

Orr Affidavit

Exhibit 42

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DEPARTMENT OF
WATER RESOURCES

Letter from B.E. Stoutemyer, District Counsel,
U.S. Reclamation Service, to the Chief Counsel,
U.S. Reclamation Service
(Jun. 30, 1919)

163-2
Transfer Case

DEPARTMENT OF THE INTERIOR

UNITED STATES RECLAMATION SERVICE

BES-PH.

Boise, Idaho, June 30, 1919.

OFFICE OF
DISTRICT COUNSEL

From - District Counsel, B. E. Stoutemyer,

To - Chief Counsel, Washington, D. C.

Subject- Case of Snake River Valley Irrigation District -
v. John Empey - suit to compel Watermaster to
raise headgates and divert water flowing in
Snake River.

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2-3- Chief Counsel
Mr. Blair

1. Referring to my letter of June 26, 1919, in regard to the above case, in which case the Plaintiff sought a Writ of Mandate to compel the Watermaster to allow the Plaintiff to open its headgates and divert the water flowing in Snake River into its canal, to which Plaintiff claimed to have a prior right:

2. As the natural flow of the river is insufficient this year to supply the priorities decreed to the Plaintiff, the opening of the Plaintiff's headgates would have resulted in the diversion of the stored water which we are running from Jackson Lake Reservoir through the channel of Snake River.

3. There is a great shortage of water in Snake River this year, this being the lowest year in thirty years, the Snake River at this time being about 3,000 second-feet lower than ever known before at this time of the year.

4. As a result many of the canals in the Idaho Falls and Blackfoot Districts have been shut out of water with prospect of very heavy losses, and of course, if the Plaintiff in this case could succeed in opening its headgates and diverting the stored water, all other companies would do likewise, with the result that we would have been unable to get the stored water down from the reservoir to the Minidoka Project and the other projects which have the right to use the stored water.

5. We tried this case before Judge Cowan at Blackfoot, Idaho, Friday and Saturday (June 27 and 28). The Plaintiff examined a number of witnesses and we cross-examined the witnesses offered by Plaintiff. At the close of Plaintiff's testimony we made a motion - in effect a motion for non-suit, which after a very extended and rather bitter argument by the Attorney for

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the Plaintiff, and a very brief argument on our part, was sustained by the Court, the Court delivering his decision and an oral opinion without leaving the bench.

6. The contention of the Attorneys for the Plaintiff as presented in their argument rested on two points:

The first was the bald proposition that the holders of decreed rights had the right to take any water flowing in the river whether natural flow or stored water, on account of the prior rights decreed to them as to the waters of Snake River.

Their second point was that the storage of the water in Jackson Lake during the winter and spring so lessened the natural flow in the river that the ground water went down, and that a large amount of the natural flow which the Plaintiff might otherwise receive, is now being absorbed in the gravel banks which Plaintiff claims were dried out by reason of our storage of water during the winter and spring.

7. The Court made a rather extended argument denying the Plaintiff's contention on both of these points and refused to issue the Writ of Mandate or to allow the Plaintiff to raise its headgates.

8. I was a little uneasy about the result of this case before this particular Judge on account of the fact that Judge Cowan had just tried a case on the Lost River, in which he ordered the Reservoir Company to release stored water from the Lost River Reservoir to supply the rights of prior appropriators on that stream, on grounds similar to those advanced in the second contention of the Snake River Valley Irrigation District.

9. There was this difference, however, in the facts in the two cases - that on the Snake River we store only about 20% or 25% of the water coming into the stream, three-fourths of the water coming in in tributaries below Jackson Lake Dam, so that our storage on Snake River has never resulted in drying up the stream as was the case in connection with the reservoir on the Lost River.

10. I believe that the Judge's decision in the Lost

River case was entirely wrong as a matter of law, as the law gives the reservoir owner the unconditional right to store water during the non-irrigation season when it is not being used by prior appropriators, and also to store the surplus flood water regardless of the fact that the storing of such water would necessarily lower the level of the water in the stream during the period of such storage, and might to a slight extent affect the amount of water seeping into the banks and adjacent lands from the river.

11. In other words, it is my understanding of the law that under the doctrine applicable in states where the doctrine of prior appropriation prevails, no person whether riparian owner or otherwise, has any vested right to demand that the current of the stream should remain at its accustomed level either for the purpose of soaking his land by seepage or for the purpose of enabling him to conveniently divert the water in his ditch.

12. If this were not so, no person could ever divert any water from any stream after one filing or appropriation had been made thereon, however small the filing of the first appropriator, because every diversion whether for the filling of a reservoir, or for direct use of a canal, would necessarily lower the level of the water in the stream. (See Schodde v. Twin Falls, 161 Fed. 42 - also Schodde v. Twin Falls, 224 U. S. 107).

13. However, as the trial court has decided in our favor with reference to the particular facts involved in the Snake River matter, it will not be necessary for us to consider this phase of the matter further.

14. I presume that this decision will end the effort of the canal companies around Idaho Falls and Blackfoot to open their gates with the permission of the court, but I understand that one of the canal companies has several times opened its gate in the night, or some time after it was locked down by the Watermaster, and has been taking water in violation of law, and has told the Watermaster, or his deputy, that they would open the gate again whenever he shut it down.

15. The Watermaster has notified the County Attorney

and requested prosecution but the County Attorney states that he is willing to prosecute, but that unless the Watermaster can prove that he saw the Defendants open the gates, they would not be able to make out a case.

16. The local community around Idaho Falls, particularly around Rigby where this case has arisen, are very much in sympathy with the idea of allowing the upper Snake River canals to open their gates and take the stored water belonging to the Minidoka and Twin Falls Projects, and local people familiar with the conditions in that section are very doubtful whether a jury could be secured which would convict.

17. In view of the acute water shortage, it is probable that there will be a good deal of trouble of this kind during the remainder of the irrigation season, and it is a serious problem how to proceed to prevent these parties from stealing the water which is so vitally necessary to mature the crops on the Minidoka and other projects which have a right to the storage water.

18. I have suggested to the Watermaster that if he cannot stop this practice by prosecution under the Criminal Statutes, he should call on the Attorney-General of the State to get out an Injunction restraining the Company from tampering with gates after they have been set by the Watermaster, and then have them up for contempt if the gates are again opened.

B. E. Stoutermyer

CC-C. of C.
P.M., Burley.
F.A. Banks, Idaho Falls, Idaho.

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