

1955

John E. McNaughton and Henrietta McNaughton v. John B. Eaton et al : Brief of Appellants

Utah Supreme Court

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IN THE SUPREME COURT OF THE STATE OF UTAH

FILED

JOHN E. McNAUGHTON and HENRIETTA McNAUGHTON, his wife,
Appellants and Plaintiffs,

— vs. —

JOHN B. EATON, an unmarried man; MYRTLE ROSS; JAMES H. FISHER and CUNA FISHER, husband and wife; RICE COOPER and EDITH R. LAWRENCE COOPER, husband and wife; W. S. ROSS; and FERN ROSS FAWCETT; JACK TURNER and MARIE TURNER, his wife, and MYRON PERRY,

Appellees and Defendants.

Clerk, Supreme Court, Utah

Case No.
8277

Brief of Appellants

EDWARD W. CLYDE

Attorney for Appellant

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CETT; JACK TURNER and
MARIE TURNER, his wife, and
MYRON PERRY,
Appellees and Defendants.

Case No.
8277

Brief of Appellants

PRELIMINARY STATEMENT

John E. McNaughton and his wife, appellants here, originally brought this action to quiet title to the waters of McNaughton Gulch. The defendants answered, claiming that they were the owners of all the waters arising

in McNaughton Gulch and denying that the plaintiffs had any interest therein. At the original trial the court awarded the water to the plaintiffs, but erroneously based its judgment on the theory that the waters were private waters not subject to the law of appropriation. The trial court found, however, that if the waters were subject to the doctrine of appropriation, plaintiffs were the senior appropriators with rights superior to the rights of any of the defendants. The defendants appealed. This court on the original appeal reversed the trial court's holding that the waters were private waters, but affirmed the trial court in its determination that the plaintiffs were the senior appropriators. The Supreme Court's prior opinion is reported in 242 P. 2d 570.

The Supreme Court remanded the case with instructions to enter judgment in accordance with its opinion. A further hearing was had. The trial court again held that the plaintiffs were the senior appropriators, fixed the duty of water at 3.5 acre feet of water per year, and then placed various restrictions on plaintiffs' right to use the water and entered an injunction against the plaintiffs. The nature of these restrictions and of the injunction can best be detailed in connection with the Statement of Facts and Argument, but it is because of these restrictions and the injunction that McNaughtons have now appealed. Suffice it to note here that the court order has taken from the plaintiffs nearly 80% of the water they have historically used.

STATEMENT OF FACTS

From the trial court's findings and the determination of the Supreme Court, we consider the following facts to be established. McNaughton Gulch is a natural waterway formed by water erosion from natural sources. The gulch varies from three to five rods in width and from five to fifteen feet in depth with steep banks on either side. The surrounding country is nearly flat with a gradual slope toward the gulch and generally to the south and east. The defendants' lands are all located below the plaintiffs' lands in the east half of the same section. (See Supreme Court's opinion.)

Historically the plaintiffs have diverted the gulch waters by a number of dams. The highest one is about a quarter of a mile upstream from plaintiffs' land and the water is conveyed on to their land below by means of a ditch. The lowest dam is on the boundary line between plaintiffs' two forty acre tracts and only a little more than a quarter of a mile downstream from their west boundary line.

The Supreme Court noted that the waters accumulating in the gulch reached the gulch by five different means, to wit: (1) Waters which drain into the gulch from natural sources; (2) Canal surplus and waste waters turned into the gulch merely to get rid of them; (3) Canal waters used to irrigate lands on both sides of the gulch which drain into it above the plaintiffs' lands;

(4) Canal waters used to irrigate the plaintiffs' lands by draining into the gulch above the plaintiffs' lowest dam; (5) Canal waters turned into the gulch to be used by them to irrigate their lands.

The Supreme Court then went on to note that:

“The first three of the above divisions are subject to appropriation either as the waters of a natural stream or waters which have been once appropriated but allowed to drain into a natural water course beyond the control of the original appropriator. The last two divisions are not subject to appropriation because they are still in the possession of the plaintiffs who have the right to use them under the original appropriation. The trial court correctly held that plaintiffs have the prior right to use all of these waters because as to the first three divisions they had first appropriated them to a beneficial use before 1903 when no application to appropriate was necessary, but the court erred in holding that plaintiffs' rights to the use of these waters are not subject to reasonable regulation and control in the saving of water.”

Since this appeal is taken because of the regulations and controls placed on plaintiffs, the facts which are material to the regulation are specifically set out as a part of the argument.

STATEMENT OF POINTS ON APPEAL

I. The Court erred in fixing a definite time schedule for the use of water by plaintiffs and appellants.

II. The Court erred in limiting appellants to two cubic feet of water per second and enjoining them from utilizing more than said quantity of water at any time.

III. That the court erred in limiting the irrigation season to 150 days and in prohibiting any use of water after September 22nd.

IV. That the court erred in entering any injunction against plaintiffs and appellants.

V. The court erred in requiring the appellants to construct appropriate by-pass facilities at their expense.

VI. The court erred in failing and refusing to place any time limits or to fix the duty, or in other wise determine and define the rights of the defendants and in refusing to enjoin them from using water in excess of their rights.

VII. The court erred in fixing the duty of water at 3.5 acre feet per acre.

VIII. The court erred in refusing to enter paragraph 9 of the proposed decree.

IX. The court erred in refusing to enter proposed Finding of Fact No. 16 to the effect that the Supreme Court had determined that there were five classes of water reaching McNaughton Gulch, two of which were McNaughton's private waters, and that McNaughton can use the McNaughton Gulch as a part of his lateral or

irrigating system and can divert and recapture his water in the McNaughton Gulch.

X. The court erred in refusing to adjudge by its decree that none of the defendants has any interest in McNaughton's canal stock, and that he can use the same at such times as he desires without regard to the defendants.

ARGUMENT

POINT I. THE PRONOUNCEMENTS OF THIS COURT ON THE ORIGINAL APPEAL ARE THE LAW OF THE CASE.

We think it well at the outset to note that such matters as this court determined on its prior appeal have become the law of the case, binding on the parties, the trial court and the Supreme Court, and are not now subject to reexamination. This court has so held on numerous occasions.¹

The Supreme Court has expressly held that appellants here are the senior appropriators with rights superior to the rights of any of the defendants; that they

¹See, for example, **Powerine Company v. Zions Savings Bank & Trust Company, et al.**, 106 Utah 384, 148 P. 2d 807, and **Gray v. DeFay**, 107 Utah 172, 153 P. 2d 544. In the **Powerine** case on a second appeal the Supreme Court said:

"We shall not review our pronouncements heretofore made in this case, nor shall we discuss the errors assigned if they deal with matters discussed in the previous opinion and upon which no new determination should have been made by the trial court, except by way of entering findings to conform to our previous opinion. * * *

"Our pronouncements are the law of the case, binding no less upon us than on the lower court. We, therefore, shall not review them."

used the water prior to 1903 about as they now use it, and that the trial court's findings in regard to appellants' prior appropriation should be affirmed. The trial court in its Memorandum Decision (R. 36) also applied this principle and upon that theory re-entered verbatim its Findings Nos. 1-9, included in which are many of the critical facts which will control this appeal.

POINT II. THE COURT ERRED IN FIXING A
DEFINITE TIME SCHEDULE FOR THE USE
OF WATER BY PLAINTIFFS AND IN LIMIT-
ING PLAINTIFFS TO 2 C.F.S. OF WATER
DURING SAID PERIOD.

The trial court noted in its original findings, (R. 11) and in its findings entered after the retrial, (R. 70) that the amount of water finding its way into the McNaughton Gulch "varies from day to day and from season to season, depending upon the irrigation practices prevailing on these adjacent lands; that the amount of water available for diversion from the gulch on to the McNaughton lands is not measurable * * * (Finding 6) that the volume of seepage or waste water flowing into the McNaughton Gulch has increased with the increase of irrigation within its drainage area, until at the high point of flow there may be several cubic feet per second flowing into the gulch, but the flow is not constant and the amount at its lowest ebb is of a negligible amount."

This finding as to the variable flow from day to day and from season to season was challenged by the de-

fendants in their first appeal, but the finding was not disturbed by the Supreme Court. Even had these findings not become the law of the cases, the evidence would compel the conclusion that the stream has a variable flow; that when upstream irrigators are wasteful in the application of water the flow of water in the gulch is high, and when they are careful in their irrigation practices the flow may be of negligible amount.

In almost the exact words of this trial court's findings, Carroll testified at pages 53 and 55 that the water is not measurable. He also testified at page 52, as follows:

“Q. Is the amount which flows therein consistent from day to day, and season?

A. Varies all the time.

Q. Does it vary day to day in the same season?

A. Yes, because we have irrigation on each side, and sometimes the waste water runs in and it will raise, and the next day somebody shuts their water off and there won't be as much in there.

Q. Do the upper irrigators permit their waste water to run into the gulch?

A. Yes, sir.”

John McNaughton testified (R. 158) as follows:

“Well, I have observed the gulch for all these years, and I find that the gulch fluctuates from year to year and day to day, and it is pretty hard to tell just how much water you are going to have, * * *

Q. Do you know what causes it to fluctuate from day to day?

A. It is caused by the amount of irrigation on each side of the gulch; that is one of the causes. And, of course, from the use of the water by the neighbors above. Sometimes they are not so careful about their water, they let it run through and return waste water, so the gulch fluctuates from waste water as well as the seepage water.”

The fact that the stream is variable is of critical importance. The trial court in its decree fixed the duty of water at 3.5 acre feet of water per acre per year, and on the basis of 66.03 acres being irrigated the court awarded plaintiff 231.05 acre feet of water each year, (R. 74). However, the court restricted the plaintiff to diversions from the McNaughton Gulch of not more than two cubic feet of water per second during an exact 92 hour 24 minute period during each ten consecutive days. If there were always two cubic feet of water per second or more in the gulch during the particular 92 hour 24 minute period when the plaintiffs are permitted by the decree to use water, they would be able to get exactly 3.5 acre feet of water per acre, or 231.05 acre feet per year. If, however, at any time during their 92 hour turn the gulch should yield less than 2 c.f.s. of water, they would not be able to get the water which the trial court and this court have adjudged that they appropriated. Since the court has found and it is the law of the case that the stream varies from day to day and from season to season, and the flow is at times of negligible amount, it was error to put the plaintiffs on such a restricted basis without provision to protect their rights against the variable flow

so that they would in any event be permitted to take the 231 acre feet awarded to them.

Historically the plaintiffs have used the water as it accumulated at their points of diversion, taking such quantities as were available. Every witness testifying on the subject admitted that for over half a century McNaughton has maintained a tight dam across the McNaughton Gulch above the points of diversion used by the defendants, (R. 12, 15, 19, 63, 73, 100, 140). There was undisputed evidence to the effect that from 1900 to 1948 there was no complaint from anyone and no trouble on the stream, (R. 183). Even the predecessors in interest to the defendants so admitted. Ed Hoeft, predecessor in interest to one of the defendants testified that from 1909 until he sold the property he had never had any occasion to disturb the McNaughton Dam, (R. 102). Ernest Johnson, who owned part of the defendants' lands said that he never bothered to walk upstream during the time he farmed the lands (R. 125). Mr. Ross, who was a predecessor in interest to some of the defendants, was on the stream for 48 years, and he never once had occasion to go upstream to the McNaughton farm (R. 33). John B. Eaton has farmed some of defendant's property for 35 years, and he never during all of that time had occasion to go to the McNaughton property until 1948 when this trouble started, (R. 353).

It thus seems undisputably established that for half a century McNaughton has maintained tight dams across McNaughton Gulch, diverting the water accumulating therein on to his lands and done of the defendants or their

predecessors interfered until 1948. In 1947 the McNaughton Dam was washed out, (R. 375). McNaughton replaced it in 1948, (R. 171). When the dam was replaced the water was shut off. Fisher, who had just become an owner of land on the gulch (R. 275) missed the water and went upstream to find it, (R. 276, 293). He saw the dams and ditches of McNaughton. The dam had been recently replaced, and the ditches had been cleared. Fisher thought the dam and ditches were new construction (R. 281, 287). He took his shovel and diverted the water out of the McNaughton ditches, (R. 294) and then had McNaughton arrested. This precipitated the filing of this lawsuit, in which the trial court and the Supreme Court have both held that McNaughton's right is prior to the rights of any of the defendants.

It is clear from the evidence that McNaughton's ditches are large enough to take more than six c.f.s. of water at the same time, (Retrial R. 26). Even though McNaughton has diverted all of the water which has accumulated in the gulch, he has found it necessary to divert water from the Ashley Canal, in which he owns stock, and supplement the gulch water with it, (R. 29, 221, 101, 152). Since the stream varies even within the same day because of the practices of upstream irrigators, it is difficult for McNaughton to know when the water will be in the gulch and how much water he will have at any given time, (R. 158).

McNaughtons' land sloped to the gulch and there is a drain ditch along the entire lower (east) end of

the McNaughton land, (R. Ex. 1, Ex. A, 261, 262, Finding 10). If the tight dam under any particular circumstance should divert surplus water on to McNaughtons' lands it would return directly to the gulch. There is no place else it could go and both the drain ditch and the points at which the water would run on the surface to the gulch are upstream from all the defendants' lands. On a variable, unmeasureable stream, the manner in which the parties peaceably functioned all these years is probably the best method of handling the administration of the stream.

In any event, the prior or senior right of McNaughtons to take the water needed by his lands is totally defeated where on a variable stream the court limits him to a rigid schedule of hours and a maximum rate of flow as was done here. It assumes a constant flow of more than 2 c.f.s. If at any time during his 92 hour turn the flow is less than 2 c.f.s. he will not get his water. The court has found that the flow is variable and at times is negligible. In the face of this finding the rigid schedule of hours and the 2 c.f.s. limit cannot stand.

POINT III. THE COURT ERRED IN LIMITING THE IRRIGATION SEASON TO 150 DAYS.

The discussion under Point III is really inter-related with the discussions under Points IV and V, which relate to the issuance of an injunction against the plaintiffs and the fixing of a duty as low as 3.5 acre feet. We will refer here only to the basis of the court's order, and will

then relate the matter to the argument under Points IV and V.

In its original Memorandum Decision the court fixed the duty of water at 3.5 acre feet per acre per year, and the irrigation season at 180 days, (R. 51). The court had also made a mathematical error in its computation, and McNaughtons filed a motion for correction of the error and for reconsideration, (R. 53). The McNaughtons had called David I. Gardner, an engineer, as an expert on the duty of water. Mr. Gardner testified that in his opinion a 180 day irrigation season was desirable in the Vernal area, (Retrial 84). He noted that the McNaughton land was uneven and that irrigation of the high spots would require an excess application of water in the swales. He also noted various other criteria which affect the duty of water, and expressed his opinion that six acre feet of water per acre per year was necessary, (Retrial 22, 23, 48 and 75). The defendants called Mr. Christensen as an expert. He testified that three acre feet per acre would be necessary on the portions of the land which had good soil (Retrial 95) and that more water would be necessary on the portions of the land which had sandy soil, (Retrial 99). Defendants also sought to fix a 150 day irrigation season, (Retrial R. 113). We will have occasion to refer to his testimony again under the argument on duty of water, but we note here that in the court's original memorandum it accepted Mr. Christensen's testimony that 3 acre feet per acre was sufficient water and then accepted Mr. Gardner's testimony on the 180 day irrigation season, (R. 51). By rotating the use

of water on ten day turns McNaughtons would be given eighteen irrigation turns per 180 day season. The court's award of 3.5 acre feet of water per acre (42 inches per acre) when divided into eighteen turns, would allow only slightly more than two inches of water per irrigation turn. Even if the crops could absorb 100 per cent of the water applied to the land with no waste, this would not mature crops. Therefore, in order to avoid an anomalous result, we urge the court to either increase the amount of water so that in each of the eighteen turns more water could be applied, or in the alternative to shorten the season, (R. 59). The court refused to increase the amount above 3.5 acre feet, but did cut the length of the season.

The evidence shows that the 150 day turn will prove too short. Gardner said that the growing season for corn and alfalfa is 180 days, (Retrial R. 8). Defendants' witness Turner did not know the growing season, (Retrial R. 105). McNaughton testified that the season might in some years begin as early as March on pasture land and in some years continue as late as November, (Retrial R. 110). Defendants' witness Hacking said the "frost free" period is generally between May and September, but sometimes it is earlier, sometimes later, (Retrial R. 112). He said he begins to irrigate in the spring "when we can get the water" and it generally comes down about the first of May, (Retrial R. 112). He irrigates until October, (Retrial R. 113). On cross-examination he admitted that after dry winters earlier irrigation might be needed, (Retrial R. 117), and that they irrigate their lawns about April 15th, (Retrial R. 117). He also said

there are seasons when it is beneficial to water the pastures until "the end of October", (Retrial R. 117) and that a late irrigation of alfalfa is very desirable and that this should be done after "the frost is severe enough, so that your growing season has stopped." (Retrial R. 117).

This is all the evidence on the length of the growing season. Every witness testified that in some years water is needed in April and some in March. Every witness also saw value from irrigating in October.

The injunction issued has had the effect of awarding all of the April and October water to the defendants, whose lands are in the same 320 acre half section, as are the plaintiffs. If plaintiffs do not need this early and late water, neither do defendants, and plaintiffs should not have been enjoined.

We thought at the trial and think now that it is beneficial to irrigate the lands as late in the Fall as water is available. Defendants apparently think so too, because they definitely wanted the plaintiffs restricted by injunction to a short irrigation season. But they wanted to be free from any like restriction on their use and strenuously objected to a finding that it was not beneficial to irrigate *their* lands before April 25th or after September 22nd. Defendants have thus succeeded, without proving any water right, in limiting the plaintiffs to a 150 day season, with an injunction which has the effect of awarding defendants all of the waters of McNaughton

Gulch between September 22nd and the following April 25th. They can have the plaintiffs punished for contempt, even though plaintiffs are not interfering with defendants or their rights. This short season enforced by an injunction, we believe is error.

POINT IV. THE COURT ERRED IN PLACING ANY INJUNCTIONS AGAINST THE PLAINTIFFS.

We consider it to be fundamental law that no one is entitled to have an injunction unless he can first show that he has a valid right which will be interfered with unless the injunction issues. It would be difficult to find a principle of law more clearly established and so free from conflict in the general authorities. In this case, the plaintiffs after having told the court (Retrial R. 123) defendants after having told the court (Retrial R. 123) attempted to prove any water right at all, were granted an injunction. They do not ask for an injunction in their pleadings, (R. 8). The injunction entered did not simply enjoin the plaintiffs from interfering with the defendants' rights, because defendants had not proved, and did not even attempt to prove any rights. The injunction was more general, making the plaintiffs subject to a contempt citation if they use water beyond their rights. There are two fundamental elements necessary to sustain an injunction, both of which are totally lacking here. First, the defendants have not shown that they have any right whatsoever which needs to be protected by an injunction, and second, there is no showing that there will be irreparable injury to the defendants if the plaintiffs

use water in a manner different from that decreed. There also is an affirmative injunction which orders the plaintiffs to install and maintain at their own expense bypass facilities past their various dams. The authorities leave no doubt concerning the error of the court in this regard.

The subject is treated generally by numerous texts. In 43 C.J.S. page 424 ff, the subject is generally discussed. It is noted in Section 15 that the power to issue injunctions should be exercised “with great caution”, and only where the reason and necessity therefor are “clearly established”. Then in Section 19 it is stated:

“The existence of a right violated is a *pre-requisite* to the granting of an injunction; an injunction will not issue to protect a right not in esse and which may never arise.”

In general text supporting the above statement it is noted:

“Where it is clear that the complainant does not have the right that he claims he is not entitled to an injunction either temporary or perpetual to prevent a violation of such supposed right.”

It is pointed out that injunctive relief is a “*remedy*” and not in itself a cause of action, and that a cause of action must always exist before injunctive relief can be granted. See also Story’s Equity Jurisprudence 1233.

The Utah Supreme Court, consistent with the above rule, has always required that there be a right in the nature of a property right owned by the complainant

before equity will grant an injunction. For that matter, the cases from all of the states are entirely in harmony with the general text statements cited above. In *Old Telegraph Mining Company v. The Central Cement Company*, 1 Utah 331, an action was sought to enjoin the defendant from a trespass upon a certain mining claim. The defense was that the plaintiff did not own the claim. Although there was no showing that the defendant owned the claim, the court denied the injunction, stating:

“In order to entitle the plaintiff to the relief asked where that relief is injunctive only, the title of the plaintiff to the property said to be trespassed upon, must be clearly shown and be undisputed or steps taken to establish the title by action at law, or valid and satisfactory reasons be shown for not doing so.”

The rule was restated and applied in *McGregor v. Mining Company*, 14 Utah 47. Again the property involved was a mining claim. The court said:

“Ordinarily, this remedy by injunction will not be exercised when the right of the complainant is doubtful and has not been settled at law. Even when it has been settled, an injunction will not be granted when the remedy at law is adequate.”

See also *Salt Lake City v. Salt Lake City Water and Electric Power Company*, 25 Utah 457, 71 P. 1069, in which the court said:

“At common law a riparian owner below was entitled to no redress against his neighbor above for the use of water when no injury resulted * * * and in this regard there is no change under the

law of appropriation. Indeed it would be contrary to the universal sense of mankind to permit redress where there has been no wrong * * * so long as his use is neither interfered with nor abridged, an appropriator has no just cause to complain, although another appropriator above him also uses the same water for a beneficial use.”

In *Dameron Valley Reservoir and Canal Company v. Bleak*, 61 Utah 230, 211 P. 974, plaintiff brought an action to determine the respective rights of plaintiff and defendant to certain waters. The court noted that both parties had proved that they diverted some water from the stream, but that the defendant had the prior right. The court said:

“In Long on Irrigation in Section 113, the law is stated thus:

‘In order to entitle the claimant of a water right to an injunction for damages in an action for an alleged interference with his right, it must, of course, appear that his right has been invaded, and an injunction will not be granted in such an action to restrain the defendant from diverting the water of the stream in question where it appears that the water diverted would not have reached the plaintiff’s land even if the defendants had permitted it to flow in its natural channel.’ ”

In *Stauffer v. Utah Oil Refining Company*, 85 Utah 388, the plaintiff sought an injunction, complaining of excessive use of certain artesian waters by the defendants. The court denied the injunction stating:

“Before plaintiffs are entitled to an injunction or judgment for damages, they must establish by

a preponderance of the evidence, that they are not receiving the water to which they are entitled, and that the defendant by the acts complained of has wrongfully deprived them of such water.”

The Utah Court in the *Stauffer* case, *supra*, cited a California case (*Hudson v. Dailey*, 105 Pac. 784), with approval. There the court had said that the plaintiff’s remedy would not be to enjoin the use of water by defendant, but “to have the respective rights of the parties determined as riparian owners, and before plaintiffs could have the aid of the court to enjoin the defendants’ use they would have to show that use was in excess of their rights and resulted in the plaintiff’s injury.”

The authorities from other states are to the same effect. For example, in *King County v. Port of Seattle*, (Wash.) 203 P. (2d) 834, the court considered a petition for an injunction to prevent a certain cab company from getting the exclusive privilege to transport passengers. The court said:

“It is incumbent upon one who seeks relief by temporary or permanent injunction to show a clear, equitable or legal title and a well-grounded fear of immediate invasion of that right. Furthermore, the actions complained of must establish an actual and substantial injury or affirmative prospect thereof to the complainant.”

See also *Jacobs v. American Bank & Trust Company*, (Okla.) 68 P. (2d) 801, involving an injunction to prevent the defendant from selling certain lands claimed by plaintiff. After holding plaintiff had failed to establish title to the land, the court said:

“Plaintiff must have title to property or some interest therein before an injunction will be granted at his instance to protect it. And he must stand on the strength of his own title, rather than on the weakness of right and title claimed by his opponents.”

It is respectfully submitted that in law no person is entitled to an injunction except to protect a right which is clearly established. Here the defendants have told the court that they have proved no water rights and that they do not desire to try to prove any, (Retrial R. 123). Even had they proved a right and sought an injunction they would at the very most only be permitted injunctive relief to protect those rights. They would not be entitled to enjoin the plaintiffs from using public water or the waters of third persons. Defendants could not have an injunction except upon a showing that the plaintiffs' use would interfere with defendants' rights.

It may be asserted that the plaintiffs can not be heard to complain if they are awarded everything to which they are entitled. The answer is that an injunction is extremely onerous and burdensome. Even with an extremely stable stream, an injunction of this type would be a burdensome thing. If plaintiffs' 92 hours and 24 minutes ends when he is occupied by other things, he must nevertheless leave the things he might be doing and go to the land and release the water to the defendants. The injunction does not merely require plaintiffs not to take defendants' water—it orders plaintiffs affirmatively to release the water.

On a fluctuating stream the problem is much more acute. For example, plaintiffs may set their dams so as to take only the water allocated to them, but with the stream varying in flow from day to day, because of upstream practices, plaintiffs may find themselves in contempt of court unless they stay in personal attendance throughout the turn. A dam set to take two cubic feet of water from a stream will certainly take more water than two feet if the upstream irrigation practices cause the stream to rise. With a fluctuating stream, the problem can not be handled by an automatic divider. When the stream is low plaintiffs must put in a tight dam to take all of the water in the stream. Even with a tight dam, they will not get the two feet to which they are entitled when the flow is of a negligible amount. Still such a tight dam would place them in contempt of court if the stream rose to two feet, or more, in their absence. Thus on land of very low economic value the senior appropriators, who for fifty years have had the prior right to use the water, now find themselves obligated either to set their dams so low that even a rising stream will not divert more than two cubic feet, thus giving them less than 3.5 acre feet of water per year, or they must set their dams so that they will take exactly all of the water up to two feet of water and then remain in constant attendance for four days and nights so that the fluctuating stream will never throw on to their lands more than two c.f.s. of water.

If this were the only manner in which the defendants could be protected, there would be more argument for

it. But where as here the defendants have failed to prove that they have any water right at all and have failed even to suggest that such a rigid control on the plaintiff is necessary to prevent irreparable injury to the defendants, it is clearly error to place such onerous restrictions upon the plaintiffs.

It is doubtful that restrictions of this type could be justified even had the defendants proved valid water rights, because, first, the court has found and the evidence shows that the stream is not measurable and that the stream is fluctuating. In order to protect and assure to the plaintiffs their rights on such a stream, they must be given some latitude in the use of their water. Second, it is undisputed that McNaughton Gulch gains water throughout its length. Waters seep into the gulch below McNaughton's land and are available to the downstream users, including the defendants. Had defendants been required to prove the existence and extent of their rights, almost certainly their rights would have been filled without in any way restricting McNaughton during part of each year. Third, it is physically impossible for defendants' lands to need water in March, April, October and November, if the court is correct in its finding that McNaughtons do not. The lands are all within a one-half mile radius. They are on the same gulch, with a common fence line. The irrigation season simply must be the same for all the lands. How then can defendants possibly show "irreparable harm" to sustain an injunction from a use of water by McNaughton before April 25th or after September 22nd? If none of the parties could use water

beneficially before April 25th or after September 22nd, none of them could suffer "irreparable harm" from a use of that water by another.

Nor in the absence of some showing that somebody had a water right was it proper to order affirmatively that McNaughton at his expense construct and maintain by-pass facilities through his dams. The evidence is clear that for 48 years and more McNaughton has maintained tight dams across the McNaughton Gulch. Now without a showing that anyone else in the world has a right to any gulch water, or that these tight dams injure anyone, McNaughton is ordered to go to the expense of constructing and maintaining by-pass facilities and will be in contempt of court if he fails so to do.

The net result of this injunction is to award to the defendants (who did not want to prove any rights) all of the water of McNaughton Gulch not decreed to plaintiffs. Because plaintiffs are under an injunction, they can not divert water until April 25th, regardless of need. Thus, until April 25th all of the water in the gulch can forever be used by these defendants to the exclusion of the plaintiffs. The same is true after September 22nd.

It is well established under the water law of Utah that anyone can use the public waters of the State prior to the time they have been validly appropriated. (*Deseret Livestock Co. v. Howells Livestock Co.*, 259 P. 2d 607.) If none of the defendants have appropriated the water of McNaughton Gulch during the months of March, April, October and November, (and the record fails to

show that they have), then the waters are insofar as this record shows public water and the McNaughtons should not have been enjoined from using them if in their judgment their lands needed water that early or late. The law contemplates that they be free to use the water which otherwise would merely run to waste. Some of the defendants' own witnesses testified that application of water on alfalfa in the late fall season, after the growing season is stopped by frost, is beneficial to an alfalfa crop, (Retrial 117). There was also testimony that the use of water in the late season to wash alkaline salts from the land is beneficial, (Retrial 22). Further, if the waters accumulating in the gulch during the summer have not been appropriated, McNaughton should be permitted to use the water to suit his convenience. Also if use of a larger irrigation head (a larger rate of flow) would not interfere with the rights of anyone, he should not have been enjoined from using a larger head.

The ridiculous result which obtains from the trial court's opinion leaves the senior appropriators so restricted in their use of the water as to essentially deprive them of the benefits of their appropriation, and destroys their vested rights, while the defendants who have been adjudicated to hold inferior rights, have been granted an injunction which is tantamount to an award of all the water in the gulch. This, even though they did not ask for an injunction, and asserted to the trial court that they had not attempted to prove any water rights and that their water rights were not in issue. The cases cited above demonstrate that this injunction is fundamental and prejudicial error.

POINT V. THE COURT ERRED IN FIXING THE DUTY AT 3.5 ACRE FEET PER ACRE.

The matter of duty of water is discussed extensively by Wiel, "Water Rights in the Western States", beginning at page 522. He points out that many states have by statute provided minimums and maximums. Utah has not done so. Weil says that in the absence of statute, the matter is not settled at any particular level, but

"In determining the duty of water as applied to the conditions in any particular case, evidence should be from actual experiment and measurement, if possible. Opinion evidence is of less value than experiment, as to which the head of water influences its duty, the less the head, the greater the quantity needed to spread it over the land, and evidence should be as definite as possible."

He then goes on to discuss various factors which affect the duty, including loss in transmission, climate, soil conditions, large losses by percolation beyond the reach of plant roots, and the amount lost in necessary fluming.

The subject matter of duty of water is also extensively discussed in "Kinney on Irrigation and Water Rights", beginning on page 1591. He lists various factors which have been investigated by the Department of Agriculture tending to solve the problems as to the proper duty of water under all conditions.²

²(1) The quantity of water required by different crops; (2) The length of the irrigation period in different sections of the arid and semi-arid regions of the west; (3) The amount or divergence between the quantity of water used in irrigation in the different months of the growing season, and the rise and fall of streams during those months; (4) The benefits of reservoirs and the percentage of the total discharge

of streams which must be stored in order to utilize the whole supply; (5) Losses in canals from seepage and evaporation; (6) Influence of different forms of water right contracts in promoting economy or waste; (7) The return from the use in irrigation of an acre foot of water; (8) The head of water and the quantity entering the intake. He then proceeds with a discussion of the above items. He defines duty as "the quantity essential to successfully irrigate a definite tract of land."

He then says :

"The economical use of water might be carried to the extent that no crops could be raised or at least very poor crops. * * * But where an appropriator has a prior right to ample water to irrigate properly a certain tract of land, *the successful raising of the crops thereon should not be made to give way by an award of a quantity of water which would require too great economy in its use.* The object of these rules is to suppress, as far as possible, the waste of water, and an award of this nature *would be going to the other extreme and would require an economy in the use of the water at the expense of successful results.* The water supply of the country should be conserved to the greatest possible extent consistent with its successful use for all beneficial purposes for which it may be appropriated. Further than this we should not go." (Page 1594)

Kinney notes that no hard and fast rule can be made as to the duty of water; that the proper duty can only be determined from the facts surrounding each particular case. What might be the proper quantity of water for one tract might not be the proper quantity for another tract. Kinney has a very detailed discussion of all the conditions which should be considered, and of the wastage of water. He recognizes that economy in the use of water might be carried to the extreme so as to make the result ridiculous. We, of course, recognize

that a sprinkling system would more efficiently use the water than flooding the water, as is more commonly done. We recognize that ditches have greater seepage loss than pipelines; that level land will take less water than uneven land; that irrigating with a large irrigation head will permit more efficient use of the water than irrigating with a small head; that using the water with storage and equalizing reservoirs is more efficient than being required to take the water as it comes; that an irrigator in constant attendance can reduce excessive runoff on the surface, etc. It is always, therefore, important to keep in mind the nature of the economic use. Certain localities by their very nature do not justify irrigation practices which might be justified by the irrigation of row crops, a citrus orchard, or a hothouse.

The evidence is clear that the common method of applying water in Ashley Valley is to divert in ditches and apply the water by flooding on to the land. In the flooding of water upon the land, some waste is indispensable to reasonable results.

Utah Cases

The Utah Supreme Court is, of course, in harmony with the theory that the duty of water must be determined in each individual case in accordance with the particular facts of each case. For example, in *Jackson v. Spanish Fork & West Field Irrigation Company*, 223 P. (2d) 827, the Supreme Court approved the full-time use of 1 c.f.s. on only 19 acres of land. In *Big Cottonwood Lower Canal Company v. Cook*, 73 Utah 383, 274

Pac. 474, the court approved four acre feet per acre for irrigation purposes. In *Jensen v. Birch Creek Ranch*, 76 Utah 356, 289 Pac. 1097, the court held that one cubic foot of water to irrigate 10 acres of land was too high.

The closest Utah case to the one at bar from a fact situation is *Sharp v. Whitmore*, 51 Utah 14, 168 Pac. 273. This was an action to quiet title to the waters of Grassy Trail Creek in Carbon County. Whitmore, who was held to have the prior right, was the farthest upstream. After he irrigated his lands, waste waters returned by deep percolation and surface runoff to the stream and became available to the downstream users. The trial court found:

“That Grassy Trail Creek is a mountain stream flowing through Sunnyside Canyon and has a short, quick watershed, and *varies greatly in its volume of flow, one year with another, and at different times in the same year, and even upon different days.* That it is fed by mountain snow and mountain storms and furnishes no constant or uniform volume of flow or supply. That by reason thereof no duty of water extending through the season can be fixed, as the stream becomes entirely dry in the majority of years and the times when water ceases to flow depends each year on conditions as to precipitation and mountain storms, and the court finds that *for such reason it is necessary that each of the appropriators as hereto found use such quantity of water in the seasons of greatest flow of said creek as can be beneficially spread upon said lands,* and does find that the quantity above mentioned can be beneficially used by each of said parties. * * *”

The Supreme Court stated that there were two issues on appeal, one of which was:

“Did the court err in determining the duty of water on the lands described in the pleadings* * *”

Further reference to the trial court's findings discloses that Whitmore had 125 acres of land. The trial court allowed 4 cubic feet of water per second as a continuous flow to irrigate that land. The Supreme Court increased this to 5 c.f.s. (1 c.f.s. for each 25 acres). The Supreme Court considered practically all of the factors mentioned above by Kinney, that is, the nature of the crops, the fluctuating stream, the nature of the soil, transmission losses, where the return flow went after Whitmore used it, etc.³

³The court said:

“The evidence shows that the irrigated land (125 acres) * * * extends along and on either side of Grassy Trail Creek a distance of about one and one-half miles, and is divided into five fields. The slope or fall of the land is toward the creek channel. * * * It is conceded that ‘Grassy Trail Creek is a natural stream of water varying widely in the volume of its flow one year to another and at different times during the same season’. * * * The evidence without conflict shows that the soil of the irrigated portions of the Whitmore Ranch is a sandy loam underlaid with sand and gravel and ‘is of a character that requires considerable water for proper irrigation.’ The evidence further shows that the waste water and some seepage water from the irrigated lands flows into the creek channel. Joseph R. Sharp, respondent, testified on this point in part, as follows: ‘More or less of the water that is used upon the Whitmore Ranch during the high water season and during the irrigation season finds its way back into the channel of the stream by drainage and seepage and comes into the channel before it reaches my place. * * * There is no other place for it to go.’ * * *

“Caleb Tanner, a civil engineer, was called by plaintiff and testified that he was on the Whitmore ranch five or six hours, and observed the character of the soil and the size of the diverting ditches; that in his judgment ‘each separate ditch would carry as much as five cubic feet per second’; that, because of the loose and porous condition of the soil the ‘minimum head he would advise using on the hay lands would be five second feet in order to get over the territory.’ * * *

“* * * The positive testimony of practical farmers who have irrigated these lands for many years is to the effect that it requires a continuous stream of five cubic feet per second during the high-water season, and all of the creek after the flow of high water ceases to properly irrigate the lands to and including the month of July.”

The trial court, basing its opinion on conflicting evidence, limited Whitmore to 4 cubic feet per second continuous flow. The Supreme Court increased this to 5 cubic feet per second and said:

“We are of the opinion that the greater and overwhelming weight of the evidence shows that a continuous flow of five cubic feet of water per second during the irrigation season can be and has been for many years economically applied on the Whitmore Ranch, and that this amount is necessary to properly irrigate the land during that period. The case is therefore remanded with directions to the trial court to strike out the word ‘four’ and insert the word ‘five’ in its fourth finding of fact * * * and decreeing Whitmore to be the prior appropriator of, and entitled to divert, five cubic feet per second of the waters of Grassy Trail Creek. * * *”

Justice Frick, in a special concurrence says:

“* * * I have less hesitancy in arriving at the foregoing conclusion, and in concurring in the modification of the district court’s findings and decree, for the reason that the evidence leaves no room for doubt that a large portion of the water that is used on Whitmore’s land immediately finds its way back into Grassy Trail Creek, and thus becomes available to the plaintiffs whose lands lie below Whitmore’s lands. In modifying the findings of fact and the decree, therefore, no injustice can possibly result to the plaintiffs, while if Whitmore were limited to the use of four second feet of water only he might suffer irreparable injury. While in my judgment, ordinarily, this court should be slow to interfere with the findings of fact and decrees of the trial courts in water cases, yet when, as here, injury might result if

the findings and decree were permitted to stand and no injury can result by modifying them, as is done in the opinion of Mr. Justice McCarty, it, in my judgment, becomes the duty of this court to make the modification.”

In my opinion, the two cases are a direct parallel in the following particulars:

1. In both cases the stream varied in flow from year to year, season to season, and day to day. See Findings 5 and 6 here and compare with Finding 9 on page 18 of Volume 51, Utah Reports.

2. In both cases it is necessary to take the water as it comes. In neither case was there any available storage and as found by the District Court in the Sharp case, because the stream flow varies, “it is necessary that each of the appropriators * * * use such quantity of water in the seasons of greatest flow of said creek as can be beneficially spread upon the lands.”

3. In each case the drainage from the lands irrigated is back to the source. The evidence is not contradicted in this case that McNaughton’s lands lie along either side of the gulch with the drainage back to the gulch. Ex. 1 and A, Finding No. 10.⁴

⁴Finding 10. “That at the lower end of this north gulch there is a drain ditch which commences a few feet north of the north gulch and extends across the east end of the McNaughton property and empties into the McNaughton Gulch; that the slope of the land is from the north gulch to the McNaughton Gulch, so that any water flowing into said drain ditch will flow into the McNaughton Gulch; that the drain ditch crosses over the most westerly ditch used by any of the defendants leading from their upper point of diversion and said drain ditch empties the waters into the McNaughton Gulch above all other points of diversion of the defendants from the McNaughton Gulch.” (R. 72)

In the *Sharp v. Whitmore* case, supra, it was this particular factor which induced the Supreme Court to increase the award from 4 to 5 c.f.s. As noted by Justice Frick in his special concurrence, it could in no way prejudice the downstream users if Whitmore were given too much water, but would irreparably harm Whitmore if he were given too little.

4. The next similarity between the *Sharp v. Whitmore* case and the case at bar is that the land is underlaid with sand and gravel in both cases, and both involved sandy soil. Here there is a conflict as to the extent of the sandy soil on McNaughton's farm, but all of the witnesses testified that at least part of the McNaughton farm is sandy. Engineer Gardner classified practically all of the McNaughton farm as being of sandy loam, (Retrial 25). Some of the defendants' witnesses testified that certain areas were sandy and part clay, (Retrial 99). There was no conflicting evidence as to the nature of the subsoil. Gardner, the only witness who testified on this point, testified that in the bottom of the gulch there is a bed of gravel which is causing the water to accumulate in the gulch. He said that the gravel underlaying the McNaughton farm is such that it would carry great quantities of water back to the gulch, and because of this he was of the opinion that the ground water level would not substantially increase even under heavy irrigation, (Retrial 15).

5. The court can take judicial knowledge of the location of Grassy Trail Creek in the east end of Carbon

County. The elevation is very similar to that of Vernal. The area of Grassy Trail Creek is not very far removed from the Vernal area, and certainly the climatic conditions are similar.

McNaughton testified at the previous trial (R. 152 and 221) that by using all of the water accumulating in the gulch he did not have sufficient water to irrigate his land. Defendants' witness Hoeft said McNaughton always kept a tight dam and used all the water, (R. 101). Witness Lee testified that McNaughton used all of the water accumulating in the gulch and still his land burned, (R. 29). Because there has not been enough gulch water, McNaughton has always maintained some canal stock. By releasing the water coming to him under his canal stock, and commingling it with the waters of the gulch he was able to get a large enough irrigation head and enough water to permit efficient irrigation and also to mature his crops. The Record stands without dispute that McNaughton has consistently released his canal water in order to permit him to water his lands adequately, (R. 152-3). He did have some canal stock, which he rented, (R. 154) but he always reserved part of his stock and the waters accumulating under it to supplement the waters from the gulch. We think that it is conclusively established that during part of every normal irrigation season McNaughton is not able to get sufficient water from the gulch to permit him to adequately irrigate his place. If he is restricted to 92 hours each ten days it is certain his lands will burn.

We have the opinion of Engineer Gardner that the McNaughton lands require 6 acre feet of water per acre. The basis of his opinion showed that he did take into consideration the factors which the Supreme Court has said were important, (Retrial 20). Witness Christensen, who also is an engineer, testified that in his opinion this land could be efficiently irrigated with 3 acre feet per acre on the clay parts, (Retrial 93), but that more would be needed on the sandy parts, (Retrial 99). This witness admitted that in all of Ashley Valley under the Ashley Valley Upper Canal, an allowance of 3 acre feet per acre from the canal is made and that when they kept records it worked out that they got 3 acre feet per year, (Retrial 92). He also testified that reservoir stock was used to bring the amount up to 3.2 c.f.s., (Retrial 93). He and every other witness who testified on the matter confessed, however, that this did not prove adequate in ordinary years. Defendants' witness Lewis, who testified concerning his useage from the canal and reservoir stock at the final hearing, stated unequivocally that the water right thus provided was not adequate, (Retrial 87). Even Mr. Christensen, who gave as his opinion that 3 acre feet was enough, testified on page 259 of the record at the former trial that the 3.2 acre feet was not enough. His testimony was as follows:

“Q. Now when asked by Mr. Colton whether or not the Ashley Valley Canal stock, one share of it irrigated ten acres, you said it would during the first part of the season. I ask you now, will it during the late part of the season.

A. I think the answer was it would during the first part of the season.

Q. Yes. Now my question is, would it during the late part of the season?

A. Ordinary years, no.”

Therefore, while the experts who have given their opinions vary somewhat, even the defendants’ expert confesses that on the sandy soil more water would be necessary, and that 3.2 acre feet is not adequate in Ashley Valley as a whole during ordinary years.

Every single witness who testified on the subject, whether for the defendants or for the plaintiffs, testified that McNaughton for half a century maintained tight dams in McNaughton Gulch and took all of the water which accumulated therein, (R. 12, 15, 19, 63, 73, 100, 140). The trial court also so found, (R. 71). These dams diverted out on to the McNaughton lands all of the waters accumulating in the Gulch. Notwithstanding this, the defendants’ expert, Mr. Christensen, admitted that the high spots on the McNaughton ground appeared to be underirrigated, but that the low spots were overirrigated, (Retrial 100). This is in harmony with the testimony of Gardner that in irrigating uneven land you must overirrigate the low spots to cause water to seep into the high spots, (Retrial 10). With all the water running on to his land McNaughton has testified that he has not had enough water, (R. 152), and many witnesses testified, and the defendants now contend that McNaughton has

been compelled through shortage of water at his points of diversion to supplement the gulch water with water diverted from the Ashley Canal under his canal stock, (R. 29, 221, 101, 152). Still another independent witness testified that with all the water being diverted from the gulch by tight dams, the McNaughton lands burn, (R. 29). We have already detailed all of the evidence above showing the length of the irrigation season in Vernal and under which every witness admitted that some irrigation in early April and late October was beneficial.

In the face of this testimony the court has awarded McNaughton the right to take the water only four days out of ten, thus giving him water only 40 per cent of the time where for fifty years he had had the tight dams and taken all the water all of the time. Further, during the limited time that McNaughton can take the water he must never take more than two cubic feet per second. Historically he has taken larger amounts when they were available, because during parts of every day and every season the flow varies and at low flow it goes down to a point where the quantity available is of a negligible amount.

McNaughton thus, having proved a senior appropriation with 48 years of uninterrupted use of all the water in the stream, has by restriction had nearly 80 per cent of the water he has historically used taken from him. Historically he used the water in April, October and November. He is prohibited from using water dur-

ing any of these months and during the last week in September. So he has lost the early and late water and has had the water totally taken from him six days out of every ten during the summer. Further, during the four days when he is permitted to use it he can never take more than 2 c.f.s. It is, therefore, crystal clear that nearly 80 per cent of the water he has historically used has been taken from him by the court's order. Since with 100% of the water going to his lands, he still found it necessary to use canal water it seems clear that his lands will burn from getting only 20% of the amount he has historically used.

In the last analysis with his lands straddling the Gulch and sloping to it and with a large drain ditch at the lower end of his land, it is impossible that he can injure the defendants. Even had they proved a water right, it is not possible for McNaughton to take from the Gulch more water than his lands can retain. The slope is to the Gulch and the drain ditch on the lower end of his field returns any runoff to the gulch upstream from any of the points of diversion used or claimed by any of the defendants. By referring as we do to the surface runoff, we do not imply that surplus water is applied. In irrigation by flooding there must always be some waste, and this waste water must in this case return to the gulch. If the waste water ever were excessive McNaughton could not hold it from the defendants, because Nature puts it back to the source. As the court held in the Sharp case discussed above, there can be no harm to the defendants from a duty fixed too high, but

there will be irreparable harm to McNaughton if it is fixed too low.

POINT VI. THE COURT ERRED IN REFUSING TO PROTECT McNAUGHTON'S RIGHT TO THE CANAL WATER AND TO FREE IT FROM THE RESTRICTIONS.

The Supreme Court has already held that the waters in McNaughton Gulch come there from five sources. Three of the sources are public waters. The other two are owned by McNaughton because they are in his control under previous appropriations. These last two are return flow to the gulch from his own irrigation and canal water. The defendants have never contended, nor could they, that they own any interest whatsoever in plaintiffs' canal stock. The plaintiffs should be free to use their water under the canal stock whenever the rules and regulations of the canal will permit them so to do. There should be no restriction as to water released by McNaughton from the canal. Also the restriction to two cubic feet should not apply. If there were at any given moment two feet of water in the gulch McNaughton should be permitted to add his canal water to it to give him a better irrigation head. We attempted to have the trial court enter findings and conclusions which would free McNaughton's canal water from the restrictions and to adjudicate that none of the defendants had any interest in the canal water. The trial court erroneously struck

these matters from the proposed findings, conclusions and decree.

POINT VII. THE COURT ERRED IN CUTTING DOWN THE IRRIGATED ACREAGE TO 66.03 ACRES.

As noted under Point I of our brief, the matters previously determined by this court have become the law of the case. The trial court found on the original trial that all of McNaughton's 80 acre tract was irrigated except seven acres, (Finding 9, R. 13). The Supreme Court said expressly that the water was used in 1903 about as it now is. When the defendants tried to introduce evidence relating to the question of irrigated acreage, I objected on the grounds that this matter had already been settled by the trial court's previous finding which had been affirmed by this court, (Retrial 86). This was argued at length before the trial judge and then he sustained my objection refusing to permit the parties on retrial to again examine the question of irrigated acreage.

Then without notice to either party, the Judge on his own motion reduced the irrigated acreage from 73, as covered by his original finding 9, to 66.03. The Supreme Court has already found that the gulch was from three to five rods wide—thus at its narrowest point it is 50 feet wide and at its widest point it is 85 feet wide. It is occupied in the bottom by a very small stream. The approximately seven acres which lie within the gulch

require water. The court noted in its original findings, (Finding 11, R. 13) that the bottom of the gulch was filled with forage. Obviously the water to sustain this growth must come from seepage from irrigation of upper lands. If the court cuts down the quantity of water needed by these upper lands to their bare needs, then the surplus which would run from said lands to irrigate this seven acres within the gulch just will not be available.

The court has thus found that land of this character needs 3.5 acre feet of water per year. It has found that all of the land is arid by Nature, (Finding 13, R. 73). It has then subtracted seven acres, because they are within the gulch. Clearly these seven acres must be irrigated from the runoff from the other lands. Yet in this manner we have been deprived of water for seven acres of land.

We think this error is all the more obvious because the trial court ruled on the retrial that he would not reconsider his Finding No. 9 (Retrial 86) which related to this matter of acreage. Plaintiffs had no warning whatsoever that the court had reconsidered this matter. There is no evidence whatsoever which will sustain the finding of the court to the effect that the bottom of the gulch does not need water and his findings are to the contrary.

SUMMARY

By the various limitations as to season, quantity, period of use, duty, etc., the district court has taken from us nearly 80% of the water we have historically used.

We respectfully submit that these restrictions must be lifted and the duty increased and the rate of flow increased so that McNaughton who has had the senior right for half a century will not have it taken from him by junior appropriators who refused to prove any rights. The injunction awarding the stream to the defendants must be lifted until they prove a right which has been or will be invaded causing them irreparable harm. parable harm.

Respectfully submitted,

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