they farmed all of it?

MR. BATES: I object to the question on the ground it is attempting to cross examine this witness on the testimony or some other testimony. I think that is improper.

THE WITNESS: If there is any question about it, we will go up and examine it. It is too swampy to farm.

506 MR. HILTON: You are giving a picture there — there is vegetation there which is so dense that people could not get through it?

A. No. I haven't intended to give that idea; neither the willows, nor the rabbit brush, nor any of it is so dense you can't walk through it.

Q. How far from that meadow land is this Petersen creek?

A. Petersen creek, the stream, that is this sedimentary wash, looking down the stream, is off to the left of it, but the stream, this underground stream comes right into the ranch near the house. The spring that I observed was not very far from the house.

Q. Did you see any grass growing in between that and the Petersen creek, on the Petersen ranch?

A. Yes, if I know this Petersen ranch. That is the one ranch above the point where the road crosses the main Petersen channel; there are grasses growing there.

507 When speaking of the Petersen creek, I mean the entire canyon, that entire canyon that is up and down the road, that has been partially refilled by this unconsolidated material. The underground flow comes down Petersen creek. It does not come down the surface channel. The

medium may be considered Petersen creek to be either this surface channel or the entire channel which includes the underground flow.

509 Q. Now, isn't there some other sources for that spring besides what you have mentioned, have you stated all the sources for that spring?

A. I consider that there are sources that may contribute to it; only indirectly what they have assisted to build up the water table in the bottom of Petersen creek.

Q. There would be other tributaries similarly close to Rosses creek?

510 A. Only smaller in quantity; I would judge, without making a more detailed study than I did, that it would contribute to the meadow land, and to the meadow land further down the canyon.

514 Q. Now, going back to Rosses creek, Mr. Lofgren, you said that the waters there in Rosses creek would seem to sink away and go down into the sand and gravels and then go down in the sand and gravels of the bed of Petersen creek, and then on down Petersen creek — isn't it possible that these underground waters would follow all the way down Petersen creek as far as it goes?

A. It would be if the gradient remained constant and the materials remained the same porosity.

516 Q. Could that water be gotten out and used on the Nebeker ranch down there?

A. It could not be gotten out there, but it could be gotten out further down.

518 Q. Isn't it true that you can tell just what has

happened in the underground flow in Petersen creek?

A. I can tell that it takes an underground surface. As to that you can see this spring area in which the water table comes to the ground surface, and that if it can't get out in a spring, it will come out in a meadow.

- 519 Q. These springs and wells on the Petersen ranch do not afford a water right for the Petersen ranch, at all?

MR. BATES: I object to that as a conclusion.

MR. HILTON: Getting right down to the situation in Rosses creek, Mr. Lofgren, and your contention here, that the water in Rosses creek flows down in the sand and down in the sands of Petersen creek; have you a judgment in the spring how much water actually gets down Rosses creek?

A. I measured the water going into the pipeline and estimated the flow in the surface stream adjacent to the lower point of diversion, also made an estimate of the surface flow as far down as they continued to be visible.

- 520 Q. It has been stated that there was .19 of a second foot of water taken from these two springs on June 15, 1939 —

A. I measured more than that.

- 521 Q. Now, take this small amount of water, this .19 cubic foot, on June 15, 1939 — I say that, because that is the day that summons was served, and so we fix that day for that reason — this small amount of water going down Rosses creek for a mile, you say it goes into the underground sands, and the underground

sands condition prevails down Petersen creek, through the underground sands for another mile, that small amount of water goes all the way down there; about how much of it, would you say, would feed that spring?

A. The only loss that it would suffer from the time, I would say, in Rosses creek, until it came out at the spring would be the loss of evaporation and transpiration. Your transpiration — plant life — would be very slowly, because you would have the level of the water table one inch. As you approach the ranch your water table gets nearer the surface. Your evaporation is considerably higher, so you would experience a
522 greater evaporation right near the ranch where the water table is up near the ground surface. Just how much higher — assuming, you say, that it is seventy-five or eighty gallons a minute, and the height of the water table, two or three feet at that point, it may increase the evaporation, it may consume as much as fifteen or twenty gallons a minute out of it.

Q. How much would it reduce it, the .19 of a cubic foot?

A. That would be about ninety gallons a minute, just a rough estimate, sixteen gallons a minute that would be taken out of this almost entirely down near the ranch.

ED. H. WATSON, recalled:

525 MR. HILTON: Now, Mr. Watson, you have heard Mr. Lofgren's testimony particularly with regard to the spring on the Petersen ranch, near the house — tell us what is the source of that spring in your opinion?

A. In my testimony this morning I showed that there were other creeks or streams, one in general, that is up in section twenty-eight particularly. I explained at the time I gave the testimony, that there is a ridge along there, the same as the situation on Rosses creek there, I think it is Cottonwood creek. Cottonwood creek also comes in the same as Rosses creek, a tributary to the drainage area in Petersen creek. Then there are other streams in through this area that come in and flow and drain into a basin. This basin roughly comes out like this for about three miles, and comes back about like this for this section. That is off to the
 526 northwest of that spring. Off to the northwest, within three to two miles from where the ridge takes off out.

Q. Now, the spring area has a coarse material, and it is the toe of the alluvial fan?

A. Most of the material right around the spring is of that character. This stream channel, that is up Cottonwood creek furnishes a great deal, practically all of the water that would come out of this spring. In other words, the canyon itself seeps here, and this alluvial fan made of coarse material is filled up, and the water seeps out of this canyon coming down here, and seeps through the rocks and breaks out in this spring. Now, this material here, that is clay. That is clay that is over here. This is a region of soft rocks. This is all a volcanic area; all the head waters of Rosses creek and Cottonwood creek, and all these other creeks for three or four miles, when you get out of that area, you get into an area of soft shell,

soft beds, and this area down here is a hard, or of soft material.

527 Q. As to this basin you mentioned to the northeast, would you say that that also contributes to this particular spring or the other springs?

A. I think that all that area drains into the basin that I just mentioned here. The drainage would run off of all that and seep into the gravel and go down into the lower sands and gravels of the basin and into that source.

RE-CROSS EXAMINATION:

By Mr. Bates.

Q. You speak of the drainage area to the north and east of the Petersen ranch where these springs are; does that drainage area include the living or surface streams?

A. No, there are no living streams in the area; they are just washes that actually flow in freshets, artificial springs, and there is one wash in Petersen creek, which is a side canyon spring.

530 THE COURT: The record may show both sides rest.

COURT'S DIRECTED FINDINGS

(TITLE OF COURT AND CAUSE).

531 THE COURT: Gentlemen, in this case the court directs that findings be prepared as follows:

1.

Determining that there was and is a legal necessity for the commencement of the action on the

part of the plaintiff, and also finding that the defendants have admitted the necessity for the taking.

2.

The court finds that the present Nebeker premises includes both of the ranches described in our Supreme Court in the case of Bastion v. Nebeker, as the same appears in 49 Ut. 390, of the official reports; and that the Petersen ranch is the recipient of both surface and underground waters which arise in the entire drainage area lying to the north and east of the premises in dispute; that included in this same drainage area is the area referred to by the parties as the Rosses creek, and that for a long time prior to the beginning of the century that waters, both surface and underground, which arise and percolate in Rosses canyon have contributed not only to the wells and springs of the Petersen ranch, but also the height of the water table itself on and adjacent to the Petersen ranch; that there has been and is now a loss of water by way of evaporation and seepage to the ranch, which at certain seasons of the year, runs as high as fifty percent but that under the practice and methods of irrigation in this section water has heretofore and now does have that penalty or duty imposed on it before it is actually placed to a beneficial use.

The court further finds that the plaintiff by proper application in the State Engineer's office applied to appropriate those springs for
 532 culinary purposes, and now finds and determines that between the 15th day of October and the first day of March of each and every

year that the springs in question were at the moment of the filing the application unappropriated public waters in the State of Utah; that between the first day of March to the first day of May of each year the court finds that half of said waters were unappropriated waters and subject to appropriation, and that defendants are the owners of the other half, that as to the remainder of the year, between May 1st and October 15th, the court finds that the defendants were and are the owners of the right to the use of all the waters both surface and underground arising in Rosses canyon

The court further finds that defendants and their predecessors do and now have a stock watering and domestic right to the use of all of the waters the year around of Rosses creek, that is the surface waters.

Now, by way of a special verdict, the court proposes to submit to the jury three questions:

1.

How much water was actually taken by the town by their improvements in the manner the evidence shows:

2.

The fair cash market value of the same:

3.

Damages to the water rights not taken but injured, if at all, by reason of the segregation of the waters taken from the other waters of Rosses creek and Petersen creek. In this connection to instruct the jury that the value of the land involved must be considered by them in fixing the amount of this damage, as well as

the damage on the first item, the present value of the land must be considered in fixing the fair cash market value of the waters actually taken.

So, as conclusions of law, gentlemen, the court concludes that these waters are owned by the parties as heretofore indicated, and reserves further conclusion of law and the matter of entering judgment until such time as the special verdict is returned.

- 533 Let the record further show that the court directs that the clerk do not enter judgment on this verdict; that the matter of entry of judgment is reserved for the court's further consideration. In other words, I take it, that the special verdict must be incorporated in the findings of fact, and that the court will enter judgment and not the clerk.

Now, as to the other case, I am not going to dictate my memorandum at this time; and let the record show that this memorandum is dictated in chambers, in the absence of the jury, and that the court now goes into open session.

(In Open Court).

THE COURT: Let the record show the jury is present. And Gentlemen of the Jury, you are instructed as follows:

I.

Plaintiff brings this action to take from the defendants, according to the law of eminent domain, certain water rights as more particularly hereinafter described. Defendants admit that the plaintiff has the right to take these

waters, but allege that they are entitled to just compensation by reason of the taking in the
 533 aggregate sum of \$6500.00. Plaintiff by way of reply denies that defendants are entitled to the amount of compensation and damage claimed.

The foregoing is merely a statement of the written claims of the parties and is not to be considered by you as evidence in the case.

2.

The final issues for you to determine in this case becomes:

1. Just how much water (in quantity) is actually taken from defendants in this proceeding? (This must be fixed either at .19 or .24 of a cubic second foot, or at some amount in between those two figures).
2. The value of said water?
3. The money value of the damages, if any sustained by the defendants to their remaining water rights not sought to be condemned by reason of its severance from the waters condemned.

3.

The burden of proving damages to the extent asserted by defendants is on the defendants. But the law requires, independent of such rule, that you award the defendants just compensation.

4.

You are charged that the defendants in this action are the owners of sufficient of the waters

actually taken by the plaintiff for domestic and stock watering purposes, to the extent shown by the evidence, the year around; that said defendants are the owners of all the waters taken by plaintiff and now flowing through its pipeline between May 1st and October 15th of each
 534 year; and half of the said waters between March 1st and May 1st of each year; that the plaintiff is the owner of all the waters taken and now flowing through its pipeline (subject to defendants' domestic and stock watering rights above mentioned) from October 15th to March 1st of each year; and is the owner of one half of the said waters (now flowing through its pipeline) between March 1st and May 1st of each year; that defendants are the owners of the right to use all waters not taken by this proceeding (that is not now flowing down plaintiff's pipeline) in the locality in question.

5.

535 You are further instructed that in assessing the compensation and damages due the defendants by reason of the taking of the water in question that same must be assessed as of the 15th day of June, 1939.

6.

You are further charged that the defendants, State of Utah, George W. Nebeker and Emily Nebeker have agreed that only one verdict need be returned by you. Accordingly, you will assess and make such award as may be proper in behalf of the defendants jointly, and the court will subsequently divide the amount of

the verdict between said parties as their interests may appear.

7.

Defendants' theory of this case is that plaintiff has taken from them about .24 c. f. s. which water now courses through plaintiff's pipeline which water was as of the 15th day of June, 1939, reasonably worth \$4000.00. It is defendants' further theory that plaintiff has damaged their remaining water rights in the sum of \$1500.00. It becomes your duty to award defendants just compensation for their injuries which awards must not exceed the amounts, respectively, above set forth.

8.

In considering defendants' theory of this case you are charged that the value of the waters taken is not controlled by the value of said water to the defendants for the purpose for which they have heretofore used it. Neither are you to be controlled in your determination of this question by its value to the plaintiff for the use it is now making of it, but you should consider any evidence offered with reference to its quality and suitability for culinary purposes and whether or not there was at that time a market or place where the defendants might have reasonably expected to dispose of it.

9.

536 In considering and determining the compensation to be paid to the defendants for the water right taken, you must fix the actual fair cash market value of the water taken. In arriving at the fair market value of the water you are

not to consider the price at which the water would sell for under special or extraordinary circumstances but by a consideration of all uses for which it is adapted and to which it may be applied and consider that it is only the
 536 fair cash market value thereof if sold on the market under ordinary circumstances for cash, and not on time, and assume that the owner is willing but not compelled to sell and the purchaser is buying but not compelled to buy. In determining the question of fair market value of the water actually taken, consideration must be given by you to the value of the land affected in connection with the water rights taken for the purpose of supplying the plaintiff with water.

10.

You are further instructed that in determining the market value of the waters actually taken you are to bear in mind that such things as the value of the improvements made by the plaintiff, or the fact that the water is now saved from further evaporation or loss by reason of being enclosed in a pipe, are not to be considered by you. The final question on this phase of the case is just how much water was taken from defendants and what was its fair cash market value as of June 15, 1939.

11.

In further considering defendants' claims you are charged that plaintiff by the installation of its municipal culinary system has taken part of the flow of Rosses creek thereby in effect separating the natural waters of said creek. In this regard, if it should appear to you from

the evidence, that by reason of the taking of the waters now flowing down plaintiff's pipeline that the waters remaining in Rosses creek and Petersen creek have been so diminished in quantity to such an extent that they have become less valuable for the purposes heretofore used, then you may proceed, after such a determination on your part, from a preponderance of the evidence, to award defendants such damages for injuries to the waters not taken as may be just and proper in the premises.

12.

You are instructed, Gentlemen of the Jury, that in considering the amount of your award to the defendants for damages, if any, to the remaining or other waters of the defendants, you are not to consider any speculative, imaginary, or possible damages that may accrue to said remaining or other waters of the defendants. You are to weigh the evidence touching the damages, if any, to the said remaining or other waters in the light of your experience and knowledge of values and damages, and from
 537 the testimony so viewed determine the reasonable and natural resulting depreciation, if any, in the fair market value of said remaining or other waters of the defendants that will result from the taking by the plaintiff of the waters in question. And in determining this question you are required to give consideration to the value of the lands affected by the taking in connection with the waters taken or injured.

13.

In fixing the fair market value of the water taken, and likewise in fixing the amount of damages, if any, to the remaining or other

waters of the defendants resulting from the taking of that water, you may not permit the amounts of your awards to be influenced by the fact, if it be a fact, that the defendants are unwilling to sell the water right taken or that the town of Sigurd needs the water taken for culinary and domestic purposes, or because of the fact that plaintiff is a municipal corporation.

- 538 You are instructed that as the power of eminent domain is necessary for the public good, it would be unjust to require the plaintiff to pay the defendants more than a fair price for the loss they will sustain by the appropriation of their property for the public good. On the other hand, the owners being compelled to part with their property, no matter how little, against their will, the law allows them just compensation therefor.

14.

You are not required in this case to accept the amounts fixed by either of the parties as constituting the damage in this case, but you may proceed and fix any amounts, not greater than proven by defendants and not less than fixed by plaintiff so long as you base such determination on evidence in the record and the instructions of the court. In determining the value of the water taken by this proceeding the same considerations are to be regarded as in the sale of property between private parties. The question is, just what was the water in question fairly worth in the market for cash as of the 15th day of June, 1939, viewed not merely with reference to the uses to which it was formerly

applied but with reference to the uses to which it was plainly adapted as of the above date, that is to say, what was this water worth (on June 15, 1939) from the standpoint of any available use including the needs and wants of the town of Sigurd. And in case the evidence discloses affirmatively that defendants' water rights not condemned will be damaged to any extent, just compensation must be awarded by you for such injuries, also. The award you make in this case must forever compensate the defendants for any damages suffered by them.

15.

- 539 Should you determine, from the evidence, that any witness has magnified or exaggerated or has minimized or depreciated either the value of the waters taken or the damages, if any, to the waters not taken on account of his interest in this case or his prejudice or want of experience, knowledge or truthfulness, then you have the right and it is your duty to disregard the evidence of such witness insofar as the same is unjustly magnified or minimized or unjustly increased or diminished.

16.

Plaintiff's theory of this case as to the waters actually taken, is, that defendants only own the right to use said water during part of the year; that said waters have no market value except in connection with grazing uses, that the value of defendants' lands have not been materially depreciated by the taking; that the manner of use of said waters by defendants justifies only a small or nominal market value being fixed by

you; and that the town has only taken .19 c. f. s. of water into its pipeline.

17.

As to defendants' waters not taken it is plaintiff's theory that defendants have suffered no injury or damage whatsoever because:

1. The market value of their lands have not been materially reduced by the taking:
2. The flow of Petersen creek during the irrigation season has not been diminished:
3. The underground or percolating waters flow down Rosses creek to Petersen creek and onto and through defendants' premises, if any, has not been interfered with or diminished in any respect.

18.

You may, if the evidence justifies it, accept either the plaintiff's or defendants' theory of this case, and return your verdict accordingly,
 540 or you may, from the evidence before you, accept either or both theories in part and reject same in part. As to the waters actually taken your verdict must not exceed that asked by defendants and may be only nominal, if the evidence justifies it. As to the waters not taken but injured, if at all, your verdict may either be as the amount claimed by defendants, or in no amount, as claimed by plaintiff, or in some amount between the respective claims of the parties, as the evidence may show.

19.

By a preponderance of the evidence is meant the greater weight of the evidence, that which is the more convincing as to its truth. It is

not necessarily determined by the number of witnesses for or against a proposition, although, all other things being equal, it may be so determined.

20.

Evidence stricken out by the court and evidence offered but not admitted should be entirely disregarded by the jury. You should consider only such evidence as has been received and permitted to remain in the case.

21.

You are the exclusive judges of all questions of fact, and of the credibility of witnesses. In judging of their credibility you have the right to take into consideration their deportment on the witness stand, their interest, if any is shown, in the result of the suit, the reasonableness of their statements, their apparent frankness or candor, or the want of it; their opportunities to know and understand, and their capacity to remember. You have the right to consider any fact or circumstance in evidence which in your judgment affects the credibility of any witness. If you believe from the evidence that any witness who has testified in this case has knowingly and wilfully testified false-
 541 ly to any material fact in this case, you may disregard the whole testimony of such witness, unless the witness is corroborated by other creditable evidence or you may give such weight to the testimony of such witness on other points as you may think it entitled to; the jury are the exclusive judges of the weight of the testimony. You should weigh the evi-

dence carefully and consider it altogether. You should give such weight to inferences from the facts proved as in fairness you think they are entitled to. If you find a conflict in the evidence, you should reconcile it, if you can, upon any reasonable theory; if you cannot do so, then you must determine for yourselves where the ultimate truth of the case is.

22.

You should consider all the evidence impartially, fairly, and without prejudice of any kind, and from such consideration, in connection with the instructions given you by the court, you should reach such a verdict as will do justice between the parties.

23.

These instructions, though numbered separately, should be construed together; each instruction should be read and understood with reference to and as a part of the entire charge, and not as though each were intended to present the whole law of the case.

24.

The concurrence of at least six members of the jury is necessary to a verdict; and one of the jurors should be appointed foreman. If all of your number agree upon a verdict it may be signed by your foreman alone; if less than all

of your number agree upon a verdict it should be signed first by the foreman and then by the other concurring jurors.

You may take these instructions with you to the jury room and return them into court with your verdict.

LEWIS JONES, District Judge.

Dated, 3rd of April, A. D. 1940.

541½ THE COURT: You may proceed with the arguments to the jury. As I understand it, the defendants have the right to open and close. You may divide the time any way you want to. We agreed upon an hour and a half to a side. The record may further show that counsel have stipulated that the exceptions to the instructions may be taken in the absence of the jury, and that the court may modify its instructions in any respect without calling back the jury. Gentlemen, I wonder if you would care to stipulate that the resident judge may hear and receive the verdict when it is returned.

MR. BATES: Yes, satisfactory with us.

MR. HILTON: We so stipulate.

THE COURT: The record may so show. Then the officer may be sworn to take charge of the jury, and the jury may retire in charge of the officer. The record may show that only exhibits 7 and 8-A are submitted to the jury at this time.

PLAINTIFF'S REQUESTS

1.

542 You are instructed, Gentlemen of the Jury, that you have four principal questions of fact to determine from the evidence before you in this case, namely:

1. What was the fair market value on June 15, 1939, of the land with the water right taken by the plaintiff?
2. What was the fair market value on June 15, 1939, of the land without the water right taken by the plaintiff?
3. Is the fair market value of the remaining or other lands of the defendants depreciated in value by the taking of the water in the two springs in Rosses creek by the plaintiff in the manner shown by the evidence?
4. If the fair market value on June 15, 1939, of the said remaining or other lands was depreciated by the taking of said spring water by the plaintiff, what is the amount of such damages?

Endorsed: Refused, JONES, D. J.

2.

You are instructed, Gentlemen of the Jury, that the burden is on the defendants to establish by a preponderance or greater weight of the evidence the fair market value of the land with the water right taken by the plaintiff as of June 15, 1939, and, likewise, the burden is on the defendants to establish by a preponderance or greater weight of the evidence the fair

market value of the land without the water right taken by the plaintiff, and, likewise, the burden is on the defendants to establish by a preponderance or greater weight of the evidence, the amount, if any, that the remaining or other lands of the defendants will be depreciated in value because of the taking by the plaintiff of the waters of the two springs in Rosses creek in the manner shown by the evidence.

Endorsed: Given in substance,

JONES, D. J.

3.

543 You are instructed, Gentlemen of the Jury, that as the power of eminent domain is necessary for the public good, it would be unjust to require the plaintiff to pay the defendants more than a fair price for the loss they will sustain by the appropriation of their property for the public good. On the other hand, the owners being compelled to part with their property, no matter how little, against their will, the law allows them just compensation therefor. Just compensation in this case is the difference between the fair market value of the land at the time of the taking with the water right and the fair market value of the land at the time of the taking without the water right, and the depreciation, if any, in the fair market value of the remaining or other lands of the defendants by the taking of the waters by the plaintiff.

Endorsed: First two sentences given; remainder refused:

JONES, D. J.

4.

In considering and determining the compensation to be paid to the defendants for the water right taken, you must fix the actual fair cash market value of the land on which the water taken by the plaintiff was used as of June 15, 1939, but with the water right, and the actual fair cash market value of that same land as of June 15, 1939, without the water right taken by the plaintiff. In arriving at the fair market value of the land both with and without the water right, you are not to consider the price at which the land both with and without the water right would sell for under special or extraordinary circumstances, but only the fair cash market value thereof if sold on the market under ordinary circumstances for cash, and not on time, and assume that the owner is selling but not compelled to sell and the purchaser is buying but not compelled to buy.

Endorsed: Given in substance,

JONES, D. J.

5.

- 544 You are instructed, Gentlemen of the Jury, that the fair market value of the land involved in this action, both with and without the water right, is not to be determined by its value for any particular use, but by a consideration of all uses for which it is adapted and to which it may be applied, and it is only the fair market value of the remaining or other lands of the defendants as diminished in value by the taking of the water in the two springs in Rosses creek in the manner shown by the evidence that de-

fendants are entitled to receive an award for depreciation in value of such remaining or other lands.

Endorsed: Given in substance,

JONES, D. J.

6.

You are instructed, Gentlemen of the Jury, that in addition to determining and fixing the fair market value of the lands of the defendants on which the water right taken by Sigurd town was used and the fair market value of that land with the water right as of June 15, 1939, you must also assess the amount of damages, if any, which will accrue to the remaining or other lands of the defendants by the taking by the plaintiff of the water involved in this action from the two springs in Rosses creek. This damage, if any, you will determine by ascertaining the fair market value of the said remaining other lands of the defendants as it was on June 15, 1939, with the water right taken by the plaintiff, and by deducting therefrom the fair market value of such property as of June 15, 1939, without the water so taken by the plaintiff. The difference between these values, if there shall be any, will be the amount of the damage done to said remaining or other lands of the defendants by the taking by the plaintiff of the water in the two springs in Rosses creek in the manner shown by the evidence. The law fixes this method of ascertaining the damages and it is your duty to follow it.

Endorsed: Refused,

JONES, D. J.

7.

545 You are instructed, Gentlemen of the Jury. that in considering the amount of your award to the defendants for damages, if any, to the remaining or other lands of the defendants, you are not to consider any speculative, imaginary or possible damages that may accrue to said remaining or other lands. You are to weigh the evidence touching the damages, if any, to the said remaining or other lands of the defendants in the light of your experience and knowledge of values and damages, and from the testimony so viewed determine the reasonable and natural resulting depreciation, if any, in the fair market value of said remaining or other lands of the defendants that will result from the taking by the plaintiff of the water of the two springs in Rosses creek in the manner shown by the evidence.

Endorsed: First 8 lines given, remainder refused.

JONES, D. J.

8.

In fixing the fair market value of the land on which the water right taken by plaintiff was used, both with and without the water and likewise in fixing the amount of damages, if any, to the remaining or other lands of the defendants resulting from the taking of that water, you may not permit the amounts of your awards to be influenced by the fact, if it be a fact, that the defendants are unwilling to sell the water right taken or that the town of Sigurd needs the water taken for culinary and domestic pur-

poses, or because of the fact that plaintiff is a municipal corporation.

Endorsed: Given in substance,

JONES, D. J.

9.

546 You are instructed, Gentlemen of the Jury, that if you believe from the testimony that any witness has magnified or exaggerated, or has minimized or depreciated the value of the land on which the water taken was used, both with and without that water, or the damage, if any, to the remaining or other lands of the defendants resulting from the taking of that water, on account of his interest in this case or his prejudice or want of experience, knowledge or truthfulness, then you have the right and it is your duty to disregard the evidence of such witness insofar as the same is unjustly magnified or minimized or unjustly increased or diminished, either as to the value of the land both with and without the water, or the damage, if any, to the remaining or other lands of the defendants resulting from the taking of the water in the two springs in Rosses creek.

Endorsed: Given in substance,

JONES, D. J.

10.

You are instructed, Gentlemen of the Jury, that in weighing the evidence and in determining the market values of the land, both with and without the water taken by the plaintiff, you are not to consider the amount of water diverted by the plaintiff into its pipeline at the springs in Rosses creek or any improved conditions at

said springs or in said Rosses creek by reason of the construction of plaintiff's pipeline and water works, but only the amount of water that the defendants have used or have been able to use from said Rosses creek under the conditions existing at said springs in said Rosses creek before plaintiff installed its water works.

Endorsed: Part in parenthesis given; remainder refused,

JONES, D. J.

11.

547 You are instructed, Gentlemen of the Jury, that in weighing the evidence and in determining the market values of the lands, both with and without the water taken by the plaintiff, you are not to value the water as property separate and distinct from the land; and you are further instructed that in arriving at the market value of the lands by the method already explained to you, you are not to consider the fact that the plaintiff has diverted the water for the culinary use of its inhabitants.

Endorsed: Refused,

JONES, D. J.

DEFENDANTS' REQUESTS

Come now all of the defendants above named and request the court to give the jury the following instructions:

1.

You are instructed that one of the questions which you are to determine is: What was the

fair and reasonable value of the water taken by the plaintiff on the 15th day of June, 1939, the day on which the summons was served on these defendants?

In determining this question you may take into consideration all of the facts and circumstances proved by the evidence to have existed that day. The defendants are entitled to be paid for the water so taken. Such sum as the water was then reasonably worth. You are not to be controlled by the value of said water to the defendants for the purpose for which they had theretofore used it, neither are you to be controlled in your determination of this question by its value to the plaintiff for the use it is now making of it, but you should consider any evidence offered with reference to its quality and suitability for culinary purposes and whether or not there was at that time a market or place where the defendants might have reasonably
 548 expected to dispose of it. If the water was desired or being used for culinary purposes or if there was at that time a system suitable for carrying the water to a place of use or if other communities may have needed the water either presently or in the future and if such facts or any of them when considered in connection with all the other evidence in the case would affect the judgment of men as to its reasonable value you should give such evidence such consideration as it is reasonably and fairly entitled to in determining the question of the value of said water. If it appears from the evidence that at the time of the taking of said waters improvements have been made which reasonably had the effect to enhance the value of the water

taken or if it appears that because of improvements made prior to the time of commencing this action the water had become especially valuable to any particular community, such evidence should be considered by you in determining the value of the water at the time of the commencement of this suit, in this regard you are further instructed, however, that the value of such water to a particular community is not necessarily the reasonable value of the water but such fact may be considered only insofar as it may reasonably affect the judgment of reasonable men as to what the water at said time was worth.

Endorsed: Given in substance,

JONES, D. J.

2.

You are instructed that where water taken by condemnation proceedings is part of a larger stream the damage that will be sustained by reason of the rendering the larger stream less effective for the beneficial use may and should be considered by you in ascertaining the amount of damages to be awarded for the taking of the water, if you find from the preponderance of the evidence that the remaining water from the stream is rendered less valuable by reason of the taking of a part of the stream.

- 549 And if you find from the preponderance of the evidence that the water taken by the plaintiff town is part of a general water supply which was owned by the defendants or either of them at the time of the taking and you also find from a preponderance of the evidence that the taking of the water condemned and placing it in a

pipe and conveying it away from the defendants' land lessened the value of the water not taken, then you are to ascertain from the evidence the amount of such damage and award the damages so found in addition to the value of the water so taken; in other words, the defendants and each of them must be made whole and be left in as good condition as they were before their water was taken. In determining this question you should consider the water, if any, left in Rosses creek whether the same can be used by the defendants for the purposes it was theretofore used; the water in Petersen creek and the effect, if any, on the use of the water in that creek the taking of the water from Rosses creek will have on the usability of the waters in Petersen's creek, and if you should find by a preponderance of the evidence that the waters of Rosses creek not taken is lost to the defendants and the use of the waters of Petersen's creek is lessened in any degree, then it is your duty to determine, from the evidence, the amount of such damage and award such damage to the defendants in addition to the value of the water actually taken by the plaintiff town.

Endorsed: Given in substance,

JONES, D. J.

3.

You are further instructed that the law of this State is that where property taken by condemnation proceedings, as in this case, constitutes a part of a larger quantity of water the damage which will accrue to the portion not sought to be condemned by reason of its severance from

the portion taken must be by the jury ascertained and assessed.

- 550 In this regard if it shall appear to you that the water taken and condemned to the plaintiff is part of the general water supply theretofore owned and used by the defendants or either of them for the irrigation of land for agricultural purposes and it shall further appear from the evidence that by the taking of the water so condemned, the portion of such water not taken or condemned has become less valuable for the purposes for which the defendants had or may have used it, it then will become your duty to determine from the evidence the amount of damages accruing to the water not taken by the plaintiff town.

In determining this question you may consider whether or not any of the water of Rosses creek or springs are permitted after the severance to flow in the natural channel from which the waters are taken and whether or not such waters so left, if any, under the conditions as may be disclosed by the evidence, can be reasonably used by the defendants for the purpose which they were used prior to the taking. If it shall reasonably appear to you from the evidence that the value of such waters so left, if any, has been depreciated as a result of the taking, then you should assess damages in the sum as will reasonably compensate the defendants and each of them for such depreciation.

You are further instructed that you should also

consider whether or not as a result of the taking of the waters condemned by the plaintiff, the effect is to lessen or diminish the value of the water flowing in Petersen creek or to less or diminish the value of the combined flow of Rosses creek and Petersen creek if it shall reasonably appear from the evidence that the effect of the taking is to lessen the flow of water from the combined sources and if it shall further appear that as a result of such diminished flow, the remaining water is of less value for irrigation purposes than it was prior to the taking, then you should assess damages for the injuries to the water not taken in such sum as will reasonably compensate the defendants and each of them for the injury so suffered.

- 551 You should further consider whether or not as a result of the taking and the consequent diminishing of the amount of the water available for the irrigation of the lands owned by the defendants or either of them, there would be damage to said land, and if so, you should determine from the evidence the amount of such damage and award all the damages so found, if any, to the said defendants.

Endorsed: Given in substance,

JONES, D. J.

PLAINTIFF'S EXCEPTIONS TO INSTRUCTIONS:

MR. HILTON: Comes now the plaintiff in this case of Sigurd v. State of Utah, George W. Nebeker and Emily Nebeker, and excepts to the proposed verdict, and findings, or instructions of the court, as follows:

Excepts to the form of verdict prepared by the court and submitted to the jury:

Excepts to instruction number three:

Excepts to instruction number four:

Excepts to instruction number seven:

Excepts to instruction number eight as follows:

“but you should consider any evidence offered with reference to its quality and suitableness for culinary purposes and whether or not there was at that time a market or place where the defendants might have reasonably expected to dispose of it.”

Excepts to that part of number nine as follows:

“but by a consideration of all uses for which it is adapted and to which it may be applied and consider that it is only the fair cash market value thereof if sold on the market under ordinary circumstances for cash.”

552 Excepts to that portion of number ten reading as follows:

“or the fact that the water is now saved

from further evaporation or loss by reason of being enclosed in a pipe.”

Excepts to instruction number eleven.

Excepts to number twelve in the use of the word “waters” wherever it appears in said instruction, in place of the word “lands.”

Excepts to that portion of instruction number fourteen, reading:

“In determining the value of the water taken by this proceeding, the same considerations are to be regarded as in the sale of property between private parties. The question is, just what was the water in question fairly worth in the market for cash as of the 15th day of June, 1939, viewed not merely with reference to the uses to which it was formerly applied but with reference to the uses to which it was plainly adapted as of the above date, that is to say, what was this water worth on June 15, 1939, from the standpoint of any available use including the needs and wants of the town of Sigurd.”

553

Plaintiff further excepts to the court's refusal to give plaintiff's request number one.

Plaintiff further excepts to the court's refusal to give plaintiff's request number two, and to the giving of the same by the court as modified.

Plaintiff further excepts to the court's refusal to give plaintiff's request number three and to the giving of the same by the court as modified.

Plaintiff further excepts to the court's refusal

to give plaintiff's request number four and to the giving of the same by the court as modified.

Plaintiff further excepts to the court's refusal to give plaintiff's request number five and to the giving of the same by the court as modified.

Plaintiff further excepts to the court's refusal to give plaintiff's request number six.

Plaintiff further excepts to the court's refusal to give plaintiff's request number seven and to the giving of the same as modified.

Plaintiff further excepts to the court's refusal to give plaintiff's request number eight and to giving of the same as modified.

Plaintiff further excepts to the court's refusal to give plaintiff's request number nine and to the giving of the same as modified

Plaintiff further excepts to the court's refusal to give plaintiff's request number ten and to the giving of the same as modified.

Plaintiff further excepts to the court's refusal to give plaintiff's request number eleven.

554 Subsequently, the jury returned into court with the following special verdict:

SPECIAL VERDICT

(TITLE OF COURT AND CAUSE).

"We the jury duly empanelled and sworn to try the issues in the above entitled cause, find

in favor of the defendants and against the plaintiff, as follows:

1. How much water in quantity was actually diverted into plaintiff's pipeline as of June 15, 1939? (This must be fixed either at .19 or .24 of a cubic second foot, or at some amount in between those two figures).

Answer: .24.

2. We find and award the defendants the sum of \$1250 for the water actually s^taken.

(That is for the portion of the year that defendants own said water).

3. We find and award the defendants the sum of \$550 as damages to their remaining water rights not sought to be condemned by reason of its severance from the water condemned.

E. C. BAGLEY, Foreman."

Dated, Richfield, Utah, April 3, A. D. 1940.

LIST OF EXHIBITS

Exhibits introduced in evidence in this case are enclosed in packet envelopes accompanying, and a part of, the transcript. The exhibits are as follows:

PLAINTIFF'S EXHIBIT 3 — Ordinance of Town of Sigurd.

PLAINTIFF'S EXHIBIT 4 —Certificate of State Engineer.

PLAINTIFF'S EXHIBIT 5 — Application of Town of Sigurd for water appropriation.

PLAINTIFF'S EXHIBIT 6 — Application of
Town of Sigurd for water appropriation.

PLAINTIFF'S EXHIBIT A — Plat of King's
Meadow Canyon and Rosses Creek.

PLAINTIFF'S EXHIBIT B — Water claim
of G. W. Nebeker, Jr.

PLAINTIFF'S EXHIBIT D — Decree adjudi-
cating The Sevier River System.

PLAINTIFF'S EXHIBIT X — Report of J.
Oscar Anderson.

PLAINTIFF'S EXHIBIT 7 — Total Annual
Rainfall, Richfield.

PLAINTIFF'S EXHIBIT 8 — Monthly Rain-
fall at Richfield.

DEFENDANTS' EXHIBIT 1 — Abstract of
Tract involved, in Sevier County.

DEFENDANTS' EXHIBIT 2 — Abstract of
Title; Nebeker, etal.

MEMORANDUM — Value of Water Taken by
Town of Sigurd.

107 STIPULATION — SETTLING BILL OF EXCEPTIONS. Filed September 11, 1940.

108 CERTIFICATE OF JUDGE — TO TRANSCRIPT OF EVIDENCE AND RECORD. Filed September 11, 1940.

INSTRUCTIONS TO THE JURY

(TITLE OF COURT AND CAUSE).

56 Gentlemen of the Jury, you are instructed as follows:

1.

Plaintiff brings this action to take from the defendants, according to the law of eminent domain, certain water rights as more particularly hereinafter described. Defendants admit that the plaintiff has the right to take these waters, but allege that they are entitled to just compensation by reason of the taking in the aggregate sum of \$6500.00. Plaintiff by way of reply denies that defendants are entitled to the amount of compensation and damage claimed.

The foregoing is merely a statement of the written claims of the parties and is not to be considered by you as evidence in the case.

2.

The final issues for you to determine in this case becomes:

1. Just how much water (in quantity) is actually taken from defendants in this proceeding? (This must be fixed either at .19

or .24 of a cubic second foot, or at some amount in between those two figures).

2. The value of said water.

3. The money value of the damages, if any, sustained by the defendants to their remaining water rights not sought to be condemned by reason of its severance from the waters condemned.

3.

The burden of proving damages to the extent asserted by defendants is on the defendants. But the law requires, independent of such rule, that you award to defendants just compensation.

4.

You are charged that the defendants in this action are the owners of sufficient of the waters actually taken by the plaintiff for domestic and stock watering purposes, to the extent shown by the evidence, the year around; that said defendants are the owners of all the waters taken by plaintiff and now flowing through its pipeline between May 1st and October 15th of each year; and half of the said waters between March 1st and May 1st of each year; that the plaintiff is the owner of all of the waters taken and now flowing through its pipeline (subject to defendants' domestic and stock-watering rights above mentioned) from October 15th to March 1st of each year; and is the owner of one-half of the said waters (now flowing through its pipeline) between March 1st and May 1st of each year; that defendants are the owners of the right to use all waters not taken by this proceeding (that is not now

flowing down plaintiff's pipeline) in the locality in question.

5.

You are further instructed that in assessing the compensation and damages due the defendants by reason of the taking of the water in question that same must be assessed as of the 15th day of June, 1939.

6.

You are further charged that the defendants, State of Utah, George W. Nebeker and Emily Nebeker have agreed that only one verdict need be returned by you. Accordingly, you will assess and make such award as may be proper in behalf of the defendants jointly, and the court will subsequently divide the amount of the verdict between said parties as their interests may appear.

7.

Defendants' theory of this case is that plaintiff has taken from them about .24 c. f. s. which water now courses through plaintiff's pipeline which water was as of the 15th day of June, 1939, reasonably worth \$4,000. It is defendants' further theory that plaintiff has damaged their remaining water rights in the sum of \$1,500. It becomes your duty to award defendants just compensation for their injuries which awards must not exceed the amounts, respectively above set out.

8.

In considering defendants' theory of this case

you are charged that the value of the waters taken is not controlled by the value of said water to the defendants for the purpose of which they have theretofore used it. Neither are you to be controlled in your determination of this question by its value to the plaintiff for the use it is now making of it, but you should consider any evidence offered with reference to its quantity and suitability for culinary purposes and whether or not there was at that time a market or place where the defendants might have reasonably expected to dispose of it.

9.

In considering and determining the compensation to be paid to the defendants for the water right taken, you must fix the actual fair cash market value of the water taken. In arriving at the fair market value of the water you are not to consider the price at which the water would sell for under special or extraordinary circumstances but by a consideration of all uses for which it is adapted and to which it may be applied and consider that it is only the fair cash market value thereof if sold on the market under ordinary circumstances for cash and not on time, and assume that the owner is willing but not compelled to sell and the purchaser is buying but not compelled to buy. In determining the question of fair market value of the water actually taken, consideration must be given by you to the value of the land affected in connection with the water rights taken for

the purpose of supplying the plaintiff with water.

10.

You are further instructed that in determining the market value of the waters actually taken you are to bear in mind that such things as the value of the improvements made by the plaintiff, or the fact that the water is now saved from further evaporation or loss by reason of being enclosed in a pipe, are not to be considered by you. The final question of this phase of the case is just how much water was taken from defendants and what was its fair cash market value as of June 15, 1939.

11.

In further considering defendants' claims you are charged that plaintiff by the installation of its municipal culinary system has taken part of the flow of Rosses creek thereby in effect separating the natural waters of said creek. In this regard, if it should appear to you from the evidence, that by reason of the taking of the waters now flowing down plaintiff's pipeline that the waters remaining in Rosses creek and Petersen creek have been so diminished in quantity to such an extent that they have become less valuable for the purposes heretofore used, then you may proceed, after such a determination on your part, from a preponderance of the evidence, to award defendants such damages for injuries to the waters not taken as may be just and proper in the premises.

12.

You are instructed, Gentlemen of the Jury, that in considering the amount of your award

to the defendants for damages, if any, to the remaining or other waters of the defendants, you are not to consider any speculative, imaginary, or possible damages that may accrue to said remaining or other waters of the defendants. You are to weigh the evidence touching the damages, if any, to the said remaining or other waters in the light of your experience and knowledge of values and damages, and from the testimony so viewed determine the reasonable and natural resulting depreciation, if any, in the fair market value of said remaining or other waters of the defendants that will result from the taking by the plaintiff of the waters in question. And in determining this question you are required to give consideration to the value of the lands affected by the taking in connection with the waters taken or injured.

13.

In fixing the fair market value of the water taken, and likewise in fixing the amount of damages, if any, to the remaining or other waters of the defendants resulting from the taking of that water, you may not permit the amounts of your awards to be influenced by the fact, if it be a fact, that the defendants are unwilling to sell the water right taken or that the town of Sigurd needs the water taken for culinary and domestic purposes, or because of the fact that plaintiff is a municipal corporation.

You are instructed that as the power of eminent domain is necessary for the public good, it would be unjust to require the plaintiff to pay

the defendants more than a fair price for the loss they will sustain by the appropriation of their property for the public good. On the other hand, the owners being compelled to part with their property, no matter how little, against their will, the law allows them just compensation therefor.

14.

You are not required in this case to accept the amounts fixed by either of the parties as constituting the damage in this case, but you may proceed and fix any amounts, not greater than proven by defendants and not less than fixed by plaintiff so long as you base such determination on evidence in the record and the instructions of the court. In determining the value of the water taken by this proceeding the same considerations are to be regarded as in the sale of property between private parties. The question is, just what was the water in question fairly worth in the market for cash as of the 15th day of June, 1939, viewed not merely with reference to the uses to which it was formerly applied but with reference to the uses to which it was plainly adapted as of the above date, that is to say, what was this water worth (on June 15, 1939) from the standpoint of any available use including the needs and wants of the town of Sigurd. And in case the evidence discloses affirmatively that the defendants' water rights not condemned will be damaged to any extent, just compensation must be awarded by you for such injuries, also. The award you

make in this case must forever compensate the defendants for any damages suffered by them

15.

Should you determine, from the evidence, that any witness has magnified or exaggerated or has minimized or depreciated either the value of the waters taken, of the damages, if any, to the waters not taken on account of his interest in this case or his prejudice or want of experience, knowledge or truthfulness, then you have the right and it is your duty to disregard the evidence of such witness insofar as the same is unjustly magnified or minimized or unjustly increased or diminished.

16.

Plaintiff's theory of this case as to the waters actually taken, is, that defendants only own the right to use said water during part of the year; that said waters have no market value except in connection with grazing uses, that the value of defendants' lands have not been materially depreciated by the taking; that the manner of use of said waters by defendants justifies only a small or nominal market value being fixed by you; and that the town has only taken .19 c. f. s. of water into its pipeline.

17.

As to defendants' waters not taken it is plaintiff's theory that defendants have suffered no injury or damage whatsoever because:

1. The market value of their lands has not been materially reduced by the taking.
2. The flow of Petersen creek during the irrigation season has not been diminished;
3. The underground or percolating water

flow down Rosses creek to Petersen creek and onto and through defendants' premises, if any, has not been interfered with or diminished in any respect.

18.

You may, if the evidence justifies it, accept either the plaintiff's or defendants' theory of this case, and return your verdict accordingly, or you may, from the evidence before you, accept either or both theories in part and reject same in part. As to the waters actually taken your verdict must not exceed that asked by defendants and may be only nominal, if the evidence justifies it. As to the waters not taken but injured, if at all, your verdict may either be as the amount claimed by defendants, or in no amount, as claimed by plaintiff, or in some amount between the respective claims of the parties as the evidence may show.

19.

By the preponderance of the evidence is meant the greater weight of the evidence, that which is the more convincing as to its truth. It is not necessarily determined by the number of witnesses for or against a proposition, although, all other things being equal, it may be so determined.

20.

Evidence stricken out by the court and evidence offered but not admitted should be entirely disregarded by the jury. You should consider only

such evidence as has been received and permitted to remain in the case.

21.

You are the exclusive judges of all questions of fact, and of the credibility of witnesses. In judging of their credibility you have the right to take into consideration their deportment on the witness stand, their interest, if any is shown, in the result of the suit, the reasonableness of their statements, their apparent frankness or candor, or the want of it; their opportunities to know and understand, and their capacity to remember. You have the right to consider any fact or circumstance in evidence which in your judgment affects the credibility of any witness. If you believe from the evidence that any witness who has testified in this case has knowingly and wilfully testified falsely to any material fact in this case, you may disregard the whole testimony of such witness, unless the witness is corroborated by other credible evidence or you may give such weight to the evidence of such witness on other points as you may think it entitled to; the jury are the exclusive judges of the weight of the testimony. You should weigh the evidence carefully and consider it altogether. You should give such weight to inferences from the facts proved as in fairness you think they are entitled to. If you find a conflict in the evidence, you should reconcile it, if you can, upon any reasonable theory; if you cannot do so, then

you must determine for yourselves where the ultimate truth of the case is.

22.

You should consider all the evidence impartially, fairly, and without prejudice of any kind, and from such consideration, in connection with the instructions given you by the court, you should reach such verdict as will do justice between the parties.

23.

These instructions, though numbered separately, should be construed together; each instruction should be read and understood with reference to and as a part of the entire charge, and not as though each were intended to present the whole law of the case.

24.

The concurrence of at least six members of the jury is necessary to a verdict; and one of the jurors should be appointed foreman. If all of your number agree upon a verdict it may be signed by your foreman alone; if less than all of your number agree upon a verdict, it should be signed first by the foreman and then by the other concurring jurors.

You may take these instructions with you to the jury room and return them into court with your verdict.

LEWIS JONES, District Judge.

Dated April 3, 1940.

Filed April 3, 1940.

39-44 Defendants' Requested Instructions are marked "given in substance, Jones, D. J."

PLAINTIFF'S REQUESTED INSTRUCTIONS.

(TITLE OF COURT AND CAUSE).

PLAINTIFF'S REQUEST NO. 1:

- 45 You are instructed, Gentlemen of the Jury, that you have four principal questions of fact to determine from the evidence before you in this case, namely:

1.

What was the fair market value on June 15, 1939 of the land with the water right taken by the plaintiff?

2.

What was the fair market value on June 15, 1939 of the land without the water right taken by the plaintiff?

3.

Is the fair market value of the remaining or other lands of the defendants depreciated in value by the taking of the water in the two springs in Rosses creek by the plaintiff in the manner shown by the evidence?

4.

If the fair market value on June 15, 1939 of the said remaining or other lands was depreciated by the taking of said spring water by the plaintiff, what is the amount of such damages?

Refused.

JONES, D. J.

PLAINTIFF'S REQUEST NO. 2:

- 46 You are instructed, Gentlemen of the Jury, that the burden is on the defendants to establish by

a preponderance or greater weight of the evidence the fair market value of the land with the water right taken by the plaintiff as of June 15, 1939; and, likewise, the burden is on the defendants to establish by a preponderance or greater weight of the evidence the fair market value of the land without the water right taken by the plaintiff; and, likewise, the burden is on the defendants to establish by a preponderance or greater weight of the evidence the amount, if any, that the remaining or other lands of the defendants will be depreciated in value because of the taking by the plaintiff of the waters of the two springs in Rosses creek in the manner shown by the evidence.

Given in substance.

JONES, D. J.

PLAINTIFF'S REJUEST NO. 3:

- 47 You are instructed, Gentlemen of the Jury, that as the power of eminent domain is necessary for the public good, it would be unjust to require the plaintiff to pay the defendants more than a fair price for the loss they will sustain by the appropriation of their property for the public good. On the other hand, Gentlemen of the Jury, the owners being compelled to part with their property, no matter how little, against their will, the law allows them just compensation therefor. Just compensation in this case is the difference between the fair market value of the land at the time of the taking with the water right and the fair market value of the land at the time of the taking without the water right, and the depreciation, if any, in the fair market value of the remaining or other lands

of the defendants by the taking of the waters by the plaintiff.

First two sentences given. Remainder refused.

JONES, D. J.

PLAINTIFF'S REQUEST NO. 4:

- 48 In considering and determining the compensation to be paid to the defendants for the water right taken, you must fix the actual fair cash market value of the land on which the water taken by the plaintiff was used as of June 15, 1939, but with the water right, and the actual fair cash market value of that same land as of June 15, 1939 without the water right taken by the plaintiff. In arriving at the fair market value of the land, both with and without the water right, you are not to consider the price at which the land both with and without the water right would sell for under special or extraordinary circumstances, but only the fair cash market value thereof if sold on the market under ordinary circumstances for cash, and not on time, and assume that the owner is selling but not compelled to sell and the purchaser is buying but not compelled to buy.

Given in substance.

JONES, D. J.

PLAINTIFF'S REQUEST NO. 5:

- 49 You are instructed, Gentlemen of the Jury, that the fair market value of the land involved in this action, both with and without the water right, is not to be determined by its value for any particular use, but by a consideration of all

uses for which it is adapted and to which it may be applied, and it is only if the fair market value of the remaining or other lands of the defendants is diminished in value by the taking of the water in the two springs in Rosses creek in the manner shown by the evidence that defendants are entitled to receive an award for depreciation in value of such remaining or other lands.

Given in substance.

JONES, D. J.

PLAINTIFF'S REQUEST NO. 6:

- 50 You are instructed, Gentlemen of the Jury, that in addition to determining and fixing the fair market value of the lands of the defendants on which the water right taken by Sigurd Town was used and the fair market value of that land with the water right as of June 15, 1939, you must also assess the amount of damages, if any, which will accrue to the remaining or other lands of the defendants by the taking by the plaintiff of the water involved in this action from the two springs in Rosses creek. This damage, if any, you will determine by ascertaining the fair market value of the said remaining other lands of the defendants as it was on June 15, 1939, with the water right taken by the plaintiff, and by deducting therefrom the fair market value of such property as of June 15, 1939 without the water so taken by the plaintiff. The difference between these values, if there shall be any, will be the amount of the damage done to said remaining or other lands

of the defendants by the taking by the plaintiff of the water in the two springs in Rosses creek in the manner shown by the evidence. The law fixes this method of ascertaining the damages and it is your duty to follow it.

Refused.

JONES, D. J.

PLAINTIFF'S REQUEST NO. 7:

- 51 You are instructed, Gentlemen of the Jury, that in considering the amount of your reward to the defendants for damages, if any, to the remaining or other lands of the defendants, you are not to consider any speculative, imaginary or possible damages that may accrue to said remaining or other lands. You are to weigh the evidence touching the damages, if any, to the said remaining or other lands of the defendants in the light of your experience and knowledge of values and damages, and from the testimony so viewed determine the reasonable and natural resulting depreciation, if any, in the fair market value of said remaining or other lands of the defendants that will result from the taking by the plaintiff of the water of the two springs in Rosses creek in the manner shown by the evidence.

First eight lines given, remainder refused.

JONES, D. J.

PLAINTIFF'S REQUEST NO. 8:

- 52 In fixing the fair market value of the land on which the water right taken by the plaintiff was used, both with and without that water,

and likewise in fixing the amount of damages, if any, to the remaining or other lands of the defendants resulting from the taking of that water, you may not permit the amounts of your awards to be influenced by the fact, if it be a fact, that the defendants are unwilling to sell the water right taken or that the Town of Sigurd needs the water taken for culinary and domestic purposes, or because of the fact that plaintiff is a municipal corporation.

Given in substance.

JONES, D. J.

PLAINTIFF'S REQUEST NO. 9:

- 53 You are instructed, Gentlemen of the Jury, that if you believe from the testimony that any witness has magnified or exaggerated, or has minimized or depreciated the value of the land on which the water taken was used, both with and without that water, or the damage, if any, to the remaining or other lands of the defendants resulting from the taking of that water on account of his interest in this case or his prejudice or want of experience, knowledge or truthfulness, then, you have the right and it is your duty to disregard the evidence of such witness insofar as the same is unjustly magnified or minimized or unjustly increased or diminished, either as to the value of the land both with and without water, or the damage, if any, to the remaining or other lands of the defendants resulting from the taking of the water in the two springs in Rosses creek.

Given in substance.

JONES, D. J.

PLAINTIFF'S REQUEST NO. 10:

- 54 You are instructed, Gentlemen of the Jury, that in weighing the evidence and in determining the market values of the land, both with and without the water taken by the plaintiff, you are not to consider the amount of water diverted by the plaintiff into its pipeline at the springs in Rosses creek or (any improved conditions at said springs or in said Rosses creek by reason of the construction of plaintiff's pipeline and water works), but only the amount of water that the defendants have used or have been able to use from said Rosses creek under the conditions existing at said springs and in said Rosses creek before plaintiff installed its water works.

Part in parenthesis given, remainder refused.

JONES, D. J.

PLAINTIFF'S REQUEST NO. 11:

- 55 You are instructed, Gentlemen of the Jury, that in weighing the evidence and in determining the market values of the lands, both with and without the water taken by the plaintiff, you are not to value the water as property separate and distinct from the land; and you are further instructed that in arriving at the market value of the lands by the method already explained to you, you are not to consider the fact that the plaintiff has diverted the water for the culinary use of its inhabitants.

Refused.

JONES, D. J.

VERDICT OF JURY

(TITLE OF COURT AND CAUSE).

75 Special Verdict in Open Court.

We, the jury empanelled and sworn to try the issues in the above entitled cause, find in favor of the defendants and against the plaintiff, as follows:

1. How much water in quantity was actually diverted into plaintiff's pipeline as of June 15, 1939? (This must be fixed at .19 or .24 of a cubic second foot, or at some amount in between those two figures).

Answer: .24.

2. We find and award the defendants the sum of \$1,250 for the water actually so taken.

(That is for the portion of the year that defendants own said water).

3. We find and award the defendants the sum of \$550 as damages to their remaining water rights not sought to be condemned by reason of its severance from the water condemned.

E. C. BAGLEY, Foreman.

Dated, Richfield, Utah, April 3rd, A. D. 1940.

Filed April 3, 1940.

MOTION FOR NEW TRIAL
(TITLE OF COURT AND CAUSE).

76 Comes now Sigurd, a municipal corporation, plaintiff above named, and moves this Honorable Court to set aside the verdict herein and for a new trial of the action upon the following grounds:

1.

Irregularity in the proceedings of the court and the orders of the court by which the plaintiff was prevented from having a fair trial.

2.

Excessive damages, appearing to have been given under the influence of passion or prejudice.

3.

Insufficiency of the evidence to justify the verdict, and that said verdict is against law.

4.

Errors in law occurring at the trial and excepted to or deemed accepted to by the plaintiff.

The foregoing motion is made upon the records, files, papers, proceedings and minutes of the court in the above entitled cause.

Dated this 6th day of April, 1940.

WM. A. HILTON,
Attorney for Plaintiff.

Duly verified.

Served April 6, 1940.

Filed April 8, 1940.

COST BILL

(TITLE OF COURT AND CAUSE).

Name	Residence	Distance	Days	Amt.
Francis Peterson, Salina ...		18 miles	7 days	\$24.60
Geo. H. Peterson, Richfield.		4 miles	7 days	21.80
John Sallales, Richfield		1 mile	7 days	21.20
William Peterson, Glenwood		6 miles	7 days	22.20
Marion Case, Annabella ...		7 miles	7 days	22.40
Guy Jensen, Monroe		11 miles	7 days	23.20
Larue Ogden, Richfield		1 mile	7 days	21.20
Mrs. John Sallales, Richfield		1 mile	7 days	21.20
Orson Crouch, Richfield ...		1 mile	7 days	21.20
Frank Anderson, Richfield .		1 mile	7 days	21.20
J. Oscar Anderson, Salina ..		18 miles	7 days	24.60
A. O. Tooley, Sigurd		8 miles	7 days	22.60
Lofgrern, Salt Lake City ..		165 miles	7 days	54.00
Nielson, Gunnison		35 miles	7 days	28.00
Jury				5.00
TOTAL				\$354.40

Served by mailing April 8, 1940.

Filed April 8. 1940.

MOTION TO STRIKE AND OBJECTIONS TO COST BILL.

(TITLE OF COURT AND CAUSE).

78 Comes now the plaintiff in the above entitled action and makes the following motion and objections relating to the cost bill of defendants herein:

1.

Plaintiff moves to strike the said cost bill upon the ground and for the reason that the said

cost bill was prematurely filed, entry of judgment on the verdict being stayed by the court. Sec. 104-14-14, R. S. 1933.

2.

That the defendants are not entitled to costs as a matter of right, but costs may be allowed or not, and if allowed, may be apportioned between the parties on the same or adverse sides, in the discretion of the court. Sec. 104-61-18, R. S. 1933.

3.

That costs being in the discretion of the court, plaintiff objects to the amount of said cost bill upon the ground that all of said witnesses were not in attendance during all of the seven days mentioned in said cost bill, and that witness fees, if allowed at all, should be allowed to said witnesses for only the day or days on which they actually testified in said cause.

4.

That it is not right or just that any fees or mileage should be allowed Witness Lofgren, for the reason that he is and was during all of said trial an official of Defendant State of Utah, employed by the State Engineer of Utah and paid a regular monthly salary, and that he appeared and testified in said cause, for Defendant State of Utah.

The above motion and objections are based upon the files and records herein, and upon evidence to be adduced upon the hearing hereof.

WM. A. HILTON,
Attorney for Plaintiff.

Filed April 13, 1940.

FINDINGS OF FACT AND CONCLUSIONS
OF LAW

(TITLE OF COURT AND CAUSE).

- 80 This cause coming on regularly for trial on the 29th day of February, 1940, and having continued over the 1st day of March at which time the court took a recess until the 5th day of March, 1940 and having continued over the 6th day of March the court again taking a recess until the 1st day of April and then continuing until the 3rd day of April, 1940 at which time the evidence having been completed on both sides and the parties having rested their case counsel having argued the matter to the jury and the court being fully advised in the premises now makes and enters its Findings of Fact and Conclusions of Law as follows:

1.

That the defendants, George W. Nebeker and Emily Nebeker are and at all times herein mentioned have been husband and wife. That plaintiff is and at all times herein mentioned has been a municipal corporation organized and existing under and by virtue of the laws of the State of Utah and that said plaintiff brought this action under and pursuant to the provisions of Section 15-7-4, 104-61-1, 104-61-20 Revised Statutes of Utah, 1933.

2.

That within the boundaries of the Southwest quarter of the Southeast Quarter and the Southeast Quarter of the Southwest Quarter, Section 28, Township 23 South, Range 1 West,

Salt Lake Meridian, in Sevier County, Utah, there are certain springs and seeps, the waters of which flow into a small natural bed sometimes known as Ross's creek.

3.

- 81 That on and prior to the 26th day of December, 1938 plaintiff constructed and completed a pipeline system for the diversion and conveyance of said waters to the inhabitants of Sigurd Town and that ever since said date plaintiff and its inhabitants have been and are now using the water of said springs and seeps for culinary, domestic and other purposes.

4.

That prior to the time of said diversion there was flowing from said seeps and springs a quantity of water in excess of one-fourth ($\frac{1}{4}$) of a cubic foot per second of time of which water the plaintiff on the 26th day of December, 1938 diverted and has ever since diverted through its pipeline from Rosses creek and into the town of Sigurd for town purposes aforesaid.

5.

That on the 7th of June, 1938 plaintiff filed an application in the office of the State Engineer of the State of Utah to divert one-half ($\frac{1}{2}$) of one cubic foot of water per second of the waters of said springs and seeps for use in the town of Sigurd by the inhabitants thereof for culinary, domestic and other purposes and that the State Engineer thereafter in part granted and approved said application for the period from

October 16th to June 15th of the succeeding year
subject to all prior rights.

6.

That the defendants, George W. Nebeker and Emily Nebeker have contracted to purchase from the defendant, State of Utah, the West Half of the Northwest Quarter, the Southeast Quarter of the Northeast Quarter and the North Half of the Southeast Quarter of Section 20, Township 23 South, Range 1 West, Salt Lake Meridian, together with all water and ditch rights of every nature used in connection with said lands and that the waters of Rosses creek, including the springs and seeps heretofore mentioned, are part of the waters now and for more than 50 years last past used in connection with said lands. And that because of said use for more than 50 years by defendants and their predecessors in interest, they have become and are now entitled to the use of all said waters for irrigation, culinary and domestic purposes. And that they have at all times prior to the taking of said water by the plaintiff as aforesaid used said waters and all of them from the 1st day of May to the 15th day of October of each and every year and that
82 they are entitled to and have used one-half ($\frac{1}{2}$) of said waters as aforesaid from the 1st day of March until the 1st day of May of each and every year, which rights so belonging to the defendants are prior and superior to any and all rights of the plaintiff by virtue of said application to appropriate or otherwise.

7.

That the defendants are the owners of the right to use all said waters for agricultural,

culinary and domestic purposes as heretofore set out and that the plaintiff has endeavored to purchase from the defendants their rights in said springs and seeps but that they have been unable to agree with plaintiff as to the value thereof.

“That on the 5th day of May, 1939, at a special meeting of the Board of Trustees of the Town of Sigurd, duly called and held as by law required, the Board of Trustees of the Town of Sigurd duly passed and adopted an ordinance, number A-4, entitled:

‘Ordinance authorizing and directing the commencement of condemnation proceedings in the Sixth Judicial District Court in and for the County of Sevier, State of Utah, to acquire the waters of all springs and seeps tributary to Ross creek arising in the Southwest Quarter of the Southeast Quarter and the Southeast Quarter of the Southwest Quarter of Section 28, Township 23 South, Range 1 West, Salt Lake Meridian, in Sevier County, Utah, for use by the inhabitants of the Town of Sigurd, Sevier County, Utah, as a water supply for culinary and domestic purposes, and authorizing and directing the employment of legal and other services in connection therewith and the payment of the value of said springs and seeps to persons entitled thereto, as ascertained by said court and declaring an emergency.’

That by said ordinance the Board of Trustees of the Town of Sigurd, plaintiff above named, declared that it was necessary for the public

good that the springs and seeps hereinabove mentioned and described be condemned and the waters thereof appropriated for the use of the inhabitants of the said Town of Sigurd. That said ordinance was duly passed and published on the 5th day of May, 1939. That the condemnation of said springs and seeps by said Town was not protested by any resident taxpayer or any other person whomsoever within the time allowed by law thereafter or at all."

That more than 50 years ago plaintiff and his predecessors in interest became the owners of the following described lands, to wit:

The West Half of the Northeast Quarter and the Southeast Quarter of the Northeast Quarter and the Northeast Quarter of the Southeast Quarter of Section 20, in Township 23 South, Range 1 West of the Salt Lake Meridian, containing 160 Acres more or less.

Also the Northwest Quarter of the Southeast Quarter of Section 20, Township 23 South, Range 1 West of the Salt Lake Meridian, containing 40 Acres more or less. Containing in all 200 Acres, more or less.

All of which lands were then barren and sterile but by means of irrigation have become highly valuable for the growing of the various crops common to this country.

8.

That for the purpose of irrigating said lands this defendant and his predecessors went upon a stream known as King's Meadow Canyon creek and diverted the same and all the waters

including the waters on the surface and underground and used the same continuously thereafter and have, excepting for the acts of the plaintiff, continued to use said waters for the irrigation and cultivation of said lands, and for culinary, domestic, and stock watering purposes. That there is tributary to said King's Meadow Canyon creek a stream of water flowing above and beneath the ground known as Petersen creek and that tributary to said Petersen creek is the stream heretofore referred to, including the springs and seeps, as Rosses creek all of which waters during all of said time have been used by defendants and their predecessors for the irrigation of said lands and that by virtue of the irrigation and cultivation of said lands they have become highly valuable as farm lands and for residential purposes. That because of the taking of said water by the plaintiff and its effect upon the remaining portion of the waters flowing down said creeks and because of the injuries suffered as a result of said taking and the damages arising therefrom to the aforesaid lands the defendants have been damaged and that for the purpose of determining the value of the water so taken by the plaintiff and the amount thereof and the injuries to the lands belonging to defendants and the waters not taken by them these questions have been submitted to a jury and the jury has returned into court their verdict in words and figures, as follows, to wit:

SPECIAL VERDICT IN OPEN COURT

- 84 We, the Jury, duly empanelled and sworn to try the issues in the above entitled cause, find in

favor of the defendants and against the plaintiff, as follows:

1.

How much water in quantity was actually diverted into plaintiff's pipeline as of June 15th, 1939? (This must be fixed either at .19 or .24 of a cubic second foot, or at some amount in between those two figures).

Answer: .24.

2.

We find and award the defendants the sum of \$1,250 for the water actually so taken. (That is for the portion of the year that defendants own said water).

3.

We find and award the defendants the sum of \$550 as damages to their remaining water rights not sought to be condemned by reason of its severance from the water condemned.

(Signed) E. C. BAGLEY, Foreman.

Dated, Richfield, Utah, April 3rd, A. D. 1940.

Which special verdict this court accepts and approves as a finding of fact with the same force and effect as though each of said three questions put to the jury had been determined by the court itself, as a fact, sitting without a jury.

9.

The court further finds that at the time plaintiff filed an application in the office of the State Engineer to divert all waters described in paragraph five of these findings, that the defendants were the owners of the right to use

all of said waters, both surface and underground between May 1st and October 15th of each year, and one-half of said waters between March 1st and May 1st of each year, so that on the date of filing the said application there was unappropriated waters within the Rosses canyon between October 15th and March 1st as to the entire flow, and between March 1st and May 1st as to one-half of said flow, and that by reason of the perfection of said application in the State Engineer's office the plaintiff became and now is the owner of the right to use all of said waters between October 15th and March 1st of each year, and one-half of said waters between March 1st and May 1st of each year.

10.

That the defendants and their predecessors appropriated all of the waters in and near Rosses canyon (excepting during the period of time as shown by the preceding paragraph) prior to the year 1900, and said defendants and their predecessors have continuously, adversely, openly, and notoriously used said waters each and every year, and that said waters have been so used for irrigation, stock watering, and domestic purposes as one system, and that the taking away of part of said waters from said system has resulted in a diminution of the remaining water rights.

11.

That except as hereinbefore specifically found otherwise, the court finds that each and all of the allegations of the answers of the defendants are true and correct, while the allegations of plaintiff's complaint and reply are untrue and incorrect.

CONCLUSIONS OF LAW

86 As Conclusions of Law from the foregoing facts the court finds:

1.

That the use to which the said water is to be applied is use authorized by law.

2.

That the taking is necessary to such use and that it is not now appropriate to any other use.

3.

That the defendants are the owners of a right to use all of the waters of the springs and seeps of Rosses creek from May 1st to October 15th of each year and one-half of said waters from March 1st to May 1st of each year.

4.

That the plaintiff has taken of water belonging to the defendants and diverted it into its pipeline twenty-four hundredths (.24) of a cubic foot of water per second of the flow of Rosses creek, and is so diverting the source.

5.

That the plaintiff is and ever since the 26th day of December, 1938 has been in possession and enjoying the use of said water but that no order of the court was on the 26th day of December, 1938 entered authorizing plaintiff to take possession of the said water but that defendants have made no demand for a return to them of said waters.

6.

That the defendants are entitled to be compensated for the reasonable value of the water taken by plaintiff as of the 15th day of June, 1939, together with interest thereon at the rate of six (6%) percent per annum from the 15th of June, 1939, in the penal sum of \$1250.00.

7.

That the defendants are entitled to be compensated for the damages done or the losses suffered to the remaining waters in said streams, taking into consideration the value of the lands upon which they were used for culinary, irrigation and stock watering purposes as aforesaid as a result of the taking of said waters by plaintiff, in the sum of \$550.00 with interest.

8.

- 87 That the award of the jury should be and is hereby by the court adopted as the amount defendants are entitled to recover for the taking of said waters and the damages to the property as aforesaid.

9.

That defendants are entitled to recover their costs expended in the trial of this action.

Signed this 13th day of May, A. D. 1940, within the Sixth Judicial District of the State of Utah, and forwarded to the Clerk of the District Court at Richfield by mail.

LEWIS JONES, District Judge.

Filed May 14, 1940.

COST BILL

(TITLE OF COURT AND CAUSE).

Name	Residence	Miles	Days	Amt.
Francis Peterson,	Salina.	18 mi.	7 days	\$24.60
Geo. H Peterson,	Richfield	4 mi.	7 days	21.80
John Sallales,	Richfield..	1 mi.	7 days	21.20
Wm. Peterson,	Glenwood.	6 mi.	7 days	22.20
Marion Case,	Annabella..	7 mi	7 days	22.40
Guy Jensen,	Monroe	11 mi	7 days	23.20
Larue Ogden,	Richfield..	1 mi.	7 days	21.20
Mrs. J. Sallales,	Richfield	1 mi.	7 days	21.20
Orson Crouch,	Richfield..	1 mi.	7 days	21.20
Frank Anderson,	Richfield	1 mi.	7 days	21.20
J. Oscar Anderson,	Salina	18 mi.	7 days	24.60
A. O. Tooley,	Sigurd.....	8 mi.	7 days	22.60
Lofgren,	Salt Lake City..	165 mi	7 days	54.00
Nielson,	Gunnison	35 mi	7 days	28.00
Jury	5.00

TOTAL.....\$354.40

Served May 20, 1940.

Filed May 20, 1940.

MOTION TO STRIKE AND OBJECTIONS
TO COST BILL.

(TITLE OF COURT AND CAUSE).

- 89 Comes now the plaintiff in the above entitled action and makes the following motion and objections relating to the cost bill of defendants herein and dated May 20, 1940:

1.

Plaintiff moves to strike the said cost bill upon

the ground and for the reason that the said cost bill was prematurely filed, entry of judgment being stayed by the court. Sec. 104-44-14, R. S. 1933.

2.

That the defendants are not entitled to costs as a matter of right, but costs may be allowed or not, and if allowed, may be apportioned between the parties on the same or adverse sides, in the discretion of the court. Sec. 104-61-18, R. S. 1933.

3.

That costs being in the discretion of the court, plaintiff objects to the amount of said cost bill upon the ground that all of said witnesses were not in attendance during all of the seven days mentioned in said cost bill, and that witness fees, if allowed at all, should be allowed to said witnesses for only the day or days on which they actually testified in said cause.

4.

That it is not right or just that any fees or mileage should be allowed Witness Lofgren, for the reason that he is and was during all of said trial an official of Defendant State of Utah, employed by the State Engineer of Utah and paid a regular monthly salary, and that he appeared and testified in said cause, for Defendant State of Utah.

The above motion and objections are based up-

on the files and records herein, and upon evidence to be adduced upon the hearing hereof.

WM. A. HILTON,
Attorney for Plaintiff.

Duly verified.

Filed May 25, 1940.

JUDGMENT

(TITLE OF COURT AND CAUSE).

- 91 This cause having come on regularly for trial on the 29th day of February, 1940, and having continued over the 1st day of March at which time the court took a recess until the 5th day of March, 1940, and having continued over the 6th day of March the court again taking a recess until the 1st day of April and then continuing until the 3rd day of April, 1940, and the cause having been duly tried before the court and a jury and the jury having returned their verdict therein which verdict is in words and figurers as follows, towit:

SPECIAL VERDICT, IN OPEN COURT

We, the jury, duly empanelled and sworn to try the issues in the above entitled cause, find in favor of the defendants and against the plaintiff, as follows:

1.

How much water in quantity was actually diverted into plaintiff's pipeline as of June 15, 1939? (This must be fixed either at .19 or .24

of a cubic second foot, or at some amount in between those two figures.

Answer: . 24.

2.

- 92 We find and award the defendants the sum of \$1,250 for the water actually so taken. (That is for the portion of the year that defendants own said water).

3.

We find and award the defendants the sum of \$550 as damages to their remaining water rights not sought to be condemned by reason of its severance from the water condemned.

Dated, Richfield, Utah, April 3rd, A. D. 1940.

(Signed) E. C. BAGLEY, Foreman

and the court having found and determined that the use to which the water rights herein-after described are to be applied is a public use authorized by law and that the taking of said water rights is necessary to such use; Findings of Fact and Conclusions of Law having been heretofore filed with the clerk of this court, now on motion of N. J. Bates and T. A. Hunt, Esqs.,

It is Ordered, Adjudged and Decreed:

1.

That the defendants are the owners of the right to the use of all of the water of Rosses creek and springs and seeps tributary thereto in Sevier County, Utah, for the period from May 1st to October 15th of each year, and are the owners of the right to the use of one-half of

said waters during the period from March 1st to May 1st of each year and that said rights are prior and superior to any right to said waters which is owned and held by the plaintiff.

2.

That the plaintiff is the owner of the right to the use of the waters of said Rosses creek together with tributary springs and seeps for the period from October 16th to but not including March 1st of each year, and is the owner of one-half of said water during the period from March 1st to May 1st of each year.

3.

That the plaintiff take and acquire by this condemnation proceeding in fee .24 of a cubic foot per second of the waters rising and flowing from said Rosses creek and tributary springs and seeps belonging to defendants, as set forth in paragraph one above. and that the plaintiff pay as compensation to the defendants within thirty days from date of entry hereof the amounts ascertained by said verdict as follows: Flow of water taken — \$1250.00, damage to other water not taken, \$550.00, together with interest on both of said sums at the rate of six percent per annum from the 15th day of June, 1939 and together with costs of this proceeding.

Dated this 23rd day of May, 1940, within the 6th Judicial District.

LEWIS JONES, District Judge,
Presiding.

Filed May 27, 1940.

94

COST BILL

(TITLE OF COURT AND CAUSE).

Name	Residence	Miles	Days	Amt.
Francis Peterson,	Salina.	18 mi.	7 days	\$24.60
Geo. H. Peterson,	Richfield	4 mi.	7 days	21.80
John Sallales,	Richfield ..	1 mi.	7 days	21.20
Wm. Peterson,	Glenwood.	8 mi.	7 days	22.20
Marion Case,	Annabella..	7 mi.	7 days	22.40
Guy Jensen,	Monroe	11 mi.	7 days	23.20
Larue Ogden,	Richfield..	1 mi.	2 days	6.20
Mrs. J. Sallales,	Richfield	1 mi.	7 days	21.20
Orson Crouch,	Richfield..	1 mi.	7 days	21.20
Frank Anderson,	Richfield	1 mi.	7 days	21.20
J. Oscar Anderson,	Salina	18 mi	4 days	15.60
A. O. Tooley,	Sigurd.....	8 mi.	7 days	22.60
Lofgren,	Salt Lake City..	165 mi.		33.00
Nielson,	Gunnison	35 mi.	1 day	10.00
Jury	5.00
TOTAL				\$291.40

Served June 3, 1940.

Filed June 3, 1940.

NOTICE OF ENTRY OF JUDGMENT

(TITLE OF COURT AND CAUSE).

- 95 Notice of Entry of Judgment to the Plaintiff,
Above Named, and Mr. William A. Hilton,
Esq., Its Attorney:

You and Each of You, will please take notice
that Judgment has been signed, filed and en-
tered in the above entitled cause, awarding to

the plaintiff .24 of a cubic foot of water per second from the spring area in Rosses creek in fee simple upon the payment to the defendants as compensation within thirty days from the entry of said judgment of the sum of One Thousand, Two Hundred Fifty and no/100 (\$1,250.00) Dollars for the water so taken, and Five Hundred Fifty and no/100 (\$550.00) Dollars damage to the water not taken and interest on both of said sums at the rate of six (6%) percent per annum from the 15th day of June, 1939, together with costs to the defendant.

T. A. HUNT,
N. J. BATES,
Attorneys for Defendants,
George W. Nebeker and
Emily Nebeker.

Duly verified.

Filed June 4, 1940

Served by mail June 4, 1940.

MOTION TO STRIKE AND OBJECTIONS TO COST BILL.

(TITLE OF COURT AND CAUSE).

- 96 Comes now the plaintiff in the above entitled action and makes the following motion and objections relating to the cost bill of defendants herein and dated June 3, 1940:

1.

Plaintiff moves to strike the said cost bill upon the ground and for the reason that the said cost bill was not filed and served within the

time as required by law. Sec. 104-44-14, R. S. 1933.

2.

That the defendants are not entitled to costs as a matter of right, but costs may be allowed or not, and if allowed, may be apportioned between the parties on the same or adverse sides, in the discretion of the court. Sec. 104-61-18, R. S. 1933

3.

That costs being in the discretion of the court, plaintiff objects to the amount of said cost bill upon the ground that all of said witnesses were not in attendance during all of the seven days mentioned in said cost bill, and that witness fees, if allowed at all, should be allowed to said witnesses for only the day or days on which they actually testified in said cause.

4.

That it is not right or just that any fees or mileage should be allowed Witness Lofgren, for the reason that he is and was during all of said trial an official of defendant State of Utah, employed by the State Engineer of Utah and paid a regular monthly salary, and that he appeared and testified in said cause for defendant State of Utah

The above motion and objections are based upon the files and records herein and upon the evidence to be adduced upon the hearing hereof.

WM. A. HILTON,
Attorney for Plaintiff.

Duly verified.

Filed June 10, 1940.

ORDER EXTENDING TIME TO FILE BILL OF EXCEPTIONS.

(TITLE OF COURT AND CAUSE).

- 98 Good cause appearing therefor, it is hereby ordered that the plaintiff above named have to and including the first day of August, 1940, in which to prepare, serve and file bill of exceptions in the above entitled cause.

Dated at Brigham, Utah, this 25th day of June, 1940.

LEWIS JONES, Judge, Presiding.

DENIAL OF MOTION FOR NEW TRIAL

(TITLE OF COURT AND CAUSE).

- 98½ This cause came on regularly for hearing at this time in open court on the motion of the plaintiff for a new trial. William A. Hilton appearing as attorney for the plaintiff and N. J. Bates, T. A. Hunt and E. J. Skeen appearing as attorneys for the defendant, George W. Nebeker and State of Utah. The court after considering and hearing the arguments and considering the records and files herein and being fully advised in the premises, orders that the motion for a new trial be and the same is hereby denied. The court feels that there was no substantial error. It is further ordered that the motion to strike the various cost bills herein be and the same is hereby taken under advisement and the motion of the defendant for payment of the judgment or that the plaintiff turn over the water to the defendant is hereby

LEWIS JONES, Presiding Judge.

MARION BIRD, Clerk.

AFFIDAVIT

(TITLE OF COURT AND CAUSE).

STATE OF UTAH,)
) ss.
COUNTY OF SEVIER)

99 George W. Nebeker being first duly sworn on his oath deposes and says that the above entitled action was commenced on the 18th day of June, 1939 by filing Complaint and service of Summons.

That at the time of the commencement of said action the plaintiff was and is more than six (6) months prior thereto had been in exclusive and unlawful possession of the water which was the subject of said action; that at or about the time of the commencement of said action the plaintiff without giving notice to the defendant as required by law, moved the court and procured the court in said cause under the provisions of Section 104-61-10 of the Revised Statutes of Utah, 1933 to issue its order authorizing and permitting the plaintiff to occupy the premises and divert and use the water sought to be condemned in this action pending the action and that said plaintiff has ever since the issuance of said order had and maintained the

exclusive use, enjoyment and possession thereof and is now in the exclusive possession and enjoyment thereof; that thereafter and in the month of April, 1940, a trial of said cause was had and the question submitted to the jury as to the reasonable value of the property sought to be condemned and the injury and damages to remaining water rights not condemned and that the jury duly returned its verdict in said cause on the 3rd day of April, 1940; that thereafter and on the 14th day of May, 1940, the court made and entered its Findings of Fact and Conclusions of Law in said case wherein and whereby the court formally adopted and
 100 made part of its Findings the Verdict of the Jury so returned in the court and that thereafter pursuant to the Findings of Fact and Conclusions of Law so made and entered by the court, the court caused to be filed and entered in said cause on the 27th day of May, 1940, its Judgment wherein and whereby the court found and ordered that the plaintiff pay as compensation to the defendants within 30 days from date of entry thereof the amounts ascertained by said verdict as follows:

Flow of water taken\$1250.00

Damage to other water taken..... 550.00

Together with interest on both of said sums at the rate of six (6%) percent per annum from the 15th day of June, 1939 and together with the costs of this proceeding

that thereafter and on the 4th day of June, 1940, notice of entry of judgment was given by attorneys for defendants to the attorneys for the plaintiff by depositing said notice in the United States Post Office at Richfield, Utah, in an envelope securely sealed and postage pre-

paid addressed to William A. Hilton, 1201 Continental Bank Building, Salt Lake City, Utah, all of which facts more fully appear from the records and files in this cause.

That although more than thirty (30) days since the entry of said final judgment requiring the plaintiff to pay to the defendant the sums of money as aforesaid has passed the said plaintiff has failed and refused to make said payment or any part thereof; that the plaintiff is a municipal corporation and that the money found to be due the defendant as aforesaid and so ordered to be paid, cannot be made on execution for which reasons and all of them the defendants are entitled to have returned to them forthwith the water heretofore taken wrongfully and unlawfully and at all times since about the 15th of December, 1938 so held and possessed wrongfully and unlawfully by said plaintiff because of and for the foregoing reasons the defendants pray that an order of this court forthwith issue annulling and voiding the order of the court heretofore entered purporting to authorize the plaintiff to be and remain in possession of the described water and directing and requiring the plaintiff forthwith to return said water and the use thereof to the defendants and to cease and desist from further interfering with the defendants in their free and undisturbed use thereof.

G. W. NEBEKER.

Subscribed and sworn to before me this 10th day of July, A. D. 1940.

T. A. HUNT, Notary Public.

(Seal).

Residence: Richfield, Utah.

My commission expires: July 11, 1941.

Filed July 11, 1940.

MOTION

(TITLE OF COURT AND CAUSE).

- 102 Come now the above named defendants and move the court for an order annulling and voiding the order of the court heretofore entered in the above entitled cause on the 22nd day of June, 1939, purporting to permit and authorize the plaintiff to occupy the premises and divert and use certain water in plaintiff's complaint specifically described and for a further order of the court authorizing and permitting the defendants to resume possession and to repossess the water in said complaint and in said order specifically referred to and restraining and enjoining the plaintiff, its agents, servants and attorneys from in any manner or at all interfering with plaintiff in the free undisturbed use and enjoyment of the water in said complaint specifically described and referred to.

Dated this 10th day of July, A. D. 1940

T. A. HUNT,
N. J. BATES,

Attorneys for Defendants

Filed July 11, 1940.

NOTICE OF APPEAL

(TITLE OF COURT AND CAUSE).

- 103 To the State of Utah, and to Hon. Joseph Chez, Attorney General of Utah, S. D. Huffaker, Assistant Attorney General, and E. J. Skeen, Special Assistant Attorney General, Its Attorneys:

To George W. Nebeker and Emily Nebeker, and to N. J. Bates and T. A. Hunt, Their Attorneys:

You, and Each of You, Will Please Take Notice

that the plaintiff Sigurd, a municipal corporation of the State of Utah, in the above entitled action, hereby appeals to the Supreme Court of the State of Utah, from the judgment entered by the above entitled court on the 27th day of May, 1940, and from the whole thereof, wherein, in a condemnation proceeding, the court determined the title to the water right and a jury, by special verdict, fixed the value of said water right, which special verdict was adopted by the court and made a part of said judgment, and also appeals from the order of the court denying the motion of plaintiff for a new trial made and entered in said court in said cause on the 10th day of July, 1940. (No undertaking on appeal required of the plaintiff Sigurd, a municipal corporation of the State of Utah, under Section 104-54-18, R. S. 1933).

Dated this 15th day of July, 1940.

WM. A. HILTON,
Attorney for Plaintiff Sigurd.

Received copy of the foregoing notice of appeal
this 15th day of July, 1940.

E. J. SKEEN,
Special Assistant Attorney
General of Utah,
Attorneys for Defendant
State of Utah.

Received copy of the foregoing Notice of
Appeal this 16th day of July, 1940.

N. J. BATES AND
T. A. HUNT,
Attorneys for Defendants
George W. Nebeker and
Emily Nebeker.

Filed July 16, 1940.

104 ORDER EXTENDING TIME to File Bill of Exceptions. Filed July 30, 1940.

ORDER RETAXING COSTS AND DENYING
MOTION TO DISMISS PROCEEDINGS.

(TITLE OF COURT AND CAUSE).

105 Plaintiff's motions to strike and/or retax costs and defendants' motion for repossession of the water in dispute or to require plaintiff to deposit the money award heretofore made with the clerk having heretofore been argued to the court with Wm. A. Hilton, Esq. appearing for the plaintiff and N. J. Bates, T. A. Hunt, and E. J. Skeen, Esqs., appearing for the defendants and the court now being sufficiently advised in the premises, now

Orders, that defendants' costs should be, and accordingly are, taxes in the sum of \$291.40 and the clerk of this court directed to enter said amount in the judgment heretofore entered and also to docket same in the judgment docket, and it is further

Ordered, that plaintiff's motions to strike should be and are denied, and it is further

Ordered, that defendants' motion for repossession of the water condemned or for a deposit of the money value of the same as fixed by the jury and accepted by the court is denied, without prejudice.

Dated this 9th day of September, 1940, within the Sixth Judicial District.

LEWIS JONES, District Judge,
Presiding.

Filed September 10, 1940.

MEMORANDUM

(TITLE OF COURT AND CAUSE).

106 After reading the briefs and the cases cited I have become convinced that at least one of the three cost bills filed by the defendants was legal and proper. Therefore all motions to strike are denied and the costs taxed in the sum of \$291.40 (this being the smallest amount claimed). A formal written order is this day being forwarded to the clerk to this effect.

As to the defendants' motion that plaintiff either deposit the money or be required to surrender back the possession of the water, I feel that the only proper thing to do under the circumstances (notice of appeal having been served and filed) is to deny this motion without prejudice with leave to the defendants to reurge this matter either after the remittitur comes down or at any subsequent time upon a showing that the appeal is not being diligently prosecuted.

I think that this disposes of all pending matters in this action at the present time. If there are other things undisposed of I invite counsel to informally call them to my attention.

Dated this 5th day of September, 1940.

LEWIS JONES, District Judge,
Presiding.

Filed September 10, 1940.

109 CLERK'S CERTIFICATE TO TRANSCRIPT. Filed September 11, 1940.

ASSIGNMENTS OF ERROR

(TITLE OF COURT AND CAUSE).

Comes now the plaintiff and appellant, Sigurd, a municipal corporation of the State of Utah, in the above entitled cause and makes the following assignments of error upon which it relies for reversal of the judgment of the Sixth Judicial District Court in and for Sevier County, Utah:

I.

The trial court erred in finding, as stated in its fourth finding of fact,

“That prior to the time of said diversion there was flowing from said seeps and springs a quantity of water in excess of one-fourth of a cubic foot per second of time of which water the plaintiff on the 26th day of December, 1938, diverted and has ever since diverted through its pipeline from Rosses creek and into the town of Sigurd for town purposes aforesaid,”

as such finding, and the whole thereof, is not sustained by the evidence, as the evidence shows that there were no measurements of said water prior to the time it was diverted into the pipeline of plaintiff, and the evidence further shows that the greatest amount of water ever diverted into plaintiff's pipeline was .24 c. f. s. (Tr. 81; Ab. 397).

II.

The trial court erred in finding, as stated in its sixth finding of fact, that

“The defendants, George W. Nebeker and Emily Nebeker, have contracted to pur-

chase from the defendant, State of Utah, the West Half of the Northwest Quarter of Section 20, Township 23 South, Range 1 West of Salt Lake Meridian, together with all water and ditch rights of every nature used in connection with said lands and that the waters of Rosses creek, including the springs and seeps heretofore mentioned, are part of the waters now and for more than 50 years last past used in connection with said lands, and that because of said use for more than 50 years by defendants and their predecessors in interest they have become and now are entitled to the use of all said waters for irrigation, culinary and domestic purposes, and that they have at all times prior to the taking of said water by the plaintiff as aforesaid used said waters and all of them from the 1st day of May to the 15th day of October of each and every year and that they are entitled to and have used one-half ($\frac{1}{2}$) of said waters as aforesaid from the 1st day of March until the 1st day of May of each and every year, which rights so belonging to the defendants are prior and superior to any and all rights of the plaintiff by virtue of said application to appropriate or otherwise,"

as such findings (Tr. 81; Ab. 397) are not sustained by the evidence but are contrary to the evidence, and the clear preponderance thereof.

III.

The trial court erred in finding, as stated in its seventh finding of fact,

"That the defendants are the owners of the

right to use all said waters for agricultural, culinary and domestic purposes as heretofore set out, and that the plaintiff has endeavored to purchase from the defendants their rights in said springs and seeps but that they have been unable to agree with plaintiff as to the value thereof" . . . and "That more than 50 years ago plaintiff and his predecessors in interest became the owners of the following described lands, to wit: The West Half of the Northwest Quarter and the Southeast Quarter of the Northeast Quarter and the Northeast Quarter of the Southeast Quarter of Section 20, Township 23 South, Range 1 West of the Salt Lake Meridian, containing 160 acres more or less, also the Northwest Quarter of the Southeast Quarter of Section 20, Township 23 South, Range 1 West of Salt Lake Meridian, containing 40 acres, more or less,"

(Tr. 82-83; Ab. 398-401), as such findings are not sustained by the evidence but are contrary to the evidence, and the clear preponderance thereof.

IV.

The trial court erred in finding, as stated in its eighth finding of fact (first six lines),

"That for the purpose of irrigating said lands this defendant and his predecessors went upon a stream known as King's Meadow Canyon creek and diverted the same and all of the waters including the waters on the surface and underground and used the same continually thereafter and have, excepting for the acts of the plain-

tiff, continued to use said waters for the irrigation and cultivation of said lands, and for culinary, domestic and stock watering purposes," and (tenth and eleventh lines) "all of which water during all of said time have been used by defendants and their predecessors for the irrigation of said lands."

(Tr. 83; Ab. 40), as said findings are not sustained by the evidence and are contrary to the evidence, and the clear preponderance thereof.

V.

The trial court erred in including in its findings of fact on the title to the water right all that part of finding No. 8, relating to damages, commencing with the words, "That because of the taking" in line thirteen thereof and extending through and including all the remainder of said finding No. 8, which includes the verdict of the jury and the acceptance and approval of the verdict as a finding of fact by the court (Tr. 83 to 85; Ab. 400 to 402) because such findings are exclusively the function of the jury and outside of the province of the court.

VI.

The trial court erred in finding, as stated in its finding of fact No. 9

"That at the time the plaintiff filed an application in the office of the State Engineer to divert all waters described in paragraph V of these findings, that the defendants were the owners of the right to use all of said waters both surface and underground between May 1st and October 15th of each year, and one-half of said

waters between March 1st and May 1st of each year,"

(Tr. 85, Ab. 402), as said findings are not supported by the evidence and are contrary to the evidence, and the clear preponderance thereof.

VII.

The trial court erred in making its finding of fact No. 10, and the whole thereof, (Tr. 85; Ab. 402), because the statements in said finding are not supported by the evidence, but are contrary to the evidence, and the clear preponderance thereof.

VIII.

The trial court erred in making its finding of fact No. 11, and the whole thereof, (Tr. 85; Ab. 403), because the statements in said finding are not supported by the evidence and are contrary to the evidence, and the clear preponderance thereof.

IX.

The trial court erred in making its conclusion of law No. 3, (Tr. 86; Ab. 404), for the reason that said conclusion is without support in the evidence and is contrary thereto and is contrary to law.

X.

The trial court erred in making its conclusion of law No. 4, (Tr. 86; Ab. 404), for the reason that said conclusion is without support in the evidence and is contrary thereto and is contrary to law.

XI.

The trial court erred in making its conclusion of law No. 5, (Tr. 86; Ab. 404), for the reason that

said conclusion is without support in the evidence and is contrary thereto and is contrary to law.

XII.

The trial court erred in making its conclusion of law No. 6, (Tr. 86; Ab. 405), for the reason that said conclusion is without support in the evidence and is contrary thereto and is contrary to law.

XIII.

The trial court erred in making its conclusion of law No. 7, (Tr. 86; Ab. 405), for the reason that said conclusion is without support in the evidence and is contrary thereto and is contrary to law.

XIV.

The trial court erred in making its conclusion of law No. 8, (Tr. 86-87; Ab. 404-405), for the reason that said conclusion is without support in the evidence and is contrary thereto and is contrary to law.

XV.

The trial court erred in making its conclusion of law No. 9, wherein it concludes that the defendants are entitled to their costs expended in the action, (Tr. 87; Ab. 405), for the reason that said conclusion is contrary to law.

XVI.

The trial court erred in entering its decree wherein it decided that the defendants were the owners of the right to use all of the waters of Rosses creek and seeps for the period from May 1st to October 15th of each year and one-

half of said waters from March 1st to May 1st of each year, and wherein it ordered the plaintiff to pay to the defendants within thirty days from the date of entry of said decree the amount ascertained by said verdict, (Tr. 91 to 93; Ab. 408 to 410), for the reason that said decree is without support in such respects and is contrary to the evidence, and the clear preponderance thereof, and that such judgment and decree is contrary to law.

XVII.

The trial court erred in not making and filing findings of fact and conclusions of law and decree in writing on the issues of title before submitting the question of damage to the jury, for the reason that the court was without jurisdiction to proceed in a manner contrary to that prescribed by law

XVIII.

The trial court erred in giving to the jury that portion of its instruction No. 2, wherein it instructed the jury as follows:

“1. Just how much water (in quantity) is actually taken from defendants in this proceeding? (This must be fixed at .19 or .24 of a second foot, or at some amount in between those two figures)”

(Tr. 57; Ab. 346), for the reason that there was no direct evidence on the amount of water actually taken on June 15, 1939, and that title to said water and the quantity of water taken was for the court to decide and not the jury, and for the further reason that said portion of the instruction is not a proper statement of the

law applicable to the facts in evidence, and that the giving of it was contrary to and against the law.

XIX.

The trial court erred in giving to the jury its instruction No. 4, (Tr. 59; Ab. 346).

XX.

The trial court erred in giving to the jury its instruction No. 7, (Tr. 61; Ab. 348).

XXI.

The trial court erred in giving to the jury the following portions of its instruction No. 8, to wit:

“In considering defendants’ theory of this case you are charged that the value of the waters taken is not controlled by the value of said water to the defendants for the purpose for which they have theretofore used it.” . . . “But you should consider any evidence offered with reference to its quantity and suitability for culinary purposes and whether or not there was at that time a market or place where the defendants might have reasonably expected to dispose of it.” (Tr. 62; Ab. 348).

XXII.

The trial court erred in giving to the jury the following portion of its instruction No. 9, to wit:

“But by a consideration of all uses for which it is adapted and to which it may be applied and consider that it is only the fair cash market value thereof if sold on the

market under ordinary circumstances for cash." (Tr. 63; Ab. 348).

XXIII.

The trial court erred in giving to the jury the following portion of its instruction No. 10, to wit:

"Or the fact that the water is now saved from further evaporation or loss by reason of being enclosed in a pipe." (Tr. 64; Ab. 349).

XXIV.

The trial court erred in giving to the jury its instruction No. 11. (Tr. 65; Ab. 349).

XXV.

The trial court erred in using and including the word "waters" in lines 3, 5, 7 and 12 of its instruction No. 12 to the jury in place of the word "lands." (Tr. 66; Ab. 350).

XXVI.

The trial court erred in giving to the jury the following portion of its instruction No. 14, to wit:

"In determining the value of the water taken by this proceeding the same considerations are to be regarded as in the sale of property between private parties. The question is, just what was the water in question fairly worth in the market for cash as of the 15th day of June, 1939, viewed not merely with reference to the uses to which it was formerly applied but with reference to the uses to which it was plainly adapted as of the above date, that is to say, what was this water worth (on June

15th, 1939) from the standpoint of any available use including the needs and wants of the town of Sigurd?" (Tr. 68; Ab. 351).

XXVII.

The trial court erred in its refusal to give plaintiff's requested instruction No. 1. (Tr. 45; Ab. 385).

XXVIII.

The trial court erred in its refusal to give plaintiff's requested instruction No. 2. (Tr. 46; Ab. 385).

XXIX.

The trial court erred in its refusal to give plaintiff's requested instruction No. 3. (Tr. 47; Ab. 386).

XXX.

The trial court erred in its refusal to give plaintiff's requested instruction No. 4. (Tr. 48; Ab. 387).

XXXI.

The trial court erred in its refusal to give plaintiff's requested instruction No. 5. (Tr. 49; Ab. 387).

XXXII.

The trial court erred in its refusal to give plaintiff's requested instruction No. 6. (Tr. 50; Ab. 388).

XXXIII.

The trial court erred in its refusal to give plaintiff's requested instruction No. 7. (Tr. 51; Ab. 389).

XXXIV.

The trial court erred in its refusal to give

plaintiff's requested instruction No. 8. (Tr. 52; Ab. 389).

XXXV.

The trial court erred in its refusal to give plaintiff's requested instruction No. 9. (Tr. 53; Ab. 390).

XXXVI.

The trial court erred in its refusal to give plaintiff's requested instruction No. 10. (Tr. 54; Ab. 391).

XXXVII.

The trial court erred in its refusal to give plaintiff's requested instruction No. 11. (Tr. 55; Ab. 391).

XXXVIII.

The trial court erred in denying plaintiff's motion for new trial. (Tr. 98½; Ab. 414).

Wherefore, the plaintiff prays that the decree and judgment of the trial court be reversed and that a new trial be granted.

Respectfully submitted,

WM. A. HILTON,
Attorney for Appellant.

Received copy of the foregoing assignments of error this day of November, 1940.

E. D. SKEEN,
Special Assistant Attorney
General for the State of Utah.

WM. A. HILTON.

Subscribed and sworn to before me this.....
day of November, 1940.

Notary Public,
Residing at Salt Lake City, Utah.

My Commission Expires: