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Association, Inc. and Its Individual Members

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IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT

OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF TWIN FALLS

In Re SRBA	)	Subcase No. 36-02080
	)	
Case No. 39576	)	REPLY BRIEF IN SUPPORT OF
	)	MOTION FOR LEAVE TO FILE
	)	LATE OBJECTION
	)	

DESCRIPTIVE SUMMARY

This Brief replies to the A&B Irrigation District's Brief in Opposition to Motion for Leave to File Late Objection and the United States' Response to Motion to File Late Objection. The

First Affidavit of Lawrence J. Jensen accompanies this Reply Brief and is filed contemporaneously herewith.

REPLY BRIEF

A. Introduction.

On December 22, 1994, the Magic Valley Underground Pumpers Association, Inc. and its over 80 individual members ("the Association") filed their Motion for Leave to File Late Objection. The objection would contest the claimed uniform September 9, 1948 priority date for the 177 wells covered by Water License No. 20736. The State Reclamation Engineer ("State Engineer") issued the license to the United States Bureau of Reclamation in June 1965. The United States claims to hold the license in trust for the A&B Irrigation District ("A&B").

A&B and the United States have opposed the Association's Motion on the following grounds:

1) the Association lacks sufficient justification for filing a late objection;

2) allowing a late objection would prejudice A&B and the U.S.; and

3) the Association has failed to present a meritorious objection to the claimed uniform 1948 priority date.

Each of those arguments is refuted in detail below. However, it is important to note at the outset that, in arguing that the Association has failed to present a meritorious objection, neither A&B nor the U.S. deals with the substance of the Association's claims about A&B's priority date. Instead, they

raise two jurisdictional arguments. First, they argue that the issue of A&B's priority date has been litigated and is therefore barred from relitigation by the doctrine of *res judicata*. Second, they argue that the exclusive means of contesting the license's priority date was to file an appeal within 60 days of the issuance of the license, which the Association failed to do. While the Association responds to these jurisdictional arguments in the discussion below, it views them as irrelevant to the Court's present task, which is solely to determine if the Association should be allowed to file a late objection. Final resolution of the jurisdictional issues raised by A&B and the U.S. can and should await the proceedings that will follow the filing of the Association's objection.

B. Good Cause Exists for Granting Leave to File the Association's Late Objection

The U.S. argues that the Association lacks a sufficient justification for filing a late objection because its members or their predecessors in interest knew or should have known about the issuance of A&B's license in June 1965 and, having failed to challenge the license then in a timely fashion, may not do so now. This argument is irrelevant. It goes to the ultimate merits of the Association's objection, rather than to the narrow question of whether the Association should be allowed to file its objection late. It should therefore not be considered by the Court at this stage of the proceedings.

The argument is also demonstrably false. The Association did not and could not have known about the issuance of the license for the simple fact that the State Engineer did not give notice to anyone other than the Bureau of Reclamation that the license had issued. Indeed, the record indicates that the State Engineer may have deliberately avoided giving notice to interested parties in order to avoid an appeal of his license decision. A&B's Exhibit F.

Moreover, the notice that was given during the 17 year history of A&B's attempt to obtain a license indicated that the State Engineer intended to issue the license with a split priority date, rather than with the uniform date that it now contains. In a 1956 letter that was sent to the parties who had raised questions about the proceedings, the State Engineer wrote:

> It is the further decision of the State Reclamation Engineer that the priority date of that part of the right initiated by Permit No. 20736 depending on works constructed prior to November 5, 1955, shall relate back to September 9, 1948, and that part of the right initiated under Permit No. 20736 and depending on works not completed by November 5, 1955, may relate back to November 5, 1955.

Exhibit D.[1] The Engineer subsequently confirmed this intention in letters dated June 25, 1964 and December 21, 1964. Exhibit I. Thus, to the extent that any of the Association's members had knowledge of the A&B license proceedings, some justifiably

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[1] Exhibits A through H were submitted with the Association's Memorandum in support of its Motion. Exhibits I and J are appended to this Memorandum.

believed that any license issued to the U.S. for A&B would have a split priority date that would reflect the actual completion times of A&B's 177 wells.

The U.S. also argues that the Association's members had timely notice of A&B's claimed water right in this proceeding and should therefore not be allowed to file late. What this assertion overlooks is the complex procedural history referred to above. To the extent that any of the Association's members may have been aware of the 30 year old issues surrounding A&B's priority date prior to the May 1993 deadline for filing objections, some had reason to believe, as noted above, that the priority date had been split. They can therefore readily be excused for not carefully scrutinizing A&B's claim in this proceeding. On the other hand, most of the Association's members, as typified by the affidavits submitted with the Association's Motion, knew nothing whatsoever of the priority date controversy prior to the deadline.[2] It is therefore unreasonable to suggest that they should have suspected a problem and done the research necessary to verify it. Johnson v. Pioneer Title Co., 104 Idaho 727, 732, 662 P.2d 1171, 1176 (Ct. App. 1983) ("Whether a party's conduct ... constitutes 'excusable

---

[2] Whether their predecessors in interest were aware of the controversy and whether they should be bound by what their predecessors knew are issues that are not relevant to the narrow question of whether they should be allowed to file a late objection.

neglect' is determined by examining what might be expected of a reasonably prudent person under similar circumstances. . . . The courts must weigh each case in light of its unique facts.").

It is unfair to claim, as the U.S. does, that the Association's members sat on their rights. As soon as they were squarely confronted with the issue of A&B's claimed uniform priority date by A&B's delivery call in July 1994, they organized themselves, did their research and, at the earliest possible moment, filed their objection. It is thus quite clear that the Association had good and sufficient cause for having failed to file a timely objection to A&B's water right.

C. Neither the U.S. nor A&B Will Suffer Prejudice if Leave to File a Late Objection is Granted

Both the U.S. and A&B claim that they will suffer prejudice if the Court allows the Association to file a late objection. However, they are unable to provide any substantial reasons why that would be so.

The U.S. claims that granting the Association leave to file its objection will "introduce an entirely new issue very late in the ligation process" and force it to prepare its defense "on a very abbreviated schedule." This is simply not true. Although over two years have passed since the deadline for filing objections, judicial stays imposed in the SRBA since that time have left this subcase in a posture where little, if any,

prejudice will result from allowing the late objection.[3] As far as the Association is aware, no discovery has taken place, a settlement conference has not occurred and a trial date has not been set. Further, a motion to intervene remains pending and the other two objections filed in this subcase are still unresolved. It is thus quite clear that the subcase is not "late in the litigation process", as the U.S. claims, and that the U.S. will have adequate time to prepare its defense.

The U.S. claims that it will be prejudiced, if the late objection is filed, by having to search "for records and evidence from 30 years ago." This claim is irrelevant to the issue before the Court. The issue is whether granting leave to file a late objection would impose some burden on the U.S. uniquely associated with the fact that the objection is late. The search of old records is not such a burden. Even if the objection had been made before the deadline, the U.S. would have had to make a search for the records from the relevant time period.

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[3] On April 19, 1994, the Court imposed a stay on this and other subcases in Reporting Areas 1, 2 and 3 while it addressed statutory changes made by the 1994 Idaho legislature. It lifted the stay on December 7, 1994, but then reimposed it from December 22, 1994 to March 21, 1995 for subcases, including this one, that involved the presumption statutes. Thus, the proceedings in this subcase were stayed for 11 of the 26 months that have passed since the May 1, 1993 deadline for filing objections. Moreover, during 6 of the 15 months when no stay was in effect, the proceedings were at a standstill because a Special Master was not appointed until November 1993.

Both the U.S. and A&B claim that granting leave to file the late objection will cause them to incur the expense of defending it. While presumably true, this is not the sort of prejudice that would justify a denial of the Association's Motion. If it were, then leave to file a late objection could never be granted because it will always result in additional expense for the parties. Disqualifying prejudice, if any, must be based on some other ground. See Johnson v. Noland, 78 Idaho 642, 646, 308 P.2d 588 (1957); In the Matter of the General Determination of Rights to the Use of Surface and Ground Waters of the Payette River drainage Basin, 107 Idaho 221, 224, 687 P.2d 1348, 1351 (1984).

A&B claims that if the Court allows the Association to file a late objection, "there will never be a conclusion to the Snake River Basin Adjudication." A&B appears to believe that if the Court allows the Association to file an objection, there will be an unending stream of late objections that the Court will be powerless to deny. This is rank speculation without any basis in fact. Moreover, it is an insult to the Court's good judgment. The Court is fully capable of considering any future motions from other parties on their merits.

In sum, even if the Association had filed its objection by the May 1, 1993 deadline, this subcase would not be in a very different posture than it is today. As a result of the stays imposed by the Court, the proceedings in this subcase are still in the very early stages. The Association filed its Motion as

soon as the stay in effect at the time of the A&B delivery call was lifted in December 1994. Neither the U.S. nor A&B have demonstrated that any prejudice to them will result if the Court grants the Association leave to file its objection. For reasons of mere inconvenience, they are seeking to deny the Association the chance to have its claims, which are vital to the livelihoods of its members, fully and fairly reviewed on the merits.

D. The Association's Priority Date Objection is Meritorious.

To justify a late objection, the Association must only plead facts which, if established, would constitute a meritorious claim. Baldwin v. Baldwin, 114 Idaho 525, 527, 757 P.2d 1244, 1246 (Ct. App. 1988). The Association has more than met its burden. In the brief in support of its Motion, the Association explained in detail why both the State Engineer and the State Attorney General concluded in 1964 that A&B is not entitled to a uniform 1948 priority date for all of its 177 wells. Exhibit F. A final determination of the Association's claim is not appropriate at this stage and the general rule, even in doubtful cases, which this is not, is to grant relief in order to reach a judgment on the merits. Johnson v. Pioneer Title Company, 104 Idaho 727, 732, 662 P.2d 1171, 1176 (Ct. App. 1983).

Neither the U.S. nor A&B directly addresses the substance of the Association's priority date objection.[4] Instead, they assert that the Association's claim lacks merit for jurisdictional reasons. The U.S. and A&B argue that the issues surrounding A&B's priority date have been litigated and are therefore *res judicata*. In addition, A&B argues that this Court lacks jurisdiction to hear the Association's challenge to A&B's priority date. In A&B's view, the provisions of a license may be challenged in court only if done so within sixty days of the issuance of the license.

1. Previous Proceedings Involving A&B's License Pose No *Res Judicata* Bar Since They Did Not Reach a Decision on the Merits

Both the U.S. and A&B claim that the Association is barred from "relitigating" the issue of A&B's priority date by the doctrine of *res judicata*. In making their claim, they rely on the fact that the appeals from the issuance of A&B's license that were filed in 1964 and 1965 were dismissed by the courts. What they conveniently overlook, even though it is plain from their own exhibits, is that the issue of A&B's priority date was not litigated on the merits in those appeals. The appeals were dismissed solely for jurisdictional reasons. A&B's exhibit F.

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[4] A&B's present counsel, Mr. Roger Ling, previously represented at least one of the Association's members in a challenge to A&B's priority date. The Association reserves the right to raise issues concerning Mr. Ling's earlier representation of clients opposed to A&B's uniform priority date.

Rule 41(b), I.R.C.P., explicitly provides that dismissal on jurisdictional grounds does not operate as an adjudication on the merits. Thus, the doctrine of *res judicata*, which limits the right to relitigate issues that have been decided on the merits, simply does not apply here. Gilbert v. Nampa School District No. 131, 104 Idaho 137, 140- 141, 657 P.2d 1 (1983) (The doctrine of *res judicata* applies only if an existing final judgment has been rendered on the merits of the case.).

On June 25, 1964, the State Engineer sent a letter to the State Director of the Bureau of Reclamation notifying him that a license would be issued for permit No. G-20736. Persons concerned about the validity of that license filed suit in five separate counties in August 1964 appealing from the decision of the State Engineer. Exhibit G. On May 6, 1965, the judge in the appeal filed in Minidoka County dismissed the appeal as premature, apparently because a license had not yet actually been issued by the State Reclamation Engineer. A&B's Exhibit E.

Shortly thereafter, on June 10, 1965, the State Engineer issued a license for Permit No. G-20736 without notifying the persons who had filed the previous appeals or anyone else who might have been interested. The license, contrary to earlier public notice by the State Engineer and without any explanation, contained a uniform 1948 priority date for all of A&B's 177 wells. In late September 1965, immediately after the persons who had filed the appeals in 1964 learned of the license issuance, an

amendment of appeal was filed in the Jerome County action and a new notice of appeal was filed in the Minidoka County action. On February 9, 1966, the Minidoka County Judge dismissed the new appeal on the ground that the 60 days for appeal had lapsed and that since appeal times were a jurisdictional matter the court was without jurisdiction to hear the appeal. The other pending appeals were also later dismissed on jurisdictional grounds.[5]

The Minidoka County court acknowledged that the State Engineer had agreed to keep the appellant advised of any action on the permit but failed to do so. Nevertheless, the court concluded that it was without authority to extend the deadline for hearing the appeal:

> It is apparently true that the respondent agreed to keep the appellant's counsel advised of whatever action was taken upon the United States' application for the waters in question. His failure to do so is at least censurable and possibly gives rise to a suspicion of a deliberate intention to avoid an appeal. Nevertheless, our law is rather well established that appeal times are jurisdictional and the fact is that the appeal was not filed within the required time. . . . I am of the opinion that I am without authority to reach any other conclusion.

A&B's Exhibit F.

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[5] The Cassia County appeal was dismissed in 1964 for reasons not disclosed by the record. The parties to the other four appeals stipulated in December 1964 that the decision in the Minidoka County appeal would be dispositive in the other appeals. In accordance with that stipulation, the appeals in Lincoln and Blaine Counties were dismissed on March 17, 1966 and the appeal in Jerome County was dismissed on March 21, 1966.

Thus, the record is clear that the issue of A&B's priority date was not litigated in the appeals filed in 1964 and 1965. The appeals were dismissed soley on jurisdictional grounds and the issues that the Association now seeks to have this Court review were never considered. The dismissal of the appeals therefore poses no *res judicata* bar to the Association's objection.

2. The SRBA is an Appropriate Forum for Raising The Association's Priority Date Objection

A&B's second jurisdictional argument is one with sweeping implications. A&B argues, in effect, that this Court lacks jurisdiction to hear any challenges to the provisions of a license. The Association explains below why this attack on the Court's jurisdiction should be rejected. However, the Court need not reach this jurisdictional issue to decide the motion before the Court. Indeed, the Association believes that any decision on such an important issue should be made only after the parties have had a full opportunity to develop the facts and legal history surrounding it.

A&B bases its argument on the language in Section 42-224 of the Idaho Code. In 1965, when the A&B license was issued, the section stated:

> . . . any one feeling himself aggrieved by the statements contained in the license issued by the department . . . may appeal therefrom to the district court of the county in which the place of use of the water

> claimed shall be situated. Such appeal shall be taken within sixty days from the date of such license. . . .

A&B claims this appeal procedure is the only means by which the provisions of a license may be challenged in court. A&B's interpretation of section 42-224 should be rejected for several reasons.

First, A&B's interpretation is contrary to case law. Courts that have construed section 42-224 have held that its appeal procedure is not the exclusive means of challenging the provisions of a license. As the court stated in Crockett v. Jones, 42 Idaho 652, 655-56, 249 P. 483 (1926):

> We are of the opinion that the remedy so provided is cumulative; that the commissioner of reclamation is but an administrative officer, without judicial powers, and any party aggrieved by the decision of such commissioner may either appeal to the district court, as provided in C. S., sec. 5582, or commence an original action in said court for the determination of the question involved in the proceeding before the commissioner of reclamation."

Similarly, the court in Sarret v. Hunter, 32 Idaho 536, 541, 185 P. 1072 (1919) stated:

> "Appellants' contention that the Sarrets are barred from questioning the formers' rights under their permit by reason of their having failed to appeal from the decision of the state engineer, and having failed to bring an action in the district court within the 90-day period prescribed by C. S., sec. 5589, is not well taken. . . . Such decision was neither final nor binding upon the rights of litigants, and did not control the courts in determining the rights of the parties.

Second, A&B's interpretation raises due process concerns. Section 42-224 does not require that notice be given to interested parties of the issuance of a license. Thus, it would be fundamentally unfair to deny interested parties their day in court for having failed to file a timely appeal under the section's appeal procedure.

Third, A&B's interpretation is inconsistent with the broad jurisdiction given to this Court and the fundamental purpose of a general adjudication. The SRBA statutes provide that the purpose of a general adjudication is to "assure that state laws and procedures provide a fair and impartial forum for the adjudication of the rights of all claimants." Idaho Code § 42-1401 (Supp. 1994). A general adjudication is defined broadly to mean "an action both for the judicial determination of the extent and priority of the rights of all persons to use water from any water system within the state of Idaho that is conclusive as to the nature of all rights to the use of water in the adjudicated water system." Id. § 42-1401A(6) (Supp. 1994). There would be scant need for a forum in which to judicially determine priority rights if all the rights embodied in licenses were deemed settled.

Fourth, other statutory provisions make plain that the issuance of a license was not meant to be a conclusive determination of water rights. Idaho law has long provided that licenses are only *prima facie* evidence of a water right.

Exhibit J, (Idaho Code § 42-220 (1948) ("Such license . . . shall be *prima facie* evidence as to such right.")); Idaho Code § 42-220 (1990). The fact that a license is described as only *prima facie* evidence of a water right is an unmistakable indication that the license is not a conclusive determination of the right. As with any other *prima facie* evidence, it may be overcome by other evidence. The proper forum for presenting such evidence is this adjudication where all interested persons are properly noticed and given the opportunity to be heard.

Similarly, Idaho's water distribution statutes in existence during 1948 to 1965, further confirm that water licenses issued during that period were not meant to be conclusive and ultimately need to be adjudicated. Section 42-604 provided that water districts could only be established on streams or water supplies whose priorities of appropriation had been adjudicated by the courts. In addition, in times of shortage, unadjudicated water rights were deemed to be subsequent to the adjudicated rights in the water supply and the watermaster was authorized to close all the headgates of ditches having no adjudicated rights if necessary to supply adjudicated rights. Exhibit J, (Idaho Code § 42-607 (1948)). This statutory scheme clearly envisioned the adjudication of water rights as the ultimate method of perfection. Under these statutes, licenses as well as other non-adjudicated water rights had secondary status.

There can be no doubt that this Court has jurisdiction to hear the concerns that the Association seeks to raise by its objection.

CONCLUSION

For the above-stated reasons, the Association's Motion for Leave to File Late Objection should be granted.

DATED this 13th day of July, 1995.

HOLLAND & HART

By Lawrence J. Jensen
Lawrence J. Jensen
Attorneys for Respondents Magic Valley Underground Pumpers Association, Inc., *et al.*

CERTIFICATE OF SERVICE

I hereby certify that on this 13th day of July, 1995, I caused to be served a true and correct copy of the foregoing Reply Brief in Support of Motion for Leave to File Late Objection by the method indicated below, and addressed to the following:

Daria J. Zane U.S. Department of Justice General Litigation Section Environment and Natural Resources Division P.O. Box 663 Washington, DC 20044-0663	✓ U.S. Mail ____ Hand Delivered ____ Overnight Mail ____ Telecopy (Fax)
Roger D. Ling Ling Nielsen & Robinson 615 H Street P.O. Box 396 Rupert, ID 83350	✓ U.S. Mail ____ Hand Delivered ____ Overnight Mail ____ Telecopy (Fax)
Chief, Natural Resources Division Office of Attorney General State of Idaho P.O. Box 44449 Boise, ID 83711-4449	✓ U.S. Mail ____ Hand Delivered ____ Overnight Mail ____ Telecopy (Fax)
U.S. Department of Justice Environment and Natural Resources Division 550 West Fort Street P.O. Box 33 Boise, ID 83734	✓ U.S. Mail ____ Hand Delivered ____ Overnight Mail ____ Telecopy (Fax)

Courtesy Copy to:

Laird Lucas Land and Water Fund of the Rockies P.O. Box 1612 Boise, ID 83701	✓ U.S. Mail ____ Hand Delivered ____ Overnight Mail ____ Telecopy (Fax)

Lawrence J. Jensen
for HOLLAND & HART

I *

* EXHIBITS "A" through "H" were submitted with original brief.

December 21, 1964

COPY

Re: Permit No. 20736

Regional Director
U. S. Bureau of Reclamation
P. O. Box 937
Boise, Idaho

Dear Sir:

Please refer to our order of June 25, 1964, establishing priorities under Permit No. 20736, and defining the conditions upon which a license will be issued, namely - "The priority date of that part of the right initiated by Permit No. 20736, depending on works constructed prior to November 5, 1955, shall relate back to September 9, 1948, and that part of the right initiated under Permit No. 20736, and depending on works not completed by November 5, 1955, may relate back to November 5, 1955."

This department is desirous of issuing a license as specified above upon receipt of a list of the wells and lands to be sumitted by the licensee, and therefore ask that said list be submitted not later than January 15, 1965.

Very truly yours,

CARL E. TAPPAN
State Reclamation Engineer

CET:ew

20736

J

IDAHO CODE

CONTAINING THE

GENERAL LAWS OF IDAHO

ANNOTATED

PUBLISHED BY AUTHORITY OF
LAWS 1947, CHAPTER 224

Compiled Under the Supervision of the
1947 Idaho Code Commission

OSCAR W. WORTHWINE
RALPH R. BRESHEARS CAREY H. NIXON
COMMISSIONERS

IN TWELVE VOLUMES

VOLUME EIGHT

INDIANAPOLIS
THE BOBBS-MERRILL COMPANY
PUBLISHERS

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IRRIGATION DISTRICTS

Min. Co. v. Bunker Hill &c. Min. &c. Co., 49 Fed. 430.

Federal Decree Fixing Priorities.

The court should follow the federal decree adjudicating interrelated water rights and fix the priorities as of the same date as in the federal decree to avoid confusion in administering the water rights where a change in points of diversion was sought. Beecher v. Cassia Creek Irr. Co., 66 Idaho 1, 154 Pac. (2d) 507.

Jurisdiction of District Court.

District court acquired full equitable jurisdiction on appeal from reclamation commission order and had full authority to impose reasonable conditions to avoid injury. Beecher v. Cassia Creek Irr. Co., Inc., 66 Idaho 1, 154 Pac. (2d) 507.

Right of Diversion.

Person claiming priority of right under judicial decrees has the statutory right to change his point of diversion provided that the rights of others are not injured, and such change does not work a forfeiture or an abandonment of such right. Graham v. Leek, 65 Idaho 279, 144 Pac. (2d) 475.

Rights of Purchasers.

An irrigation company has the right to purchase water rights and change points of diversion provided such action will not result in substantial injury to water rights of others. Beecher v. Cassia Creek Irr. Co., Inc., 66 Idaho 1, 154 Pac. (2d) 507.

Rights of Subsequent Appropriator.

Subsequent appropriator has vested right to continuation of conditions as they existed when his appropriation was made. Crockett v. Jones, 42 Idaho 652, 249 Pac. 483.

Subterranean Waters.

Where a subsequent appropriator of subterranean water operates pumps at a lower level than prior appropriators, and thereby causes a shortage, the expense of lowering the prior appropriators' pumps so they will receive the same amount of water as before must be borne by the subsequent appropriators. Noh v. Stoner, 53 Idaho 651, 26 Pac. (2d) 1112.

Transfer of Rights.

Users of water from ditch or canal acquire property right therein which they may transfer to other lands under such ditch or canal, or may sell and transfer to purchaser who may also transfer the same to other lands under the ditch and canal, so long as the change does not interfere with the rights of others. Hard v. Boise City Irr. &c. Co., 9 Idaho 589, 76 Pac. 331, 65 L. R. A. 407.

Collateral References.

Obstruction, diversion, or other interference with flow of surface water as a taking or damaging of property. 128 A. L. R. 1195.

Prescriptive right of riparian owners to continuance of artificial channel or ditches. 88 A. L. R. 134.

42-109. Change in course of ditch—When prohibited.—Whenever any ditch or canal has been constructed for the purpose of conveying water and selling the same for irrigating purposes, it is unlawful for the owner or owners of said ditch or canal to change the line of said ditch or canal so as to prevent or interfere with the use of water from said ditch or canal, by any one who, prior to the proposed change, had used water for irrigating purposes from said ditch or canal. [R. S., part of § 3189; reen. R. C. & C. L., § 3248; C. S., § 5564; I. C. A., § 41-109.]

Collateral Reference.

Right of owner to alter his easement in such a way as to deprive servient estate of incidental benefits. 172 A. L. R. 193.

42-110. Right of ditch owners to divert water.—The proprietors of any ditch, canal or conduit, or other works for the carriage of water, whose right relative to the quantity of water they shall be entitled to divert by means of such works shall have been established by any decree of court, shall be entitled to such quantity measured at the point of diversion, subject, however, to all prior rights. [1899, p. 380, § 32; reen. R. C. & C. L., § 3249; C. S., § 5565; I. C. A., § 41-110.]

Cited in: State v. Twin Falls Canal Co., 21 Idaho 410, 121 Pac. 1039, writ of error dismissed 235 U. S. 690, 59 L. ed. 427, 35 Sup. Ct. 205; Kettenbach v. Walker, 32 Idaho 544, 186 Pac. 912.

42-111. Domestic purposes defined.—The phrase "domestic purposes" as contained in this title shall be construed to include water for the household, and a sufficient amount for the use of domestic animals kept with and for the use of the household. [1899, p. 380, part of § 12; reen. R. C. & C. L., § 3250; C. S., § 5566; I. C. A., § 41-111.]

Cross ref. Domestic purposes not to include land irrigation, § 42-914.

Heating of Dwelling-houses.

Heating of dwelling-houses comes within the meaning of "domestic purposes." Public Utilities Comm. v. Natatorium Co., 36 Idaho 287, 211 Pac. 533.

42-112. Completion defined.—By completion is meant conducting the waters to the place of intended use. [R. S., § 3162; 1899, p. 380, § 7; reen. R. C. & C. L., § 3251; C. S., § 5567; I. C. A., § 41-112.]

Cited in: Schodde v. Twin Falls Land &c. Co., 161 Fed. 43, affd. 224 U. S. 107, 56 L. ed. 686, 32 Sup. Ct. 470; Sand Point Water &c. Co. v. Panhandle Dev. Co., 11 Idaho 405, 83 Pac. 347.

Tit. 42, c. 2, Ref. to L. '53 c. 182 Sec. 12, p. 291

Tit. 42 c. 2 New matter L. '49 c. 24 Secs. 1, 2 pp. 41, 42

Tit. 42, c. 2 New matter L. '51 c. 61 Secs. 1-6 pp. 88-90

Tit. 42, c. 2 New matter L. '51 c. 200 Secs. 1-16 pp. 423-429

CHAPTER 2

APPROPRIATION OF WATER—PERMITS, CERTIFICATES, AND LICENSES—SURVEY

42-201. Water rights acquired under chapter.—All rights to divert and use the waters of this state for beneficial purposes shall hereafter be acquired and confirmed under the provisions of this chapter. And after the passage of this title all the waters of this state shall be con-

trolled and administered in the manner herein provided. [1903, p. 223, § 41; am. R. C. & C. L., § 3252; C. S., § 5568; I. C. A., § 41-201.]

Compiler's notes. Prior to its amendment by the Revised Code, the second sentence of this section read, "And after the passage of this act ———," referring to the act of 1903, as shown in the history note.

Department of reclamation substituted for state engineer throughout this chapter on the authority of S. L. 1919, ch. 8, § 37.

Comp. leg. Ariz. Code 1939, §§ 75-102, 75-105.

Cal. Deering's Gen. Laws 1937, Act 9091, §§ 16, 17.

N. Mex. Stat. 1941, §§ 77-501—77-531.

N. D. Rev. Code 1943, §§ 61-0401—61-0421.

Wyo. Comp. Stat. 1945, §§ 71-238—71-250.

Sec. to sec. ref. This chapter is referred to in § 42-1402.

Cited in: (In brief of counsel) King v. Chamberlin, 20 Idaho 504, 118 Pac. 1099.

ANALYSIS

Evidence of amount diverted.
Methods of appropriation.
Public use.
Riparian owners subject to law.
Subterranean waters.
Validity.
Wrongful appropriation.

Evidence of Amount Diverted.

Claimant seeking decree to confirm his right to the use of water by appropriation must present to court sufficient evidence to enable it to make definite and certain findings as to amount of water actually diverted and applied, as well as amount necessary for beneficial use claimed. Reno v. Richards, 32 Idaho 1, 178 Pac. 81.

Methods of Appropriation.

There are two methods by which one may acquire water right. One may obtain prior right to use of water of stream where he actually diverts and applies the same to a beneficial use, although he may never have applied to state engineer for permit to do so. Neilson v. Parker, 19 Idaho 727, 115 Pac. 488; Youngs v. Regan, 20 Idaho 275, 118 Pac. 499; Furey v. Taylor, 22 Idaho 605, 127 Pac. 676; Crane Falls Power &c. Co. v. Snake River Irr. Co., 24 Idaho 63, 133 Pac. 655; Washington State Sugar Co. v. Goodrich, 27 Idaho 26, 147 Pac. 1073; Basinger v. Taylor, 30 Idaho 289, 164 Pac. 522.

Water may be appropriated without compliance with the steps provided by the statute, but in such case it requires actual application to a beneficial use to complete the appropriation; right is limited to the amount so applied, and with date of priority determined by such application to beneficial use. Reno v. Richards, 32 Idaho 1, 178 Pac. 81.

Public Use.

Use of land for development of power from streams for aid of farming is a public use for which condemnation will lie. Bassett v. Swenson, 51 Idaho 256, 5 Pac. (2d) 722.

Riparian Owners Subject to Law.

Riparian owners who desire to appropriate public waters for beneficial use must comply with provisions of the law same as those who are not riparian owners. Idaho Power &c. Co. v. Stephenson, 16 Idaho 418, 101 Pac. 821.

Subterranean Waters.

Subterranean waters may be appropriated by diversion and beneficial use without compliance with this chapter. Silkey v. Tiegs, 51 Idaho 344, 5 Pac. (2d) 1049.

Validity.

The 1903 act is not a local and special law. Boise City Irr. & Land Co. v. Stewart, 10 Idaho 38, 77 Pac. 25.

The subject-matter of the 1903 act is within its title. Boise City Irr. & Land Co. v. Stewart, 10 Idaho 38, 77 Pac. 25.

Enactment of this section was proper exercise of legislative power. Big Wood Canal Co. v. Chapman, 45 Idaho 380, 263 Pac. 45.

Wrongful Appropriation.

One who diverts water and puts it to a beneficial use by aid of a trespass, does not, pursuant to such trespass, acquire a water right. Bassett v. Swenson, 51 Idaho 256, 5 Pac. (2d) 722.

Decisions Under Former Law.

This section repealed prior appropriation acts which provided in substance for the posting and recording of a notice and commencement and completion of diversion works within reasonable time. For purpose of historical reference, the following notes of decisions under the old appropriation law are given:

Appropriator is entitled to a reasonable time within which to get his land in cultivation and to make application of water to the land, and what constitutes a reasonable time is a question of fact dependent upon the circumstances in each particular case. Conant v. Jones, 3 Idaho 606, 32 Pac. 250.

Party who appropriated water to run a sawmill, but failed, for fourteen years after posting his notice, to erect or put into operation such sawmill, failed to proceed with reasonable diligence and lost his right to water appropriated. Stickney v. Hanrahan, 7 Idaho 424, 63 Pac. 189.

One who posts and records his notice of intention to appropriate water, and within sixty days thereafter commences work on his diversion works, and continues prosecution of same with reasonable diligence, is entitled to have his appropriation date from posting of notice, and his right is prior and superior to rights of any subsequent appropriator claiming either by posting notice and compliance with the statute or by the natural diversion and application of the water. Sand Point Water &c. Co. v. Panhandle Dev. Co., 11 Idaho 405, 83 Pac. 347.

Person desiring to appropriate water may do so either by naturally diverting water and applying it to a beneficial use, or he may pursue the statutory method of posting and recording his notice and commencing to prosecute his work within the statutory time. Sand Point Water &c. Co. v. Panhandle Dev. Co., 11 Idaho 405, 83 Pac. 347.

42-202 Rel. m/ L. '51 c. Sec. 7, p. 426

42-202. Application to appropriate water—Contents—Filing fees—Disposition of fees—Record of receipts.—For the purpose of regulating the use of the public waters and of establishing by direct means the priority right to such use, any person, association or corporation hereafter intending to acquire the right to the beneficial use of the waters of any natural streams, springs or seepage waters, or lakes or other public waters in the state of Idaho, shall, before commencing the construction, enlargement or extension or change in the point of diversion of the ditch, canal, or other distributing works, or performing any work in connection with said construction or proposed appropriation or the diversion of any waters into a natural channel, make an application to the department of reclamation for a permit to make such appropriation. Such application must set forth:

1. The name and post-office address of the applicant.
2. The source of the water supply.
3. The nature of the proposed use.
4. The location and description of the proposed ditch, channel or other work and the amount of water to be diverted and used.
5. The time required for the completion of construction of such works, which in no case shall exceed five years from the date of approval of the application.
6. The time required for the complete application of the water to the proposed use, which must be within six years after the date set for the completion of such works.

Whenever it is desired to appropriate and store flood or winterflow waters, the applicant shall specify in acre feet the quantity of such flood or winterflow waters which he intends to store, but for irrigation purposes he shall not claim more than five acre feet of water per acre of land to be irrigated, nor, in the event of the filing of an application claiming both normal flow and flood water and winterflow water, shall the total amount of water claimed exceed the equivalent of a continuous flow during the irrigation season of more than one cubic foot per second for each fifty acres of land to be irrigated, or more than five acre feet of stored water for each acre of land to be irrigated.

The application shall be accompanied by a plan and map in duplicate of the proposed works for the diversion and application of the water to a beneficial use, showing the character, location and dimensions of

the proposed reservoirs, dams, canals, ditches, pipe lines and all other works proposed to be used by them in the diversion of the water, and the area and location of the lands proposed to be irrigated.

If the application involves more than twenty-five second feet of water or the development of more than five hundred theoretical horse power, such application shall state the financial resources of the corporation association, firm or person making the application, and the means by which the funds necessary to construct the proposed works are to be provided, and the estimated cost of construction; and if such application is made by a corporation, it shall also state the amount of its capital stock, how much thereof has been actually paid in, and the names and places of residence of its directors; and if for the generation of power or any other purpose than irrigation or domestic use, the purpose for which it is proposed to be used, the nature, location, character, capacity and estimated cost of the works, and whether the water used is to be and will be returned to the stream, and if so, at what point on the stream.

In case the proposed right of use is for agricultural purposes, the application shall give the legal subdivisions of the land proposed to be irrigated, with the total acreage to be reclaimed as near as may be; provided, that no one shall be authorized to divert for irrigation purposes more than one cubic foot of water per second of the normal flow for each fifty acres of land to be so irrigated, or more than five acre feet of stored water per annum for each acre of land to be so irrigated, unless it can be shown to the satisfaction of the department of reclamation that a greater amount is necessary: Provided further, that the plan of irrigation submitted shall provide for the distribution of water to within not more than one mile of each legal subdivision of the land proposed to be reclaimed by the use of such water; provided also, that in the case of all ditches designed to have a capacity of ten cubic feet per second or less, such map showing the location of such ditch, and the place of use of such water, or the location of the lands to be irrigated, may be upon blanks furnished by the department of reclamation.

No application shall be accepted and filed by the department of reclamation until the applicant shall have deposited with the department a filing fee of five dollars, if the quantity of water claimed is one cubic foot or less per second, and if the quantity of water claimed is in excess of one cubic foot per second, the fee to be so deposited by the applicant shall be increased twenty-five cents for each additional cubic foot or fraction thereof: provided, that where flood and winterflow water for storage purposes is claimed, the fee to be paid by applicant on the filing of the application shall be five dollars, if the quantity claimed is two hundred fifty acre feet, or less, and if the quantity of water claimed is in excess of two hundred fifty acre feet the fee to be paid by the applicant shall be increased twenty-five cents for each additional two hundred fifty acre feet or fraction thereof.

All moneys received by the department of reclamation under the provisions of this chapter shall be deposited with the state treasurer, and such sums as may be necessary shall be available for the payment of the expenses of the department of reclamation incurred in carrying out the provisions of this chapter.

Such expense shall be paid by the state auditor in the manner provided by law, upon vouchers duly approved by the state board of examiners, for the work performed under the direction of the department of reclamation. The department of reclamation shall make and keep in a suitable book a record of all filing fees received in connection with applications for permits to appropriate public waters, and said record shall set out:

1. The name of the applicant;
2. The number of the application;
3. The quantity of water filed on;
4. The amount of the fee received; and
5. The date of receipt of said fee.

Provided further, that rights initiated prior to the enactment of this amendment, so far as it pertains to flood and winterflow waters, shall not be affected thereby. [1903, p. 223, § 1; am. 1905, p. 357, § 1; reen. R. C., § 3253; am. 1913, ch. 37, § 1, p. 136; reen. C. L., § 3253; C. S., § 5569; am. 1929, ch. 281, § 1, p. 675; I. C. A., § 41-202; am. 1935, ch. 145, § 1, p. 353.]

Sec. to sec. ref. This section is referred to in § 42-203.

ANALYSIS

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Amendment, Effect of.

The amendment to this section did not operate to amend §§ 42-216, 42-224, 42-306, and 42-308; and one to whom water permit is granted by the commissioner of reclamation may not urge unconstitutionality of amendment to statutes governing contests of permits in the absence of a showing of injury by reason thereof. Twin Falls Canal Co. v. Huff, 58 Idaho 587, 76 Pac. (2d) 923.

Change of Diversion.

Where person made application under this section, before or after its amendment in 1913, to appropriate water, and permit was granted, but he subsequently desired to change point of diversion, it was necessary for him to comply substantially with § 42-222. Washington State Sugar Co. v. Goodrich, 27 Idaho 26, 147 Pac. 1073.

The denial of irrigation district's application of order for change of point of diversion does not constitute res judicata. Colthorp v. Mountain Home Irr. Dist., 66 Idaho 173, 157 Pac. (2d) 1005.

Constitutionality of Amendment.

This section is not unconstitutional, as amended, as conferring judicial power on commissioner of reclamation. Twin Falls Canal Co. v. Huff, 58 Idaho 587, 76 Pac. (2d) 923.

Contents of Application.

Application under this section is required to state facts which can be secured only by entrance to place where appropriation is made, and survey of premises and surroundings at point of diversion and place of improvement, and also a survey of the realty to be taken for dams and ditches to be used in appropriating water to a beneficial use. Marshall v. Niagara Springs Orchard Co., 22 Idaho 144, 125 Pac. 208.

Contingent Right of Permittee.

By application for permit, permittee secures inchoate right which will ripen into legal and complete appropriation by compliance with statutory steps. Such right is merely contingent right which may ripen into complete appropriation, or may be defeated by failure of holder to meet statutory requirements. Big Wood Canal Co. v. Chapman, 45 Idaho 380, 263 Pac. 45.

Enjoining Diversion.

To enjoin diversion and change in the place of use of water, the injury, if any, must be confined to a water right. Colthorp v. Mountain Home Irr. Dist., 66 Idaho 173, 157 Pac. (2d) 1005.

Natural Springs.

Water of natural spring is subject to a valid appropriation for a beneficial use.

Short v. Praisewater, 35 Idaho 691, 208 Pac. 844.

Parties to Suits.

The United States is an indispensable party to a suit by an irrigation district where the United States has a contractual interest for use of the waters involved. American Falls Reservoir Dist. No. 2 v. Crandall, 82 Fed. (2d) 973.

Percolating Waters.

It can make no difference that waters collecting and forming what is known as a spring are seepage and percolating waters, rather than from well-defined subterranean stream, so long as such waters gravitate to and collect at a certain and definite point, and there constitute a volume of water known and designated as a spring. In either case such waters found upon the public domain are subject to location and appropriation for any useful or beneficial purposes. Le Quime v. Chambers, 15 Idaho 405, 98 Pac. 415, 21 L. R. A. (N. S.) 76.

Percolating or subterranean waters are subject to appropriation. Bower v. Moorman, 27 Idaho 162, 147 Pac. 496, Ann. Cas. 1917C, 99.

Period of Abandonment.

It is only where there is an abandonment of five years of beneficial use by the appropriator that water may be considered as unappropriated water of the state. Colthorp v. Mountain Home Irr. Dist., 66 Idaho 173, 157 Pac. (2d) 1005.

Private Ponds.

Law does not purport to deal with private waters, such as private ponds, artificial lakes or wells owned by private persons and formed by collecting and impounding surface waters. King v. Chamberlin, 20 Idaho 504, 118 Pac. 1099.

Private Rights in Waters.

Private rights in waters authorized by law are simply rights to the rise of the "public waters" and not an ownership in them, at least while they are flowing in the natural channel. Boise City Irr. & Land Co. v. Stewart, 10 Idaho 38, 77 Pac. 25.

So long as water continues to flow in its natural channel, it is not and cannot be made the subject of private ownership, except in so far as it is regarded as a part of the land by or through which the stream flows. Boise City Irr. & Land Co. v. Stewart, 10 Idaho 38, 77 Pac. 25.

Public Waters.

The term "public waters" refers to all waters running in the natural channel of the streams, and the state may, by proper legislation, regulate the appropriation and use thereof. Boise City Irr. & Land Co. v. Stewart, 10 Idaho 38, 77 Pac. 25.

Rights Acquired.

Rights acquired under water license are confined to waters described in application. Rabido v. Furey, 33 Idaho 56, 190 Pac. 73.

Riparian Owners.

Riparian owners who desire to appropriate public waters for a beneficial use must comply with the provisions of law the same as those who are not riparian owners. Idaho Power &c. Co. v. Stephenson, 16 Idaho 418, 101 Pac. 821.

Fact that there had been a conversion by lower riparian owner of seepage water of upper riparian owner would not of itself entitle former to injunctive relief restraining latter from cessation of waste or to beneficial use of it. Colthorp v. Mountain Home Irr. Dist., 66 Idaho 173, 157 Pac. (2d) 1005.

Seepage Water.

Surface waste and seepage water may be appropriated, subject to right of owner to cease wasting it, or in good faith to change place or manner of wasting it, or to recapture it, so long as he applies it to a beneficial use. Sebern v. Moore, 44 Idaho 410, 258 Pac. 176.

A suit for damages for diversion of return flow of water after 40 years, such water being decreed to defendant's land, the seepage of which had been used by plaintiff and his predecessors, without alleging an abandonment, failed to state a cause of action. Colthorp v. Mountain Home Irr. Dist., 66 Idaho 173, 157 Pac. (2d) 1005.

The appropriation of seepage and waste water is subject to the right of the owner to cessation of waste, or in good faith change place of wasting, or to recapture it so long as it is applied to a beneficial use. Colthorp v. Mountain Home Irr. Dist., 66 Idaho 173, 157 Pac. (2d) 1005.

Subterranean Waters.

Subterranean waters may be appropriated by diversion and beneficial use without compliance with this section. Silkey v. Tiegs, 51 Idaho 344, 5 Pac. (2d) 1049.

Unconstitutionality of Part of Amendment.

Even if some provisions of the amendatory statute of this section were unconstitutional, the district court should not dismiss the action, but should proceed under the prior valid statute and such portion of the amendment as could be held valid. Such a proceeding is not an action for a declaratory judgment, and the court will not pass upon the question of unconstitutionality therein until presented in a cause demanding rulings thereon. Twin Falls Canal Co. v. Huff, 58 Idaho 587, 76 Pac. (2d) 923.

Waters from Hot Wells.

Waters of hot wells held not public waters and not subject to appropriation except by owners of fee. Public Utilities Comm. v. Natatorium Co., 36 Idaho 287, 211 Pac. 533.

42-203. Notice upon receipt of application—Protest—Hearing and findings—Record of proceedings—Appeals.—On and after the passage, approval and effective date of this section, upon receipt of an application to appropriate the waters of this state, where such application involves the development of more than five hundred theoretical horse power, or where for any other beneficial use or purpose such application involves more than twenty-five cubic feet of water per second, the commissioner of reclamation, in compliance with the provisions of this section and with the rules and regulations of the department of reclamation, shall, within ten days from the time of receipt of such application, issue a notice signed by the commissioner and in such form as the department may prescribe, specifying the number of the application and the date of filing thereof, the name and post-office address of the applicant, the source of the water supply, the amount of water to be appropriated, in general the nature of the proposed use, the approximate location of the point of diversion, and the point of use, stating in said notice that any protest against the approval of such application, in form prescribed by the department, shall be filed with the department within forty days from the date of such notice. The commissioner shall cause the notice to be served on the applicant, and upon such service, the applicant shall cause the same to be published within ten days from the date of such service in a newspaper printed within the county wherein the point of diversion lies, or in the event no newspaper is printed in said county, then in a newspaper of general circulation therein. This notice shall be published at least once each week for three successive weeks. Applicant shall cause due proof of such publication to be filed in the department.

Any person, firm, association or corporation concerned in any such application may, within the time allowed in the notice of application, file with said commissioner a written protest against the approval of such application, which protest shall state the name and address of protestant and shall be signed by him or by his agent or attorney and shall clearly set forth his objections to the approval of such application. Hearing upon the protest so filed shall be held within sixty days from the issuance of notice of application. Notice of this hearing shall be given by mailing notice not less than ten days before the date of hearing and shall be forwarded to both the applicant and the protestant, or protestants, by registered mail. Such notice shall state the names of the applicant and protestant, or protestants, the time and placed fixed for the hearing and such other information as the commissioner may deem advisable. In the event that no protest is filed, then the commissioner may forthwith approve the application, providing the same in all respects conforms with the requirements of this chapter, and with the regulations of the department of reclamation.

Such hearing shall be conducted before the commissioner of reclamation under rules and regulations to be promulgated by the department of reclamation. Technical rules of pleading and evidence need not be applied. The commissioner may adjourn such hearing from time to

time upon application of the applicant or the protestant, or protestants, but no adjournment shall exceed a reasonable length of time. Any person or corporation who has formally appeared in said hearing shall have the right to subpoena witnesses who shall testify under oath at said hearing. The commissioner may, in his discretion, appoint an engineer or other competent person to make an examination and investigation of all facts material and relevant in behalf of the State and make report of his findings, in person, under oath or by affidavit, at the time of the hearing. The commissioner shall have authority to administer oaths to such witnesses as appear before him to give testimony, provided each of the parties appearing at said hearing shall pay in advance to the commissioner the costs of taking and transcribing the testimony of such witnesses as they may desire to produce, or of such evidence as may be offered by them, to be estimated by the commissioner at or before the time set for the hearing, together with any other costs which may be incurred at such hearing. Any party desiring a transcript of the proceedings at such hearing shall be required to pay any additional costs that may be incurred therefor. The commissioner shall find and determine from the evidence presented what use or uses the waters sought to be appropriated can be and are intended to be applied, and where such proposed use is such that it will reduce the quantity of water under existing water rights, or that the water supply itself is insufficient for the purpose for which it is sought to be appropriated, or where it appears to the satisfaction of the department that such application is not made in good faith, is made for delay or speculative purposes, that the applicant has not sufficient financial resources with which to complete the work involved therein, or if a renewal permit, that such applicant has not proceeded diligently in applying the waters involved therein to any beneficial use or purpose, the commissioner may reject such application and refuse issuance of permit therefor, or may partially approve and grant permit for a less quantity of water than applied for. Upon the approval of any application in whole or in part, the fees prescribed by section 42-202 shall be paid to the department prior to the issuance of any permit thereon. The provisions of this section shall apply to any boundary stream between this and any other state in all cases where the water sought to be appropriated has its source largely within the state, irrespective of the location of any proposed power generating plant.

A full and complete record of all proceedings had before the commissioner on any hearing had and all testimony shall be taken down by a reporter appointed by the commissioner, and the parties shall be entitled to be heard in person or by attorney or by agent. Any person or corporation who has formally appeared at the hearing, feeling aggrieved by the judgment of the commissioner may appeal therefrom to the district court of the county in which the point of diversion of the proposed appropriation shall be situated. Such appeal shall be taken within sixty days from the ruling or action of the commissioner and shall be perfected when the appellant shall have filed in the office of the clerk of such district court a copy of the application, certified by the commissioner as a true copy, together with the petition to such court setting forth the appellant's reason for appeal. A copy of such petition shall be served upon all persons or corporations adversely affected who appeared at the hearing. Such appeal shall be heard and determined upon such competent proof as shall be adduced or offered by the department of reclamation or some person duly authorized in its behalf. That upon hearing of said cause, the district court shall have jurisdiction to reverse and remand said cause for further hearing before the commissioner of reclamation or dismiss said cause, or may affirm the ruling of the commission of reclamation, or may modify the decision appealed from in any manner which the said district judge shall deem to comport with equity and justice.

A copy of said judgment shall be transmitted to the commissioner of reclamation within five days after its rendition.

An appeal by any party aggrieved lies from a final judgment of the district court in said cause to the Supreme Court of the state of Idaho and the practice and procedure that now obtains or that may be enacted hereafter by law and the rules of the Supreme Court of the state shall apply in all appeals from any final judgment of the district court as aforesaid. [C. S., § 5569A, as added by 1929, ch. 212, § 1, p. 429; I. C. A., § 41-203; am. 1935, ch. 145, § 2, p. 353.]

Compiler's note. The law enacting this section was approved March 16, 1929, and did not carry an emergency clause.

Amendment, Effect of.

The amendment to this section did not operate to amend §§ 42-216, 42-224, 42-306, and 42-308; and one to whom water permit is granted by the commissioner of reclamation may not urge unconstitutionality of amendment to statutes governing contests of permits in the absence of a showing of injury by reason thereof. Twin Falls Canal Co. v. Huff, 58 Idaho 587, 76 Pac. (2d) 923.

Appeals.

Court is bound to take, on an appeal from an order of the commissioner of reclamation, the date on letter to the protestant reciting that the order was "made and entered this day" rather than the date actually appearing on the ruling and order. Idaho Power Co. v. Buhl, 62 Idaho 351, 111 Pac. (2d) 1088.

Constitutionality of Amendment.

This section is not unconstitutional, as amended, as conferring judicial power on reclamation commissioner. Twin Falls Canal Co. v. Huff, 58 Idaho 587, 76 Pac. (2d) 923.

Unconstitutionality of Part of Amendment.

Even if some provisions of the amendatory statute of this section were unconstitutional, the district court should not dismiss the action, but should proceed under the prior valid statute and such portion of the amendment as could be held valid. Such a proceeding is not an action for a declaratory judgment, and the court will not pass upon the question of unconstitutionality therein until presented in a cause demanding rulings thereon. Twin Falls Canal Co. v. Huff, 58 Idaho 587, 76 Pac. (2d) 923.

42-204. Examination—Permit—Commencement of work—Bond.—On receipt of the application, which shall be of a form prescribed by the department of reclamation, it shall be the duty of that department to make an indorsement thereon of the date of its receipt, and to make a record of such receipt in some suitable book in its office. It shall be the duty of the department to examine said application and ascertain if it sets forth all the facts necessary to show the location, nature and amount of the proposed use. If upon such examination the application is found defective, it shall be the duty of the department of reclamation to return the same for correction within thirty days from the receipt of such application, and the date of such return, with the reason therefor, shall be indorsed on the application, and a record made thereof in a book kept for recording the receipt of such applications. A like record shall be kept of the date of the return of corrected applications, but such corrected applications shall be returned to the department of reclamation within a period of sixty days from the date indorsed thereon by the

42-204 (I.C.A. 41-204) Amended L. '49 a. Sec. 1 p.

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department: provided, that if it be returned after such period of sixty days such corrected application shall be treated in all respects as an original application. All applications which shall comply with the provisions of this chapter and with the regulations of the department of reclamation shall be numbered consecutively, and shall be recorded in a suitable book kept for that purpose, and it shall be the duty of the department to approve all applications, made in proper form, which contemplate the application of water to a beneficial use: provided, that the department may deny any such application or may refuse to grant a renewal of same where it appears to the satisfaction of the department that such application is not made in good faith, is made for delay or speculative purposes, that the applicant has not sufficient financial resources with which to complete the work involved therein, or if a renewal permit that such applicant has not proceeded diligently in applying the waters involved therein to any beneficial use or purpose, or that the water supply itself is insufficient for the purpose for which it is sought to be appropriated.

The approval of an application shall be indorsed thereon, and a record made of such indorsement in the department of reclamation. The application so indorsed shall constitute a permit, and shall be returned to the applicant, and he shall be authorized, on receipt thereof, to proceed with the construction of the necessary works for the diversion of such water, and to take all steps required to apply the water to a beneficial use and to perfect the proposed appropriation. In its indorsement of approval on any application the department shall require that actual construction work shall be completed within a period of five years from the date of such approval, and that one-fifth of such work of construction shall be done within one-half the period of time allowed for the completion of such works. The department may limit the application to a less period of time for the completion of such works than is asked for, and likewise the perfecting of the proposed right for a less period than is named in the application, and such indorsement shall give the date when such work shall be completed, also the date when beneficial application of the water to be diverted by such works shall be made for the purposes intended.

Provided, however, that in cases where the applicant is prevented from proceeding with his work by his failure to obtain necessary consent or final approval or rejection from the federal government because of the pendency of an application for right of way or other matter within the jurisdiction of the United States, or by litigation of any nature which might bring his title to said water in question, the department of reclamation upon proper showing of the existence of any such condition, and being convinced that said applicant is proceeding diligently and in good faith, shall extend the time so that the time caused by such delays shall be added to the time given in the original permit for each and every action required.

Provided further, that the time for completion of works under any permit involving the construction of a reservoir of more than 200,000 acre feet capacity or for the appropriation of water to be impounded in such reservoir of more than 200,000 acre feet capacity, may upon application to the state commissioner of reclamation supported by a showing that additional time is needed on account of the time required for organizing, financing and constructing works of such large size, be extended by the state commissioner of reclamation for an additional period

of five years, but not to exceed ten years in all from the date of permit, and that extension of time for completion of works under this proviso shall automatically extend the time for completion of the twenty per cent required to be done in half the time, and for making proof of application of water to beneficial use: provided, that no such extension shall be granted unless the applicant for such extension shall show that there has been actually expended toward the construction of said reservoir (including expenditures for the purchase of rights of way and property in connection therewith) at least $100,000.

Any applicant feeling himself aggrieved by the indorsement made by the department of reclamation upon his application may appeal therefrom to the district court of the county in which the point of diversion of the proposed appropriation shall be situated. Such appeal shall be taken within sixty days from the return of the application by the department of reclamation, and shall be perfected when the applicant shall have filed in the office of the clerk of such district court a copy of the application, certified by the department of reclamation as a true copy, together with the petition to such court, setting forth the appellant's reason for appeal. Such appeal shall be heard and determined upon such competent proof as shall be adduced by the appellant, and such like proof as shall be adduced by the department or some person duly authorized in its behalf.

The maps accompanying such applications must contain the name of the proposed work, and, when it is possible, the number of the permit. They must in addition, have the name or names of the applicant or applicants, and when the proposed works have a capacity of more than twenty-five second-feet, a certificate of the surveyor giving the date of the survey, his name and post-office address. It shall be the duty of the department of reclamation to examine these maps or plats, and to ascertain if they agree with the description contained in the application, and when found to agree, to approve the same, file one copy in its office and return the other, approved, to the party filing them.

Every holder of a permit which shall be issued under the terms and conditions of an application filed hereafter appropriating twenty-five cubic feet or less per second must, within sixty days from the date upon which said permit issues from the office of the department of reclamation, commence the excavation or construction of the works by which he intends to divert the water, and must prosecute the work diligently and uninterruptedly to completion, unless temporarily interrupted through no fault of the holder of such permit by circumstances, over which he has no control.

Every holder of a permit, except the United States acting through the bureau of reclamation, of the department of the interior, which shall be issued under the terms and conditions of an application filed hereafter, appropriating more than twenty-five cubic feet per second must, within sixty days from the date upon which the said permit issues from the office of the department of reclamation, file with the department a bond in an amount to be fixed by the department, not exceeding $10,000, in form and sufficiency of sureties to be approved by the department, conditioned upon faithfully carrying to completion the works of diversion as specified in said permit; the amount of the bond to be fixed by the department within the limits hereinbefore prescribed.

The holder of any permit who shall fail to comply with the provisions of this section within the time or times specified shall be deemed to have

abandoned all right under his permit. [1903, p. 223, § 2; am. 1905, p. 357, § 2; reen. R. C., § 3254; am. 1911, ch. 64, § 1, p. 184; am. 1915, ch. 133, § 1, p. 289; reen. C. L., § 3254; C. S., § 5570; am. 1923, ch. 135, § 1, p. 196; I. C. A., § 41-204; am. 1935, ch. 145, § 3, p. 353; am. 1941, ch. 161, § 1, p. 320.]

Compiler's note. The words enclosed in parentheses so appeared in the act.

Cross ref. Cancellation of permits, §§ 42-208, 42-301 et seq.

Cited in: (In brief of counsel) Pierson v. State Bd. of Land Comrs., 14 Idaho 159, 93 Pac. 775; (In dis. op.) Syster v. Hazzard, 39 Idaho 580, 229 Pac. 1110.

ANALYSIS

Amendment, effect of.
Applicable to United States.
Constitutionality of amendment.
Conveyance of water right.
Effect of permit.
Permit defined.
Trespass.
Unconstitutionality of part of amendment.
Vested rights.

Amendment, Effect of.

The amendment to this section did not operate to amend §§ 42-216, 42-224, 42-306, and 42-308; and one to whom water permit is granted by the commissioner of reclamation may not urge unconstitutionality of amendment to statutes governing contests of permits in the absence of a showing of injury by reason thereof. Twin Falls Canal Co. v. Huff, 58 Idaho 587, 76 Pac. (2d) 923.

Applicable to United States.

Restrictive five-year requirement for completion of irrigation appropriations is binding on United States, public waters not being governed, in this respect, by same principle applicable to public lands. Pioneer Irr. Dist. v. American Ditch Assn., 50 Idaho 732, 1 Pac. (2d) 196.

Constitutionality of Amendment.

This section is not unconstitutional, as amended, as conferring judicial power on reclamation commissioner. Twin Falls Canal Co. v. Huff, 58 Idaho 587, 76 Pac. (2d) 923.

Conveyance of Water Right.

Water right is real estate and must be conveyed as real estate, and where one has a valid water permit issued to him by state engineer (department of reclamation) he can not convey water right secured thereby by simply handing permit to would-be purchaser. Gard v. Thompson, 21 Idaho 485, 123 Pac. 497.

Effect of Permit.

Granting of permit secures no rights to holder, but compliance with conditions of permit initiates right to use water, which right becomes vested and dates back to the issuance of permit. Washington State Sugar Co. v. Goodrich, 27 Idaho 26, 147 Pac. 1073.

Permit Defined.

Permit is not an appropriation of the public waters of state, but is the consent of state given in manner provided by law to construct and acquire real property. Permit gives applicant an inchoate right, which will ripen into a legal and complete appropriation only upon completion of works and application of water to a beneficial use. Speer v. Stephenson, 16 Idaho 707, 102 Pac. 365; Marshall v. Niagara Springs Orchard Co., 22 Idaho 144, 125 Pac. 208; Basinger v. Taylor, 30 Idaho 289, 164 Pac. 522.

Trespass.

Mere fact that state engineer (department of reclamation) grants permit in no way confers any right to enter upon private land for the purpose of making appropriation. Marshall v. Niagara Springs Orchard Co., 22 Idaho 144, 125 Pac. 208.

In order to initiate right to appropriate water under this section at a point upon land belonging to state, if it is necessary for applicant to enter upon land owned by state for purpose of making necessary examination and surveys, maps and plans required in order to make a proper application to state engineer (department of reclamation) for a permit, by so entering, such party would be a trespasser upon said land, under R. C., § 1578 (§ 57-312 herein). Tobey v. Bridgewood, 22 Idaho 566, 127 Pac. 178.

Unconstitutionality of Part of Amendment.

Even if some provisions of the amendatory statute of this section were unconstitutional, the district court should not dismiss the action, but should proceed under the prior valid statute and such portion of the amendment as could be held valid. Such a proceeding is not an action for a declaratory judgment, and the court will not pass upon the question of unconstitutionality therein until presented in a cause demanding rulings thereon. Twin Falls Canal Co. v. Huff, 58 Idaho 587, 76 Pac. (2d) 923.

Vested Rights.

State engineer (department of reclamation), by granting subsequent water permit, can not interfere in any manner with vested rights of prior appropriators. Lockwood v. Freeman, 15 Idaho 395, 98 Pac. 295; Nielson v. Parker, 19 Idaho 727, 115 Pac. 488; Gard v. Thompson, 21 Idaho 485, 123 Pac. 497.

42-205. Issuance of permit—Restrictions.—No permit shall be issued by the department of reclamation of the state of Idaho, for the appropriation of water for power purposes, nor shall any such permit be assigned, transferred, mortgaged, sold or conveyed to any person, firm or corporation except in accordance with the provisions of this act. [1937, ch. 142, § 1, p. 233; am. 1947, ch. 66, § 1, p. 106.]

Compiler's note. The words "this act" refer to S. L. 1937, ch. 142, as amended by S. L. 1947, ch. 66, which is compiled herein as §§ 42-205—42-210.

42-206. Residence a requisite for issuance.—No permit to appropriate water for power purposes in the state of Idaho shall hereafter be granted to any person or association of persons not an actual bona fide resident or residents of the state of Idaho, nor to any corporation unless organized or qualified to do business in and under the laws of the state of Idaho. [1937, ch. 142, § 2, p. 233; am. 1947, ch. 66, § 2, p. 106.]

Sec. to sec. ref. This section is referred to in § 42-207.

42-207. Sale, transfer, assignment or mortgage of permit.—Whenever the holder of a permit to appropriate water for power purposes within the state of Idaho, desires to sell, assign transfer or mortgage such permit so held by him, he shall file with the state reclamation engineer a copy of the deed, bill of sale, assignment, mortgage or other document of transfer, together with such proof as the state reclamation engineer may require that the new owner, holder or assignee of such permit, or the mortgagee, or one or more of the trustees under any mortgage trust indenture, possesses the qualifications set forth in section 42-206, and that such transfer is made in good faith, and not for purposes of speculation or delay; and the sale, transfer, assignment or mortgaging of any such permit except as herein provided shall be void, it being the express intention of the legislature to prohibit the transfer of permits to appropriate water for power purposes by mortgaging the same or otherwise, except in accordance with the provisions of this act. [1937, ch. 142, § 3, p. 233; am. 1947, ch. 66, § 3, p. 106.]

Compiler's note. For sections in which "this act" is compiled, see note to § 42-205.

Collateral Reference.

Assignability of an easement in gross or of a license in respect to water. 130 A. L. R. 1253.

42-208. Cancelation or revocation for noncompliance.—Every permit to appropriate water for power purposes hereafter issued by the state reclamation engineer shall have plainly printed thereon, that the same is issued subject to the provisions of this act and in the event of its sale, transfer, assignment or of its being mortgaged without a compliance with the provisions of this act, such permit shall be immediately

canceled and revoked by the state reclamation engineer. [1937, ch. 142, § 4, p. 233; am. 1947, ch. 66, § 4, p. 106.]

Compiler's note. For sections in which "this act" is compiled, see note to § 42-205.

Cross ref. Petition for cancelation, § 42-302.

42-209. Effect of illegal transfer.—Every permit to appropriate water for power purposes that shall be sold, transferred, assigned or mortgaged in violation of the provisions of this act shall be immediately canceled, and the transfer thereof shall not be binding on the state of Idaho. [1937, ch. 142, § 5, p. 233; am. 1947, ch. 66, § 5, p. 106.]

Compiler's note. For sections in which "this act" is compiled, see note to § 42-205.

42-210. Application of act.—The provisions of this act shall not apply to any municipal corporations within the state. [1937, ch. 142, § 6, p. 233.]

Compiler's notes. Section 7 of S. L. 1937, ch. 142 repealed S. L. 1935, ch. 75.

For sections in which "this act" is compiled, see note to § 42-205.

42-211. Amended application and permit.—Whenever application has been made for a permit to appropriate water for irrigation, or whenever a permit has been issued and the applicant or permit holder desires to change the place of intended use of the water or correct the description of the lands to be irrigated, he shall file a request therefor with the department of reclamation, which shall thereupon note the application on the record of the original application or permit, and shall issue a new permit, noting the amendment therein, and specifying that it is issued as an amendment to the original. The right to the use of water under the amended permit shall date from the time of the original permit: provided, an additional amount of water is not asked for, and except where the rights of others are adversely affected by such changes, in which case it shall date from the filing of the application for the amendment. [1907, p. 314, § 1; reen. R. C. & C. L., § 3255; C. S., § 5571; I. C. A., § 41-205.]

List of Lands.

Amendment of list of lands to be reclaimed is properly allowed where rights of others are not adversely affected and no additional water is claimed. Big Wood Canal Co. v. Chapman, 45 Idaho 380, 263 Pac. 45.

42-212. Diversion of private waters.—The department of reclamation is hereby prohibited from issuing or granting permits to divert or appropriate the waters of any lake not exceeding five acres in surface area at highwater mark, pond, pool or spring in this state, which is located or situated wholly or entirely upon the lands of a person or corporation, except to the person or corporation owning said land, or with his or its written permission, executed and acknowledged as required for the conveyance of real estate. [1911, ch. 230, § 1, p. 782; reen. C. L., § 3255a; C. S., § 5572; I. C. A., § 41-206.]

Percolating Waters.

This section is statutory recognition of private ownership in certain waters, and that right to percolating waters can not be taken from owner of fee without compensation. Public Utilities Comm. v. Natatorium Co., 36 Idaho 287, 211 Pac. 533.

Spring Waters.

Under this section, the rule prevails that lakes of the surface area of less than five acres and pools and springs located wholly upon, and within the land of a person or corporation, and the waters thereof, are appurtenant to and a part of the land and belong exclusively to the owners of the land. But, notwithstanding this rule, it is well settled that waters of natural springs which form a natural stream or streams flowing off of the premises on which they arise are public waters, subject to acquirement by appropriation, diversion and application to beneficial use. Jones v. McIntire, 60 Idaho 338, 91 Pac. (2d) 873.

The waters of spring on land where they arose and sank were private waters and owner of adjoining land had no right to the use of same in absence of a showing of strict compliance with this section. Maher v. Gentry, — Idaho —, 186 Pac. (2d) 870.

It is well settled that the waters of natural springs, which form a natural stream or streams flowing off the premises on which they arise, are public waters subject to acquirement by appropriation, diversion and application to a beneficial use. Maher v. Gentry, — Idaho —, 186 Pac. (2d) 870.

42-213. Diversion of private waters—Applicants must show right of way.—All applications to the department of reclamation for permits to divert or appropriate the waters of any lake, pond, pool or spring shall state whether such lake, pond, pool or spring is wholly or entirely upon the land of any person or corporation other than the applicant, and, in the event that it is, such application shall state that the applicant has the written permission from such owner, executed and acknowledged as required by the provisions of the preceding section to divert or appropriate such water. [1911, ch. 230, § 2, p. 783; reen. C. L., § 3255b; C. S., § 5573; I. C. A., § 41-207.]

42-214. Proof of completion.—On or before the date set for the completion of works for the diversion and application of water under any permit, the holder of such permit, or his assigns, shall be prepared to submit proof of the completion of such works to the department of reclamation. Such holder of such permit shall first notify the department that he is prepared to submit such proof of completion of such works. Such notice to the department shall be given by registered mail at least sixty days before the date set for the completion of such works, and shall be on a form furnished by such department, and shall state:

1. The name of the person or corporation holding the permit under which such works are constructed.
2. The post-office address of such person or the place of business of such corporation.
3. The number of such permit, and the date set for the completion of such works under the same.
4. The use for which said water is intended.
5. Whether or not such works will be fully completed on the date set for such completion and the amount of water which such works are capable of conducting to the place of intended use in accordance with the plans of the same accompanying the application for such permit.
6. If for irrigation, the amount and description of the lands for which said water is available according to such plans.

In case of all canals or other works designed to divert and carry more than fifty cubic feet per second of water, the facts set forth in such notice to the department of reclamation shall be certified to by a well known and competent irrigation engineer.

Upon receipt of such notice by the department of reclamation the department shall immediately order its publication for a period of four

weeks in some newspaper designated by the person sending such notice and published in the county in which such works are situated. Such published notice shall also state the date when such proof of completion shall be submitted to the department, and the place where the same shall be submitted, and such publication shall be at the expense of the person making such proof.

Such person or persons establishing such proof of completion may offer the affidavits of competent engineers in relation to the grades, dimensions and capacity of such works, and the amount and location of land to which water can be delivered for irrigation. The department of reclamation may, in the case of canals designed to divert fifty cubic feet per second or more, demand that profiles and cross sections, showing the grade and the finished condition of such works, be filed with it in support of the claims which may be made in relation to the finished condition of such works, by the person or persons holding such permit. And in the case of works capable of diverting, on the date set for such completion, the full amount of water for which such works were intended, the department shall have authority to order the water turned into such works for the purpose of measuring the same.

Provided, that under all permits claiming six and four-tenths feet of water or less, but not otherwise, the permit holder may make such proof of completion without publication of notice by filing with the department of reclamation on or before the date set for completion of works, or within ten days thereafter, an affidavit setting forth the following information:

1. The name of the person or corporation holding the permit under which such works are constructed.
2. The post-office address of such person or the place of business of such corporation.
3. The number of such permit and the date set for the completion of such works under the same.
4. The use for which said water is intended.
5. Whether or not such works will be fully completed on the date set for such completion and the amount of water which such works are capable of conducting to the place of intended use.
6. If for irrigation, the amount and description of the lands for which said water is available according to said permit. [1903, p. 223, § 4; reen. R. C., § 3257; am. 1913, ch. 144, § 1, p. 509; reen. C. L., § 3257; C. S., § 5574; I. C. A., § 41-208.]

Extensions of Time for Completion.

In 1923, 1925, 1927, 1929 and 1933 statutes were enacted granting authority to the commissioner of reclamation to extend the time within which works under permits to appropriate public waters must be completed. The last one of these enumerated statutes, S. L. 1933, ch. 40 expired March 1, 1935; S. L. 1929, ch. 3 expired January 20, 1931; S. L. 1927, ch. 10 expired January 20, 1929. S. L. 1925, ch. 28 expired January 20, 1927; and S. L. 1923, ch. 9 expired January 1, 1925. In each case the extension of time was required to be given on or before the date of the expiration of the act, and was not to exceed two years. S. L. 1935, ch. 74 was enacted granting an extension of time but such act was repealed by S. L. 1937, ch. 142, § 7. In 1943 a statute was enacted granting an extension of time and was amended in 1945 and 1947. The last amendment, S. L. 1947, ch. 28 expired July 1, 1949; S. L. 1945, ch. 12, expired July 1, 1947; and the original act, S. L. 1943, ch. 79 expired March 1, 1947. This act and its amendments also required the extension of time to be given on or before the expiration date of the act.

ANALYSIS

Constitutionality.
Estoppel.
Mandamus.
Necessity of compliance.
Proof of publication of notice.
Protests.
Trespass.

Constitutionality.

This section does not vest judicial power in state engineer (department of reclamation) in violation of Const., art. 5, § 2. Boise Irr. &c. Co. v. Stewart, 10 Idaho 38, 77 Pac. 25, 321.

Estoppel.

A protective association having fully performed its contract with a reservoir company by withdrawing its protest and having accepted the fruits thereof, namely, relief from the hazard of not obtaining approval, and having secured approval of its application without the necessity of a hearing, it would appear it would be estopped to set up any claim of ultra vires or invalidity of the contract. Payette Lakes Protective Assn. v. Lake Reservoir Co., — Idaho —, 189 Pac. (2d) 1009.

Mandamus.

Mandamus will lie to compel state engineer (department of reclamation) to perform ministerial duties. Idaho Power &c. Co. v. Stephenson, 16 Idaho, 418, 101 Pac. 821.

Necessity of Compliance.

Total failure to commence work within time provided in permit, or to complete one-fifth of work in limited time, can not be cured by extending time for making proof of beneficial use of water so attempted to be appropriated. Washington State Sugar Co. v. Goodrich, 27 Idaho 26, 147 Pac. 1073.

Proof of Publication of Notice.

Affidavit of owner of newspaper that he published notice for five weeks is full compliance with this section. Big Wood Canal Co. v. Chapman, 45 Idaho 380, 263 Pac. 45.

Protests.

The statute providing for a hearing on the water appropriator's application to make final proof envisions protests may be filed and such has been the practice and custom. Payette Lakes Protective Assn. v. Lake Reservoir Co., — Idaho —, 189 Pac. (2d) 1009.

Trespass.

Where necessary data can be furnished from observation or survey made beyond the premises where the diversion is to take place, there is no trespass, since trespass must be physical, not merely mental. Idaho Power Co. v. Buhl, 62 Idaho 351, 111 Pac. (2d) 1088.

42-215. Department of reclamation to report on work—Issuance of certificate.—On or before the date set for receiving such proof of completion, in all cases where the amount of water claimed under the permit exceeds six and four-tenths cubic feet per second, but not otherwise, the department of reclamation shall make or cause to be made a full inspection and examination of the works constructed, and shall make or cause to be made a report on their condition, ascertaining and stating whether or not they conform to the terms of the application and permit, and are capable of diverting the amount of water intended, and the department shall ascertain how much water such works are capable of diverting and conducting to the place of intended use at the time of such proof of completion. The department shall issue a certificate to the holder of such permit or his assigns, which certificate shall set forth:

1. The name of the holder of the permit under which the works are constructed.
2. The number of such permit.
3. The date of the application for the same.
4. The post-office address of such holder.
5. The condition of such works.
6. The purpose for which they were constructed.
7. The quantity of water which can be diverted by the same and conducted to the place of intended use.
8. And if such water is to be used for irrigation, a description of the lands for which water is made available by such works.

The department of reclamation shall file such report and make a record in books kept in its office for the purpose of all the facts in relation to

the condition of such works, and their capacity on the date of such proof of completion.

Whenever it shall be desired to enlarge or extend existing works, or complete works not completed on the date set for such completion, all applications for a permit to make such enlargement, extension or completion shall be filed with the department of reclamation, the same as for original construction, and the priority of all rights resulting from such enlargement, extension or completion shall relate to such application. [1903, p. 223, § 5; reen. R. C., § 3258; am. 1913, ch. 83, § 1, p. 340; reen. C. L., § 3258; C. S., § 5575; I. C. A., § 41-209.]

Cited In: (In marginal notes) Schodde v. Twin Falls Land &c. Co., 224 U. S. 107, 56 L. ed. 686, 31 Sup. Ct. 470.

ANALYSIS

Action at law.
Constitutionality.
Construction.
Presumption of compliance.
When right vests.

Action at Law.

Holders of subsequent permits, upon a proper showing, are entitled to judgment in action at law canceling prior permits issued without statutory compliance, when state engineer (department of reclamation) refuses to cancel such permits. Clark v. Hansen, 35 Idaho 449, 206 Pac. 808.

Constitutionality.

This section does not vest judicial power in state engineer (department of reclamation) in violation of Const., art. 5, § 2. Boise Irr. &c. Co. v. Stewart, 10 Idaho 38, 77 Pac. 25, 321.

Construction.

Under this section, one to whom permit for enlargement or extension is issued must complete one-fifth of work within one-half of time granted and can not claim credit for construction already done at time permit was issued. Clark v. Hansen, 35 Idaho 449, 206 Pac. 808.

Purpose and object of requiring proof of completion of works is to ascertain whether or not such works conform to terms of application and permit, and are capable of diverting amount of water intended. Substantial conformity with such application and permit is all that is required. Big Wood Canal Co. v. Chapman, 45 Idaho 380, 263 Pac. 45.

There is no inconsistency between acceptance of works under this section and refusal by state to finally accept irrigation system as whole as complete performance of construction contracts. Big Wood Canal Co. v. Chapman, 45 Idaho 380, 263 Pac. 45.

Presumption of Compliance.

It will be presumed, in absence of evidence to contrary, that state engineer (department of reclamation) performed his duty and made examination and inspection required before issuance of his certificate. Big Wood Canal Co. v. Chapman, 45 Idaho 380, 263 Pac. 45.

When Right Vests.

When right to use of unappropriated waters has been initiated by application for permit and proper steps taken to perfect such right, such right becomes vested and dates back to issuance of permit. Big Wood Canal Co. v. Chapman, 45 Idaho 380, 263 Pac. 45.

42-216. Appeal from department's decision.—Whenever any person or persons feel themselves aggrieved by the determination of the department of reclamation in relation to the question of completion of works constructed under a permit issued by the department, such person or persons may appeal to the courts: provided, that such appeal shall be taken within sixty days from the date of the certificate relating to such completion by such department, and shall be perfected when the appellant shall have filed in the office of the clerk of the district court a copy of the certificate, certified by the department as a true copy, together with the petition to such court setting forth the appellant's reason for appeal. Such appeal shall be heard and determined upon such competent proof as shall be adduced by the appellant, and such like proofs as shall be adduced by the department of reclamation or some person authorized

in its behalf. [1903, p. 223, § 6; reen. R. C. & C. L., § 3259; C. S., § 5576; I. C. A., § 41-210.]

Amendment, Effect of.

This section was not amended directly or by implication by 1935 Session Laws, chapter 145, which amended § 42-202 et seq. Twin Falls Canal Co. v. Huff, 58 Idaho 587, 76 Pac. (2d) 923.

42-217 Rel. matter L. '31 c. 200 Sec. 10, p. 428

42-217. Proof of application to beneficial use.—On or before the date set for the beneficial use of waters diverted under the provisions of this chapter, which in no case shall be more than six years from the date set for the completion of any canal or other works designed to divert and conduct the public waters of the state to a place of use, or the date for the enlargement or extension or the completion of works for such purpose, the person or persons using such water shall submit proof that they have used such water for the beneficial purpose for which the diversion of such water was intended. Such user of such water shall first notify the department of reclamation that he is prepared to prove that such water has been beneficially applied to the purpose for which it was intended. Such notice to the department shall state:

1. The name and post-office address of such user.
2. The use to which such water has been applied.
3. The amount used.
4. The place of such use, and if for irrigation, the description by legal subdivisions of the land so irrigated.
5. The name of the canal or ditch or other works by which such water is conducted to such place of use.
6. The relation or understanding upon which the right to take water from such works is based.
7. The source of supply from which such water is diverted; and,
8. The date of the priority which such user is prepared to establish.

Such notice and such written proof as may be required to be submitted by such user shall be upon forms furnished by the department of reclamation, and such statements shall be sworn to by such user and be supported by the affidavits of two disinterested witnesses.

Upon receipt of such notice by the department of reclamation the department shall order its publication in some newspaper designated by such user and published in the county in which the major portion of such land is situated, for a period of four weeks, and shall fix a date when such proof shall be submitted and name a place where such proof will be received. Such date shall be subsequent to the completion of such publication, and the department shall, on or before the date set for such final proof, examine, or cause to be examined:

1. The place where such water is used, and, if the use is for irrigation, he shall ascertain the area and location of the land irrigated and the nature of all the improvements which have been made as a direct result of such use.
2. The capacities of the ditches or canals or other means by which such water is conducted to such place of use, and the quantity of water which has been beneficially applied for irrigation or other purposes.

The department or the person making such examination under the direction of the department shall also, on the date set for such final proof, receive the written statements made by the person or persons submitting such proof, and the affidavits of the witnesses, which statements and affidavits, together with a report of the investigation which the department is instructed to make, shall be forwarded at once to the

department: provided, that whenever several of such final proofs shall be offered from the same locality, the department shall arrange, whenever practicable, to have such notices for publication combined, and to have such examinations made by the same person and on the same date, as near as may be, with a view of minimizing the expense of taking such proofs, and such publication shall be at the expense of the person or persons submitting such proof: provided also, that whenever irrigation systems cover more than 25,000 acres, that proof of beneficial use may be made at any time within a period of ten years from the date set for the completion of the works, and in all such cases, proof of beneficial use may be made by the persons, company or corporation constructing the irrigation works on behalf of the project, and in such cases, the lands upon which the water has been used need not be described by legal subdivisions, but may be described generally as the lands under the irrigation system, and it shall only be necessary to show in such cases that the quantity of water beneficially applied for irrigation has been applied within the limits of the project. [1903, p. 223, § 7; reen. R. C., § 3260; am. 1913, ch. 36, § 1, p. 134; am. 1915, ch. 94, § 1, p. 216; reen. C. L., § 3260; C. S., § 5577; I. C. A., § 41-211.]

Sec. to sec. ref. This section is referred to in §§ 42-218, 42-1402.

Cited In: Vineyard Land &c. Co. v. Twin Falls Salmon River Land &c. Co., 245 Fed. 9; Vineyard Land &c. Co. v. Twin Falls Oakley Land &c. Co., 245 Fed. 30; Idaho Power &c. Co. v. Stephenson, 16 Idaho 418, 101 Pac. 821.

Proof of Use Inadmissible.

Where it appears that an irrigation district failed to prove the issuance of a permit by the state engineer, or a compliance with the terms of such a permit, as it has alleged in its pleading, it will not be permitted to prove the beneficial use of an additional amount of water. Bachman v. Reynolds Irr. Dist., 56 Idaho 507, 55 Pac. (2d) 1314.

42-218. Proof of application to beneficial use—Extension of time.—Whenever a less period of time than the maximum prescribed in the preceding section has been granted by the department of reclamation for making proof of beneficial use, upon a satisfactory showing being made by the permit holder, the department can extend the time for making such proof of beneficial use, but in no case shall such extension or extensions, including the original time granted, exceed the maximum prescribed in the preceding section. The department shall grant no extension unless the application therefor be filed with it prior to the date upon which the proof of beneficial use was required to be made under the original terms of the permit, or within thirty days after such date. [1913, ch. 47, § 1, p. 154; am. by implication, 1915, ch. 94, § 1, p. 216; adding a proviso extending the maximum period to ten years in some cases; compiled and reen. C. L., § 3260a; C. S., § 5578; I. C. A., § 41-212.]

19 to I. c. 200 11, p. 428

42-219. Issuance of license—Priority.—Upon receipt by the department of reclamation of all the evidence in relation to such final proof, it shall be the duty of the department to carefully examine the same, and if the department is satisfied that the law has been fully complied with and that the water is being used at the place claimed and for the purpose for which it was originally intended, the department shall issue to such user or users a license confirming such use. Such license shall be issued under the seal of the office of the department of reclamation, and shall state the name and post-office address of such user, the purpose for which such water is used, the quantity of water which may be used,

which in no case shall be an amount in excess of the amount that has been beneficially applied. If such use is for irrigation, such license shall give a description, by legal subdivisions, of the land which is irrigated by such water. Such license shall bear the date of the application for, and the number of, the permit under which the works from which such water is taken were constructed; the date of the completion of such works; the capacity of such works on such date of completion; the date when proof of beneficial use of such water was made, and also the date of the priority of the right confirmed by such license, which shall be the date of the application for the permit for the construction of the works from which such water is taken, and to which such right relates. All the licenses which relate to the same permit and which bear the same date of priority shall be numbered alike, and shall belong to the same class, and all the rights relating to the same sources of supply shall be numbered numerically in the order of the priority of such rights: provided, that whenever proof of the beneficial application of water shall be offered subsequent to the date stated in the permit, or in any authorized extension thereof, when such beneficial application shall be made, such proof shall be taken, and if satisfactory to the department of reclamation, a license shall be issued by the department the same as though such proof had been made before such date fixed for such beneficial application, but the priority of the right established by such proof shall not date back to the date of the application for the permit to which such right would relate under the provisions of this chapter, but shall bear a date which shall be subsequent to the date of such application, a time equal to the difference between the date set in such permit, or extension thereof, for such beneficial application of such water and the date of such proof: provided, however, that upon irrigation projects where the canals constructed cover an area of 25,000 acres or more, or within irrigation districts organized and existing as such under the laws of the state of Idaho, the license issued shall be issued to the persons, association, company or corporation or irrigation district owning the project, and final proof may be made by such owners for the benefit of the entire project and it shall not be necessary to give a description of the land by legal subdivisions but a general description of the entire area under the canal system shall be sufficient, and the water diverted and the water right acquired thereby shall relate to the entire project and the diversion of the water for the beneficial use under the project at any time within a period of ten years shall be sufficient proof of beneficial use without regard as to whether each and every acre under the project is irrigated or not. [1903, p. 233, § 8; reen. R. C., § 3261; am. 1915, ch. 94, § 2, p. 218; modified by 1913, ch. 47, § 1, p. 154, and 1915, ch. 94, §§ 1, 2, p. 216; compiled and reen. C. L., § 3261; C. S., § 5579; am. 1925, ch. 44, § 1, p. 61; I. C. A., § 41-213.]

Sec. to sec. ref. This section is referred to in § 42-1402.

Cited in: Vineyard Land &c. Co. v. Twin Falls Salmon River Land &c. Co., 245 Fed. 9; Vineyard Land &c. Co. v. Twin Falls Oakley Land &c. Co., 245 Fed. 30; Idaho Power &c. Co. v. Stephenson, 16 Idaho 418, 101 Pac. 821; Speer v. Stephenson, 16 Idaho 707, 102 Pac. 365; Newport Water Co. v. Kellogg, 31 Idaho 574, 174 Pac. 602.

Doctrine of Relation.

Doctrine of relation as to priority of appropriation can not be invoked until final consummation of appropriation as defined by statute, and can be invoked only to extent of completion of appropriation. Basinger v. Taylor, 30 Idaho 289, 164 Pac. 522.

Use of Water.

In order to warrant issuance of license, it must appear that water is being used

at place claimed, and for purposes for which it was originally intended. Basinger v. Taylor, 36 Idaho 591, 211 Pac. 1085.

42-220
Ref. to
L. '51 c. 200
Sec. 11, p. 428

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42-220. Effect of license.—Such license shall be binding upon the state as to the right of such licensee to use the amount of water mentioned therein, and shall be prima facie evidence as to such right; and all rights to water confirmed under the provisions of this chapter, or by any decree of court, shall become appurtenant to, and shall pass with a conveyance of, the land for which the right of use is granted. The right to continue the beneficial use of such waters shall never be denied nor prevented for any cause other than the failure, on the part of the user or holder of such right, to pay the ordinary charges or assessments which may be made or levied to cover the expenses for the delivery or distribution of such water, or for other reasons set forth in this title: provided, that when water is used for irrigation, no such license or decree of the court allotting such water shall be issued confirming the right to the use of more than one second foot of water for each fifty acres of land so irrigated, unless it can be shown to the satisfaction of the department of reclamation in granting such license, and to the court in making such decree, that a greater amount is necessary, and neither such licensee nor any one claiming a right under such decree, shall at any time be entitled to the use of more water than can be beneficially applied on the lands for the benefit of which such right may have been confirmed, and the right to the use of such water confirmed by such license shall always be held subject to the local or community customs, rules and regulations which may be adopted from time to time by a majority of the users from a common source of supply, canal or lateral from which such water may be taken, when such rules or regulations have for their object the economical use of such water. [1903, p. 223, § 9; reen. R. C. & C. L., § 3262; C. S., § 5580; I. C. A., § 41-214.]

Cited in: Idaho Power &c. Co. v. Stephenson, 16 Idaho 418, 101 Pac. 821; Russell v. Irish, 20 Idaho 194, 118 Pac. 501.

License and Water Right.

License is prima facie evidence of water right, but no certificate issued by state engineer prior to license is made prima facie evidence of water right. Basinger v. Taylor, 30 Idaho 289, 164 Pac. 522.

Prima Facie Evidence.

Water license is only prima facie evidence of water right. Basinger v. Taylor, 36 Idaho 591, 211 Pac. 1085.

Test of Necessary Amount.

The amount of water that a water user has been in the habit of using is not the true test of the duty of the water, but the test is the amount actually necessary for the beneficial purpose to which the water is to be applied. Graham v. Leek, 65 Idaho 279, 144 Pac. (2d) 475.

Waiver of Rights.

By obtaining issuance of license, licensee does not waive any rights he may previously have had through actual diversion and application to a beneficial use. Joyce v. Rubin, 23 Idaho 296, 130 Pac. 793; Newport Water Co. v. Kellogg, 31 Idaho 574, 174 Pac. 602.

42-221. Fees of department.—Upon the issuance of a certificate by the department of reclamation in relation to the completion of any canal, ditch or other works constructed under the provisions of this chapter, a fee, to cover the expense of the examination of such works, shall be paid to the department by the person or persons submitting the proof of such completion. For all ditches or canals having a capacity of ten cubic feet per second or less, such fee shall be five dollars. For all ditches or canals having a capacity of more than ten cubic feet per second, such fee shall be at the rate of five dollars for the first ten second feet and

thirty cents for each additional second foot of such capacity. For examining the ditches and lands of the user at the time of making final proof of the application of water, a fee of two dollars shall be paid to the department, at the time of making such proof, for each legal subdivision of forty acres or fraction thereof to which such water may have been applied. For examining the ditches or other works and the place where such water is used, when such use is not for irrigation, a fee of five dollars shall be paid the department at the time of making such examination and taking the proof of such use: provided, that in the case of water used for irrigation, where two or more users whose lands join or who take water from the same common lateral, join in the publication of the notice of their intention to make such proof of application, a fee of one dollar for each legal subdivision of forty acres or fraction thereof receiving such water shall be paid to the department at the time of making such proof: provided further, that in the case of water used for irrigation, where the right sought is additional to an existing water right, and where the department of reclamation is not required to make an examination of the ditches or the lands of the user in order to determine that the water has been applied to a beneficial use, no fee for examining the ditches or lands of the user shall be paid to the department; and this proviso shall apply to rights already initiated, as well as rights to be hereafter acquired. For making certified copies of any papers on file in his office, the department shall charge a fee at the rate of twenty cents per folio. All fees received by the department of reclamation under the provisions of this chapter shall be recorded in a fee book, and shall at once be turned over to the state treasurer and placed in the general fund of the state. [1903, p. 223, § 10; am. 1905, p. 174, § 1; reen. R. C. & C. L., § 3263; C. S., § 5581; am. 1923, ch. 53, § 1, p. 60; I. C. A., § 41-215; am. 1941, ch. 116, § 1, p. 228.]

Construction.

While conduit through which water user diverts water may not strictly be a ditch or canal, nevertheless he is liable for fee based on capacity of his diversion works. Idaho Power &c. Co. v. Stephenson, 16 Idaho 418, 101 Pac. 821.

42-222
Rel. matter
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42-222. Abandonment—Change of point of diversion and place of use—Appeal from decision of department.—All rights to the use of water acquired under this chapter or otherwise shall be lost and abandoned by a failure for the term of five years to apply it to the beneficial use for which it was appropriated, and when any right to the use of water shall be lost through non-use or abandonment such rights to such water shall revert to the state and be again subject to appropriation under this chapter. Provided, further, that upon proper showing before the state reclamation engineer of good and sufficient reason for non-application to beneficial use of such water for such term of five years, the state reclamation engineer is hereby authorized to grant an extension of time extending the time for forfeiture of title for non-use thereof to such waters for a period of not to exceed five years. Any person desiring to change the point of diversion or the place of use of such water shall first make application to the department of reclamation, stating fully in such application the reason for making such transfer. Such application shall describe the land, the use of water on which it is to be abandoned and shall describe the land to which it is desired to have such right transferred, and if such water is to be conducted to such land through another canal or lateral or from a different point of

diversion than the one described in the license or decree of the court confirming such right, such facts shall be fully set out in such application, and, if the department shall require it, a plat showing the location of such land and ditches, or canals or points of diversion shall be furnished by such applicant; that after the receipt of said application, the department of reclamation shall cause at the expense of the applicant, a notice of such application to be published once a week for two issues in a newspaper published in the county in which such lands are situated from which it is proposed to transfer the water, or if such lands are in more than one county, then such notice shall be published in each of such counties, which notice shall be substantially as follows: Notice is hereby given that _____of_____ has applied to the state reclamation engineer of the state of Idaho for a certificate authorizing him to change the point of diversion or to transfer the use of_____of the water of_____, from the land upon which it is now used, i.e._____ to the following described tract_____. And that, on the _____day of_____A.D. 19____, at_____ before the state reclamation engineer, or his authorized agent, the opportunity will be given to any and all persons to appear and present for his consideration any reason or reasons why a certificate should not be issued authorizing such transfer.

That such applicant shall file with the department of reclamation an affidavit showing the publication of such notice; the date of hearing thereon must be fixed at a time not less than five days after the last publication of such notice; the time and place of hearing shall be fixed by the state reclamation engineer upon receipt of such application; that at the time of, or after said hearing, the state reclamation engineer shall examine the said application and in his discretion, may examine the lands from which said waters are proposed to be transferred, and the lands to which the said water is proposed to be transferred at the expense of the applicant; that upon receiving the application, the state reclamation engineer shall notify the watermaster of the district in which such lands are situated and such watermaster shall notify the state reclamation engineer of his approval or disapproval of the application, and the state reclamation engineer shall not finally determine the said application until he has received from such watermaster either his approval or non-approval thereof, which action of such watermaster shall only be received as other evidence before the state reclamation engineer in the final determination of such application, and shall, provided no one shall be injured by the transfer, and that the application shall be granted, issue to each such applicant, under the seal of his office, a certificate authorizing such transfer, which certificate shall state the name of the applicant and shall contain a copy of the license or an abstract of the decree confirming the right to the use of the water upon the land from which it is desired to transfer such right and a description of the land to which such right is transferred. A fee of one dollar shall be paid to the department by such applicant for such certificate of transfer issued by it and such application shall be recorded by the department in a book kept for that purpose, and the department shall not thereafter divert to or upon the lands, the water for which has been so abandoned, any of such water, but shall divert such water from such stream so that it may be used on the lands to which such right has been transferred: provided, further, that any person or persons who are owners by decree

of court or by appropriation of a water right and who have, with reasonable diligence, annually increased the beneficial use of the water covered by such water right or do hereafter with reasonable diligence annually increase the beneficial use of the water held under such water right shall not be subject to the penalties of abandonment and loss by non-use of such water right, as provided in this section.

Any person or persons feeling themselves aggrieved by the determination of the department of reclamation in issuing or refusing, upon application for permission to change the point of diversion or the place of use of water, to issue a certificate authorizing such transfer, may, within sixty days from the date of such refusal or approval, appeal to the district court for the county in which the land is situated to which such water is appurtenant. Such appeal shall be perfected when the appellant shall have given written notice of such appeal to the department of reclamation and shall have filed in the office of the clerk of the district court a copy of the application for change of the point of diversion or place of use, certified by the department as true copy and having endorsed thereon the order of the department granting or refusing to grant a certificate authorizing such transfer together with a petition to such court setting forth the appellant's reason for such appeal and evidence of service of notice of appeal on the department. Such appeal shall be heard and determined upon such competent proof as shall be adduced by the appellant, such like proofs as shall be adduced by the department of reclamation, and other parties appearing in said action in said district court. [1903, p. 223, § 11; am. 1905, p. 27, § 1; am. 1907, p. 507, § 1; reen. R. C., § 3264; am. 1915, ch. 34, § 1, p. 103; am. 1917, ch. 166, § 1, p. 495; reen. C. L., § 3264; C. S., § 5582; am. 1921, ch. 146, § 1, p. 334; I. C. A., § 41-216; am. 1933, ch. 193, § 1, p. 382; am. 1943, ch. 53, § 2, p. 101; am. 1945, ch. 63, § 1, p. 79.]

Compiler's notes. Section 1 of S. L. 1943, ch. 53 is compiled herein as § 42-108.

Section 2 of S. L. 1945, ch. 63 declared an emergency. Approved Feb. 21, 1945.

Sec. to sec. ref. This section is referred to in §§ 42-223, 42-1707.

Cited in: (In brief of counsel) Joyce v. Rubin, 23 Idaho 296, 130 Pac. 793.

ANALYSIS

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Abandonment.

Abandonment is a question of intention and must be evidenced by a clear and decisive act. Idaho Farms Co. v. North Side Canal Co., 24 Fed. Supp. 189.

Patentee of land, over which right of way for reservoir has been granted, or his successor in interest, may institute proceedings to declare forfeiture and quiet title in case of abandonment. Carns v. Idaho-Iowa Lateral &c. Co., 34 Idaho 330, 202 Pac. 1071; Hurst v. Idaho-Iowa Lateral &c. Co., 34 Idaho 342, 202 Pac. 1068.

Right based upon decree of court is not immune from showing that it has been abandoned, and such showing does not impeach decree upon which such right is based where evidence of abandonment relates to time subsequent to decree. Albrethsen v. Wood River Land Co., 40 Idaho 49, 231 Pac. 418.

Where it appears from testimony of competent engineers that canal of prior appropriator lacks capacity to carry water decreed to it, and that the excess has been returned to stream and used by subsequent appropriators, abandonment results against such prior appropriator, a five-year period having elapsed. Albrethsen v. Wood River Land Co., 40 Idaho 49, 231 Pac. 418.

Abandonment of water right begins when owner ceases to apply water to beneficial use, and where he fails to so apply it for five years, it reverts to state and again becomes subject to appropriation. Chill v. Jarvis, 50 Idaho 531, 298 Pac. 373.

An abandonment of a water right must have been continuous for five consecutive years. Carrington v. Crandall, 65 Idaho 525, 147 Pac. (2d) 1009.

Only when an appropriator abandons his water by failing to apply it to a beneficial use for the statutory period of five years can it be considered and treated as unappropriated public water of the state. Colthorp v. Mountain Home Irr. Dist., 66 Idaho 173, 157 Pac. (2d) 1005.

Abandonment Not Favored.

If no public interest is forwarded by the abandonment, equity is against declaring a forfeiture. Idaho Farms Co. v. North Side Canal Co., 24 Fed. Supp. 189.

Abandonment and forfeitures of water rights are not favored, and, even though forfeited and abandoned for five years prior to the time that subsequent appropriators initiated their right, if, subsequent to such five-year period, and prior to such subsequent appropriators' initiation of their right, the first appropriators and their predecessors in interest under claim of right and continuity of interest of diversion and application for mining purposes as to the amount applied rediverted and applied, there would be no abandonment which could inure to the benefit of subsequent appropriators. Zezi x. Lightfoot, 57 Idaho 707, 68 Pac. (2d) 50.

Abandonment of Decreed Water Right.

A decreed water right is not immune from a showing that it has been abandoned, and such showing does not impeach the decree upon which the right is based, where the evidence received with reference to the abandonment relates to a time subsequent to the decree. Graham v. Leek, 65 Idaho 279, 144 Pac. (2d) 475.

Action to Quiet Title.

Where predecessor in title of both plaintiff and defendant had transferred water right from ranch now owned by defendant to ranch now owned by plaintiff, latter could maintain action to quiet title to such water right although predecessor in title had not had statutory authority to make such change. Federal Land Bank v. Union Central Life Ins. Co., 51 Idaho 490, 6 Pac. (2d) 486.

Appeal Not Exclusive Remedy.

Any party aggrieved by decision of commissioner may either appeal to district court or commence original action in said court. Crockett v. Jones, 42 Idaho 652, 249 Pac. 483.

Appeal to District Court.

Proceedings before district court under this section are de novo. First Security Bank v. State, 49 Idaho 740, 291 Pac. 1064.

On appeal from action of department of reclamation, district court acquires full equitable jurisdiction over entire controversy. In re Rice, 50 Idaho 660, 299 Pac. 664.

District court acquired full equitable jurisdiction on appeal from reclamation commission order and had full authority to impose reasonable conditions to avoid injury. Beecher v. Cassia Creek Irr. Co., Inc., 66 Idaho 1, 154 Pac. (2d) 507.

Appeal to Supreme Court.

Hearing on appeal to district court from reclamation commissioner must be reviewed by Supreme Court on appeal and not by writ of review. State v. Adair, 49 Idaho 271, 287 Pac. 950.

Application of Section.

This section must be followed when it is applicable. First Security Bank v. State, 49 Idaho 740, 291 Pac. 1064.

Appurtenancy.

Water right is not necessarily appurtenant to land on which it is used, and may be separated therefrom. First Security Bank v. State, 49 Idaho 740, 291 Pac. 1064.

Burden of Proof.

In an action to quiet title, brought by subsequent appropriators on the theory that the former appropriators had abandoned the use of water, the burden of proof is placed on the subsequent appropriators to show that persons who had used the water by permission used more than that for which they had permission. Zezi v. Lightfoot, 57 Idaho 707, 68 Pac. (2d) 50.

Carey Act Settlers Excluded.

This section was not intended to apply to settlers within a Carey Act (U. S. Code [9A, F. C. A.] tit. 43, § 641) project who were not themselves the appropriators of water from public streams of the state. Idaho Farms Co. v. North Side Canal Co., 24 Fed. Supp. 189.

Change of Diversion.

The owner of a water right has the statutory right to change his point of diversion provided that the rights of others are not injured, and such change does not work a forfeiture or an abandonment of such right. Graham v. Leek, 65 Idaho 279, 144 Pac. (2d) 475.

A change in point of use will not be permitted without limitations if the enlarged use in time or amount increases the burden on the stream, or decreases the volume of water in the stream to the injury of appropriators on the stream. Beecher v. Cassia Creek Irr. Co., Inc., 66 Idaho 1, 154 Pac. (2d) 507.

Construction.

Where one secures permit under this chapter and appropriates water thereunder, it is a statutory appropriation, and to change the point of diversion there must be a substantial compliance with this section. Washington State Sugar Co. v. Goodrich, 27 Idaho 26, 147 Pac. 1073.

This section is not in conflict with § 42-108. Washington State Sugar Co. v. Goodrich, 27 Idaho 26, 147 Pac. 1073.

This section neither added to nor detracted from property rights already existing. First Security Bank v. State, 49 Idaho 740, 291 Pac. 1064.

This section is remedial and should be construed liberally. In re Rice, 50 Idaho 660, 299 Pac. 664.

Estoppel to Deny User's Right.

Where it is made to appear that a water user's title may have been originally questionable or uncertain, nevertheless, where one who had a superior right thereto stood by with full knowledge of the facts for more than twenty years and allowed an adverse claimant to proceed to use the water on the theory that such adverse user had a valid title to the water and a legal right thereto, and such adverse user, in the meantime, incurred large indebtedness on the strength of title to the water, the one who formerly had a superior right is estopped to assert it. Hillcrest Irr. Dist. v. Nampa & Meridian Irr. Dist., 57 Idaho 403, 66 Pac. (2d) 115.

Evidence.

Evidence in the cited case was insufficient to sustain the burden of proof on the part of subsequent appropriators to show that third persons, to whom the owners had given permissive use, used water other than that covered by such permission. Zezi v. Lightfoot, 57 Idaho 707, 68 Pac. (2d) 50.

Injury.

Injury to one owner of drainage canal by coowners' abandonment thereof does not prevent latter from selling water right, or changing place of conveyance, point of diversion, or place of use. In re Johnson, 50 Idaho 573, 300 Pac. 492.

Permissive Use.

Permissive use is sufficient to inure to the benefit of the true owners of water or persons entitled to its use and to prevent the operation of the abandonment statute. Zezi v. Lightfoot, 57 Idaho 707, 68 Pac. (2d) 50.

Persons Entitled to Change.

The equitable principle of laches and negligence barred the correction of water right decree which had been entered 16 years prior and 7 years had elapsed after petitioner had purchased the land, during which time the rights of other owners of water rights had intervened. Albion-Idaho Land Co. v. Adams, 58 Fed. Supp. 579.

Right to change point of diversion belongs to stockholding consumer in mutual ditch company as fully as to any other appropriator, so long as rights of others are not injuriously affected. Twin Falls Canal Co. v. Shippen, 46 Idaho 787, 271 Pac. 578.

An irrigation company has the right to purchase water rights and change points of diversion provided such action will not result in substantial injury to water rights of others. Beecher v. Cassia Creek Irr. Co., Inc., 66 Idaho 1, 154 Pac. (2d) 507.

Pleadings.

Complaint alleging abandonment should allege that specific quantities of water have been used or are claimed by plaintiff. Inman v. Round Valley Irr. Co., 41 Idaho 482, 238 Pac. 1018.

Questions Determined in Separate Action.

In proceeding to change point of diversion of water, question of abandonment of priority is not generally before court if proper objection is made thereto. Such right should be settled in some other proceeding. Twin Falls Canal Co. v. Shippen, 46 Idaho 787, 271 Pac. 578.

If ownership of water, or right to change, is disputed in proceeding under this section, such question must be determined in action for that purpose. Federal Land Bank v. Union Central Life Ins. Co., 51 Idaho 490, 6 Pac. (2d) 486.

Remedy in Equity.

Where applicant for change of place in use of water is not owner of land to

which water has been made appurtenant, he may proceed in equity rather than under this section. First Security Bank v. State, 49 Idaho 740, 291 Pac. 1064.

Resumption of Use.

Forfeiture of water right is not effective although statutory abandonment has occurred, if the original owner resumes the use prior to a claim of right by a third person. Carrington v. Crandall, 65 Idaho 525, 147 Pac. (2d) 1009.

Reversion to State.

When the right to the use of water has been lost through non-use or abandonment, the right to such use reverts to the state and is again subject to appropriation. Graham v. Leek, 65 Idaho 279, 144 Pac. (2d) 475.

Right Acquired by Purchaser.

Where purchaser acquired land after the rendition of water right decree, he received only that which the vendor had for sale and if the right to correct the decree had been lost by laches or otherwise, the purchaser was in no better position than the vendor. Albion-Idaho Land Co. v. Adams, 58 Fed. Supp. 579.

Subsequent Appropriators.

Rule as to change of place of application can not inure to the aid of subsequent appropriators because, not being appropriators during the time, it was no concern of theirs except as it bears on the question of abandonment where or how the water was diverted or applied. Zezi v. Lightfoot, 57 Idaho 707, 68 Pac. (2d) 50.

42-223. Renewal of extension of time.—The state reclamation engineer is hereby authorized to grant one renewal for a period of five years, of any extension of time of forfeiture of title for nonuse or nonapplication to beneficial use heretofore granted or hereafter granted under the provisions of section 42-222, as amended, upon proper showing, and upon application made during or within six months after the termination of the present war. [1945, ch. 97, § 1, p. 147.]

Compiler's note. Section 2 of S. L. 1945, ch. 97 declared an emergency. Approved Mar. 2, 1945.

42-224. Protest against license—Appeal from decision.—Any person desiring to protest against the statements made by the person or persons submitting proof of the beneficial application of water in the published notice of their intention to submit such proof, shall file a statement with the department of reclamation on or before the date set for such proof, stating clearly the reason for such protest, and stating the reason, if any, why a license should not be issued confirming the right claimed. Such protest shall be based solely upon the statements in such notice and shall be sworn to by such protestant.

In issuing a license confirming any right to use water for beneficial purposes, the department of reclamation shall be governed in its actions by the records relating to works from which such water is taken which may be on file in the office of the department, and by the reports of the examination of such works, the place where such water is used, and the extent of such use. Such license may confirm such claim in whole or in part, or such license may be refused, such determination depending upon the extent to which such claim is supported by such records, and such examination of the conditions relating to such use made on the ground under the authority of the department. If the department shall refuse to issue a license, the reasons for such refusal shall be recorded in a book kept for the purpose: provided, that any one feeling himself aggrieved by the statements contained in the license issued by the department, or the refusal of the department to issue such license, may appeal therefrom to the district court of the county in which the place of use of the water claimed shall be situated. Such appeal shall be taken within sixty

days from the date of such license or the refusal to issue such license, and shall be perfected when the appellant shall have filed in the office of the clerk of such district court a copy of the license, or, if such license shall not have been issued, a copy of the statement made by the department giving the reasons why such license was not issued, a copy of the protests against the issuing of such license filed with the department, and a copy of the report of the examination of the place of use of such water made under the authority of the department, and of other documentary proof in relation to such use which may be filed in the office of the department. Such copies of licenses, reports, protests and other proof shall be certified by the department as true copies. Such copies shall be filed in the office of such clerk together with a petition to such court setting forth the appellant's reason for appeal. Such appeal shall be heard and determined upon such competent proof as shall be adduced by the appellant, and such like proofs as shall be adduced by the department of reclamation or some person duly authorized in its behalf. [1903, p. 223, § 12; reen. R. C. & C. L., § 3265; C. S., § 5583; I. C. A., § 41-217.]

Cited in: Hillcrest Irr. Dist. v. Nampa & Meridian Irr. Dist., 57 Idaho 403, 66 Pac. (2d) 115.

Effect of Amendatory Statutes.

This section was not amended directly or by implication by statutes governing the proceedings before the commissioner to obtain a permit. Twin Falls Canal Co. v. Huff, 58 Idaho 587, 76 Pac. (2d) 923.

42-225. Survey of appropriations—Duty of department.—It shall be the duty of the department of reclamation to proceed, as soon as may be, to make an examination of the streams of the state (beginning with those whose waters have not yet been allotted), and the works diverting water therefrom, said examination to include the measurement of the discharge of said streams and the carrying capacity of the various ditches and canals diverting water therefrom; an examination of the irrigated lands, and an approximate measurement of the lands irrigated or susceptible of irrigation from the various ditches and canals, which said observations and measurements shall be reduced to writing and made a matter of record in its office, and it shall be the duty of the department of reclamation to make, or cause to be made, a map or plat on a scale of not less than one inch to the mile, showing, with substantial accuracy, the course of the stream, the location of each ditch or canal diverting water therefrom, and the legal subdivisions of land which have been irrigated, and it shall also note on such map the lands which are susceptible of irrigation from the ditches and canals already constructed. Such examination shall be made as rapidly as possible to include all the streams used for irrigation in the state. The department of reclamation shall indicate on such map the lands the water rights for which have been adjudicated by the courts, noting on each tract the number of the priority of such rights, and whenever an application for a permit to appropriate water from a stream shown on such map shall be allowed, such department shall indicate on such map the line of such canal or ditch or other works, and indicate by appropriate colors the lands to be irrigated by such works, and shall note thereon the number of such permit. Whenever proof is made that water has been beneficially applied from such works to any of such lands, and license shall be issued for the same as in this chapter provided, the number of such license so issued shall be at once noted on such map on the subdivision

42-233a Amended L.'63, ch 216 sec 2, p 624

42-233b Repealed L.'63, ch 216 sec 4, p 626

42-237g Amended L.'63, ch 216 sec 3, p 626

of such lands to which such license shall relate, and all these and other facts relating to the development of irrigation on such stream shall be carefully posted on such map. [1903, p. 223, § 33; reen. R. C., § 3266; compiled and reen. C. L., § 3266; C. S., § 5604; I. C. A., § 41-218.]

Compiler's note. The words enclosed in parentheses so appeared in the act.

Cross ref. Appropriation for survey of certain water resources, see note, § 42-101.

Conservation of water for irrigation purposes, §§ 42-1501—42-1506.

Water resources survey, § 42-1701.

Sec. to sec. ref. This section is referred to in § 42-1401.

Construction and Validity.

It is the duty of state engineer (department of reclamation) to examine streams and diversion works, beginning with streams the waters of which have not been adjudicated by decree of court. Work to be done by engineer (department) under this section is to be paid for by the state and is partly for purposes of making a permanent record of water appropriations and rights to use thereof. The section is constitutional. Boise Irr. &c. Co. v. Stewart, 10 Idaho 38, 77 Pac. 25, 321.

Map to Be Filed.

Upon being ordered to make survey and prepare map, department should file map with court or at least place it in court's possession, and is not excused by subsequent settlement of case on stipulated findings. Hamilton v. Swendsen, 46 Idaho 175, 267 Pac. 229.

42-229 Amended L.'63, ch 216 sec 1, p 624

CHAPTER 3

APPROPRIATION OF WATER—CANCELATION OF PERMITS

42-301. Permits contestable—When and by whom.—If the holder of a permit to appropriate the public waters shall fail to comply with the requirements of his permit as to the commencing of work or the filing of bond thereunder, or the completion of one-fifth of the construction work within one-half the time allowed for the entire completion of such construction work, or shall fail to complete the entire construction work within the time specified in his permit, said permit may be canceled and voided by the department of reclamation as hereinafter provided at the instance of any person or persons holding any permit for the diversion of water from the same stream, such permit postdating the permit which is sought to be canceled. [1909, p. 299, § 1; reen. C. L., § 3265a; C. S., § 5584; I. C. A., § 41-301.]

Compiler's notes. The act forming the basis of this chapter repealed a prior law, 1903, p. 223, § 3, am. 1907, p. 532, § 1, reen. R. C., § 3256; C. S., § 5584.

Department of reclamation substituted for state engineer throughout this chapter on the authority of § 67-3301.

Comp. leg. Cal. Deering's Gen. Laws 1937, Act 9091, §§ 18, 20.
N. D. Rev. Code 1943, § 61-0408.
Wyo. Comp. Stat. 1945, § 71-243.

Action in District Court.

Holders of subsequent permits, on a proper showing, are entitled to judgment in action at law canceling prior permits, when department of reclamation refuses to cancel such permits in a proceeding instituted before it. Clark v. Hansen, 35 Idaho 449, 206 Pac. 808.

Constitutionallty.

The act, of which this is the first section, does not vest in state engineer (department of reclamation) judicial power and is not in conflict with Const., art. 2, § 1 or art. 5, § 2. Speer v. Stephenson, 16 Idaho 707, 102 Pac. 365.

Time Limits.

If work is not commenced within time specified in permit for water, issued by state engineer (department of reclamation), or if one-fifth of the work is not completed within time therein limited, failure can not be cured by extending time for making proof of the beneficial use of water attempted to be appropriated. Washington State Sugar Co. v. Goodrich, 27 Idaho 26, 147 Pac. 1078.

42-302. Petition for cancelation.—Any person as above specified desiring the cancelation of a permit shall file with the department of reclamation a petition clearly setting forth the facts upon which he bases his prayer for cancelation, plainly stating wherein the holder of the permit, which is sought to be canceled, has failed to comply with the law and with the requirements of his permit. [1909, p. 299, part of § 2; reen. C. L., § 3265b; C. S., § 5585; I. C. A., § 41-302.]

Cross ref. Suit to quiet title, § 42-308.

Sec. to sec. ref. This section is referred to in § 42-308.

42-303. Notice of contest.—Upon receipt of such petition, the department of reclamation shall issue a notice, naming the petitioner as contestant and all persons, shown by the records of the department of reclamation to have any claim of title or interest in the permit sought to be canceled as contestees, and requiring all contestees to appear at the office of the department on a day to be specified therein, which day shall be not less than sixty nor more than ninety days from the date of the notice, and show cause, by affidavit, if any there be, why said permit should not be canceled. Such notice shall be sent by registered mail, addressed to every person named therein at his last known post-office address. [1909, p. 299, part of § 2; reen. C. L., § 3265c; C. S., § 5586; I. C. A., § 41-303.]

Due Process.

This provision that permits shall be recorded in the office of the state engineer (department of reclamation) and requiring notice of contest must be sent by registered mail to last known post-office address of all persons shown by the records to have an interest is sufficient notice and due process. Speer v. Stephenson, 16 Idaho 707, 102 Pac. 365.

42-304. Hearing.—On the day set for the hearing the contestant and such contestees as have filed the affidavit hereinbefore required of them, shall file such affidavits in support of their respective allegations as they may desire, and the department of reclamation may require such additional evidence and may make or cause to be made by an engineer whom the department may designate, such personal examination of the work done under the permit in question, as the department may deem necessary to enable it to render a fair decision: provided, that before making or causing such examination to be made the department shall estimate the cost of such examination and shall require the contestant to deposit a sum equal to such estimate and if after the making of such examination it is found that the amount so deposited is in excess of the cost of such examination the department shall return such excess to the contestant. For the purpose of producing additional testimony in making investigations, the department may continue the hearing to such time, not exceding thirty days, as would seem to it advisable. [1909, p. 299, part of § 2; reen. C. L., § 3265d; C. S., § 5587; I. C. A., § 41-304.]

42-409. Appropriation for use in Wyoming.—The department of reclamation shall, under the laws of this state, allow the appropriation of water in this state for beneficial use in the state of Wyoming only when, under the laws of the latter, water may be lawfully diverted therein for beneficial use in the state of Idaho. Upon any stream flowing across the state boundary a right of appropriation, having the point of diversion and the place of use in the state of Wyoming and recognized by the laws of that state, shall have the same force and effect as if the point of diversion and the place of use were in this state: provided, that the laws of that state give like force and effect to similar rights acquired in this state. [1919, ch. 118, § 1, p. 404; C. S., § 5603; I. C. A., § 41-409.]

Collateral Reference.

Cooperation or compacts between states as to water rights. 134 A.L.R. 1412.

CHAPTER 5

APPROPRIATIONS BY DIVISION OF GRAZING OF UNITED STATES DEPARTMENT OF INTERIOR

42-501. Appropriation by United States grazing division—Fee—Conditions of permit—Flow.—The division of grazing of the department of interior of the United States may appropriate for the purpose of watering livestock any water not otherwise appropriated, on the public domain. The department of reclamation shall, upon application in such form and of such content as it shall by rule prescribe issue permit and license and certificate of water right within a reasonable time in such form as it shall prescribe for such appropriation. With each such application there shall be paid to the department of reclamation a fee of one dollar and there shall be no further fee required for the issuance of the permit or license and certificate of water right, nor for any other proceedings in connection with such application. Such permit, license and certificate of water right shall be conditioned that the water appropriated shall never be utilized thereunder for any purpose other than the watering of livestock without charge therefor on the public domain. The maximum flow for which permit, license and certificate of water right may issue hereunder shall be five miner's inches, and the maximum storage for which permit, license and certificate of water right may issue hereunder shall be fifteen acre feet in any one storage reservoir. [1939, ch. 205, § 1, p. 412.]

42-502. Revocation of permit.—Such permit, license and certificate of water right may be revoked by the commissioner of reclamation in his discretion for the purpose of issuing permit for the construction of any reservoir to have a storage capacity of at least five hundred acre feet of water for irrigation purposes. [1939, ch. 205, § 2, p. 412.]

42-503. Right to file application under general laws.—Nothing herein shall be construed to deprive the department of reclamation of the United States from filing application for waters nor from obtaining permit, license and certificate of water right under the general laws of the state having to do with the appropriation of waters of the state. [1939, ch. 202, § 3, p. 412.]

42-504. Separability.—Notwithstanding any other evidence of legislative intent, it is hereby declared to be the controlling legislative intent that if any provision of this act, or the application thereof to any person or circumstances, is held invalid, the remainder of the act and the application of such provision to persons and circumstances other than those as to which it is held invalid, shall not be affected thereby. [1939, ch. 202, § 4, p. 412.]

42-505. Provisions controlling over other acts.—In so far as the provisions of this act are inconsistent with the provisions of any other law, the provisions of this act shall be controlling. [1939, ch. 202, § 5, p. 412.]

CHAPTER 6

DISTRIBUTION OF WATER AMONG APPROPRIATORS

42-601. Water divisions—Establishment and boundaries.—For the purpose of administering and controlling the public waters, the state of Idaho is hereby divided into three water divisions denominated water division No. 1, water division No. 2, water division No. 3.

Water division No. 1 shall consist of all lands within this state drained by the Snake river and its tributaries as far west as American Falls, and all lands within this state drained by Bear river and its branches, and by other streams flowing on the slope of the Salt Lake basin.

Water division No. 2 shall consist of all lands within this state drained by Snake river and its tributaries on the south side from Bruneau river, and by the Snake river and its tributaries on the north side from American Falls to and including the Malad river, also all lands within this state drained by the streams flowing toward and sinking near the northern edge of the Snake river plains, and the lands in this state drained by the Salmon river and its tributaries as far west as the south fork of said river.

Water division No. 3 shall consist of all lands within this state drained by the Snake river and its tributaries on the south side from the mouth of the Bruneau river to and including the Owyhee river, and by the Snake river and its tributaries on the north side from the mouth of the Malad river to and including the Clearwater river, excepting that portion of the water shed of the Salmon river included in water division No. 2, and all that portion of the state lying north of the water shed of said Clearwater river. [1903, p. 223, §§ 13, 16; reen. R. C. & C. L., § 3268; C. S., § 5605; I. C. A., § 41-501.]

Compiler's note. See compiler's note, § 42-602.

Comp. leg. Ariz. Code 1939, §§ 75-128, 75-129.

Cal. Deering's Gen. Laws 1937, Act 9091, §§ 37-37h.

N. Mex. Stat. 1941, §§ 77-301—77-305.

Wyo. Comp. Stat. 1945, §§ 71-101—71-108.

Cited in: Walbridge v. Robinson, 22 Idaho 236, 125 Pac. 812, 43 L. R. A. (N. S.) 240; (in brief of counsel) Bower v. Moorman, 27 Idaho 162, 147 Pac. 496, Ann. Cas. 1917C, 99.

42-602. Department of reclamation to supervise water distribution.—It shall be the duty of the department of reclamation to have immediate direction and control of the distribution of water from all of the streams to the canals and ditches diverting therefrom. The department must execute the laws relative to the distribution of water in accordance with rights of prior appropriation.

The department of reclamation shall, in the distribution of water from the streams to the canals, be governed by this title. [First paragraph: 1915, ch. 34, § 4, p. 103; second paragraph: 1903, p. 223, § 32; reen. R. C., § 3283; am. 1915, ch. 34, § 17, p. 112; reen. C. L., § 3270; C. S., § 5606; I. C. A., § 41-502.]

Compiler's notes. S. L. 1915, ch. 34 repealed R. C., § 3270, together with other sections providing for a water commissioner to distribute the water in each of the divisions defined in § 42-601.

Department of reclamation substituted for state engineer on authority of § 67-3301.

Cited in: Public Utilities Comm. v. Natatorium Co., 36 Idaho 287, 211 Pac. 533.

Determination of Time for Use.

Decree making water user judge of time when water can be used is too broad. This matter should be determined by department of reclamation which has immediate direction and control of water distribution. Arkoosh v. Big Wood Canal Co., 48 Idaho 383, 283 Pac. 522.

Review.

Action of commissioner in determining when water may be first beneficially used and in delivering or refusing to deliver water may be reviewed and controlled in such manner, as facts may require, by appropriate action on part of any person deeming himself aggrieved. Arkoosh v. Big Wood Canal Co., 48 Idaho 383, 283 Pac. 522.

Subterranean Waters.

Court may retain jurisdiction of cause involving rights to subterranean waters for two years and decree administrative provisions concerning such rights, although this section does not expressly relate to subterranean waters not in a defined stream. Silkey v. Tiegs, 51 Idaho 344, 5 Pac. (2d) 1049.

42-603. Supervision of water distribution—Rules and regulations.—The department of reclamation shall provide such rules and regulations in relation to making of proof of completion of works constructed under the provisions of this title, and of the proof of application of the water as provided for in this title, and shall also devise all needful rules for the distribution of water from the streams, as shall be necessary to carry out the laws in accordance with the priorities of the rights of the users thereof. [1915, ch. 34, § 8, p. 103; reen. C. L., § 3273; C. S., § 5607; I. C. A., § 41-503.]

Compiler's note. Department of reclamation substituted for state engineer on authority of § 67-3301.

42-604. Creation of water districts.—The department of reclamation shall divide the state into water districts in such manner that each public stream and tributaries, or independent source of water supply, shall constitute a water district: provided, that any stream or water supply, when the distance between the extreme points of diversion thereon is more than forty miles, may be divided into two or more water districts: provided, that any stream tributary to another stream may be constituted into a separate water district when the use of the water therefrom does not affect or conflict with the rights to the use of the water of the main stream: provided, that any stream may be divided into two or more water districts, irrespective of the distance between the extreme points of diversion, where the use of the waters of such stream by appropriators in one district does not affect or conflict with the use of the waters of such stream by appropriators outside such district: provided, that this section shall not apply to streams or water supplies whose priorities of appropriation have not been adjudicated by the courts having jurisdiction thereof. [1903, p. 223, § 23; am. 1907, p. 532, § 2; reen. R. C., § 3274; am. 1909, p. 326, § 1; am. 1915, ch. 34, § 9, p. 103; reen. C. L., § 3274; C. S., § 5608; am. 1927, ch. 63, § 1, p. 78; I. C. A., § 41-504.]

Application of Section.

On streams "whose priorities of appropriation and use have not been adjudicated by the courts having jurisdiction thereof" there can be no legal organization of water district, and no persons claiming to be officers of such district have any authority to determine priorities and amounts or to interfere with the irrigation works of any user. Marsters v. United States, 236 Fed. 663.

Estoppel to Deny Validity.

In action for contribution for expense of watermaster, defendant who had participated in meetings of water district and received benefits for eleven years could not deny liability, although this section had not been complied with in the formation of such water district. Owen v. Nampa &c. Irr. Dist., 48 Idaho 680, 285 Pac. 464.

Validity of District.

No particular steps are specified or form prescribed to be taken or followed by department of reclamation in creating or designating water district. Owen v. Nampa &c. Irr. Dist., 48 Idaho 680, 285 Pac. 464.

Waters in Boise River.

Decision in case of Farmers Cooperative Ditch Co. v. Riverside Irr. Dist., 16 Idaho 525, 102 Pac. 481, together with decree and orders of trial court in that case, though not res judicata, constituted an adjudication of the waters in Boise River for the purpose of distribution. Owen v. Nampa &c. Irr. Dist., 48 Idaho 680, 285 Pac. 464.

Collateral Reference.

Right of owner of land within reclamation project in respect to which water right was allowed upon application pursuant to reclamation act, to perpetual right beyond control of federal government for sufficient amount of water beneficially to irrigate land. 115 A. L. R. 1320.

42-605. District meetings—Watermaster and assistants—Election—Removal—Oath and bond.—There shall be held on the first Monday in March in each year, commencing at two o'clock P. M., a meeting of all persons owning or having the use of an adjudicated right, in the waters of the stream or water supply comprising such district. Such meeting shall be held at some place within the water district, convenient to a majority of those entitled to vote thereat, which place shall be designated by the department of reclamation, and the department shall, between January first and February first of each year, file such designation with the county auditor of the county or counties within which such water district is situated and shall notify by mail all persons, companies or corporations known by it to own or claim the use of the waters of such district. Provided that in water districts whose area includes land in more than four counties the annual meeting shall commence at ten o'clock A. M. instead of two o'clock P. M.

At such meeting there shall be elected a watermaster for such water district, and such other regular assistants as such meeting shall deem necessary, and such meeting shall prior to the election of such watermaster and assistants fix the compensation to be paid them during the time actually engaged in the performance of their duties. At such meeting each person present owning or having the use for the ensuing irrigation season of any adjudicated right equal to ten inches of water in the stream or water supply comprising such water district, shall be entitled to one vote; provided, that in any water district having fifty or less than fifty adjudicated water rights, each person present, owning or having the use for the ensuing irrigation season of any adjudicated right in the stream or water supply comprising such water district, shall be entitled to one vote for each twenty-four hour second foot of water delivered to such person, or his predecessor in interest, during the previous irrigation season, as shown by the watermaster's report for the previous irrigation season filed with the county auditor of the county or counties in which such district is located. Such meeting shall choose a chairman and secretary and shall determine the manner and method of electing watermasters and assistants. Within five days after such meeting the chairman and secretary shall forward a certified copy of the minutes of such meeting to the department of reclamation: provided, that a corporation shall be considered a person for the purpose of this section and shall cast its vote by some one to be designated by the corporation: provided, that each stockholder in said corporation shall be entitled to as many votes as he shall have units of ten miners' inches of water, regularly adjudicated, in the stream or water supply comprising such water district: provided, that should said meeting not be held, or should said watermaster not be chosen or his compensation fixed as above provided, then the department of reclamation must appoint such watermaster and fix his compensation.

The department of reclamation may remove any watermaster whenever such watermaster fails to perform his duty as watermaster, upon complaint in that respect being made to the department in writing, by three persons owning or having the right to the use of an adjudicated right in such district: provided, that upon investigation the department finds such charge to be true, and the department may appoint a successor for the unexpired term.

Before entering upon the duties of his office, said watermaster shall take and subscribe an oath before some officer authorized by the laws of the state to administer oaths, to faithfully perform the duties of his office, and shall file with the department of reclamation said oath and his official bond in the penal sum of $500.00, unless the amount of said bond be otherwise fixed in a greater amount by such meeting, with not less than two sureties, to be approved by the department of reclamation and conditioned for the faithful discharge of the duties of his office. [1903, p. 223, § 24; reen. R. C., § 3275; am. 1909, p. 326, § 1; am. 1915, ch. 34, § 10, p. 103; reen. C. L., § 3275; C. S., § 5609; am. 1925, ch. 60, § 1, p. 86; am. 1931, ch. 94, § 1, p. 160; I. C. A., § 41-505; am. 1947, ch. 9, § 1, p. 9.]

Cross ref. Appointment of watermaster by owner of ditch, canal, or lateral, § 42-901.

Ex officio game warden, may be appointed as, § 36-120.

Compensation: Allotment and charge against land and canals, § 42-610; payment and collection from water users, §§ 42-611—42-617.

Sec. to sec. ref. This section is referred to in § 42-608.

Cited in: Marsters v. United States, 236 Fed. 663; (in brief of counsel) Knowles v. New Sweden Irr. Dist., 16 Idaho 217, 101 Pac. 81.

ANALYSIS

Liability for watermaster's acts.
Nature of office.
Power of commissioner.
Suit against watermaster.
Voting rights.

Liability for Watermaster's Acts.

Water company is no more responsible for acts of watermaster than any water user of system, so long as it does not aid, abet him, or ratify his acts. Bailey v. Idaho Irr. Dist., 39 Idaho 354, 227 Pac. 1055.

Nature of Office.

Watermaster is not agent of water company or water user, but is ministerial officer. Bailey v. Idaho Irr. Co., 39 Idaho 354, 227 Pac. 1055.

Watermaster is public administrative officer, and holds office until his successor is elected or appointed and qualified. Big Wood Canal Co. v. Chapman, 45 Idaho 380, 263 Pac. 45.

Power of Commissioner.

Commissioner of reclamation has no power to determine legality of election of watermaster and appoint another in his place. Whitten v. Chapman, 45 Idaho 653, 264 Pac. 871.

Suit against Watermaster.

In suit against watermaster to adjudicate the rights of water users of certain wells, proceedings were not binding on users not made parties thereto and intervenors had ample opportunity to protect their rights and would have been in no better position had suit been instituted under this section. Owsley Canal Co. v. Henninger, 66 Idaho 485, 162 Pac. (2d) 389.

Voting Rights.

Each person or corporation with right equal to ten inches of water is entitled to one vote for every ten inches thus possessed and not to one vote only for his entire holdings. Whitten v. Chapman, 45 Idaho 653, 264 Pac. 871.

Corporation is person and may properly designate someone to cast its vote, based on whole number of inches of water to which it is entitled. Whitten v. Chapman, 45 Idaho 653, 264 Pac. 871.

42-606. Reports of watermasters.—All watermasters shall make reports to the department of reclamation as often as may be deemed necessary by said department; said reports shall contain the following information: The amount of water necessary to supply all of the ditches, canals and reservoirs of the district; the amount of water actually coming into the district to supply such ditches, canals or reservoirs; whether such supply is on the increase or decrease; what ditches, canals and reservoirs are at times without their proper supply, and the probability as to what the supply will be during the period before the next report will be required, and such other information as the department may suggest. Said department shall carefully file and preserve such reports and shall from them ascertain what ditches, canals and reser-

voirs are, and what are not, receiving their proper supply of water, and if it shall appear that in any district of that division, any ditch, canal or reservoir is receiving water whose priority postdates that of the ditch, canal or reservoir in another district as ascertained from its register, it shall at once order such postdate ditch, canal or reservoir shut down, and the water given to the elder ditch, canal or reservoir, its orders being directed at all times to the enforcement of priority of appropriation, according to its tabulated statement of priorities, to the whole division, and without regard to the district within which the ditches, canals or reservoirs may be located. The reports of watermasters to the department or reclamation shall be filed and kept in the office of the department. [1903, p. 223, § 25; reen. R. C., § 3276; am. 1915, ch. 34, § 11, p. 103; reen. C. L., § 3276; C. S., § 5610; I. C. A., § 41-506.]

Compiler's note. Department of reclamation substituted for state engineer on authority of § 67-3301.

42-607. Distribution of water.—It shall be the duty of said watermaster to distribute the waters of the public stream, streams or water supply, comprising his water district, among the several ditches taking water therefrom according to the prior rights of each respectively, in whole or in part, and to shut and fasten, or cause to be shut or fastened, under the direction of the department of reclamation, the headgates of the ditches heading from such stream, streams or water supply, when in times of scarcity of water it is necessary so to do in order to supply the prior rights of others in such stream, or water supply: provided, that any person or corporation claiming the right to the use of the waters of the stream or water supply comprising a water district, but not owning or having the use of an adjudicated right therein, shall, for the purposes of distribution, during the scarcity of water, be held to have a right subsequent to the adjudicated rights in such stream or water supply, and the watermaster shall close all headgates of ditches having no adjudicated right if necessary to supply adjudicated rights in such stream or water supply, provided that any water right, the priority of which has been decreed, shall be deemed to be adjudicated within the meaning of this section. [1903, p. 223, § 26; am. R. C., § 3277; am. 1909, p. 326, § 1; am. 1915, ch. 34, § 12, p. 103; reen. C. L., § 3277; C. S., § 5611; am. 1927, ch. 63, § 2, p. 78; I. C. A., § 41-507.]

Cited in: Marsters v. United States, 236 Fed. 663.

ANALYSIS

Abandonment of priority.
Decree governs watermaster.
Preference during scarcity.
Preferential use not adverse.
Watermaster's duties.

Abandonment of Priority.

The right of priority to water in time of shortage, given under this section, may be abandoned. Graham v. Leek, 65 Idaho 279, 144 Pac. (2d) 475.

Decree Governs Watermaster.

Watermaster can not be required to go beyond provisions of decree to ascertain whether or not the same is supported by findings or whether there is a conflict between the findings and decree, but he can look only to the decree for his instructions as to the amount of water to be distributed to each claimant. Stethem v. Skinner, 11 Idaho 374, 82 Pac. 451.

Preference During Scarcity.

Where water rights of parties have been adjudicated, it is duty of watermaster during scarcity of water to treat unadjudicated rights as inferior and subordinate to decreed rights. Big Wood Canal Co. v. Chapman, 45 Idaho 380, 263 Pac. 45.

Preferential Use Not Adverse.

Distribution of water to decreed rights in time of scarcity is not adverse but permissive use based upon watermaster's statutory duty to give preference. Big Wood Canal Co. v. Chapman, 45 Idaho 380, 263 Pac. 45.

Watermaster's Duties.

A watermaster is only an administrative officer and has no interest in the subject of litigation involving the water under his control. His only duty is to distribute the waters of his district in accordance with the respective rights of appropriators, adjudicated rights having preference over unadjudicated rights. Nampa & Meridian Irr. Dist. v. Barclay, 56 Idaho 13, 47 Pac. (2d) 916.

42-608. Watermaster's term of service.—Said watermasters shall not begin their work until they have been called upon by three or more owners or managers of ditches or persons controlling ditches, in the several districts, by application in writing, stating that there is a necessity for the use and control of the waters of such district. In the absence of application or in water districts in which there are five or less adjudicated water rights, the watermaster may be called upon to assume his duties at any time the department of reclamation finds that there is a necessity for the use and control of the waters of the district. The watermaster shall not continue performing services after the necessity therefor shall cease, which shall be determined by the department of reclamation, and in no event after the first of November of each year, unless otherwise provided by the rules and regulations of the respective districts, adopted at the annual water users' meeting. At any annual meeting the water users may, by resolution, provide that the watermaster shall serve throughout the year. The commissioner of reclamation, upon receipt of a certified copy of the minutes of said meeting containing such resolution and upon the receipt of the oath and official bond of said watermaster, as provided for in section 42-605, shall immediately issue a certificate of appointment ordering said watermaster to assume his duties at once and continue the same throughout the year as provided for in said resolution. [1903, p. 223, § 27; reen. R. C., § 3278; am. 1909, p. 326, § 1; am. 1915, ch. 34, § 13, p. 103; reen. C. L., § 3278; C. S., § 5612; am. 1927, ch. 63, § 3, p. 78; I. C. A., § 41-508; am. 1939, ch. 199, § 1, p. 378.]

Compiler's note. Section 2 of S. L. 1939, ch. 199 is compiled herein as § 42-614.

Cross ref. See notes, § 42-602. Arkoosh v. Big Wood Canal Co., 48 Idaho 383, 283 Pac. 522.

Construction.

This provision is mandatory and watermaster can not recover for services as such watermaster unless services were rendered after such written application has been presented to him. Walker v. Elmore County, 16 Idaho 696, 102 Pac. 389.

Watermaster is paid per diem compensation and legislative intent is to prevent commencement of work until called upon by water users by written request. Big Wood Canal Co. v. Chapman, 45 Idaho 380, 263 Pac. 45.

Term of Office.

This section does not expressly fix term of office of watermaster but he holds office until his successor is elected or appointed and has qualified. Big Wood Canal Co. v. Chapman, 45 Idaho 380, 263 Pac. 45.

42-609. Watermaster's assistants—Employment in emergency—Oath and compensation.—Said watermaster shall have power, in case of emergency, with the approval of the department of reclamation, to employ suitable assistants to aid him in the discharge of his duties, who shall take the same oath as the watermaster, and shall obey his

instructions, and shall be entitled to not exceed five dollars per day for every day they are employed, to be paid in the same manner as provided for the payment of watermasters: provided, that not more than one assistant shall be appointed to each fifteen miles of the stream whose waters have been allotted. [1903, p. 223, § 28; reen. R. C., § 3279; am. 1915, ch. 34, § 14, p. 103; reen. C. L., § 3279; C. S., § 5613; am. 1927, ch. 63, § 4, p. 78; I. C. A., § 41-509.]

Compiler's note. Section 5 of S. L. 1927, ch. 63 declared an emergency.

42-610. Compensation of watermasters — Allotment and charge against land—Charge against canal.—Watermasters herein provided for shall make up a sworn statement which shall be approved by the department of reclamation, and shall show the number of days said watermaster has devoted to the distribution of such water, and the number of days his assistant or assistants have devoted to the same purpose, and such statement shall also show the volume of water, stated in cubic feet per second, he has by virtue of the allotment of said waters delivered to each user each day, and shall describe the lands to which said water was so delivered. The pay for the services of said watermaster and his assistants shall be a charge against the land of the users to which said water was so delivered, the expense for said services being first divided between all classes as to priority of allotment or decree, in the proportion which the number of days such water is received by all users in the same class of priority of allotment or decree bears to the whole number of days said watermaster is engaged in distributing said water; the amount charged to each user in the same class of priority of allotment or decree bearing the same proportion to the amount charged to all users in the same class of priority of allotment or decree as the volume of water delivered to each user bears to the whole amount delivered to all of like class of priority of allotment or decree, by the said watermaster and his assistants. This statement, which shall show the proper distribution of the said expenses among the various users, shall be filed with the auditor and recorder of the county or counties in which the said water was delivered: provided, that when any portion of the allotted waters is distributed by said watermaster to the canal of any duly organized canal company, the amount of the expense chargeable for such services shall be a charge against such canal and the account of such charge to be paid by the county in the manner herein provided shall be charged as a tax against such canal, which tax shall be collected in the manner provided by law for the collection of other taxes, and no canal in this state shall be exempt from the payment of such tax, whether the water right be decreed or undecreed, or whether the water so distributed to said canal be the natural flow of the stream, or stored water, or whatever may be its source, nature or description. [1903, p. 223, § 29; am. 1907, p. 482, § 1; reen. R. C., § 3280; am. 1915, ch. 34, § 15, p. 110; reen. C. L., § 3280; C. S., § 5614; am. 1925, ch. 60, § 2, p. 86; am. 1927, ch. 81, § 1, p. 99; I. C. A., § 41-510.]

Cross ref. Compensation fixed by election at district meeting or by department of reclamation, § 42-605.

Compensation of watermaster appointed by court, § 42-901.

Sec. to sec. ref. This section is referred to in § 42-618.

Cited in: Bailey v. Idaho Irr. Co., 39 Idaho 354, 227 Pac. 1055.

42-611. Compensation of watermaster and assistants—Payment and collection from water users.—A bill, based upon such statement, for the services performed by the said watermaster and his assistants, shall be presented at a regular meeting of the board of county commissioners, who shall order a warrant issued to said watermaster or his assistants on the current expense fund of the county. The auditor and recorder of said county shall add the amounts charged to the land of the users, and to such ditches to which said water was delivered, to the taxes of said land or ditches as may be levied for the following year, which shall be collected along with other taxes, and turned into the current expense fund of the county. [1903, p. 223, § 30; am. R. C. & C. L., § 3281; C. S., § 5615; I. C. A., § 41-511.]

Sec. to sec. ref. This section is referred to in § 42-618.

42-612. Budget of water district—Adoption and contents—Debt of water user.—At any annual meeting the water users must adopt a budget covering the estimated expenses of said district for the ensuing year, and by resolution determine that said budget shall be collected, and the compensation of the watermaster and his assistants and any other expenses of delivering the water of said district to the users thereof shall be paid in the manner hereinafter, in this section, provided. Said budget shall show the aggregate amount to be collected from all the water users in said district, and the amount to be paid by each ditch, canal company, irrigation district or other water user, and for the purpose of computing said respective amounts, the water delivered to the various ditches, canal companies, irrigation districts or other users during the past season or seasons, not exceeding five seasons, shall be used as a basis. Upon the adoption of said budget the amount payable by each ditch, canal company, irrigation district or other water user, as shown by said budget, shall become the debt of each respectively and shall become due and payable as hereinafter provided. [C. S., § 5615-A, 1st par., as added by 1927, ch. 39, § 1, p. 51; I. C. A., § 41-512; am. 1933, ch. 217, § 1, p. 462.]

Sec. to sec. ref. This section in referred to in §§ 42-617, 42-618.

42-613. Budget — Collection — Payment of district expenses.—Said budget when approved shall be filed with the secretary of said meeting and thereupon he shall immediately prepare and file a certified copy thereof with the commissioner of reclamation and a certified copy with the county auditor of such county or counties designated at said water users' meeting. If more than one county is designated then said budget shall show the amount to be collected in each county and the water users from which each county shall make collection. Each auditor of the county or counties so designated, shall immediately make up a roll showing the amount of said budget to be collected by his county and the ditch, canal company, irrigation district or other water user from whom the same shall be collected and the respective amounts from each. When said roll is completed, the county auditor shall deliver the same to the county treasurer for collection. Said county treasurer shall thereupon mail a notice to each ditch, canal company, irrigation district or other water user of the amount payable by each such water user, for the distribution of water and other expenses of said district

for the ensuing year, which amount shall be due and payable on the first day of June of said year and if not so paid, shall bear interest at the rate of eight per cent per annum from said date until paid. It is hereby declared the duty of the respective county auditors and treasusers to perform the services herein required.

The county treasurer, upon receipt of said roll, shall open a special account to be known as "Water District ——— Funds" and shall credit to said account all moneys received from the water users of said district. The compensation of the watermaster and his assistants and any other charges against said water district shall be paid from the funds of said account in the same manner as bills against the county are paid. [C. S., § 5615-A, 2d & 3d par., as added by 1927, ch. 39, § 1, p. 51; I. C. A., § 41-513.]

Cross ref. Change in time for collection of budget, § 42-617.
Claims against counties, § 31-1501 et seq.

Sec. to sec. ref. This section is referred to in §§ 42-617, 42-618.

42-614. Report of water delivered — Basis for apportionment of expenses — Excessive or deficient payments — Filing of report.—It is further provided that on or before the fifteenth day of November of each year when the watermaster's period of service for the year expires before that day, but if the watermaster's term of service for the year expires thereafter, then on or before the first day of February next thereafter, the watermaster of each district, operating under the provisions of this chapter, shall prepare a complete report showing the total amount of water delivered during the preceding irrigation season within his district, the amount delivered to each ditch, canal company, irrigation district or other water user, the total expense of delivery and all other expenses of said district, and shall apportion said costs and expenses to all water users on a proportionate basis as follows: As the amount of water delivered to any ditch, canal company irrigation district or other user is to the total amount delivered in the district, so shall the amount payable by each such user be to the total charges and expenses of said district, and shall show the amount which should be paid by each such user. If any water user, based upon said report, has paid more than his or its proportionate part, such user shall be credited with such excess on the amount due from him for the succeeding year, or if any user has paid less than his or its proportionate part, the amount of such deficit shall be added to the amount to become due from such user for the succeeding year; which said report shall be filed with the secretary of said water district and a copy thereof with the department of reclamation. [C. S., § 5615-A, 4th par., as added by 1927, ch. 39, § 1, p. 51; I. C. A., § 41-514; am. 1937, ch. 24, § 1, p. 33; am. 1939, ch. 199, § 2, p. 378.]

Compiler's notes. Section 1 of S. L. 1939, ch. 199 is compiled herein as § 42-608.
Section 3 of S. L. 1939, ch. 199 declared an emergency. Approved Mar. 9, 1939.

Sec. to sec. ref. This section is referred to in § 42-618.

42-615. Proposed budget for succeeding year.—Said watermaster shall, on or before November fifteenth in each year, also prepare and file with the secretary of said water meeting a proposed budget for the succeeding year, together with a distribution of the amount of said budget to the respective water users, using the actual deliveries for the past irrigation season or seasons, as the basis for said distribution as hereinabove provided, which said proposed budget and distribution shall be submitted to the water users for consideration and approval at the next annual water meeting. [C. S., § 5615-A, 5th par., as added by 1927, ch. 39, § 1, p. 51; I. C. A., § 41-515.]

Sec. to sec. ref. This section is referred to in § 42-618.

42-616. Budget—Action to collect charges—Attorney's fees.—Said water district shall have the right to collect any charges due and unpaid, by civil action, said action to be brought in any court of competent jurisdiction, in the name of the county treasurer to whom such charges are payable, and in addition to the amount found due, together with interest and costs, may also recover such sum as the court may adjudge reasonable as attorney's fees in said action. [C. S., § 5615-A, 6th par., as added by 1927, ch. 39, § 1, p. 51; I. C. A., § 41-516.]

Compiler's note. Section 2 of S. L. 1927, ch. 39 declared an emergency.

Cited in: Owen v. Nampa &c. Irr. Dist., 48 Idaho 680, 285 Pac. 464.

Sec. to sec. ref. This section is referred to in § 42-618.

42-617. Time for collection of budget—Water not delivered until charges paid—Filing of resolutions and copies—Collection at time fixed.—At any annual meeting of the water users at which a budget has been adopted, covering the estimated expenses of said district for the ensuing year, as provided in section 42-612, said water users may by resolution fix a date different than that fixed by said section 42-613 upon which the amount payable by each ditch, canal company, irrigation district or other water user shall become due and payable, and said amount shall become due and payable from each such user on the date so fixed by said resolution, and if not paid when due shall bear interest from said date until paid at the rate of eight per cent per annum. Said water users at said meeting may also by resolution provide that no ditch, canal company, irrigation district or other water user shall have the right to demand and receive any water and the watermaster shall not deliver water to any such user until the amount due and payable from such user, as shown by the budget adopted at said meeting, has been paid.

All resolutions adopted under the provisions of this section shall be filed with the secretary of said meeting and thereupon he shall immediately prepare and file a certified copy thereof with the commissioner of reclamation and a certified copy with the county auditor of such county or counties as designated at said water users' meeting.

At the same time the county auditor delivers the roll to the county treasurer for collection, as provided in said section 42-613, he shall also deliver to said treasurer a copy of any resolutions filed in his office, under the provisions of this section. The county treasurer shall collect said roll in the manner provided in said section 42-613: provided, that if said water users at their annual meeting have by resolution provided for a time of payment of the amount due from each user, as shown in said budget, other than the time fixed in said section 42-613, the said

county treasurer shall collect the same at the time fixed in said resolution: and, provided further, that if said water users have by resolution provided that no water shall be delivered to any water user until the amount due from such user has been paid, said notice, to be mailed by said county treasurer, shall also state the substance of said resolution. [C. S., § 5615-B, as added by 1929, ch. 87, § 1, p. 140; I. C. A., § 41-517.]

Compiler's note. Section 2 of S. L. 1929, ch. 87 declared an emergency.

Sec. to sec. ref. This section is referred to in § 42-618.

42-618. Alternate plan of collecting expenses in water districts whose area includes land in more than four counties.—In water districts whose area includes land in more than four counties, the waterusers, instead of following the provisions of sections 42-612, 42-613, 42-614, 42-615, 42-616, and 42-617, may, at any annual meeting, authorize the watermaster to collect his compensation and that of his assistants, and other expenses of delivering the water of said district to the users thereof, directly from the waterusers, canal companies, and irrigation districts. When so authorized the watermaster shall collect such compensation and expenses directly from the waterusers, except that, charges against individuals who do not receive water through a duly organized canal company may be collected through the counties in which their lands are located, as provided in sections 42-610 and 42-611. The waterusers in such water districts whose area includes land in more than four counties may also, at any annual meeting, authorize the watermaster to withhold water deliveries from those users who have not paid their pro-rata share of the cost of operating the district as levied until such time as said pro-rata share of the cost is paid. Said water district shall have the right to collect any charges due and unpaid, by civil action, said action to be brought in any court of competent jurisdiction, in the name of the watermaster to whom such charges are payable, and in addition to the amount found due, together with interest and costs, may also recover such sum as the court may adjudge reasonable as attorney's fees in said action. [1947, ch. 11, § 1, p. 51.]

CHAPTER 7

HEADGATES AND MEASURING DEVICES

42-701. Maintenance by appropriators—Procedure upon failure to maintain.—The appropriators or users of any public waters of the state of Idaho shall maintain to the satisfaction of the department of reclamation suitable headgates and controlling works at the point where the water is diverted, which shall be of such construction that it can be locked and kept closed by the watermaster or other officer in charge, and shall also be of such construction as to regulate the flow of water at the diversion point and such appropriator shall construct and maintain, when required by the department, a rating flume or other measuring device at such point as is most practical in such canal or ditch for the purpose of assisting the watermaster or department in determining the amount of water that may be diverted into said ditch from the stream. Plans for such headgates, rating flumes or other measuring devices shall be approved by the department of reclamation: provided, that should any appropriator or user of the public waters of the state of Idaho neglect or refuse to construct or maintain such headgates, controlling works, or measuring devices, upon receiving ten days' notice from the department of reclamation within which to begin to remedy such defects as exist in accordance with said notice, then the department of reclamation may order the duly qualified and acting watermaster of the water district to shut off and refuse to deliver at the point of diversion, the water claimed by such appropriator or user until he does construct and maintain such headgates, controlling works or measuring devices or remedy the defects which exist: provided, that such appropriators or users of the public waters of the state of Idaho shall be given a reasonable time within which to complete construction of such headgates, controlling works or measuring devices, depending upon the size and extent thereof, when due diligence has been used in the prosecution of such work. [1899, p. 223, § 31; reen. R. C., § 3282; am. 1913, ch. 68, p. 305; am. 1915, ch. 34, § 16, p. 111; am. 1917, ch. 53, part of § 1, p. 122; reen. C. L., § 3282; C. S., § 5616; am. 1927, ch. 69, § 2, p. 85; I. C. A., § 41-601.]

Compiler's note. C. S., §§ 5617-5619 were repealed by S. L. 1927, ch. 69, § 1.

Cross ref. Distributor of water under fixed annual charge, water companies to furnish headgates and measuring devices, § 42-903.

Comp. leg. Ariz. Code 1939, § 75-130.
Cal. Deering's Gen. Laws 1937, Act 9091, § 37C.
N. Mex. Stat. 1941, § 77-519.
N. D. Rev. Code 1943, § 61-0237.
Wyo. Comp. Stat. 1945, § 71-311.

Nonprofit Irrigation Corporation.

A nonprofit irrigation corporation, which is merely a medium or instrumentality created to represent the farmers owning water rights from the reservoirs and is doing for them what each one can not do for himself, is engaged in agricultural labor and its employees are within the exception of the unemployment compensation law excepting agricultural labor from the operation of its terms. Big Wood River Canal Co. v. Unemployment Compensation Division of Industrial Accident Board, 61 Idaho 247, 100 Pac. (2d) 49.

42-702. Measuring devices above reservoirs.—Any person, firm or corporation using the channel of any stream or streams or any tributary of such stream or streams in this state as an impounding reservoir shall place therein at a point above and as near as practicable to the backwater of such reservoir such system or device as the department of reclamation may require for measuring the flow of water at such point and in accordance with plans and specifications which shall be furnished by the department. [1917, ch. 53, part of § 3, p. 124; reen. C. L., § 3282d; C. S., § 5620; I. C. A., § 41-602.]

Compiler's note. Department of reclamation substituted for state engineer on authority of § 67-3801.

42-703. Measuring devices along streams.—It shall also be the duty of those using water in any district to place in the streams from which said water is diverted and at such places and intervals on said streams as the department of reclamation may require suitable systems or