

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

IN RE THE GENERAL ADJUDICATION
OF RIGHTS TO THE USE OF WATER FROM
THE SNAKE RIVER BASIN WATER SYSTEM.

CIVIL CASE NUMBER: 39576

Ident. Number: A25-04085
Date Received: 2/01/1989
Receipt No: E006260
Received By: EMC

NOTICE OF CLAIM TO A WATER RIGHT
ACQUIRED UNDER STATE LAW

1. Name: INDEPENDENT IRRIGATION CO. 208-754-4733
Address: 755 N. 3400 E.
MENAN, ID 83434

2. Date of Priority: JUN 01, 1884

3. Source: SCOTT SLOUGH Trib. to: SINKS

4. Point of Diversion:

Township	Range	Section	1/4 of	1/4 of	1/4 of	Lot	County
05N	38E	21	SE	SE	SW		JEFFERSON
		28	NW	NW	NE		JEFFERSON

5. Description of diverting works:
HEADING FOR INDEPENDENT CANAL - CONCRETE WITH METAL SCREW GATE.

6. Water is used for the following purposes:

Purpose	From	To	C.F.S.	(or)	A.F.A.
IRRIGATION	04/01	11/01	44.000		

7. Total Quantity Appropriated is:
44.000 C.F.S. (and/or) A.F.A.

8. Total consumptive use is 6316.0 Acre Feet Per Annum.

9. Non-irrigation uses:
NONE

10. Place of Use:

Township	Range	Section	1/4 of	1/4 of	Lot	Use	Acres
05N	37E	25	NE	SE		IRR	40.0
			NW	SE		IRR	40.0

Section Acres 80.0

A25-04085

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Date: 02/01/89

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10. Place of Use: Continued

Township	Range	Section	1/4 of	1/4	Lot	Use	Acres
05N	38E	7	SW	SW	11	IRR	30.0
						Section Acres	30.0
		18	SW	NE	17	IRR	10.0
			SE	NE	17	IRR	10.0
			NE	NW	7	IRR	22.0
			NW	NW	8	IRR	40.0
			SW	NW	9	IRR	40.0
			SE	NW	10	IRR	34.0
			NE	SW	13	IRR	40.0
			NW	SW	5	IRR	40.0
			SW	SW	6	IRR	40.0
			SE	SW	4	IRR	40.0
			NE	SE	11	IRR	27.0
			NW	SE	12	IRR	40.0
			SW	SE	14	IRR	40.0
			SE	SE	15	IRR	40.0
						Section Acres	463.0
		19	NE	NE		IRR	40.0
			NW	NE		IRR	40.0
			SW	NE		IRR	40.0
			SE	NE		IRR	40.0
			NE	NW		IRR	40.0
			NW	NW	1	IRR	38.8
			SW	NW	2	IRR	38.9
			SE	NW		IRR	40.0
			NE	SW		IRR	40.0
			NW	SW	3	IRR	38.8
			SW	SW	4	IRR	38.9
			SE	SW		IRR	40.0
			NE	SE		IRR	40.0
			NW	SE		IRR	40.0
			SW	SE		IRR	40.0
			SE	SE		IRR	40.0
						Section Acres	635.4
		20	NE	NE		IRR	9.0
			NW	NE		IRR	13.0
			SW	NE		IRR	40.0
			SE	NE		IRR	40.0

10. Place of Use: Continued

Township	Range	Section	1/4	of	1/4	Lot	Use	Acres
05N	38E	20	NE		NW		IRR	13.0
			NW		NW		IRR	32.0
			SW		NW		IRR	40.0
			SE		NW		IRR	40.0
			NE		SW		IRR	40.0
			NW		SW		IRR	40.0
			SW		SW		IRR	40.0
			SE		SW		IRR	40.0
			NE		SE		IRR	40.0
			NW		SE		IRR	40.0
			SW		SE		IRR	40.0
			SE		SE		IRR	40.0
							Section Acres	547.0
		21	NE		SW		IRR	5.0
			NW		SW		IRR	11.0
			SW		SW		IRR	38.0
			SE		SW		IRR	37.0
							Section Acres	91.0
		28	NE		NW		IRR	40.0
			NW		NW		IRR	40.0
			SW		NW		IRR	5.0
			SE		NW		IRR	5.0
							Section Acres	90.0
		29	NE		NE		IRR	40.0
			NW		NE		IRR	40.0
			NE		NW		IRR	40.0
			NW		NW		IRR	40.0
			SW		NW		IRR	40.0
							Section Acres	200.0
		30	NE		NE		IRR	40.0
			NW		NE		IRR	40.0
			SW		NE		IRR	40.0
			SE		NE		IRR	40.0
			NE		NW		IRR	40.0
			NW		NW	1	IRR	39.0
			SW		NW	2	IRR	39.1
			SE		NW		IRR	40.0

10. Place of Use: Continued

Township	Range	Section	1/4 of	1/4	Lot	Use	Acres
05N	38E	30	NE	SW		IRR	23.0
			NW	SW	3	IRR	39.0
			NW	SE		IRR	10.0
						Section Acres	390.1
						Total Acres	2526.5

11. Place of use in counties: JEFFERSON

12. Do you own the property listed above as place of use? NO

13. Other Water Rights Used:

WATER FROM SNAKE RIVER THRU LONG ISLAND AND INDEPENDENT CANALS.

14. Remarks:

PLACE OF USE REFLECTS LANDS OWNED BY STOCKHOLDERS IN INDEPENDENT CANAL THAT ARE ENTITLED TO WATER FROM SCOTT SLOUGH. INDEPENDENT'S RIGHT TO USE WATER FROM SCOTT SLOUGH WAS AFFIRMED IN AN IDAHO SUPREME COURT DECISION ENTITLED INDEPENDENT IRRIGATION CO. VS G. CLYDE BALDWIN, WATERMASTER IN 1926. A BRIEF SUMMERY OF COURT'S DECISION IS CONTAINED IN A LETTER WRITTEN BY RON CARLSON, WATERMASTER, COPY ATTACHED.

15. Basis of Claim: BENEFICIAL USE

16. Signature(s)

(a.) By signing below, I/We acknowledge that I/We have received, read and understand the form entitled "How you will receive notice in the Snake River Basin Adjudication." (b.) I/We do _____ do not X wish to receive and pay a small annual fee for monthly copies of the docket sheet.

Number of attachments: 3

For Organizations:

I do solemnly swear or affirm that I am President of Independent Irrigation Co. that I have signed the foregoing document in the space below as President of Independent Irrigation Co. and that the statements contained in the foregoing document are true and correct.

W. Ronald Shippen
Signature of Authorized Agent

President Independent Irrigation Co.
Title and Organization

Feb. 1, 1989
Date

State of Idaho)
County of Bonneville) SS.

Subscribed and sworn (or affirmed) before me this 1 day
of Feb 19 89

Ernest Carlson
Notary Public

Seal

Residing at Idaho Falls, ID
My Commission Expires 14 June 1994

Top 5N

Storage
Bldg.

18

130
3PE

24

19

MICROFILMED

NOV 18 1992

LONG ISLAND

Storage
Bin

Tap 5N

Rgc 38E

Point of Diversion

Menan

NOV 1 1992

LONG ISLAND

25-04085

May 6, 1991

Independent Irrigation Co.
755 N. 3400 E.
Menan, ID 83434

RE: Evidence of Priority

Dear Sir:

The Notices of Claim identified with the numbers shown at the end of this letter has been filed in the Snake River Basin Adjudication (SRBA). The Notices indicates the water usage are based on "Beneficial Use" or a "Statutory Claim". Water rights of this type are established by the historical use of water, dating back to when water was first used for the purpose claimed, at or on the place of use identified on the Notice. The date the water was first put to use, known as the priority date, has not been confirmed by a License, Decree, or Permit. For this reason, proof must be provided supporting the priority date.

For your reference I have provided a printout of your Notices and the pamphlet entitled "Evidence of Priority". The pamphlet describes the types of evidence required and suggests which documents will fulfill this requirement. While I encourage you to read all of the pamphlet, I direct your attention to the two sections entitled "What Kind of Evidence is Required" and "Some Examples of Documents Which May Be Evidence of the Priority Date".

It is our goal to recommend this historical water rights within the Snake River Basin as accurately as possible. Field exams to verify other items of the Notices have been or soon will be conducted by Department personnel. But, the Department will not recommend the Notices be decreed by the court if no evidence of a priority date is submitted.

Please submit the required evidence supporting the priority dates by June 6, 1991, referencing all documents with the corresponding Notice numbers. If you have any questions not covered by this letter or the enclosed pamphlet, please contact this office.

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Independent Irrigation Co.

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All Notices required to submit this evidence are currently being reviewed for recommendation to the court. Hence, the need for expediency on your part or your agency. Every effort should be made to submit this information within 30 days of the date of this letter.

Respectfully submitted,

Ernest Carlsen
Water right Supervisor, Adjudication

EC:sc

Enclosure: Brochure on "Evidence of Priority"
Proof Report

A25-04085
INDEPENDENT IRRIGATION CO.
755 N. 3400 E.

MENAN ID 83434

A25-04086
INDEPENDENT IRRIGATION CO.
755 N. 3400 E.

MENAN ID 83434

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STATE OF IDAHO
DEPARTMENT OF WATER RESOURCES
WATER DISTRICT NO. 1

John V. Evans
Governor

150 Shoup

1515 Lincoln Road
Idaho Falls, Idaho 83401
(208) 522-5404

C. Stephen Allred
Director

January 30, 1981

Mr. Ronald Shippen
Rt. #1, Box 75
Menan, Idaho 83434

Dear Mr. Shippen:

We have recently reviewed available information relating to the water rights on the Scott Slough. Our investigation revealed the following chain of events: In 1922 the Ninth District Court decreed 44 cubic feet per second to the Independent Irrigation Company from Scott Slough. This water was to be used for the irrigation of 2,200 acres located within Sec. 18, 19, 20, 21, 28, 29, and 30, T. 5N, R. 38E and in Sec. 25, T. 5N, R. 37E, B.M., Jefferson County, under a priority of June 1, 1884. This decree was essentially supplemental to the Rexburg Decree.

However, in December of 1922 the judge declared his decision "null and void" apparently because the watermaster John Empey and W. G. Swendsen, Commissioner of Reclamation did not appear in court; and later argued that they should, therefore, not be bound by the court's decision.

In 1923 a new action was filed in district court but on the motion of the intervenors; Snake River Valley Irrigation District, Idaho Irrigation District, New Sweden Irrigation District, and North Side Canal Company, Ltd., the judge granted a "non-suit" in the action.

The Independent Irrigation Company appealed this decision to the State Supreme Court. The State Supreme Court reversed the action of the district court. After all of the legal dust settled, the Independent Irrigation Company was left with what may be the best "use right" in the State of Idaho. This right remains unquantified, although the priority of June 1, 1884 seems to have been confirmed. There is presently no right for Scott Slough that could be delivered by the watermaster, and because of the position taken by the supreme court there is some question that you could even call upon the watermaster to deliver water to you from Scott Slough. However, I believe Independent's right to use Scott

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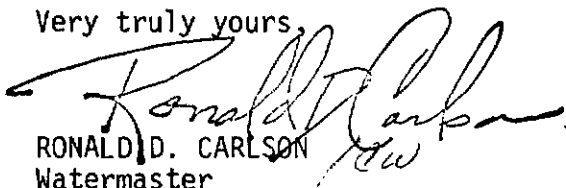
Mr. Ronald Shippen
January 30, 1981
Page 2

Slough water is spelled out in the original district decision, and even though the judge voided his order in the case, the court would almost certainly confirm your right as identified in this case.

I recommend that you take action to get your rights clearly described. You should file claims for all of your rights on Scott Slough, including your June 1, 1884 right for 44 c.f.s. This claim, in particular, should be referred back to the original decree and the supreme court's decision.

If you would like to discuss this further or would like some help in preparing the claims, please feel free to contact me.

Very truly yours,



RONALD D. CARLSON
Watermaster

RDC:cw

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NOV 10 1992

No.
IN THE
SUPREME COURT
OF THE
STATE OF IDAHO
INDEPENDENT IRRIGATION COMPANY,
Limited, et al.,
Plaintiffs-Appellants.
vs.
G. CLYDE BALDWIN, Watermaster, et al.,
Defendants-Respondents.
and
SNAKE RIVER VALLEY IRRIGATION DISTRICT,
IDAHO IRRIGATION DISTRICT,
and NEW SWEDEN IRRIGATION DISTRICT,
Intervenors
and
NORTH SIDE CANAL COMPANY, Ltd.,
Intervenor.

BRIEF of APPELLANT

*Appeal from the District Court of the Ninth Judicial
District of the State of Idaho, in and
for Jefferson County.*

HON. ROBERT M. TERRILL, *Presiding Judge*

O. A. JOHANNESSEN,	Residing at Idaho Falls, Idaho
D. E. RATHBUN,	Residing at Idaho Falls, Idaho.
	Attorneys for Appellants.
OTTO E. McCUTCHEON	Residing at Idaho Falls, Idaho.
R. E. STOUTEMEYER,	Residing at Boise, Idaho.
WHITCOMB, COWEN & CLARK,	Residing at Blackfoot, Idaho.
WALTERS & PARRY,	Residing at Twin Falls, Idaho.
	Attorneys for Respondents.

Filed, 1926.

Clerk, Supreme Court of Idaho.

THE TIMES-REGISTER PRESS IDAHO FALLS, IDAHO

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[43 L.N.]

Mrs. Peter-
living with
money, and
As said in
3 Pac. 742:
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only denied.

[43 L.N.] INDEPENDENT IRR. CO., LTD., v. BALDWIN. 371

Points Decided.

The judgment of the trial court is ordered affirmed. Costs awarded to respondent.

Wm. E. Lee, C. J., and Dodge and T. Bailey Lee, JJ., concur.

Taylor, J., dissents.

Petition for rehearing denied.

(December 15, 1926.)

INDEPENDENT IRRIGATION COMPANY, LTD., a Corporation, et al., Appellants, v. G. CLYDE BALDWIN, Watermaster of District No. 36, and W. G. SWENDSEN, Commissioner of Reclamation, Respondents, and SNAKE RIVER VALLEY IRRIGATION DISTRICT, IDAHO IRRIGATION DISTRICT, NEW SWEDEN IRRIGATION DISTRICT, and NORTH SIDE CANAL COMPANY, LTD., Intervenor and Respondents.

[33 Pac. 457.]

WATERS AND WATER RIGHTS—DIVERSION FROM TRIBUTARY—INTERFERENCE—TEMPORARY INTERFERENCE—DISMISSAL OF ACTION—WORKS DISPOSITION—DISCHARGE OF OWNERS—MOTION FOR REHEARING—EFFECT—EVIDENCE—DUTY OF WATERMASTER AND RECLAMATION COMMISSIONER—REVERSAL OF JURY IN EQUITABLE ACTION.

1. Under C. S., sec. 8648, persons with derived rights in waters of river and tributary in having flow maintained are entitled to intervene in action to enjoin interference with diversion from stream flowing into river.

2. On motion for reversal, defendant for that purpose is deemed to have admitted all facts on which there is evidence and which evidence tends to prove and every legitimate inference therefrom.

3. On motion for reversal, evidence must be interpreted most strongly against defendant.

4. Evidence held to establish that waters had been diverted and applied to beneficial use for approximately forty years without any interference or adverse claim.

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IN THE DISTRICT COURT OF THE NINTH JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF JEFFERSON.

INDEPENDENT IRRIGATION COMPANY,
Limited, a corporation, J.R.
Schofield, O.W. Green, B.R. Shippen,
M.M. Staker, George Berrett, C.S. Owens,
Ous Youngstrom, George Polson, William
Cherry, J.G. Andrews, C.A. Hansen,
J.W. Bone, William S. Berrett, R.K.
Livermore, George Cherry, O.W. Green,
Alma Nielson, O.C. Raymond, Joe Hadley,
R.D. Green, and A.S. Anderson,

PLAINTIFFS,

FINDINGS OF FACT,
CONCLUSIONS OF LAW,
ORDER AND DECREE.

LONG ISLAND IRRIGATION COMPANY, a cor-
poration, JOHN EMPEY, Watermaster of
District number 36, and W.G. SWENDSEN,
Commissioner of Reclamation of the State
of Idaho,

DEFENDANTS.

This cause came on to be heard this 9th day of October,
1922, O.A. Johannesen, Esq., appearing for and on behalf of
the plaintiffs, and the said defendants not appearing, either
in person or by counsel, and witnesses having been duly sworn,
to testify for and on behalf of the plaintiff, and the Court
having heard the evidence, and being fully informed as to
the law in the matter, finds as follows:

FINDINGS OF FACT.

I.

That on or about the 21st day of March, 1922, the
plaintiffs filed a complaint against the above-named defen-
dants, and also filed a Lis Pendens, as provided by law;
that an order was issued by this Court directing the pub-
lication of the said Lis Pendens in the Rigby Star, a new-
paper published in Jefferson County, Idaho; that copy of
the said Lis Pendens was duly published in the said Rigby
Star for a period of three (3) consecutive weeks, and that
proof of said publication has been duly filed herein.

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1967-10-19

No.
 IN THE
SUPREME COURT
 OF THE
STATE OF IDAHO
INDEPENDENT IRRIGATION COMPANY,
 Limited, et al.,
 Plaintiffs-Appellants.
 vs.
 G. CLYDE BALDWIN, Watermaster, et al.,
 Defendants-Respondents.
 and
 SNAKE RIVER VALLEY IRRIGATION DIS-
 TRICT, IDAHO IRRIGATION DISTRICT,
 and NEW SWEDEN IRRIGATION DIS-
 TRCT,
 Intervenor.
 and
 NORTH SIDE CANAL COMPANY, Ltd.,
 Intervenor.

BRIEF of APPELLANT

*Appeal from the District Court of the Ninth Judicial
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 for Jefferson County.*

HON. ROBERT M. TERRILL, *Presiding Judge*

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D. E. RATHBUN,	Residing at Idaho Falls, Idaho.
	Attorneys for Appellants.
OTTO E. McCUTCHEON	Residing at Idaho Falls, Idaho.
B. E. STOUTEMEYER,	Residing at Boise, Idaho.
WHITCOMB, COWEN & CLARK,	Residing at Blackfoot, Idaho.
WALTERS & PARRY,	Residing at Twin Falls, Idaho.
	Attorneys for Respondents.

Filed, 1926.

.....
 Clerk, Supreme Court of Idaho.

THE TIMES-REGISTER PRESS IDAHO FALLS, IDAHO

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NOV 10 1992

No.....
IN THE
SUPREME COURT
OF THE
STATE OF IDAHO
INDEPENDENT IRRIGATION COMPANY,
Limited, et al.,
Plaintiffs-Appellants.
vs.
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	Attorneys for Respondents.

Filed, 1926.

.....
Clerk, Supreme Court of Idaho.

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STATEMENT OF FACTS

This action was brought by the Independent Irrigation Company, Ltd., an Idaho corporation organized as a farmers irrigation company, and its stockholders, against G. Clyde Baldwin, who was then the Watermaster of Water District No. 36 of the State of Idaho, and W. G. Swendsen, the Commissioner of Reclamation of said State. The defendants duly appeared by the Attorney General of the State of Idaho, and subsequently a petition in intervention was filed by the Snake River Valley Irrigation District, the Idaho Irrigation District, and the New Sweden Irrigation District, and also another petition in intervention by the North Side Canal Company, Ltd. Orders granting leave to intervene, were duly entered, and thereafter the intervenors filed formal pleadings in the nature of "answers" in intervention. The case was duly heard before Hon. Robert M. Terrell of the Fifth Judicial District of the State of Idaho, who was called in by Hon. George W. Edgington, Judge of the Ninth Judicial District, to hear said cause.

At the conclusion of the hearing, the intervenors moved the court that the action be dismissed, which Motion was granted. From the order and judgment of dismissal made by the Court, the plaintiffs bring this appeal to the Supreme Court of the State of Idaho.

The action brought by the plaintiffs was for the purpose of enjoining the Watermaster and the Commissioner of Reclamation from unlawfully preventing the diversion of certain spring waters flowing in a natural channel known as Scott Slough, and situated in Jefferson County, Idaho. The plaintiffs, in their complaint, allege that they have been the appropriators and users of all of the waters originating in and flowing through the said Scott Slough,

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continuously, from and ever after the first day of June, 1884, and that they have, at all times, claimed to be the exclusive owners of said water and have used the same in an open and notorious manner, under such claim. The plaintiffs further allege that the lands owned by them, and which were, and are irrigated from the waters diverted from said slough, are arid in character, and cannot produce crops unless irrigated, and that by reason of the soil formation they require a greater volume of water per acre than most of the other lands in the Snake River Valley. The intervenors, in their answers, alleged that Scott Slough was tributary to Snake River, and that as such the waters in said Scott Slough had been adjudicated, or should have been adjudicated, (ff. 535; 541-2) in that action, generally known as the "Snake River Water Suit," brought in the Sixth Judicial District of the State of Idaho, in and for the County of Fremont, wherein the Rexburg Irrigation Company, et al., were plaintiffs, and the Teton Irrigation Canal Company, et al., were the defendants, and in which suit a decree was entered on or about the 6th day of December, 1910. Also, that in the said suit the Independent Irrigation Company, Ltd., had been decreed 1700 inches of water of the "South Fork of Snake River," with a priority date of June first, 1884, and that the water so decreed was the only water to which the plaintiffs were entitled, for their farms, comprising 2170 acres of land requiring irrigation. (ff. 634; 745).

At the hearing, the plaintiffs presented oral and documentary testimony, and the intervenors in their cross-examination of plaintiffs' witnesses, introduced a number of exhibits. After plaintiffs had presented the greater part of their testimony and before the conclusion thereof, the intervenors presented their motions, one of which asked for a dis-

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solution of a Writ of Injunction previously made by the Court enjoining the defendants from interfering with plaintiffs' headgates, and the other motion asking the court to dismiss the action on the ground that the plaintiffs had wholly failed to allege or prove any cause of action, and had wholly failed to allege or prove any grounds for injunctive relief, both of which motions were granted by the court. No evidence was introduced on behalf of the intervenors or on behalf of the defendants, other than the aforesaid exhibits.

The evidence introduced on the part of the plaintiffs conclusively proved, among other things:

1. That the plaintiffs or their predecessors in interest, were original settlers upon certain tracts of farming land situated in the vicinity of Menan, Jefferson County, Idaho, and which lands form a part of a large tract of land generally referred to as the "Island," and which is about 22 miles long and contains approximately 35,000 acres of land. On the North side of this so-called Island, flows the Snake River, and on the South of this so-called Island, there extends an old Snake River channel bed which is used by a great number of irrigating canal companies as a feeder canal, and which connects with the main channel of the river, at both ends, in such a way as to form the Island. (ff. 474-476; 964-965; 995-7; 1051-2; Ex.s "A" and "C.")

2. That the settlement of the lands owned by the plaintiffs began as early as the year 1879, and that the settlers organized, in the year 1884, the Independent Canal Company, now known as the Independent Irrigation Company, and that by means of the water rights appropriated at the time, and the diversion works theretofore constructed, and later on enlarged upon and extended, the aforesaid lands

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have been continuously irrigated every year for a period dating prior to the year 1884. (ff. 410-412; 491-493; 507-508; 746-749; 815-819; 966-968.)

3. That the water diverted and appropriated and used by the plaintiffs and their predecessors, had two main sources. The one source was the South Fork of Snake River, from which stream they had diverted and used an amount decreed in the so-called Snake River Water Suit, to be 1700 inches; the other source was an amount of water which consisted of all of the water originating from springs in what is known as Scott Slough. That the two quantities of water were necessary in the proper irrigation of the said lands. (ff. 450-542; 499-500; 495; 503; 506; 555; 558; 568; 770-1; 667; 732-735; 741-743; 824-828; 899-900; 924-929; 930-941; 969-972; 1000-1002; 1018-1023; Ex. "A;" 1059-1062.)

4. That the water originating in Scott Slough, had been, during the entire period of time, exclusively used by the plaintiffs and their predecessors. That plaintiffs and their predecessor had, from an early date, and prior to June 1, 1884, constructed at a point on the Scott Slough, certain diversion works, which consisted principally of a tight and solid dam across the slough and a canal with proper head-gate leading from the said slough and above the said tight dam. That from a period prior to June 1st, 1884, no part of the waters originating in said Scott Slough had flowed into Snake River, and that the Slough was in no manner and in no wise tributary to said River. (ff. 406-412; 436-7; 441; 422; 472; 493-497; 634-637; 641; 729-736; 749; 751; 763; 818; 821; 872-874; 969-972; 1052-1054.)

5. That from a period prior to June 1, 1884, and continuously ever thereafter, no person or persons, company or companies had used any part of the

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waters originating in the Scott Slough, above the dam constructed therein by the plaintiffs, and their predecessors, other than the said plaintiffs and their predecessors in interest, and that the use of the said waters by the latter had been exclusive, open and notorious, and under the claim of right and ownership, and that until the defendants commenced to interfere with the headgate of the plaintiffs upon the said Scott Slough, the use of said waters by the plaintiffs and their predecessors had never been questioned or interfered with. (ff. 417-428; 500-503; 736-739; 763; 821-824; 998-1000; 1053-1055.)

6. That the right to the waters of said Slough, above the dam constructed in said Slough by the plaintiffs and their predecessors, had never been adjudicated, and that in the so-called Snake River Water Suit, herein-before referred to, the plaintiffs and their predecessors had been informed by counsel that inasmuch as the waters originating in said Slough, and above the dam placed therein by the plaintiffs and their predecessors, were not tributary to Snake River, and formed no part of the waters flowing in said River subsequent to the construction of said dam, it was unnecessary for the said waters to be adjudicated in the said suit, and that the only water claimed by the plaintiffs which required adjudication in said suit, was that portion of the water diverted and used by the plaintiffs out of the South Fork of Snake River. That by reason of said belief and said advice, the plaintiffs and their predecessors filed no pleadings and introduced no evidence in the said Snake River water suit, in support of their right to the use of the water originating in Scott Slough, and the only pleadings and only evidence introduced by the plaintiffs and their predecessors, in the said Snake River suit, was that required in support of their claim to 1700 inches of

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water diverted from the South Fork of Snake River. (ff. 412-415; 426-7; 558-9; 822; Ex. 1 and B.)

7. That the defendants, the said Watermaster and the said Commissioner of Reclamation, had no personal interest in the controversy, and, in the matter of the distribution of water, perform purely a ministerial duty.

8. That the intervenors had never at any time, or in any manner, diverted or appropriated, or otherwise made use of or made claim to any right what-so-ever in, and/or to any part of any of the waters originating in the said Scott Slough, above the dam maintained there by the plaintiffs. (ff. 426-429; 501-503; 822-824.)

9. That while that portion of the water right claimed and used by the plaintiffs, which originated in the said Scott Slough from Springs in said slough and above the dam therein maintained by the plaintiffs had never been adjudicated in any action at law, the said right was nevertheless one fully recognized by the laws of the State of Idaho, and that the plaintiffs had a legal right to maintain the action brought by them against the defendants, because of interference or threatened interference by the defendants, with the use of the said water by the plaintiffs.

10. That the plaintiffs and their predecessors, at the time of the organization of the Independent Canal Company, had given said Company the name "independent" by reason of the fact that the main source of supply of water was independent of all other sources, the said independent source being the Springs in the said Scott Slough. (ff. 494.)

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11. That the lands owned by the plaintiffs were arid in character and that unless they were regularly irrigated with a sufficient supply of water, crops could not be grown on them profitably. That if the lands were not irrigated they would become practically valueless.

12. That by reason of the character of the soil, the lands of the plaintiffs and other lands on the "Island" required a greater amount of water per acre for proper irrigation of crops growing thereon, than was required on other lands situated in the Snake River Valley. That it had been proven in the so-called Snake River water suit, that the lands required approximately the use of four miner's inches of water per acre, to grow successfully, crops thereon, and that at the present time one second foot of water, or 50 miner's inches, was sufficient to irrigate not to exceed twenty-five acres of land. That the 1700 inches of water decreed to the plaintiffs from the South Fork of Snake River, was wholly insufficient for the proper irrigation of said lands and were capable of supplying water, in proper and sufficient quantities, for less than half of the acreage owned by the plaintiffs. That the water originating in Scott Slough, and which had always been used by the plaintiffs, was necessary in the successful irrigating of the lands owned by the plaintiffs, and that unless plaintiffs had the use of the said water, undisturbed, and as it had been used by them prior to any interference by the defendants, the plaintiffs could not successfully grow crops on their lands, and would suffer a large pecuniary loss annually in the value of their crops, and perpetually in the decreased value of their lands. (ff. 416-17; 595-599; Pf. Ex. B; 799-800; 830-833.)

That the only remedy left to the plaintiffs and which could give them adequate relief was the order

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and decree sought, and which would perpetually enjoin the defendants and their successors from unlawfully preventing plaintiffs' diversion and use of the spring water claimed by them.

13. That some time prior to the filing of this action, the plaintiffs had entered into an agreement with one J. W. Hays, to sell to him 1700 inches of water owned by the plaintiffs and decreed to them from the South Fork of Snake River. This agreement was entered into for a number of reasons, among which may be mentioned:

a. The financial condition of the plaintiffs, which made it imperative on a majority of them to sell a portion of their property, both real and personal, in order to secure funds with which to pay obligations.

b. Economies developed by the plaintiffs in the use and management of the water, whereby, at considerable sacrifice to each, rotation in irrigation was practiced, and such crops grown as made economy possible. (ff. 796; 667; 799; 839-842; 884-885; 942-945; 987; 1057-9.)

c. The substrata becoming permeated with silt which retarded the great loss by drainage. (ff. 799-801; 947-949; 978-9; 986-990; 1055-1057.)

d. Another very important reason was the fact that the 1700 inches was diverted from Snake River through the Long Island Canal, and there were difficulties in the proper distribution of this water by reason of that fact, and the plaintiffs were facing

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a proposition whereby they would have been compelled to construct at great expense, a new canal connecting the Scott Slough with Snake River. (Note: Since this case was tried, the Hays deal has been abandoned, and the 1700 inches have been re-transferred to the plaintiffs.) (ff. 835-838.)

14. That the so-called Snake River suit, by which the waters of Snake River and its tributaries were adjudicated, was not commenced until 1904, and was not finally determined until 1910. That the dam constructed by plaintiffs in the so-called Scott Slough was built in 1884, twenty years prior to the commencement of the Snake River suit, and had been maintained there during all that period of time, and that it was of solid construction and absolutely prevented any water arising in Scott Slough above said dam from entering the river through said slough. That while it is true that the plaintiffs, when not using the water claimed by them for irrigation purposes, returned all such water to Snake River, such return, however, was through properly constructed and placed waste gates, the same as all other irrigation canal companies are compelled to maintain in order to prevent flooding of lands and destruction of works. (Exs. "I" and "B;" ff. 859; 522; 851-854; 759-766.)

15. That after the organization of water District No. 36, the plaintiffs, with other water users in said district, paid their pro-rata share of all annual charges imposed in connection with the distribution of water and participated in the various deliberations of the water users of said District, and that this continued after the so-called Hays sale agreement was made and still continues. (ff. 1081-1095.)

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ENUMERATION OF ERRORS RELIED UPON
BY APPELLANT

No. 1. The court erred in granting defendant's motion for a non-suit in this action. (ff. 1122.)

No. 2. The Court erred in discharging the injunction. (ff. 1122.)

No. 3. The Court erred in over-ruling Plaintiff's motion and request for a jury on questions of fact. (ff. 261 and ff. 397.)

No. 4. The Court erred in the rejection of evidence offered by Plaintiffs as follows:

1. (ff. 420.) The Court sustained an objection to the following questions asked the witness Anderson, one of the plaintiffs:

"Q." "During all of this period of time you have been acquainted with the Independent Irrigation Company's canal system, and its source of water in the Scott Slough, I will ask you whether the Canal Company has claimed to be the absolute owner of the water that arose in the slough as indicated on your map?"

2. (ff. 559.) The question is asked relative to the former case brought out by defendant as follows:

"Q." "At the time of this hearing while you were there in Court, were you advised that the water you claimed in the Slough was not a part of the water to be decreed from the river?"

"A." "Yes, sir."

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The question was stricken and the Court sustained an objection to the question.

3. (ff. 560.) The question was asked of Mr. Green:

"Q." "I will ask you, Mr. Green, if at the time you testified in the so-called Snake River suit, when the Court was present, and Mr. Mill-sap and Mr. Rich, and I think Mr. McCutcheon here, and all the parties in interest who were supposed to be there that day were present, if you were advised that no proof need be made by you on the water you claimed in the Scott Slough?"

The Court sustained an objection.

4. (ff. 684.) The Court sustained an objection to the following question asked of C. H. DeCamp who had served as the water master in this particular district:

"Q." "Did you as a public officer charged with the distribution of the water of Snake River in this section of the State understand at that time that the Independent Irrigation Company had an independent source of supply from the Scott Slough?"

5. (ff. 687.) The Court sustained objection to each of the following questions asked the same witness:

"Q." "Did you as water commissioner in 1911 know that the Independent Irrigation Company was diverting and using certain waters arising in the Scott Slough?"

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"Q." "Did you as water commissioner know that the Independent Canal Company had and did use a water right which was in addition to the decreed right which you briefed in your pamphlet of the Snake River decree?"

6. (ff. 843.) The Court sustained objections to the following question asked Gust Youngstrom:

"Q." "During that meeting was it discussed among the stockholders whether or not you should make proof on the water you claimed from the slough, as well as the water you claimed from the river?"

7. (ff. 844.) The Court sustained objection to the following question:

"Q." "Did your company in 1905 attempt to make any proof in the Snake River decree suit in support of the water you claimed out of Scott Slough?"

8. (ff. 975.) The Court sustained objection to the question asked Mr. Green:

"Q." "In that hearing. Did you,—while the Court was in session and the Court was present and the attorneys were present, did you hear any discussion as between the attorneys and the Court as to the water that you were making proof on at that time?"

9. (ff. 977.) The Court sustained objections to the plaintiff proving that in the hearing at St. Anthony referred to by the defense, that after discussion by counsel for the various parties with the Court, it then decided that this spring water was not included in the suit.

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5. The Court erred in denying plaintiffs' motion to strike the answers of each and all of the intervenors from the files (ff. 340-377). For the reason that there is no showing in the record that a decision as between the plaintiffs and defendants would in any manner affect the intervenors or any of them.

PROPOSITIONS OF LAW

I

The appropriation of water in the year 1884, and the continuous use of said water for the irrigation of lands from and ever since said date, establishes a good and valid right and title to the use of said water.

Sections 3 and 4 of Article 15 of the Constitution of the State of Idaho.

The Compiled Statutes of Idaho, Sections 5561, 5562, 5556, 5558.

Section 3165 Revised Statutes of Idaho, 1887.

Reno vs. Richards, 32 Idaho, page 1

Scarrett vs. Hunter, 32 Idaho, page 541

Kinney on Irrigation (2nd Ed.) Section 725

Nielson vs. Parker, 19 Idaho, page 727.

Lockwood vs. Freeman, 15 Idaho, page 395

Morris vs. Bean, 146 Fed. 423

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Malad Valley Irr. vs. Campbell, 2 Ida. 411

Hillman vs. Hardwick, 3 Ida. 255

Lequieme vs. Chambers, 15 Idaho, 405

Sandpoint Water & Light Co., vs. Panhandle Development Company, 11 Ida. 405

Furey vs. Taylor, 22 Ida. 605

Crane Falls, etc. Co. vs. Snake River Irrig. etc., 24 Idaho 63.

II

When invoking the doctrine of estoppel by judgment, among other well known and established requirements, it must be proven that the precise questions involved have been fully litigated and determined in the prior suit in order to constitute *res adjudicata*.

Jensen vs. Barry and Ball, 27 Idaho, page 394

Marshall vs. Underwood, 38 Idaho, page 464

Wood River Power Co. vs. Arkoosh, 37 Idaho, page 348

Niel vs. Hyder, 32 Idaho, page 576

U. S. Express vs. Lounge June, 160 Fed., page 251

U. S. vs. Coos Bay Co., 110 Fed., page 864

Kinney on Irri. (2nd Ed.), page 2879

Long on Irrigation (2nd Ed.), page 221.

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III

In proving a right to the use of water appropriated by actual application to a beneficial use, or by prescriptive right, the party asserting said right, may prove that they have publicly claimed, and to the knowledge of the public, used the water in question, and that such claim and use was known to and recognized by the officers in charge of the distribution of water as well as to the general public, for a period of forty years.

Knight vs. Knight, 53 Northeastern, page 306.

IV

To be a tributary to a thing is to contribute to that thing. As to whether or not certain waters are tributary to others is a question of fact.

Josslyn vs. Daly, 15 Ida., page 137

Kinney on Irri. (2nd Ed.), page 507

Kinney on Irri. (2nd Ed.), page 1137

Rabido vs. Furey, 33 Ida 56.

V

"Scott Slough," prior to 1884 connected up with Snake River, but when in that year, a tight dam was constructed by the appellants across the entire channel of said Slough, and said tight dam has been maintained continuously from that time to the present, and the water arising in the Slough, above the dam, from springs and other natural sources, has

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not been permitted to reach the river (except through the irrigation canal constructed by the appellants), and all of the water naturally arising in the Slough has been used on the appellants' lands, "Scott Slough" ceased to be a tributary of Snake River, and was not such in either the year 1904 or the year 1910.

Kray vs. Muggle, 54 L. R. A. 473

Pewaukee vs. Savoy, 50 L. R. A. 836 and note.

Warren vs. Westbrook, 35 L. R. A. 388

Smith vs. Youmans, 37 L. R. A. 285

27 R. C. L. Page 1293-7

Leonard vs. Shatcer, 28 Pac. 457

VI

The complaint of the appellants, showing upon its face, that the appellants had appropriated and used continually for more than forty years, all of the water arising from springs and other natural sources in Scott Slough, above a tight and permanent dam maintained by them, across the Slough, and that the watermaster was attempting to prevent the diversion and use of this water by the appellants, the latter were entitled to an injunction restraining the watermaster in his unlawful attempts.

Montpelier Milling Company vs. City of
Montpelier, 19 Ida. 212

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Sanderson vs. Salmon River Canal 34 Ida.
145

Moe vs. Harger, 10 Ida. 302

Section 6769—I. C. S.

Kinney on Irrigation (2nd Ed.) pages
2922-23-31-32

Atchison vs. Peterson, 22 Law. Ed. 414.

VII

Under a claim or right to the use of water by appropriation and continuous use, as guaranteed by the Constitution, or, of public, open, notorious claim of and continuous use of water, the question of fact should be submitted to a jury on request.

Burke vs. McDonald, 2 Ida. 339

Phoenix Ins. Co. vs. Doster, 106 U. S. 32

Killian vs. Ebbinghaus, 110 U. S. 568

Elliott on Evidence, Vol. 3 Sec. 1616

Wheeler vs. Laird, 18 N. E. 212

Harrison vs. Spence, 51 N. W. 642

Barnes vs. Light, 22 N. E. 441

Heney vs. Breeden, 42 S. E. 916

Jangraw vs. Mee, 54 Atl. 189

Bradstreet vs. Huntington, 5 Peters (U. S.)
402.

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ARGUMENT

In a consideration of the case before the court, there are three questions that naturally arise and suggest themselves, and upon the correct determination of them, must rest the final decision of the court:

1. Did the plaintiffs and appellants have a water right, consisting of (a) certain water decreed from the South Fork of Snake River, and (b) certain other water arising from springs in Scott Slough?

2. If they had and owned certain water arising from Springs in Scott Slough, and which was in addition to water appropriated from the South Fork of Snake River, was the former included in the so-called Snake River Decree Suit, and were the plaintiffs and appellants therefore limited to only 1700 inches of water with a priority date prior to 1910, the date of the decree.

3. If the water claimed and used by the plaintiffs and appellants, and which arose from springs in Scott Slough, was not adjudicated in the Snake River Decree Suit, did they have a right to an injunction restraining the watermaster from interfering with their use thereof.

DID PLAINTIFFS HAVE A WATER RIGHT?

That the plaintiff, through its shareholders, had appropriated and continuously used all of the spring water for irrigation of their lands since the year 1884, and that said water so appropriated has been claimed, by the appropriators and users thereof, as the water to which they were exclusively entitled to use under a public claim of ownership, cannot under the evidence be denied. We quote from the witness Anderson:

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"Q." "How long have you been acquainted with the lands owned by the stockholders? A. Forty-one years."

"Q." "And how long have you been acquainted with the source of supply in the Scott Slough used in the irrigation of these lands? A. Forty years."

"Q." "I will ask you whether or not you know if the stockholders of the Independent Irrigation Company have, during all that time used all of the water arising from the Scott Slough from springs in the distance shown on your plat? A. Yes, sir."

"Q." "I will ask you, Mr. Anderson, whether during this period of time, forty years, there has been any other person, or Canal Company, other than the Independent Canal Company and its stockholders, during the irrigation season, drawing water from the Scott Slough, which water is that which comes from springs in the distance on the Slough shown on your map? A. No; there hasn't been any other Company. The Independent Irrigation Company have been sole users of the water."

"Q." Has any other person, to your knowledge, attempted to take that water from the Independent Irrigation Company or its stockholders, other than the water master who is the defendant in this case? A. No, sir."

"Q." "Then during this entire period the Independent Irrigation Company has been the exclusive users of this particular water? A. Yes, sir."

"Q." "And there has been no interference from any person? A. No, sir."

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"Q." "And have the Independent Irrigation Company and its stockholders, including yourself, claimed to be the owners of this water? A. Yes, sir; we do."

"Q." "And you now claim to be the owners? A. Yes, sir."

We quote from O. W. Green (ff. 500) :

"Q." Referring now particularly to the water you state that arises in the Scott Slough by means of springs, and above the dam you constructed in the Slough in 1884, have you and the other stockholders of the company used that water? A. Yes, sir."

"Q." "Continuously? A. Yes, sir."

"Q." "Has any other person or company used any part of that water? A. No, sir."

"Q." "At no time during that period? A. No, sir."

"Q." "What has been your claim with reference to ownership as to this particular water? Did you claim to be the owners of it? A. Yes, sir."

"Q." "Has any person, or persons, or companies, other than the water master who is defendant in this case attempted to take any part of this water away from you at any time. A. No, sir."

We could quote the same in substance from the other witnesses. Their right to the said water has been recognized by the officers in charge of the distribution of water (ff. 679 to 683) and by other water users continuously for more than forty years.

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and until the water master, who was then comparatively new in the territory, not seeing any decree of record for the said water right, undertook to close the gates and deny the plaintiff the use of any water.

When the plaintiffs had reached a point in the hearing of said cause where it was agreed that the additional evidence to be introduced consisted of certain tax record evidence, the defendants and intervenors, as will be noted from the record, moved for a non-suit, and this motion was granted by the court. Apparently the motion was granted upon the theory that the action brought by the plaintiffs was not a proper one, and that they should pursue some other remedy to establish and protect their alleged rights. (ff. 1123.) It is to be noted that the court's judgment was entered without prejudice to the plaintiffs' right, so that the plaintiffs might bring any other action they saw fit. However, the court expressed no opinion as to what form of an action would be more appropriate than that of enjoining the wrongful and unlawful interference with the vested rights of the plaintiffs, and the latter are therefore compelled to reply upon their own judgment and conclude that the action was a proper one to prevent the commission of the alleged wrong.

THE QUESTION OF RES ADJUDICATA

The apparent reason urged by the defendants and intervenors in support of their motion for a non-suit was that the doctrine of estoppel by judgment prevented the plaintiffs from pursuing the present action, because, as they maintain, the plaintiffs had no right to the water involved, that is to say,—the natural flow from the springs in Scott Slough had never been adjudicated, and the plaintiffs therefore had no decreed right to the water. The intervenors

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apparently relied upon the evidence which they introduced on cross-examination (defendants' exhibit No. 1), which was to the effect that in a former suit and which involved other waters than that in controversy, the plaintiffs were parties. The exhibit in question, which was the evidence of two of the plaintiffs in the present action, did not even tend to prove that the water involved in the present action was the subject of litigation in the former suit, and this evidence likewise failed to prove that any of the parties intervening in this action, were parties in the former suit. The evidence, however, and contrary to the theory of the intervenors, included in exhibit No. 1, tends to show that the water involved in the present case was neither considered nor determined in the Snake River decree suit, and that it was considered by the attorneys and the court, in that action, as being independent and separate water and not necessary in the proper determination of the rights involved in the former suit. The name of the corporation itself indicates that it was an independent concern and it was testified at the hearing that this name was selected because of the peculiar independent source of the water appropriated by the plaintiffs.

However, whether or not exhibit No. 1, which decidedly tends to show that the Scott Slough water was separate and distinct from the Snake River water which was decreed, makes the slough water a part of that decreed, is after all, not the vital point. The defendants alleged that the plaintiffs are estopped and the burden is upon the intervenors to show by competent evidence whether the doctrine of estoppel is applicable in this case. There is nothing in the evidence that in any way, shape or form indicates identity of parties or identity of interests, or identity of subject matter, nor is there

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even a single element of estoppel by judgment to be found in the entire record.

In *Marshall vs. Underwood*, 38 Idaho, 464, the Court has held that there must be a concurrence of at least four conditions to make a matter *res judicata*.

1. Identity of the thing sued for.
2. Identity of the cause of action.
3. Identity of the persons.
4. Identity of the quality of the persons for or against whom the claims were made.

In the records before us there is no evidence whatever that any one, much less four, of these conditions exist. The lower court apparently assumed, without proof, that if an opportunity had been presented wherein the plaintiffs could have, or might have had the water decreed to them, and they failed to avail themselves of such opportunity, they were, therefore, barred from protecting any rights they now have, unless, they attempted to do what no other person has attempted in Idaho,—that is, to determine in one action, the rights of all persons using water from the Snake River and its tributaries. A portion of the water users of the Upper Valley had their water decreed in the action brought in Fremont County,—the so-called Snake River water suit, but in that action a large number of other water users, many even in the Upper Valley, were not included, and their rights were not determined. In that suit no attempt was made to determine the rights of the water users of the same stream who reside lower down the valley. None of the water

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users taking water out of Snake River below Blackfoot, were included in the decree, to which reference is made in the evidence. The water users of Willow Creek, one of the largest tributaries in this vicinity, were not included, and many other water rights were likewise not included.

In the present case we have the peculiar situation, —of the water users of the Northside Canal Company, who were not parties to the former suit, pleading it in their answer in intervention in this suit and relying upon it for estoppel, and obtaining a judgment of non-suit, apparently by reason of it.

We dare say, the most far-fetched and the most unheard of theory of estoppel by judgment ever advanced in any court, is that indicated in this action, viz., that a water user, regardless of his right, cannot prevent a water master from unlawfully shutting off his water, unless he shows a decreed right; and that he must bring an action involving every water user from the head of Snake River to its outlet in the Columbia River, and have their respective rights determined, before he can prevent the water-master from unlawfully interfering with his constitutional rights in this State.

No person has ever attempted to commence such a litigation; and no suit involving a few, or many, of the users of water from Snake River, can affect the right of plaintiffs to maintain this action, unless it be affirmatively shown that plaintiffs have lost their constitutional rights, and have no vested right whatever, for plaintiffs have clearly and fully shown by the evidence, that they have used all of the spring water of Scott Slough, continuously, since 1884, thus giving them the very best right, known in this state, to the use of that water,—a constitutional right covered by Section 3 of Article 15 of the State Constitution.

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The Water Commissioner is an employee of the State Engineer, and this court, in *Lockwood vs. Freeman*, 15 Idaho, page 398, has very aptly used the following language:

"The State Engineer has no authority to deprive a prior appropriator from water in any stream in this state and give it to any other person. Vested rights cannot be taken away."

In *Reno vs. Richards*, 32 Idaho, page 1, the Court held that:

"Water may be appropriated from a stream by diversion therefrom and application to a beneficial use, without compliance with the steps provided by the Statute, but in such case it requires actual application to be a beneficial use to complete the appropriation, and the right is limited to the amount so applied to a beneficial use and with date of priority determined by such application."

The appropriation and application to beneficial use continued from 1884 to this date, and was so testified to by each witness. The question then is,—have they a vested water right? The contention of the defendant is that they have not a vested right, for two reasons. One is, that the plaintiffs' Company lost this right when they intervened in another suit, then pending, and asserted a right to use some of the water of Snake River and took a decree of 1700 inches of water, to be used by them only in the early spring. (See intervenors' exhibit 1, a part of which is read into the record, ff. 550, 551, 704). The right which was decreed, was taken at the time with the distinct understanding and announcement

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before court and counsel that plaintiffs had a separate and additional and independent vested water right in the springs in question. The second, or other contention is, that some of the stockholders in the plaintiff corporation hold other water rights at the present time. But it clearly appears, however, that any additional water rights now held by any of them, are for other and separate lands, not included under the Independent Company's canal system.

When the first witness, Anderson, was questioned pertaining thereto he replied: (ff. 993.)

"Yes, I own it for other lands.

Q. Do you transfer it to this land some times?

A. No. I never.

Q. Your Long Island water?

A. I never had occasion to."

When the plaintiff, Staker, was questioned thereto, he replied: (ff. 949.)

"Q. Mr. Staker, did you own any stock in the Long Island Canal system?

A.—Yes, sir, very little.

Q. What do you use that water for?

A. For a city lot."

Also the witness George Poulson, (ff. 1002), who testified as follows:

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"I have a small right in the Long Island Canal, about twelve dollars. There is a small piece on the other side of a little stream that runs through my field and I made a change with one of my neighbors to save fluming across otherwise I would have no use for it."

As a further argument, suppose we concede that the springs in question, like many other streams, Willow Creek, the Blackfoot River, the Portneuf River, Boise River, and even the Mud Lakes, are tributaries to the Snake River water system, and that the waters of said tributaries, any one or all of them, had not been actually determined or finally litigated and decreed, we cannot therefore, jump at the conclusion that any or either of the settlers upon any of the streams not litigated, could be cut off by the State Engineer or his Commissioner from their vested water rights. Neither can we jump at the conclusion that any or either individual having a vested right to said streams not theretofore decreed or litigated, must bring a general action to have his vested right determined as against every other individual water user under the Snake River water system, before he is permitted to protect his rights against the wrongful encroachment of a watermaster.

Originally, and in the early period of irrigation of much of the lands in the Snake River Valley, one, two, three and four inches of water, under the usual method of measurement, per acre was allowed for irrigation, depending on the character of the soil. In the vicinity where the plaintiffs live, all of their neighbors, using the water directly from the Snake River, were allowed, two, three or four inches of water per acre, as the evidence in this case shows. (Plaintiffs' exhibit "B.")

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If under improved methods and changed conditions any part is to be dispensed with, the user should have his choice of the water he desires to retain.

The plaintiffs under the Independent Company Canal, had the independent spring water in Scott Slough, and sought and obtained 1700 inches of additional water from Snake River to augment the spring water flow, and for their first irrigation only. This was much less than one inch per acre. Now because of changed conditions and established economics which made them believe they no longer required the 1700 inches, and like some of their neighbors, therefore, offered to let the surplus water go to other users, and in the same manner as their neighbors did, an attempt is made by the watermaster and by the intervenors to deprive them of all of the spring water which they have enjoyed for forty years as their exclusive right.

SCOTT SLOUGH NOT A TRIBUTARY TO SNAKE RIVER

The evidence presented by the plaintiffs shows conclusively that Scott Slough, at one time connected up with Snake River, but that in the year 1884, the plaintiffs constructed across the slough a tight dam which prevented an and all water arising in the slough from reaching the river. This water was appropriated by the plaintiffs and has been used continuously on their lands for irrigation and other beneficial purposes. The evidence further shows that all of the water arising naturally in the slough has been so used. While it is true that at times the Long Island Irrigation Company will turn into Scott Slough, an excessive amount of water from its canal system, and thus

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overflow the works maintained by the plaintiffs in the slough, such fact does not in any manner prove or tend to prove that the plaintiffs have not changed the course of the slough and have not, since 1884, prevented all of the waters arising in the slough from springs and other natural sources from reaching the river. A review of the decree entered in the so-called Snake River suit shows that none of the intervenors who were parties to that suit have any water decreed to them from Snake River, prior to June 1, 1884, but that on the contrary, their dates of priority are considerably later than June 1, 1884, and the pleading of the intervenors who were not parties to that suit, admit that their claims of priority dates from periods subsequent to 1884. If the claims of the plaintiffs, and these claims are supported by ample proof, are true, then at the time the intervenors appropriated water from Snake River there was no water arising in Scott Slough, above the tight dam maintained by the plaintiffs, that ever reached the river, and consequently the Slough was not a tributary of the River at the respective times when the intervenors made their appropriations, and again it was not a tributary of the river in 1904 when the Snake River water suit was instituted, nor in 1910 when the decree in that suit was entered.

To be tributary to a thing is to contribute to that thing. Surely since 1884, Scott Slough has not contributed to the water flowing in Snake River, excepting at such times as when the water users under the Independent Irrigation Company's canal system were not irrigating and permitted the water flowing in their canal system to waste into the river through artificially constructed works built for that purpose. No sane person will maintain that any irrigation enterprise in the Snake River valley makes use of all of the water appropriated at all times, day

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and night, during the year, and that there are not times, even during the irrigation season, as for instance, during rainy weather, when a portion of the water appropriated and generally used, is permitted to waste back into the river channel, either by means of shutting down the intake gates on the river or through waste gates maintained at point along the canal system. The evidence shows that the Independent Irrigation Company maintains a waste gate at the terminus of its canal.

As to whether or not the waters of Scott Slough were tributary to Snake River is, of course, a question of fact. This is to be determined only as other facts and circumstances of the case. The plaintiffs having presented a prima facie case, that the waters of the slough were not in fact tributary to Snake River, it was incumbent on the intervenors by preponderance of evidence to prove the contrary.

It is a well settled rule of law, also, that the diversion of the water of the tributary will not be restrained at the suit of a lower appropriator from the main stream, unless such diversion diminishes the quantity of water which would otherwise reach the main stream by a natural channel, and then it will be restrained only as to such quantity and for such period and as to such person, having a prior right, as may be affected. (*Long on Irrigation*, 2nd Ed., page 236.) This rule of law is clearly pointed out by the Supreme Court of this State in the case of *Josslyn vs. Daly*, 15 Idaho, 137, 148 and 149.

In the recent case of *Rabido vs. Furey*, 33 Ida. 56, our Supreme Court holds that the converse of the proposition contended for herein on behalf of the appellants, may be true. In the case referred to, Mary Rabido contended that she was the owner of certain water from Goggles Springs, which had

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been conserved and conducted through Goggles Creek at a time subsequent to when certain appropriations of water in Goggles Creek had been made. This court found that, the fact that the waters from Goggles Springs had been conducted into Goggles Creek did not therefore make them a part of the waters of the Creek, although the Springs were so situated with reference to the Creek that it might have been inferred that seepage from the springs ultimately found their way into the Creek.

In the case of the Village of Pewaukee vs. Savoy, (103 Wis. 271, 50 L. R. A. 836), the Supreme Court of Wisconsin, in deciding a case where reciprocal rights were involved by reason of the damming of the outlet of the Lake, and raising the water level of the Lake so that lands privately owned surrounding the original Lake were flooded, lays down the general proposition as follows:

"A person is presumed to intend the natural consequences of his deliberate acts. A situation once created and continued for such length of time that it would be considered a violation of good faith to the public for the person responsible for it to change his position, and restore the original situation, brings into play the principle of estoppel in pais, or precludes him from revoking what is legally considered a dedication of his land affected by his acts, to the public use Uninterrupted and continuous use acquiesced in for twenty years, constitutes conclusive proof of dedication. Applying those principles to the facts of this case, it is easily seen that the conduct of the owners of the property in dispute in this case, in maintaining an

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the artificial condition of the waters of Pe-
waukee Lake for some fifty years, which
they knew gave to the public the right to
enjoy it as a natural condition, hence, in-
tended that such should be done, and the
use accordingly operated most effectively
to dedicate all lands owned by them affect-
ed by such condition, to the public use, and
to surrender to the proper custodian of
lands devoted to such use, the title neces-
sary to maintain and protect it."

In the case of Kray vs. Miggli, 84, Minn. 90, 50
L. R. A. 54, the Supreme Court of Minnesota holds
to the following:

"Where the flow of a stream of water
has been diverted from its natural channel,
or obstructed by a permanent dam and such
diversion or obstruction has continued for
the time necessary to establish a prescrip-
tive right to perpetually maintain the same,
the riparian owners along such stream of
water who have improved their property
with reference to the change and in re-
liance on the continuance thereof, acquire
a reciprocal right to have the artificial con-
dition undisturbed."

In the case of Smith vs. Youmans, 37 L. R.
A., 285, the Supreme Court of Wisconsin
lays down the rule that:

"The artificial state or condition of
flowing water founded upon prescription,
becomes a substitute for the natural con-
dition previously existing, and from it
arises a right on the part of those interest-
ed to have the new condition maintained."

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It cannot be argued that, should the appellants now abandon the dam which has been maintained by them in Scott Slough since 1884, and remove the dam from the Slough, and some person or persons below the dam were in any manner affected by the changed conditions, such parties so damaged could not obtain an injunction against the plaintiffs, compelling them to restore the dam and maintain the conditions that existed prior to the removal of the dam. The converse of this proposition is equally true, and if any one attempts to interfere with the dam maintained for this long period of time by the plaintiffs in Scott Slough, and deprive them of the water arising in said Slough, and which has been used by them during the entire period since the construction of the dam, the plaintiffs may obtain the necessary writ of injunction, enjoining such interference, and such a writ might also be obtained by the plaintiffs against the Long Island Irrigation Company to prevent the latter Company from wasting into the Scott Slough such an amount of water as would in any manner tend to destroy the works maintained by the plaintiffs or which would in any manner interfere with the proper distribution of the waters claimed and used by the plaintiffs.

If, in the year 1884, the plaintiffs established a tight dam in Scott Slough, and the evidence shows that they so did and have maintained that dam in the slough continuously from said date, they have acquired a valid right, of which they cannot be dispossessed, to maintain such a dam perpetually. And if they have, in like manner, and the evidence conclusively proves that they have, diverted from the Scott Slough all of the water arising therein above their dam, from springs and other natural sources, and have made beneficial use of all of said water every year, they have likewise acquired a right to the perpetual use of said water so long as it can be used

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by them beneficially, in the manner provided by the laws of our State. It is equally true, that if the two foregoing conditions have obtained for the period of time herein stated, and the evidence conclusively proves that they have, Scott Slough and the water arising therein was not tributary to Snake River after June 1, 1884, and has never been tributary to Snake River from said date, and was therefore not a tributary to Snake River when the intervenors appropriated water from said river, nor was it tributary in the year 1904 when the Snake River water suit was instituted, nor in the year 1910 when the decree in that suit was entered, and therefore the water arising in the Slough was not one of the things necessary to be determined and adjudicated in the latter suit. The facts presented by the plaintiffs conclusively prove that Scott Slough and the water arising therein was always considered independent of Snake River, and for that reason the plaintiffs did not seek to have it adjudicated to them in the Snake River suit.

The evidence moreover conclusively shows that no matter what view may be taken of the Snake River suit and the waters that were decreed in that suit, the water arising in Scott Slough above the dam maintained by the plaintiffs has never, at any time, since 1884, been flowing into the River, and consequently has never been used at any time, by any of the intervenors nor by any other person or persons, either natural or artificial, and that the plaintiffs have had the sole and exclusive use of all of said water during every year, at all times when required by them in the irrigation of their lands, or for other beneficial purposes.

The attention of the Court is called to the error of the trial Court designated as No. 4 and which refers to the rejection of certain evidence offered on

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the part of the plaintiffs. Without going into an extensive argument, it seems to the appellants almost self-evident that the plaintiffs, under all known rules of evidence, had a right to submit the evidence proffered and referred to in this specification of error. Whether or not the Independent Irrigation Company claimed a water right which was independent of water from Snake River, and whether or not such water right had been used in a beneficial way by the Company and its stockholders, and whether or not there had been any interference with plaintiffs' use of the water, and whether or not the plaintiffs had claimed the exclusive right to the use of the said water, since 1884, and that this claim had been made openly and notoriously, and whether or not any other water user using water from Snake River had in any manner deprived the plaintiffs from using the said water, were all questions of fact, to be presented to the court, and the plaintiffs had a right to be heard on each and all of them.

Plaintiffs in writing, requested that the facts in this case be tried by a jury. The question of adverse possession or prescriptive right was one of the issues, and we quote from Elliot on Evidence, Vol. 3, Section 1616:

"Adverse possession in most cases may be said to be a mixed question of law and fact, or, in other words, it is usually a question of fact for the jury under proper instructions from the court. Etc."

Usually a suit asking injunctive relief is not to be tried to a jury, but in an action of this nature where the right to use the water is brought in question, and that right is based upon the constitutional right of appropriation, possession and use, and the

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right to possession and use of water is denied by intervenors, we deem it proper to submit the question of fact establishing the right of possession to a jury, and in addition to the authorities heretofore given, we would call the court's attention to:

Stoker vs. Kirtly, 6 Idaho page 795

Robertson vs. Moore, 10 Idaho page 115

Lindstrom vs. Hope, 12 Idaho page 714.

In conclusion, no matter how the evidence may have been viewed, the plaintiffs proved a vested right to certain water, not included in the decree, which could be subject only to the rights of prior appropriators and users, if there were any, and until such prior appropriators and users proved to the Court that the waters claimed, diverted and used by the plaintiffs actually did interfere with their vested rights, the plaintiffs were entitled to an injunction against the watermaster.

This court, in the case of Montpelier Milling Company vs City of Montpelier, 19 Ida. 212, emphatically states that:

"An action to determine the right to waters flowing in a public stream in this state, wherein the facts alleged show that the plaintiff appropriated such water and applied the same to beneficial use, prior in time to the alleged diversion and appropriation of the defendant, constitutes a cause of action, and entitles the plaintiff to an injunction restraining further appropriation on the part of the defendant."

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In the case before the Court, the plaintiffs sought to enjoin the Commissioner of Reclamation and his agent, the watermaster of District No. 36, from unlawfully preventing the plaintiffs from diverting and using the water arising in Scott Slough. The complaint filed fully stated the facts, and the evidence introduced in support of the facts therein alleged, made at least a prima facie case,—that the plaintiffs had certain water rights; and it was incumbent on the intervenors, by competent evidence, to disprove the prima facie case, so made by them. The intervenors having failed to introduce any evidence whatever, not even as to their rights to intervene, the granting of the motion for non-suit was contrary to law, and in contravention of the rights of the plaintiffs. The Court should have entered judgment for the plaintiffs, as prayed for in their complaint.

Respectfully submitted,

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Attorneys for Appellants.

Residence: Idaho Falls, Idaho.

Service of copy of foregoing brief acknowledged
this.....day of August, 1926.

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For the Attorneys for Respondents.

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