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No. 887.

Filed Oct 6. 1942

W. T. Mathews
Clerk.

Deputy.

IN THE FIRST JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA,
IN AND FOR THE COUNTY OF DOUGLAS

IN THE MATTER OF THE DETERMINATION OF THE)
RELATIVE RIGHTS IN AND TO THE WATERS OF)
MCFaul CREEK AND ITS TRIBUTARIES, IN)
DOUGLAS COUNTY, STATE OF NEVADA.)

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND DECREE

The above entitled matter came on regularly for hearing in the above entitled Court on the 7th day of July, 1942, before Honorable Clark J. Guild, District Judge of said Court presiding, the whole of said stream system being within said Douglas County, State of Nevada, and he being the Judge designated by statute to hear and having jurisdiction to hear said matter, upon the State Engineer's Final Order of Determination of the relative rights of the claimants and appropriators to the use of the waters of said stream system of McFaul Creek and its tributaries, which Final Order of Determination had been duly filed by said State Engineer herein; there being no exceptions to said Final Order of Determination filed or otherwise submitted to the Court by the hereinafter named claimant or any other person or persons, the Court proceeded to hear the matter and to take such testimony as it deemed necessary herein.

W. T. Mathews, Deputy Attorney-General of the State of Nevada, appeared in said hearing and proceedings on behalf of the State of Nevada and the State Engineer of said State, and

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Mr. Paul Saltow appeared for and on behalf of claimant, Arthur K. Bourne.

The Deputy Attorney-General thereupon, at said hearing, offered and there were received in evidence in support of the rights of the claimant, as set forth in said Final Order of Determination, the sworn statements of the claimant, verified affidavits, files, and records of the State Engineer's Office respecting the rights of said claimant to the use of the waters of said stream system, including also the cultural map establishing the cultural area involved, the diversion ditch, and the kinds and character of lands irrigated by said claimant, together with the oral testimony of Hugh A. Shamberger, Assistant State Engineer of the State of Nevada, explaining said maps and other files and records so introduced in evidence.

The Court, having duly considered the entire record and evidence so introduced and there being no exceptions filed by claimant and/or any other person or persons to the Final Order of Determination of the said State Engineer, and being fully advised in the premises, now makes and enters its Findings of Fact, Conclusions of Law, and Judgment and Decree herein.

FINDINGS OF FACT

I.

That on June 19, 1939, George B. Thatcher, Attorney at Law, of Reno, Nevada, representing Arthur K. Bourne, petitioner and claimant herein, filed with Alfred Merritt Smith, State Engineer of the State of Nevada, a petition requesting the determination of the relative rights of claimants to the use of the waters of McFaul Creek and its tributaries in Douglas County, Nevada.

That the State Engineer, through his assistant, Hugh A. Shamberger, thereupon and in accordance with the provisions of Section 18 of the Water Code, being Section 7905, Nevada

1 Compiled Laws, 1929, made an investigation of the facts and
2 conditions of and concerning said McFaul Creek and its tributaries
3 for the purpose of disclosing whether the determination of said
4 rights was justified and filed his report thereon with the State
5 Engineer on July 6, 1939. That said report of said facts and
6 conditions disclosed that a determination of said relative
7 rights was justified, and said State Engineer thereupon made and
8 entered his order on July 11, 1939, granting said petition for
9 the determination of said relative rights in and to the waters
10 of McFaul Creek and its tributaries.

11 That as a result of said investigation it was found
12 that Arthur K. Bourne was the only known water user on said Mc-
13 Faul Creek stream system and its tributaries; that on July 13,
14 1939, said claimant, by and through his attorney, George B.
15 Thatcher, pursuant to the provisions of Section 36b of the
16 Water Code, being Section 7925, Nevada Compiled Laws, 1929, did
17 waive in writing the provisions of the Water Code in reference
18 to notices and the service and publication thereof, all as
19 provided in Sections 18 to 31, inclusive, of the Statutes of
20 1913, the same being Sections 7905 to 7918, inclusive, Nevada
21 Compiled Laws, 1929, as amended and supplemented, so that the
22 State Engineer could make a Final Order of Determination without
23 the giving, serving or publication of any notices required in
24 said Act for the purpose of filing the same with the District
25 Court in the manner prescribed in Section 34 of said Water
26 Code, the same being Section 7921, Nevada Compiled Laws, 1929,
27 as amended.

28 That Norman DeVaux, predecessor in interest of Arthur
29 K. Bourne, had, on September 26, 1921, filed with the State
30 Engineer his proof of appropriation of water from McFaul Creek
31 for irrigation and domestic purposes and supporting map, and
32 that said proof and map had been assigned Serial Number 01768.

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That on September 4, 1941, Arthur K. Bourne filed his amended proof of appropriation of water with supporting map under Serial Number 01768 for irrigation and stockwatering purposes from McFaul Creek and tributaries.

That on September 4, 1941, there was filed affidavit of Ed. McFaul in support of the vested rights of Arthur K. Bourne.

That thereupon the State Engineer, in accordance with the provisions of Section 36b of the Water Code, being Section 7925, Nevada Compiled Laws, 1929, made up in typewritten form and entered in the records of his office, on October 30, 1941, a Final Order of Determination defining the only right to the waters of said McFaul Creek stream system and filed a certified copy of said order herein on November 14, 1941, together with the original evidence taken by and filed with the State Engineer.

That the State Engineer on the 13th day of November, 1941, mailed to Arthur K. Bourne, the claimant and only known water user on McFaul Creek and its tributaries, in care of Paul Saltow, a certified copy of said Final Order of Determination.

That upon the filing of said Final Order of Determination and said evidence with the Clerk of this Court, and on or about the 17th day of November, 1941, this Court made and entered an order setting a time for hearing of exceptions to the said Final Order of Determination at the hour of 2:00 o'clock P.M. on January 5, 1942, at the County Court House at Minden, Nevada, all as provided in Section 34 of said Water Code, being Section 7921, Nevada Compiled Laws, 1929, as amended, and therein ordered that any and all parties in interest who were aggrieved or dissatisfied with said Final Order of Determination so filed should file with the clerk of said Court and serve upon or

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transmit to said State Engineer by registered mail notice of exceptions to said order at least five days prior to the date set for said hearing.

That the State Engineer thereupon, on or about the 21st day of November, 1941, gave notice to Arthur K. Bourne, the claimant and only known water user on McFaul Creek and its tributaries, by service of a certified copy of a certified copy of the order setting time for said hearing.

That the State Engineer of the State of Nevada, in accordance with Section 34 of the Water Law, also caused said last mentioned order of the Court to be published at least once a week for five consecutive weeks in the Record-Courier, a newspaper of general circulation published in Douglas County, Nevada, commencing with the issue of November 28, 1941, and ending with the issue of December 26, 1941, the said newspaper being published in the County within which said stream is located, and that thereafter the State Engineer filed with the Clerk of this Court proof of such service by registered mail and by such publication.

That the original time of hearing of exceptions to the Order of Determination as fixed by the Court for January 5, 1942, at the hour of two o'clock P.M. was postponed, and on July 1st, 1942, by order of the Court set for the 7th day of July, 1942, at two o'clock P.M. in the Court House at Minden, Douglas County, Nevada. Notice dated July 1st, 1942, of said hearing was sent by registered mail to Arthur K. Bourne, the only known water user of the waters from McFaul Creek and its tributaries. Proof of such service was filed with the Clerk of this Court.

The Court finds that all and singular the proceedings, orders and notices required by said Water Code of this State were duly had, made and given herein as required by law, and

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that all and singular the matters and things in said record contained were done, performed, given and made in strict accordance with said Water Code, and that this Court had and has jurisdiction to hear and determine said matter.

II.

The Court finds that McFaul Creek and its tributaries is located wholly within Douglas County, State of Nevada, originating approximately near the northeastern part of Township 13 North, Range 18 East, M.D.B.& M., at an elevation of about 8,000 feet, and flows in a southwesterly direction and enters the lands owned by Mr. Bourne near the northeastern corner of Section 15 of said township and range and continues on in a southwesterly direction to the lands on which the waters are placed to beneficial use.

III.

The Court further finds that the stream system's flow is typical of many small streams and creeks existing in the State of Nevada; that in the Spring when the snowfall is normal, the flow from the melting snow added to that from its natural source of water supply provides a supply of water sufficient to serve all the hereinafter decreed water rights; that this flow of water usually continues only for a comparatively short period of time in the Spring and early Summer, and that thereafter when the flow from melting snow is at an end, the only supply of water for said claimant is derived almost entirely from the natural source of water supply.

IV.

The Court further finds that the climate where the lands of claimant are situated is dry and semi-arid and that it is necessary to irrigate said lands in order to produce crops thereon, and it is necessary that water be provided from said McFaul Creek stream system for the purpose of irrigation.

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V.

That the name of the claimant and appropriator set forth in said Final Order of Determination, the source of water supply, the means by which the water is secured from such source and applied to beneficial use, the year of priority, the legal subdivisions and classifications of lands, the length of the irrigation season, the provisions for the installation, maintenance and regulation of headgates and control works, measuring devices, designation of ditches and channels, the duty of water, and the provisions for rotation of use of water, and the provisions as to any junior rights, all as set forth in said Final Order of Determination, are true, proper and correct, and all and singular the same should be approved and confirmed.

VI.

PRIORITIES

The Court further finds that the priority under this proof, No. 01768, is hereby found to be and fixed at the Year 1870.

VII.

CLASSES OF LAND

The Court also finds that there is one class of land served with water from said McFaul Creek stream system, which is hereby designated as Meadow Pasture land, and consists of all lands listed under said Proof No. 01768.

VIII.

IRRIGATION SEASON

The Court further finds that the water heretofore appropriated for irrigation purposes was used during the commonly known Summer irrigation season; and the Court finds that the irrigation season should begin on May 1st and end, or should end, on September 30, both dates inclusive, being an irrigation season of the length of 153 days, except when climatic conditions are

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such that irrigation during the said period is not in accordance with good husbandry and actual beneficial use of water, in which event the State Engineer should determine by examination at the beginning of the irrigation season and thereupon set the date for the beginning of said season and the ending thereof, giving due notice to parties concerned therewith.

IX.

DUTY OF WATER

The Court further finds that the duty of water on said lands herein shall be at the rate of not to exceed 0.0132 cubic feet per second continuous flow, or 4 acre feet per acre during the irrigation season of 153 days.

X.

MEASUREMENT OF WATER

The Court further finds that all water diverting from McFaul Creek and its tributaries for irrigation purposes in accordance with the rights as herein defined shall be measured at the point where the water in each main ditch first becomes appurtenant to the land to be served, or as near thereto as practical.

XI.

HEADGATES AND CONTROL WORKS

The Court also finds that it is for the best interests of the claimant herein that substantial headgates and control works, and weirs to facilitate the measurement and control of water, should be installed wherever and whenever necessary to insure the proper distribution of said water in accordance with the hereinafter decree of water rights.

XII.

ROTATION IN USE OF WATER

The Court further finds that the claimant herein named, or any of his successors in interest and/or assigns, should have

1 the right to rotate the use of water to which he or they may be
2 entitled, between the various ditches diverting water from said
3 stream system; provided, that whenever any of the lands as
4 listed in said Final Order of Determination are irrigated with
5 waters of more than one source, the right to such combined use
6 of said water from all of said sources of supply should not
7 exceed the duty of water as allowed herein for said lands.

8 XIII.

9 CHANGE OF PLACE OF USE

10 The Court further finds that all waters allocated in
11 said Final Order of Determination shall be appurtenant to the
12 place or places of use designated therein; and the Court further
13 finds that in the event it is desired to change the point of
14 diversion, manner of use and/or place of use of said waters as
15 so allocated, the claimant or water user must make application
16 to the State Engineer for permission to change such point of
17 diversion, manner and/or place of use according to law.

18 XIV.

19 JUNIOR RIGHTS

20 The Court further finds that no person holding a right
21 of appropriation not listed in said Final Order of Determination
22 or hereinafter listed in the Decree of this Court shall be
23 entitled to receive any water from said McFaul Creek or its
24 tributaries until all appropriations in said Final Order of
25 Determination and in said Decree have been fully satisfied.

26 XV.

27 RIGHTS OF APPROPRIATION

28 From the said Final Order of Determination and the
29 evidence, both oral and documentary, submitted in support thereof,
30 the Court finds that the name of the claimant and appropriator
31 of the waters of McFaul Creek and its tributaries, the source of
32 water supply, the means by which water is secured from the source

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of supply for beneficial use, the point of diversion, the year of priority, the cultural acreage and/or place of use, the legal subdivisions, section, township and range, and the duty of water, all as listed, stated and set forth in said Final Order of Determination, are proper, full, true and correct, and that the same should be and hereby are confirmed, settled and allowed as therein fully set forth.

CONCLUSIONS OF LAW

From the evidence presented and received in this said matter and from the foregoing Findings of Fact, the Court makes the following Conclusions of Law:

I.

That the State Engineer had the right, authority and jurisdiction under the Water Code of this State, i.e., Sections 7890 to 7978, inclusive, Nevada Compiled Laws, 1929, as amended, to make the investigations made by him, conduct the hearings had by him, receive the proofs and maps received by him, hear the evidence presented to him, and to prepare, make, enter and file in his office the original of said Final Order of Determination and file a certified copy thereof in this Court, and to determine in said Final Order of Determination the relative rights of the water users of said McFaul Creek stream system and its tributaries; that said State Engineer duly made all orders necessary and proper in connection therewith and entered the same in his office as required by said Water Code; that each and every notice required by law to be given herein to the claimant and appropriator was duly given by the said State Engineer in the manner and at the time required by law, and that said notices contained all the statements required by law, and that the claimant and appropriator of the waters of said McFaul Creek stream system and its tributaries duly received the information and notices requir-

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ed by law herein.

II.

That this Court had jurisdiction to hear and try this said matter and has jurisdiction to find, make and enter the foregoing Findings of Fact and these Conclusions of Law and enter its Decree herein.

III.

That Arthur K. Bourne constitutes the claimant and the only claimant who was and is appropriator and user of the waters of the said McFaul Creek stream system and its tributaries on the date the Final Order of Determination was filed with the Clerk of this Court and on the date of the trial and hearing of said matter.

IV.

That the said Arthur K. Bourne as claimant and appropriator of the waters of the McFaul Creek stream system and its tributaries, by and through the ditch named, and his successors in interest, are claimants and appropriators of and to the waters of the said stream system; that said Arthur K. Bourne and his predecessors in interest continuously from the date of said appropriation or priority, when such water was available for beneficial use, diverted all of such quantity of water from said McFaul Creek stream system and its tributaries and applied the same to beneficial use as alleged in said Final Order of Determination.

V.

That the duty of water should be fixed in the Decree as 4 acre-feet per acre for the irrigation season for all lands classified in said Final Order of Determination.

VI.

That all of the water allotted in the Decree should be appurtenant to the lands designated therein and in the event

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that claimant and/or his successors in interest desire to change the point of diversion, manner and/or place of use of the waters therein allotted, such water user must make application to the State Engineer for permission to make such change in the manner as provided by the Water Code of the State of Nevada.

VII.

That the relative priority or rank of the right to appropriate the waters of McFaul Creek stream system and its tributaries as listed in the Decree shall govern and be recognized at all times hereafter; and that no person or persons holding a right of appropriation in and to the waters of said stream system not listed in said Decree shall be entitled to receive any water from said stream system and its tributaries until all appropriations in said Decree set forth have been fully satisfied.

VIII.

That except where specifically otherwise ordered herein, and/or in said Decree, the Final Order of Determination made, filed and caused to be entered of record in this said matter by the State Engineer, should be affirmed.

JUDGMENT AND DECREE

THEREFORE, BY REASON OF THE FINDINGS OF FACT AND CONCLUSIONS OF LAW HEREINBEFORE SET FORTH, IT IS ORDERED, ADJUDGED AND DECREED BY THE COURT AS FOLLOWS:

I.

That the State Engineer made all necessary and proper orders herein as required by law, and that each and every notice required by law was duly given to the claimant and appropriator; that said claimant and appropriator had full opportunity to appear and be heard in objection to and to file exceptions to the

1 said Final Order of Determination herein; that said claimant
2 and appropriator is the only claimant and appropriator of the
3 waters of McFaul Creek stream system and its tributaries.

4 That this Court has full and complete jurisdiction
5 to hear, try and determine this matter and to make and enter
6 herein this Decree.

7 II.

8 That, except such persons as may have acquired or
9 may hereafter acquire rights to the use of the waters of the
10 McFaul Creek stream system and its tributaries granted under
11 and pursuant to application to the State Engineer under and
12 by virtue of the provisions of the Water Code of this State,
13 no person other than the claimant named herein has or claim-
14 ed any interest in or to said water or in or to the use of
15 said water of said stream system and its tributaries or any
16 part thereof.

17 III.

18 That except as specifically in this Decree other-
19 wise ordered, the Final Order of Determination made, filed and
20 caused to be entered of record in this matter by the State
21 Engineer be, and the same is hereby confirmed.

22 IV.

23 That the name of the claimant and appropriator of
24 the waters of the McFaul Creek stream system and its tribu-
25 taries, the source of water supply, the means by which water
26 is secured from the source of supply for beneficial use,
27 the point of diversion, the year of priority, the cultural
28 acreage or place of use, the legal subdivision, section, town-
29 ship and range, the duty of water, and the number of cubic
30 feet of water per second for each acre irrigated by said
31 claimant and appropriator is hereby adjudged as follows, to-
32 wit:

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Claimant: Arthur K. Bourne Proof No. 01768 and Amended
Proof No. 01768.

Source: McFaul Creek and its tributaries

Means of diversion: Ditch

Point of diversion: In the NE $\frac{1}{4}$ NW $\frac{1}{4}$, Section 15, Township 13 N.,
Range 18 E., M.D.B. & M., or at a point that bears S. 38° 36'
W. 885 feet from the N. $\frac{1}{4}$ Corner of said Section 15.

Year of Priority	Cultural Area	Description of Land				Duty of Water	
	Meadow Pasture (Acres)	Sub-division	Section	Township N.	Range E.	C.F.S.	Acres Feet
Prior to 1870	16.96	NW $\frac{1}{4}$ NW $\frac{1}{4}$	15	13	18	0.224	67.84
"	7.74	NE $\frac{1}{4}$ NW $\frac{1}{4}$	15	13	18	0.102	30.96
"	0.08	SW $\frac{1}{4}$ NW $\frac{1}{4}$	15	13	18	0.001	0.32
Totals	24.78					0.327	99.12

V.

That the irrigation season shall begin on May 1st and end on September 30, both dates inclusive, of each year, being a length of 153 days, except when climatic conditions are such that irrigation is not in accordance with good husbandry and actual beneficial use of water. The State Engineer shall then determine by examination the beginning of the irrigation season and set the date thereof, giving notice to the claimant and to all other parties concerned therewith. The setting of the date shall be for the sole purpose of administering and distributing the waters of the McFaul Creek stream system and its tributaries.

VI.

That the duty of water on lands irrigated from said McFaul Creek stream system and its tributaries is hereby adjudged

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and decreed and fixed as 4 acre-feet per acre during the irrigation season for said lands; that the rate of flow to which said claimant is entitled for direct diversion shall be 0.0132 of a cubic foot of water per second for each acre of land irrigated based upon an irrigation season of 153 days, which said amount of water in uniform continuous flow will yield the acre feet allotment per acre as fixed as said duty of 4 acre-feet.

VII.

That all measurements of amounts of water diverted are to be made at the point where the water in the ditch first becomes appurtenant to the land to be irrigated therefrom, or as near thereto as practicable, the location, if not selected by the State Engineer, to be approved by him. Due allowance for ditch losses shall be made by the State Engineer.

That substantial headgates or such other control works and weirs to facilitate the measurement and control of water, approved by the State Engineer, shall be installed whenever and wherever necessary to insure the proper distribution of the water in accordance with the rights to its said use.

VIII.

That the said claimant and/or any of his successors in interest shall have the right to rotate the use of water to which he or they may be collectively entitled between the various users diverting water from the said stream system; provided, that whenever any of the lands as listed in said Final Order of Determination are irrigated with waters of more than one source, the right to such combined use of said water from all of said sources of supply shall not exceed the duty of water as allowed herein for said lands.

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IX.

That all waters allocated in this Decree shall be appurtenant to the place or places of use designated herein. In the event it is desired to change the point of diversion, manner and/or place of use of said waters as so allocated, the claimant or water user shall make application to the State Engineer for permission to change such point of diversion, manner of use and/or place of use according to law.

X.

That no person or persons holding a right of appropriation of water from McFaul Creek stream system and its tributaries not listed in this Decree shall be entitled to receive any water from said stream system and its tributaries until all appropriations herein listed and set forth have been fully satisfied.

XI.

That the State Engineer, his assistants and water commissioners, shall be the administrators of the waters of the McFaul Creek stream system and its tributaries, and he shall make such rules and regulations as may be necessary for the proper distribution of said waters so long as said rules conform to these Findings, this Decree, and the Water Code of this State.

XII.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED,

That the claimant and appropriator hereinbefore named is the owner of the flow and the use of the several amounts of water appropriated to him as set forth herein, and in said Final Order of Determination where no change has been made herein; that said claimant and appropriator, and each of his servants, agents and attorneys, and all persons claiming by, through or under him or them, and his or their successors and assigns,

1 in and to the water right and land herein described, be and
2 each of them is forever enjoined and restrained from claiming
3 any rights in or to the waters of the said McFaul Creek stream
4 system and its tributaries, except the right herein allotted,
5 allowed, prescribed and determined, or allowed by permits
6 which have been or may hereafter be granted by the State
7 Engineer of the State of Nevada.

8 XIII.

9 IT IS FURTHER ORDERED, ADJUDGED AND DECREED,

10 That the claimant and appropriator herein, and each
11 of his servants, agents and attorneys, and all persons claiming
12 by, through or under him or them, and his or their successors
13 and assigns, be and each of them is forever enjoined and
14 restrained from diverting from the natural channel of said
15 McFaul Creek or from any other means of diversion and trans-
16 portation of water and from using any of the said water in any
17 other manner, or at any other time, or for any other purpose
18 or purposes or upon any other land or lands than as provided
19 and prescribed by the terms of this Decree, or by permit
20 granted or that may hereafter be granted by the State Engineer
21 of the State of Nevada.

22 XIV.

23 IT IS FURTHER ORDERED, ADJUDGED AND DECREED,

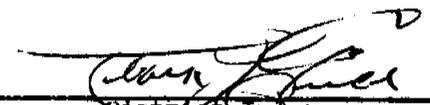
24 That the said claimant and appropriator herein and
25 each of his servants, agents, attorneys and/or employees, and
26 his and/or their successors in interest, and all and every
27 person or persons acting in aid or assistance of any of said
28 parties or either of them, be, and each of them is, hereby
29 enjoined and restrained from in any manner meddling with,
30 opening, closing, changing, injuring or interfering with any
31 headgates, weirs, waterbox, flume or measuring device, placed,
32 installed or established by the State Engineer or by his

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authority or direction, unless such act be done by the permission
or authority of the said State Engineer and/or any of his
assistants and water commissioners, if during the period of his
regulation or control of said water, or if not done during
such period, then by virtue of the allowances, authority,
terms and provisions of this Decree or by a permit granted or
that may hereafter be granted by the State Engineer of the
State of Nevada.

DATED this 6th day of October

1942.


District Judge

STATE OF NEVADA, { ss.
County of Douglas

I, H. K. Jepson, County Clerk of Douglas County, State of Nevada and ex-officio Clerk of the District Court, First Judicial District of the State of Nevada, in and for said County of Douglas; said Court being a Court of Record, having a common law jurisdiction, and a Clerk and a Seal, do hereby certify that the foregoing is a full, true, and correct copy of the original Findings & Fact. Conclusions & Law. Thereof

which now remains on _____
in my office in Minden, in said county.

IN TESTIMONY WHEREOF, I have hereunto
set my hand and affixed my Official Seal at
Minden, in said County and State this 6
day of Oct, A. D., 1942
H. K. Jepson County Clerk