

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

O. J. NEELEY and MYRTLE NEELEY,
his wife,

Plaintiffs,

vs.

GEORGE BROWNING and PHEBE BROWNING,
his wife, and MORRIS SLAYMAKER and
THELMA SLAYMAKER, his wife,

Defendants.

FILED 5/31 1954
4:11 P.M.

H. T. McKelvey
Clerk
M. J. Vane

ANSWER TO AMENDED COMPLAINT
AND CROSS COMPLAINT.

Come now the defendants above named, and in answer to Plaintiffs' complaint on file herein, admit, deny and allege as follows:

I.

Defendants admit all allegations contained in Paragraphs I, II, III and IV of plaintiffs' complaint on file herein.

II.

Defendants deny each and every allegation in Paragraphs V and VI of plaintiffs' complaint well pleaded, except as hereinafter set forth.

III.

Defendants allege that Pony Creek is an intermittent stream, having a substantial flow of water during the spring and early summer of each year, but that such flow is substantially reduced, or that it ceases, in later parts of the summer and the autumn of each year; that the parties hereto, amongst them, have made full use of all available waters of said Pony Creek for many years, and that a fair and equitable distribution thereof has heretofore been made of such waters; but that plaintiffs' share of said waters will equal the sum of 435 miners inches of said waters only during periods of high water.

IV.

That defendants George Browning and Phebe Browning, his wife, now are, and at all times herein mentioned, have been the owners, and in the possession of the following described property, situated in Madison County, State of Idaho, to-wit:

The South Half of the Southwest Quarter and the Southwest Quarter of the Southeast Quarter of Section 29, township 6 North, Range 13 East of the Boise Meridian; and the North Half of the Northwest Quarter of Section 32, Township 6 North, Range 13 East of the Boise Meridian.

160 acrs
200

V.

That James D. Browning, a predecessor in title of said George Browning and Phebe Browning, his wife, filed upon 3.2 second feet of the waters of Pony Creek, of which sum, proof was made on 1.3 second feet, and license issued to one Anne Kearney, assignee of said James D. Browning, and also a predecessor of said defendants, in title; said License being No. 1505, issued by the State of Idaho to said Anne Kearney; that the balance of the water so filed on by said James D. Browning was put to use over a period of time, although not reduced to license.

VI.

That Morris Slaymaker and Thelma Slaymaker, his wife, the other above named defendants, now are, and at all times herein mentioned, have been the owners, and in the possession of the following described property, situated in Madison County, State of Idaho, to-wit:

The South Half of the Northwest Quarter, the North Half of the Southwest Quarter, and the Northeast Quarter of Section 32, Township 6 North, Range 43 East of the Boise Meridian.

VII.

320
acres

That License No. 2264 for 2.5 second feet of the Waters of Pony Creek was issued by the State of Idaho to Dora Weaver, the assignee of John Weaver, for use on 125 acres in the Northeast Quarter of Section 32, aforesaid; that additional water was put to use from time to time thereafter upon additional land by said Dora Weaver and by said John Weaver, who are predecessors in title of the said Morris Slaymaker and Thelma Slaymaker, defendants.

VIII.

That one Charles H. Cazier filed on 8 second feet of the waters of Pony Creek for use on the unsurveyed South Half of the Southwest Quarter of Section 19; the West Half of Section 30; Township 6 North, Range 43 East of the Boise Meridian, now in Madison County, State of Idaho; that such filing was never reduced to license; that some part thereof, was, however, usefully applied to the irrigation of parts of said land; that a portion thereof was deeded to James A. Browning, by Quit Claim Deed dated May 31st, 1912, and recorded May 19th, 1915, in Book 17 of Deeds, at Page 320, under recorder's instrument No. 5044, records of Madison County, State of Idaho; that said James A. Browning was a predecessor in title of the defendants, George Browning and Phebe Browning, his wife; and that the plaintiffs may properly claim under the balance of said filing, insofar as actually used by them and their predecessors in title.

IX.

That water disputes having heretofore arisen in connection with the said waters of Pony Creek, the predecessors in title of the present owners of the lands watered thereby, did, in June, 1917, form a corporation, to-wit, PONY CREEK CANAL COMPANY, to deliver said water to the various users for irrigation and domestic purposes, and did thereby, in settlement of all former disputes, make a fair and equitable division of said waters of Pony Creek, as set out in the Articles of Incorporation of said Corporation, which are filed in the records of Madison County, State of Idaho, under recorder's instrument No. 15216, a certified copy of which are hereto attached, as Exhibit "A", and which are hereby incorporated and made a part hereof, by reference, as fully as if though herein set forth in full.

X.

That plaintiffs, O. J. NEELEY and MYRTLE NEELEY, his wife, are the successors in interest to Ira J. Davis, and to one-half the holdings of E. D. Clark and Eli Clark, Jr.; that defendants, MORRIS SLAYMAKER and THELMA SLAYMAKER, his wife, are the successors in interest to one-half the holdings of E. D. Clark and Eli Clark, Jr.; and that defendants, GEORGE BROWNING and PHEBE BROWNING, his wife, are successors in interest to J. A. BROWNING and to Annie Kearney; all as mentioned and shown in the aforesaid Articles of Incorporation.

XI.

That the diversionary works used by the parties hereto, when in proper repair, are capable of carrying approximately 960 miners inches of water; that when such full stream of water is being diverted and used, the said plaintiffs would be entitled to the sum of 435 miners inches of water; the defendants, George Browning and Phebe Browning, his wife, would be entitled to the sum of 300 inches of water; and the defendants, Morris Slaymaker and Thelma Slaymaker, his wife, would be entitled to the sum of 225 inches of water; but that when the flow of water is reduced, each party is entitled to his pro rata share, on the same basis as aforesaid, without right in any party, and especially without right in the plaintiffs, to demand any given flow of water in inches; but only to demand a pro rata share of such water as may be available at any given time.

AND FOR CROSS COMPLAINT, Defendants and Cross-complainants complain of the Plaintiffs and Cross-defendants, and for cause of action allege:

I.

Defendants and Cross-complainants hereby re-plead Paragraphs I to XI of their Answer, inclusive, and by reference, hereby make same a part of this Cross-Complaint.

II.

Defendants allege that for over 36 years, to-wit, since June 25th, 1917, they or their predecessors in title have owned, used, and enjoyed the uninterrupted use of their respective pro rata shares of the waters of Pony Creek, a tributary to Snake River, in Madison County, Idaho, for irrigation and domestic purposes, on the foregoing described premises, said pro rata share being determined on the basis of the contribution of their predecessors to PONY CREEK CANAL COMPANY, as set forth in Exhibit "A", hereunto attached, as above set forth..

WHEREFORE, Defendants pray judgment that the adverse claims of Plaintiff, as set forth in Plaintiff's complaint herein filed, be determined by this Court; that it be adjudged and decreed that Defendants are the prior owners of their respective pro rata shares of the waters of Pony Creek, and that Plaintiffs have no right, title or interest whatsoever therein or thereon superior to the right, title and interest of Defendants in and to their respective shares as above set forth.

That title to said respective shares of water be quieted in the Defendants as against the Plaintiffs, and all persons claiming under them; and that the usual decree foreclosing all adverse claims against these defendants be entered.

Defendants further pray for such other or further or different relief as to this Honorable Court may seem just and equitable, and for costs of this suit; and that Plaintiffs' complaint being fully answered, the plaintiffs may take nothing thereunder.

Dated this 20th day of May, 1954.

Leonard O. Kingsford
LEONARD O. KINGSFORD, Attorney for the
Defendants. Residence and Post Office
Address: Rexburg, Idaho.

STATE OF IDAHO)
 : ss.
County of Madison)

George Browning and Morris Slaymaker being first duly sworn, depose and say, each for himself, and not one for the other:

That he is one of the parties defendant in the above and foregoing entitled cause; that he has read the foregoing answer and cross complaint, and knows the contents thereof; and the same is true as he verily believes.

George Browning
Morris Slaymaker

Subscribed and sworn to before me this 21st day of May, 1954.

Leonard O. Hingsford
NOTARY PUBLIC for Idaho, residing at
Rexburg, Idaho. My commission
expires: August 14th, 1957.

I hereby acknowledge service of a copy of this ANSWER TO AMENDED COMPLAINT AND CROSS COMPLAINT, this 21st day of May, 1954.

Ray W. Rigby
RAY W. RIGBY, Attorney for the
Plaintiffs and Cross-Defendants.