

78-4134

Carter,
I think the enclosed
info will give good direction
on the Last Chance Spring.
Please look on page 7
#7.

Thanks,

Ed Osborn
208 - 347 - 2364

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DEPARTMENT OF
WATER RESOURCES

IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT OF
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADAMS.

E. I. OSBORN,

PLAINTIFF,

-vs-

L. F. SMITH, LEE HIGHLEY, guardian
of the person and estate of L. F.
Smith, and J. K. McREYNOLDS,

DEFENDANTS.

ANSWER

CROSS COMPLAINT.

Comes now L. F. Smith by Lee Highley, his guardian,
and appearing herein for himself alone and not for his co-de-
fendants, J. K. McReynolds, and makes this his answer to the
complaint of Plaintiff filed here and admits, denys and alleges
as follows, to-wit:-

I.

This answering defendant admits each and everyoof
the allegations set forth in paragraphs I, II, III of plaintiff's
complaint.

II.

Answering paragraph IV of said complaint this answer-
ing defendant denys that more than thirty years ago or at any
other time, the immediate grantor of this plaintiff, one Wilson
A. Williams, or any other person, construct a ditch from said
creek leading to and upon the Southwest Quarter of the South-
east Quarter, and the Southeast Quarter of the Southwest Quarter
of said section 8, and the East one-half of the Northwest Quarter
of said section 17, or any part or portion of said lands of a
size sufficient to, and which did divert and carry, or of a size

X

sufficient to, or which did divert or carry of the water of said creek, to and upon said lands 150 minors inches, and denys that said amount of water or any other amount has been used each year since the time alleged in said paragraph or during any of said years, or at all, for the irrigation of crops and hay, or crops or hay upon said land and this answering defendant denys that said amount of water when obtainable or when not obtainable from said creek is necessary for the proper irrigation and cultivation of said land mentioned in said paragraph IV.

III.

Answering paragraph V of said complaint this answering defendant denys that at the time said water was so diverted by said Williams as alleged, neither of these defendants or any other person was diverting or claiming or using of the water of said creek and denys that said Williams was the first appropriator of any of the water thereof, and denys that said Williams ever at any time made any appropriation of the water of said creek.

IV.

Answering paragraph VI of said complaint this defendant denys that plaintiff succeeded to all or any of the rights of said Williams by purchase or otherwise in and to said lands and water right, or lands or water right, as set forth in said complaint or otherwise, and denys that said Williams ever at any time had or owned or held any right to the use of water in said creek capable of succession by purchase or otherwise by plaintiff.

V.
Answering paragraph VII of said complaint this answering defendant denys that he has at any time sought to deprive plaintiff of the use of the water of said creek by diverting the same from said creek and by carrying the same by lands owned by this answering defendant, other than by under a claim of right so to do and which claim of right is hereinafter set forth in the cross-complaint of this answering defendant.

And for his answer to the other and further cause of action set forth in plaintiff's complaint, this defendant admits, denys and alleges as follows, to-wit:

1. Answering paragraph II of said further cause of action this answering defendant denys that more than twenty years ago or at any other time, plaintiff constructed a ditch from said Three Mile Creek of a capacity sufficient to carry and which did carry, from said creek to and upon the Southwest Quarter of the Southwest Quarter of said Section 8, and the West one-half of the Northwest Quarter of said Section 17 or at any part of said lands 100 minors inches or any other amount of the water of said creek, and denys that every since the alleged construction of said ditch during each irrigation season or during any one or more of the irrigation seasons of said years, when sufficient water was flowing in said creek, said plaintiff has continued to divert, carry, and use, or to divert or carry or use, for the purpose of irrigating crops on said land or for any other purpose, 100 minors inches of water or any other amount, and denys that said amount of water is necessary for the purpose of irrigating and cultivating said land.

2. Answering paragraph III of said further cause of action this defendant denys that at the time alleged in plaintiff's

complaint as the time of appropriation of water as set forth in plaintiff's first cause of action herein, that this answering defendant was not diverting or claiming or using any of the water of said creek and denys that plaintiff was the first appropriator of the water thereof, and admits that this answering defendant had prior to the time of plaintiff's alleged appropriation and use of the water of said creek as alleged in his further cause of action, made appropriations and use of the water of said creek and as hereinafter set forth in this answering defendant's cross complaint and denys that said appropriation and use by this answering defendant was subsequent to plaintiff's alleged appropriation and use as set forth in his first cause of action.

3. Answering paragraph IV of plaintiff's further cause of action this answering defendant denys that he has at any time sought to deprive the plaintiff of the use of the water of said creek and carry the same away from said creek to the lands of this answering defendant except under a claim of right so to do.

CROSS COMPLAINT.

And for a further answer to the complaint of plaintiff and for his cross complaint herein, this answering defendant alleges as follows, to-wit:-

1. That at some time in the present year the above named defendant, L. F. Smith, was by the probate Court of the County of Adams, State of Idaho, declared by it's order, duly made and entered, and in-competent person, and that Lee Highley was there-upon by an order of said Court likewise duly made and entered, appointed the guardian of the person and estate of said L. F. Smith, and that every since said Lee Highley has been and now is the duly appointed qualified and acting guardian of the person and estate of said L. F. Smith.

2. That this answering defendant is the owner and in possession of the following described lots, pieces, or parcel of land lying and being situated in the County of Adams, State of Idaho, to-wit:- the North one-half of the Southwest Quarter and the South one-half of the Northwest Quarter and the Northwest Quarter of the Northwest Quarter of Section 7, and the Southwest Quarter of the Southwest Quarter of Section 6, all in Township 19, North of Range 2 East, E. M., all of which said land is arid in nature and without the artificial application of water thereon will not produce profitable crops and which said lands with the artificial application of water produces large and profitable crops.

3. That Three Mile Creek is a tributary of the Little Salmon River in the County of Adams, State of Idaho, and is one of the natural streams of the State of Idaho, the water of which said stream are subject to appropriation and use by citizens of the United States of America.

4. That during all the times mentioned in this cross complaint this answering defendant was and still is a citizen of the United States of America.

5. That on or about the month of May, 1883, this answering defendant and cross complainant commenced the construction of an irrigation ditch beginning at a point on the North bank of said Three Mile Creek about two hundred yards East of the wagon road along said lands and extending therefrom in a Northwest direction about one-fourth of a mile leading to and upon the lands of this defendant and cross complainant hereinbefore described, which ditch was so constructed two feet wide at the top and bottom and ten inches deep and of such size and proportions as to enable it to carry, and it did carry, throughout its entire course, 150 inches minors measurement, measured under a four inch pressure of water, and which said ditch was fully com-

pleted on the fifth day of May, 1884; that said ditch was constructed by and at the instance of this answering defendant and cross complainant for the purpose of conveying water from said three Mile Creek to and upon the lands hereinbefore described and for the purpose of acquiring a water right for irrigation purposes and to be used upon said lands, that for the purpose of further acquiring and perfecting said water right for said lands this answering defendant and cross complainant on the 22nd day of June, 1888 posted a notice of appropriation of water under the laws of the State of Idaho, on the north bank of said Three Mile Creek and at the point of commencement of said irrigation ditch hereinbefore described and thereafter, and on the 22nd day of June, 1888, caused a copy of said notice to be recorded in the office of the County Recorder in the County of Washington, State of Idaho, and which said notice was thereafter recorded in Book I of water rights at page 199, records of said office and which notice also appears of record in the office of the County Recorder of the County of Adams, State of Idaho, in Book A of water rights at page 20 thereof, and that at the time of the posting and recording of said notice as aforesaid, said irrigation ditch herein-after described and described in said notice was fully completed, a copy of which said notice so posted and recorded as aforesaid, is hereto attached, marked Cross Complaint, Exhibit A, and by reference thereto is hereby made a part of this cross complaint.

6. That during each and every year since the year 1883, this defendant and cross complainant has conveyed through said irrigation ditch from said Three Mile Creek to and upon his said lands, 150 miners inches of water and has each and every season during said year 1883 actually used said water in the irrigation of his said lands and in the production of valuable crops thereon.

7. That for the purpose of further protecting his said water right as hereinbefore described, for his said lands and for the purpose of insuring the amount of water flowing in said Three Mile Creek, sufficient to irrigate his said lands, this defendant on or about the year 1883 constructed an irrigation ditch leading from a natural spring located at or about the center of Section Nine, Township Nineteen, North of Range Two West, of Boise-Meridian, in a Westerly direction and at a distance of about three miles to a branch of said Three Mile Creek and carried from said spring and commingled with the natural water of said branch of said Three Mile Creek and of Three Mile Creek, 60 miners inches of water measured under a four inch pressure and which said ditch so constructed was of sufficient size to carry throughout it's entire length, said 60 miners inches of water and that each and every year since the year 1883 this defendant and cross complainant has actually diverted from said spring and emptied into and commingled with the water of said Three Mile Creek, 60 miners inches of water, and has thereafter reclaimed from said Three Mile Creek said 60 miners inches of water at such times as the natural flow of said Three Mile Creek was insufficient to fill the said irrigation ditch of this cross complainant herein first described.

8. That at or about the year 1883, this cross complainant for the purpose of acquiring a further water right for his said lands diverted from said three Mile Creek at or about the Northeast Corner of the Southeast Quarter of the Southeast Quarter of Section Seven, Township Nineteen, North of Range Two East of Boise Meridian, 150 miners inches of water measured under a four inch pressure and carried the same through a natural slough leading in

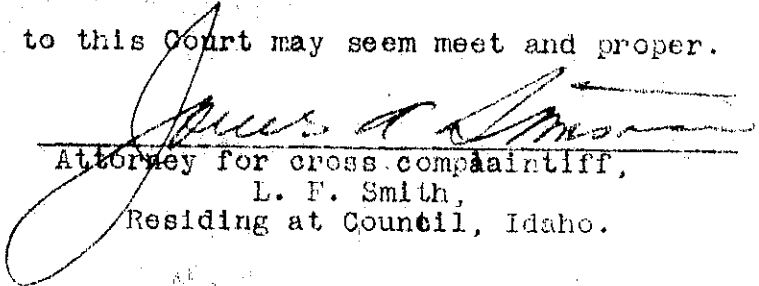
a Northwesterly direction to and upon the lands of this cross complainant and which said natural slough was of a sufficient size to carry through it's entire length said amount of water and upon said lands, and that this cross complainant through said ditch herein first described and through said natural slough has each and every year during the irrigation season of said years since 1883, actually diverted from said Three Mile Creek and carried to and upon his said lands an amount of water sufficient to properly irrigate 200 acres of his said lands and during each and every season since 1883 this cross complainant has actually irrigated from said Three Mile Creek 200 acres of his said lands and that 250 inches measured under a four inch pressure, of water, is necessary for the proper irrigation of his said lands.

9. That the said plaintiff and the said defendant, J. K. McReynolds, has at divers time sought to deprive this cross complainant of the use of said water by diverting the same from said creek and carrying the same to lands owned by them respectively through separate ditches to the great and irreparable injury and damage to this cross complainant, and unless said plaintiff and said defendant, McReynolds, are enjoined by a proper decree of this Court, they and each of them will divert and carry away said water which deprive this cross complainant of the use thereof, thereby greatly injuring him and his said lands in a manner and to an extend impossible of estimation.

10. That this cross complainant has not a plan speedy for adequate remedy at law in the premises.

WHEREFORE, this complainant prays that he by adjudged to have a prior and superior right to the use of the water of said creek as against the plaintiff and said defendant, McReynolds, to the extent and amount of 200 inches thereof, miners

measurement, measured under a four inch pressure and that it be further adjudged that this cross complainant has a right to commingle said water from said spring with the natural flow of said Three Mile Creek and to reclaim the same therefrom, at such times as the natural flow of said Creek is insufficient to give to this cross complainant said amount of water to which he is entitled from the natural flow of said Creek. That the said plaintiff and said defendant, McReynolds, be required to appear and show what, if any, right or title they or either of them have in and to the water of said Three Mile Creek and that it be adjudged that whatever right or title they have or claim, in and to the natural flow of said Creek be adjudged inferior and subsequent in time, to the right of this cross complainant and judgment for his costs herein expended and that said plaintiff and said defendant, McReynolds, and their agents and successors in interest be enjoined and forever restrained from taking, using, or appropriating, any of the water of said Creek, when such taking, use, or appropriation thereof, would reduce the flow of said Creek below 200 miners inches, measured under a four inch pressure, and for such other and further and different relief in the premises as to this Court may seem meet and proper.


Attorney for cross complainant,
L. F. Smith,
Residing at Council, Idaho.