

In the District Court of the 5th Judicial District of the State of Idaho
in and for Franklin County.

Plaintiff - Charles M. Harris

vs

[Barsons own Atkinson Property]
[Bastians own Harris Property]

Defendants - Alfred J. Atkinson
Marium H. Costley

DECREE

This cause having been heretofore tried to the court without a jury and duly and regularly submitted to the court for its decision upon the merits thereof and taken under advisement by the court, and the court having duly said and regularly made and filed therein its findings of fact and conclusions of law, and, the court being fully advised in the premises, both as to the law and the facts therein,

NOW, THEREFORE it is hereby adjudged and decreed:

First, that the plaintiff take nothing by his said action and that the same be and the same is hereby dismissed.

Second, that the defendants are the owners therefore and are entitled to and they are hereby awarded and decreed the free uninterrupted and unobstructed use of all of the waters of Costley or Clarkston Creek, including all of the springs seeping or flowing into the channel of the said Creek from the source or head there-of down to the lands of the defendants, described as follows, to-wit:

The $SE\frac{1}{4}SE\frac{1}{4}$, Sec. 23, the $SW\frac{1}{4}SW\frac{1}{4}$, Sec. 24, the $W\frac{1}{2}NW\frac{1}{4}$, the $NW\frac{1}{4}$ of $SW\frac{1}{4}$, and Lot 4 of Sec. 25, thence $E\frac{1}{2}NE\frac{1}{4}$, $NE\frac{1}{4}SE\frac{1}{4}$ and lot 1 of Sec. 26 all in T. 16S, R. 37E, B.M., containing 347.42 acres for the irrigation of said lands during the irrigation season of each and every year from and after the month of March until the month of November and sufficient of such waters for defendants domestic, culinary, and stockwatering purposes to be used upon defendants said land and

premises for the said and remaining months of each and every year, excepting only $\frac{1}{2}$ of the flood and freshet waters which find their way into the plaintiffs reservoir during the high water seasons of each year in the spring up and till, but no later than May 15th of each year, which said freshet and flood waters may lawfully be reservoired and stored by the plaintiff and used for the irrigation of his lands described in his complaint. That the plaintiff has and possesses no right, title or interest whatever in or to any of the said waters of Costley or Clarkston Creek, excepting said flood and freshet waters for any purpose whatsoever, and his claim thereto is without merit.

Third: That the defendant's and each of them are entitled to and are hereby granted the right and privilege, free from hinderance of the plaintiff, or any person claiming through or under him, to enter upon the lands of the plaintiff described as follows:

TO-WIT:

The NE $\frac{1}{4}$ NE $\frac{1}{4}$ and NW $\frac{1}{4}$ NE $\frac{1}{4}$ of Sec. 21, and SE $\frac{1}{4}$ NE $\frac{1}{4}$ and SW $\frac{1}{4}$ NE $\frac{1}{4}$, Sec. 22, all in T. 16S, R. 37E, B.M. for the purpose of repairing or keeping free from obstructions, and cleaning out of the channel of said creek and also the tributaries leading into such channel of any and all obstructions to the free, uninterrupted and continuous flow of said water. And the said Plaintiff, his agents, servants, and all persons claiming through or under him, are each hereby enjoined and restrained from interfering or obstructing the free flow of any and all waters of said Costley or Clarkston Creek. Above granted and decreed to defendants (including said springs) from the headwaters or sources of said waters down to the defendants said land, both above and below Plaintiff's reservoir.

It is hereby further ordered adjudged, and decreed that the defendants have and recover of and from Plaintiff their costs of suit in this cause expended taxed at the sum of \$

Dated this 2nd day of November, 1924.

Robert M. Tarrell
Judge

Fixed November 26th, 1924

John A. Kofoed
Clerk

On June 28, 1978, a pre-permit field examination was completed on R. V. Bastion's application No. 15-7049. The application proposes the appropriation of 100 AF of water for fish propagation by means of an earth filled dam, spillway and control gate. The source of water was incorrectly described as Jenkin's Hollow and the point of diversion was correctly described as being in the NE $\frac{1}{4}$ NE $\frac{1}{4}$, Sec. 21, T. 16S, R. 37E, B.M., County of Oneida.

An examination of the entire drainage revealed that the source of water for this proposed appropriation is actually Costley or Clarkston Creek which derives its flow from three unnamed springs, located in the:

- (1) NE $\frac{1}{4}$ NE $\frac{1}{4}$, Sec. 21, T. 16S, R. 37E - Oneida
- (2) NE $\frac{1}{4}$ NW $\frac{1}{4}$, Sec. 21, T. 16S, R. 37E - Oneida
- (3) NW $\frac{1}{4}$ NW $\frac{1}{4}$, Sec. 16, T. 16S, R. 37E - Oneida

The creek has a flow of .257 cfs measured at a point downstream from the confluence of the three springs but upstream from the proposed point of diversion.

An irrigation diversion was discovered downstream from the proposed dam site. The Barsons maintain a small diversion dam and reservoir (less than one AF) from which they both pump and gravity flow creek water into a sprinkler system for the irrigation of their grain fields.

I spoke with the Barson brothers about the proposed project and they claimed that all of the natural flows and all of the water from the springs tributary to the creek were decreed for their grain fields. They further claimed that the 1924 decree was in the name of Alfred Atkinson and Miriam H. Costley. Also, as the Barsons live in Clarkston, Utah and do not receive an Idaho newspaper, they were unaware of the advertised application for permit and the proposed project.

An investigation further downstream revealed that this creek was not tributary to the waterways of Utah. Indeed, the creek ends at the point where it flows into the Barson's reservoir. From this point on, it is either diverted by the

Barsons for irrigation, or it seeps into the highly permeable gravel-based soil. The Barsons claim that water from the creek has not been tributary to Utah's Clarkston Creek for the last 15 years. The only other apparent appropriation of water from the creek is a small stockwater diversion located upstream from the proposed dam site. Water is diverted directly from a spring located in NE $\frac{1}{4}$ NW $\frac{1}{4}$, Sec. 21 via a pipeline into a stock watering trough. Overflow from the trough flows back into the creek.

A copy of the Decree in question was obtained from the Franklin County Court House in Preston. Originally lands now owned by the Barsons were jointly owned by Alfred Atkinson and Miriam Costley and the lands now owned by the Bastians belonged to a Mr. Harris. In the 1920's Harris built a dam upstream and began storing and diverting creek water for irrigation of his lands located in Sec. 21 and 22, T. 16S, R. 37E, B.M.

The two downstream water users brought suit against Mr. Harris and won. All of the spring and natural flows of the creek were decreed to the downstream users except that Mr. Harris was allowed to store $\frac{1}{2}$ the flood and freshet waters of the drainage for whatever purpose he chose during the non-irrigation season of each year.

Although Harris was decreed the right to store this water for use up-on his lands, does the present property owner, R. J. Bastian, have the right to revive a water right that has apparently been abandoned for more than 15 years? Although fish propagation is a non-consumptive use of water, a reservoir of the proposed size would promote seepage loss of water to the gravel-based soil and would have a very detrimental effect on the downstream water users. In my opinion a reservoir of 100 AF is totally unrealistic and inappropriate. From an analysis of the conditions as they exist a 5 to 10 AF fish pond would have been more appropriate.

Finally, if Bastian's portion of the decree is still valid he has no need to file for permit with the Department as he already has a right to store freshet water under the 1924 decree. The Barsons are against any upstream storage and have indicated that it will definitely affect their water right and are willing

to take the matter to the courts in order, to prove that Bastian's right to store water has been constitutionally abandoned.

Anthony R. Kozlowski
Anthony R. Kozlowski
Water Resource Agent
Eastern Region

Channel Width = 21" (Distance from right bank)		Depth	Area	Rev.	Velocity	Time (Sec.)
1)	3"	.32	.080	30	.532	59
2)	6"	.40	.100	40	.644	64
3)	9"	.43	.108	30	.587	53
4)	12"	.50	.125	15	.358	46
5)	15"	.46	.115	10	.237	50
6)	18"	.46	.115	5	.151	56
TOTAL		.257 c.f.s. - 115.34 g.p.m. - 13 miner's inches				

