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Idaho Falls, Idaho
December 5, 1929

1929

Mr. John E. Hayes, General Manager
Twin Falls Canal Company,
Twin Falls, Idaho.

Dear Mr. Hayes:

The following data will meet your request for information as of November 30 as nearly as is possible from the data thus far received:

Jackson Lake Reservoir

Storage on hand October 31, 1929 415,710 acre-feet.
Storage on hand November 25, 1929 424,730 acre-feet.

American Falls Reservoir

Storage on hand October 31, 1929 911,070 acre-feet.
Storage on hand November 30, 1929 847,[illegible] acre-feet.

Snake River

Mean flow past Clough gaging station during month of Nov. 3,120 sec.-feet.
Mean flow past American Falls " " " " " 7,220 " "

It should be understood that the river discharges given in these reports are preliminary only and are subject to change with changes in rating or other revisions which may be made prior to the completion of final computations.

Sincerely yours,

J. Clyde Baldwin
District Engineer.

Snow Surveys

1 year ago

Idaho Falls, Idaho
March 16, 1929

Mr. H. P. Boardman, Chairman of Committee
in charge of Nevada Cooperative Snow Surveys,
Mount Rose Observatory,
Reno, Nevada.

Dear Sir:

Your letter of March 14, addressed to Mr. W. G. Steward, has been referred to me for reply.

I note that you are particularly interested in the southwestern Idaho territory and I can give you little information concerning this area.

Moran, Ida

Beginning with the winter 1919-1920 Joseph Markham, Superintendent Jackson Lake Dam, has made monthly surveys, from December to April inclusive, of the snow on the high area tributary to Jackson Lake Reservoir. On each trip he visits about 12 selected localities which are fairly representative of different phases of the area and in each one of these places he measures average snow depth and water content.

We do not yet have the March information available but for the trip which ended on February 21, 1929 he finds an average snow depth of 60 inches with a water content of 16½ inches. This represents just about the mean of the 10 year period as regards depth but is 2½ inches below normal in water content. Furthermore, he reports that, due presumably to dry weather last fall, the ground beneath the snow is much less thoroughly saturated than usual. Roughly, therefore, we would say that we may expect, on the basis of this survey, a run-off in the neighborhood of 20% below normal subject, of course, to such changes as may be indicated by the later March and April surveys.

Another factor, the effect of which is a little hard to determine, is that in general during the past winter we have had precipitation somewhat above normal in the lower valley areas, whereas precipitation at the higher elevations has almost universally been below the average amount since last September.

Trusting that the above information may be of some value to you, I am

Sincerely yours,

W. Clyde Baldwin

District Engineer.

BES:EAG

603 Postoffice Building
Portland, Oregon
October 1, 1929.

Mr. G. Clyde Baldwin,
Watermaster, District No. 36,
Idaho Falls, Idaho.

Dear Mr. Baldwin:

The demurrer in the case of Twin Falls Canal Company v. Carter, et al, was argued before Judge Sutphen at Shoshone on September 13. For your information we are enclosing copy of our brief on the demurrer, from which you will be able to see the various points which were argued before the court.

Judge Bothwell was allowed ten days to file a brief and we were allowed ten days after his brief is received to file a reply brief. Although the ten days elapsed over a week ago, we have not yet received copy of Judge Bothwell's brief, but suppose it will arrive after awhile.

We are also mailing a copy of the defendants' brief to Mr. Carter. This case involves some very interesting questions from a legal standpoint.

Very truly yours,

B. E. Stoutemyer
District Counsel

encl.

Copy with enclosure to
Mr. Geo. W. Carter,
Commissioner of Reclamation,
Boise, Idaho.

IN THE DISTRICT COURT
OF THE FOURTH JUDICIAL DISTRICT OF THE STATE OF IDAHO,
IN AND FOR THE COUNTY OF LINCOLN.

TWIN FALLS CANAL COMPANY, a corporation, Plaintiff, vs. GEORGE N. CARTER, Commissioner of Reclamation; C. CLYDE BALDWIN Deputy Commissioner of Reclamation of the State of Idaho, and C. CLYDE BALDWIN, Watermaster of District No. 36; and HUBERT WORK, Secretary of the Interior of the United States of America, Defendants, GUY DIXON, Intervenor.	DEFENDANTS' BRIEF ON DEMURRER

The sole purpose of the action is to restrain public officers of the state of Idaho, charged by law, and by the terms of the Pector decree as well, with the distribution of the stored and natural flow waters of Snake river, in the performance of their official duties.

Section 5611, Idaho Compiled Statutes, as amended, directs the watermaster to

> "distribute the waters of the public stream * * * among the several ditches taking water therefrom according to the prior rights of each respectively"

etc., and section 5644 requires the Commissioner of Reclamation and his assistants to so convey stored water turned into the bed of a stream for carriage purposes

> "that those having the right to the use of such water shall secure the volume to which they are entitled".

The Foster decree directs

> "The State Engineer of the State of Idaho, or his duly authorized deputy (to) determine what part of the water flowing in Snake River at the Minidoka and Milner Dams is storage waters and what part is natural flow, as provided by the Idaho Session Laws of 1909, entitled: 'An act to provide for the safeguarding of the rights of those conserving Public Waters in Reservoirs and Prohibiting Misappropriation of such Waters by those having no Right to the Use of the Same and Declaring a Misdemeanor,' the amount of the natural flow to be determined as such natural flow would be if unaffected by the diversions or acts of the parties hereto or any or either of them or by the release of stored water."

The complaint confirms the official character of the duties performed by the defendants under the laws and decree from which quotations are just made, and generally alleges their failure to properly construe the directions of the law and the aforementioned decree in the performance of their duty. No wrong is imputed to the defendants nor fraud, nor a performance of their duty in a grossly reckless, negligent or abandoned manner so that fraud may be inferred from their acts.

In fine, the plaintiff merely alleges that there is now a difference between the plaintiff and defendants of interpretation of the directions to the defendants given by the Foster decree.

There exists a strong presumption that public officers discharge their duties faithfully and in a manner prescribed by law, and all facts not alleged or proved are presumed to be such as will sustain the legality and propriety of the action of the public officers in question.

Meservey v. Gulliford, 14 Ida. 133; 93 Pac. 780.
McLean v. Farmers High Line Canal & Res. Co.,
98 Pac. 16, 18 (Colo.)
Wadsworth v. U. P. Ry. Co., 38 Pac. 515 (Colo.)
Humboldt Land & Cattle Co. v. Allen,
14 Fed. (2nd) 650, 655.
People v. Walsh, 36 Am.St. Rep. 138; 96 Ill. 252
Shimmons v. Saginaw, 104 Mich. 511; 62 N.W.725.
St. Josephs v. Parrell, 106 Mo. 437; 17 S.W.497.
Barber Asphalt Co. v. Ullman, 137 Mo. 543,
38 S.W.456.
Beck v. Holland, 29 Mont. 234, 74 Pac. 410.
Comstock v. Larimer & Weld Reservoir Co.,
145 Pac. 700.
Big Wood Canal Co. v. Chapman, 45 Ida. 380, 263 Pac.45.
Ross v. Stewart, 57 L.ed. 629.
See list of authorities cited in Adams County v.
First Nat. Bank of Council, 272 Pac. 699.

In Ross v. Stewart it was held -

"All reasonable presumptions must be indulged in support of the action of the officers to whom the law intrusted the proceedings resulting in the patent, and unless it clearly appears that they committed some material error of law, or that misrepresentation and fraud were practised upon them, or that they themselves were chargeable with fraudulent practices, and that, as a result, the patent was issued to the defendant when it should have been issued to the plaintiff, their action must stand.

Shepley v. Cowan, 91 U.S.330, 340,
23 L. ed. 424, 427.
Marquez v. Frisbie, 101 U.S.473,
25 L.ed. 800.
Quimby v. Conlan, 104 U.S.420, 426,
26 L.ed. 800, 802.
Baldwin v. Stark, 107 U.S. 463,
27 L.ed. 526, 2 Sup.Ct.Rep.473.
Lee v. Johnson, 116 U.S.48, 29 L.ed.570,
6 Sup.Ct. Rep. 249.
Sanford v. Sanford, 139 U.S.642,
35 L.ed. 290, 11 Sup.Ct.Rep. 666.

It certainly cannot be presumed that the water claimed by the plaintiff was maliciously wasted by these public officers or diverted to the use of others, in fraud, or in utter disregard of the rights of the plaintiff. The presumption exists that this water was diverted by the defendant officers to others in order to perform their duty under the law and the directions of said Foster decree or some other Snake River decree as interpreted by them.

For that reason, the allegations of the complaint are insufficient. It is not enough for the plaintiff to complain of the acts of the defendant officers, but it is necessary to rebut the aforementioned presumption by the allegation of all material facts which, if taken as true, may not admit of any theory under which said officers may have acted lawfully in the discharge of their official duties.

It will surely be admitted that if the plaintiff has ample water to supply all it needs the action of the defendant officials, in failing to divert to the plaintiff the additional waters claimed in this action, would not be unlawful. But the complaint is silent upon this material point. Taken in connection with the aforementioned presumption, that every reasonable lawful intendment will be imputed to an official act, the complaint fails to refute this theory upon which such acts should be upheld as being wholly within their authority as conferred by law.

The plaintiff cannot complain because the defendant officers have failed to permit the plaintiff to waste water in violation of the criminal statutes of the state, and if the plaintiff is receiving all the waters which it can place to beneficial use without the so-called increment or return flow to Snake river between the points indicated in its complaint, then there is no cause of action.

In this connection it should be borne in mind that the plaintiff's complaint does not charge the defendant officers with a dereliction of duty in the delivery of 3000 second-feet awarded by the Foster decree. It alleges such a duty, but

nowhere alleges that the defendants have failed in that duty, but merely complains because these officers have failed to divert the increment or return flow without any showing that such additional water is necessary for a beneficial use on the lands of plaintiff or that the plaintiff has any prior or superior right of use thereto over other appropriators of the waters of Snake River.

It goes without saying that it is the policy of the State to discourage extravagant use of water and that the constitution and water laws enjoin its conservation. In fact the very decree under which the plaintiff claims, contains the following clause which is as much a part of the decree as the several awards, to wit:

> "It is further Ordered, Adjudged and Decreed, that none of the parties hereto or their successors in interest shall have a right to the use of the waters of the Snake River beyond the amount that may be required from time to time for their necessary beneficial use and that water shall not be wasted under any of said systems; and whenever the beneficial use has ceased such party or parties shall cease to divert and have no right to divert the said waters."

The most important dimension of a water right is its time of priority as related to others. If the plaintiff's rights (conceding its claim in this action) are inferior in point of time to others for the benefit of which the defendant officers were acting in diverting the waters claimed in this action from the plaintiff's headgates, the official acts complained of are authorized by law, and it must be presumed that the defendants were so acting. Until ultimate facts are pleaded which will overthrow this presumption, the complaint fails to state a cause of action.

Likewise, the complaint fails to show that the parties to this action have not for a long period of years by their actions construed the terms of the Foster decree in the manner which the plaintiff now contends is wrongful.

The defendant officers have been acting under the theory that the water claimed in this action is not natural flow of Snake river "as the natural flow would be if unaffected by the acts or diversions of the parties" to the Foster decree. The plaintiff contends that such water is a part of the natural flow. No burden of pleading is upon the defendants. Their acts, being official, are rightly protected by the presumption aforementioned. It is therefore incumbent upon the plaintiff attacking the legality of those acts to allege by its complaint that the water which it now claims is not alone the natural flow of Snake river, but that flow as specifically defined by the Foster decree. Because of this omission, the complaint fails to state a cause of action.

Can it be asserted as a matter of fact that the Foster decree is the only Snake river water adjudication suit? And that only those parties to it so designated have superior rights to the use of the waters of Snake river to those of the plaintiff? And that the court entering that decree had jurisdiction to determine or did determine the rights of those parties diverting the water now claimed by the plaintiff? Unless it is so asserted by the plaintiff, its complaint is demurrable as not having sufficient facts alleged to state a cause of action.

Our demurrer having admitted all well pleaded facts of the complaint, it must be taken as true that the defendants are, in discharge of their official duties, diverting the "increment" to Snake river between Neeley gaging station and Milner dam to others than the plaintiff who is entitled to the use of a specific measurement of the natural flow of Snake river at Milner dam under the terms of the Foster decree. It must also be admitted that if there is ample natural flow at Milner dam to supply the plaintiff's rights as defined by the Foster decree, without the so-called "increment" aforementioned, there is no duty required of the defendants to allow said "increment" to run in Snake river at Milner dam for the use of the plaintiff. It being presumed that the defendant officials have acted lawfully, there is no cause of action stated by a complaint which fails to allege that there is insufficient natural flow in Snake river at Milner dam without the whole of said "increment" to fully provide the plaintiff's rights.

The case of McLean v. Farmers High Line Canal and Reservoir Co., supra, is upon a statement of fact "on all fours" with the instant controversy. In that case, the court held:

> "Where illegality of official action is relied upon as a ground for invoking the aid of a court to restrain steps to be taken in consummation thereof, the party seeking such relief must allege the facts which constitute the illegality complained of. 17 Enc. Pl. & Pr. 189; Talbott v. City of Buffalo, 125 N.Y.280, 26N.E.265; Palmer v. Logansport & Rock Creek C.R.Co., 108 Ind. 137, 8 N.E.905. Plaintiffs averred that their rights to the use of water represented by their priorities and rights which they had acquired to the waters of Clear Creek were superior to those of appropriators of water in district No. 2, and that there were other appropriators then drawing water from the river and

> Clear creek junior to the rights of plaintiffs sufficient to supply the needs of consumers in that district. The defendants (the water officials) were not claiming the water for their use. They had no personal interest therein. Their action in taking the necessary steps to cause the water of Clear creek to flow down the stream for the use of appropriators below was in the discharge of their duties. They were but the agents to distribute the water in accordance with the several decrees adjudicating water rights in water division No. 1. They could not represent the consumers in district No. 2; so that any determination of the question of the relative rights of plaintiffs and other consumers in division No. 1 would not bind the latter. Squire v. Livezey, 26 Colo. 302, 85 Pac. 181. In short, none of the averments of the complaint to which we have referred, nor all taken together, state any cause of action against the defendant water officials, for the reason that it appears that they were only acting in their official capacity, and no facts are pleaded from which it is made to appear that they were acting in excess of the authority conferred upon them by law. True, as just noticed, plaintiffs averred that their rights were superior to appropriators of water in district No. 2, but this averment merely emphasized the fact that the real parties in interest were the appropriators in that district."
> 98 Pac. 19.

The plaintiff's complaint is silent as to when the wrongful practices of the defendant officers, of which the plaintiff now complains, first began, or the duration of time over which they have extended. Predicated upon the presumption that public officers discharge their duties in a lawful manner, we must assume that the facts will show that they have diverted the waters to which the plaintiff now makes claim in the manner complained of over a continuous period of years commencing at least as early as the time at which the Foster decree was entered, or since June, 1913. So that now, for the first time in 14 years, the plaintiff questions these official acts as performed by the defendants and their predecessors in office.

One of the grounds of attack upon the complaint by demurrer is that the complaint fails to allege that the plaintiff is innocent of "laches" in bringing its action. Closely allied to this ground is the doctrine of "equitable estoppel" which, in turn, is the basis for a familiar rule of construction that courts will endeavor to follow the construction placed upon a contract or decree by the parties thereto, in interpreting an apparent ambiguity in any of their terms.

Brooklyn Life Ins. Co. v. Butcher, 95 U.S.410.
District of Columbia v. Gallaher, 124 U.S.505.
Metropolitan Nat. Bank v. Benedict Co., 74 Fed. 185.
Fox Solid Pressed Steel Co. v. Schoen, et al, 77 Fed. 30.
St. Joseph Union Depot Co. v. C.R.I.& P.Ry.Co., 89 Fed. 648.
C.R.I. & P.Ry.Co. v. D.& R.G.R.Co., 143 U.S. 596.
Topliff v. Topliff, 122 U.S.121.
Chicago v. Sheldon, 9 Wall. 50.
State of Washington v. Mountain Springs Co., 108 Pac. 248.
Northfolk Water Co. v. Medland, 187 Fed. 163.

At the time the Foster decree was entered, and in fact previous to that time, the plaintiff agreed that the water which it now claims might be diverted by the defendants' predecessors in office in the manner which is now apparently objectionable. Acting under that agreement and the terms of the Foster decree as thus construed by the plaintiff, the defendants proceeded to divert such water to others who have ever since that time been using the same, and which now has, to those users, become an established right in property upon which their welfare depends. After a period of fourteen years, the plaintiff's officers change their minds and by this action take a wholly different attitude and say that the interpretation placed upon the terms of the Foster decree by the defendants, and their predecessors, is wrong, and ask a court of equity to rectify the alleged wrong.

The plaintiff will probably argue that this is a matter of proof, and, were this not an action for equitable relief and especially against the continuation of official acts, the plaintiff's argument would be sound. But the law has supplied this proof by a presumption wholly compatible with the theory under which the alleged wrongful acts on the part of these officers are made to appear lawful.

As a statement of a general rule, the defense of "laches" must be pleaded if the same does not appear upon the face of the complaint. The exception lies in an action in equity for an injunction against official acts.

Stearns, Administrator, v. Page,
7 Howard,830; 12 L.ed. 928.
Badger v. Badger, 2 Wall, 87, 96;
17 L.ed. 836.
Felix v. Patrick, 145 U.S.317.
Galliher v. Cadwell, 145 U.S.368.
Sullivan v. Railroad Co., 94 U.S.811.
Maddo v. Bardon, 2 C.C.A. 335, 51 Fed.493.
Reed v. Dingless, 56 Fed. 171.
Daggett v. Helm, 17 Cat. 96.
Penn. Mutual Life Ins. Co. v. Austin,
168 U.S.685, 698; 18 Sup.Ct.283,228;
42 L.ed. 626.
Phillipi v. Phillipi, 115 U.S.151; 29 L.ed.820.

The burden being upon the plaintiff to allege the facts necessary to sustain the "equities" of its claim, and that it was diligent in asserting its rights when it first became apprized of the now alleged wrongful acts on the part of the defendant officers and its reasons for the delay in bringing its action, it must be assumed, in the absence of any allegations of the complaint to the contrary, that the present practice of diverting Snake river water has been the practice of the defendant officers ever since the Foster decree was entered.

That this burden of pleading is upon the plaintiff appears to be without question. It was said by Justice Grier in the case of Stearns v. Page (supra):

> "A complainant, seeking the aid of a court of chancery under such circumstances, must state in his bill distinctly the particular act of fraud, misrepresentation, or concealment — must specify how, when, and in what manner, it was perpetrated. The charges must be definite and reasonably certain, capable of proof, and clearly proved. If a mistake is alleged, it must be stated with precision, and made apparent, so that the court may rectify it with a feeling of certainty that they are not committing another, and perhaps greater, mistake. And especially must there be distinct averments as to the time when the fraud, mistake, concealment, or misrepresentation was discovered, and what the discovery is, so that the court may clearly see, whether, by the exercise of ordinary diligence, the discovery might not have been before made."
>
> Stearns v. Page, 14 L.ed. 928.

To the same effect is the case of Badger v. Badger,(supra), in which the court says:

> "Complainant should set forth in his bill specifically which were the impediments to an earlier prosecution of his claim; how he came to be so long ignorant of his rights, and the means used by the respondents to fraudulently keep him in ignorance; and how and when he first came to a knowledge of the matters alleged in his bill; otherwise the chancellor may justly refuse to consider his case on his own showing, without inquiring whether there is a demurrer or formal plea of the statute of limitations contained in the answer."
>
> Badger v. Badger, 17 L.ed. 836.

The same doctrine is asserted by the supreme court in Felix v. Patrick (supra), and in Gallihor v. Cadwell (supra). In the case of Sullivan v. Railroad Co. (supra), the court holds:

> "Nothing can call forth this court into activity but conscience, good faith and reasonable diligence."
>
> Sullivan v. RR. Co., 94 U.S.811.

Courts of equity have always been averse to recognizing "stale demands", irrespective of the limitation period provided by statutes. In the final analysis of what constitutes such stale demands as to deny them recognition, each case is determined upon its own peculiar merits and depends on the nature of the claim; any intervening rights; the excuses or lack of excuse for the delay; whether or not any fraud used is responsible for the delay; the opportunity for an earlier presentation of the claim; the public interest involved, etc. Apply these tests to the complaint filed herein by the plaintiff, and it proves to be insufficient in facts alleged to state a cause of action, particularly to bring into action the equitable powers of this court.

The plaintiff's complaint is insufficient in another important particular. Its right which it now claims is invaded is not made to appear. It will be admitted that if all of the lands irrigable under the plaintiff's canals have ample water for their successful irrigation, without the use of the water which the plaintiff now contends is being withheld by the defendant officers, the equity powers of this court may not be called upon to compel an act which is expressly prohibited and made criminal by the laws of the State of Idaho - namely a waste of water.

One of the essential elements of the plaintiff's right is "the beneficial use" of the waters it now claims, and even a decree in an adjudication suit cannot decree a right to waste the waters of the State.

Admitting the material allegations of the plaintiff's complaint for the purposes of this demurrer, it lacks this

essential - an allegation that the right to the use of the waters claimed is necessary for the proper irrigation of the plaintiff's lands.

Carroll v. Vance, 88 Pac. 1069 (Colo.)
Comstock v. Larimer & Weld Reser. Co., 145 Pac. 790 (Colo.)
Van Camp v. Emery, 15 Ida. 802; 89 Pac. 752.
Drake v. Earhart, 2 Ida. 750, 23 Pac. 541.
Kirk v. Bartholomew, 2 Ida. 1067, 29 Pac. 40.
Wiel on Water Rights (page 502)
McLean v. Farmers H.L.C.Co. (supra)
Washington State Sugar Co. v. Goodrich et al., 147 Pac. 1075.
Golf v. Pomponio, 120 Pac. 142 (Colo.)

The writer of the opinion in the case of Comstock v. Larimer & Weld Reservoir Company (supra) has so well abridged the opinions of other cases herein cited that we quote from that opinion at length as follows:

"(2) The objection that the complaint sets forth no facts showing or tending to show that the water officials were acting contrary to law was also good. The allegations of the complaint as to the water officials in this respect are substantially as follows:

'That said defendants Cogswell, Comstock and Armstrong refused and still refuse to allow this plaintiff to receive from the said river and its tributaries said water, and plaintiff states that the acts of said defendants and their refusal to allow plaintiff to receive such waters through the headgate of its inlet canal for storage are unwarranted, illegal and in violation of plaintiff's decreed rights.'

In paragraph 20 of the complaint the plaintiff sets out the order of the Division Engineer complained of, and concludes that paragraph in the following language:

'That such order was uncalled for, and the assumption of a power and authority on the part of said defendants, Cogswell and Comstock, that they as public officials, have no legal authority to assume or make; that it was an assumption of power and authority not conferred in any manner upon them, by or under the laws and statutes of this state.'

This order shows upon its face that it was made in precise accord with the police statutes of the state, governing the method of distribution of water between various appropriators, in the discharge of their public duties in the distribution of water to ditches and consumers according to their respective rights and priorities. In McLean v. Farmers' H.L.C.& R.Co., supra, speaking to this point it is said:

'By section 2468, 1 Mills' Statutes, it is made the duty of the superintendent of irrigation to distribute the waters in his division in accordance with the rights of priority of appropriation as established by the judicial decrees entered in the several water districts included in such division, and that he shall have general control over the water commissioners of the districts embraced in his division. The several decrees of the water districts within a water division are to be treated as one, and the water distributed accordingly. * * * It is charged, however, that the acts of the defendants in closing down plaintiff's headgates were wholly unauthorized, illegal and unlawful * * * This statement does not aid the complaint, because it is but a statement of a mere legal conclusion without any statement of facts upon which to base it. * * * In short, none of the averments of the complaint to which we have referred, nor all taken together, state any cause of action against the defendant water officials, for the reason that it appears that they were only acting in their official capacity, and no facts are pleaded from which it is made to appear that they were acting in excess of the authority conferred upon them by law'.

That is precisely the situation which confronts the court in this case. The complaint is barren of facts which in any way show that the water officials were acting beyond, or contrary to, the authority conferred upon them by law. From anything that is made to appear by the averments of the complaint, they were clearly acting within their power and doing only that which the law enjoined upon them, as such officials, to do.

(3, 4) It is further urged against the complaint that it does not state facts sufficient to state a cause of action against the direct irrigators who were made defendants in the suit. It was incumbent upon the plaintiff in this connection to show affirmatively by proper allegations that it has a superior right to these defendants to divert the water of the Cache La Poudre river for storage during the period named. It is not sufficient in a case of this kind for the plaintiff to show that it has made an appropriation of water for storage and has obtained a decree therefor. It must go further and show that the right so decreed is relatively prior to that claimed by the parties in interest against whom relief is sought. In other words, the plaintiff should have shown by the averments of its complaint, in order to state a cause of action, that its alleged rights dominated the rights of the

direct irrigators whose right of use it undertook to have denied. Since the complaint failed to do this, it is in that respect insufficient. * * * * In order to entitle an appropriator of water to maintain an equitable action against the use of water by another appropriator, it must be shown by allegations of fact that the one seeking such relief has a dominant and superior right, both in point of time and necessity of use. Nothing of this sort is made to appear in the complaint, but by necessary inference and implication the very opposite is shown."

"In Carroll v. Vance, 39 Colo. 216, 88 Pac. 1069, upon the question of the sufficiency of the complaint to entitle one appropriator to restrain an alleged unlawful diversion ofwater by another, this was declared:

'A complaint, in an action by a senior appropriator to restrain an unlawful diversion of water, which merely alleges that plaintiff has a priority superior to that of the defendant, with which the defendant is interfering, is but a mere conclusion of law, and is not a sufficient statement of ultimate facts constituting a prior appropriation, but it is necessary to state the facts which show such appropriation and its priority.'

In McLean v. Farmers' H.L.C.& R.Co., supra, it was said:

'The object of the action was to prevent these officers from causing water to flow down the stream for the use of appropriators in district No. 2, and in order to effect this end it was necessary that the rights of plaintiffs to the subject-matter of controversy be adjudged superior to those of these appropriators.'

Surely unless facts are set forth in the complaint which show such superiority of right no cause of action is stated, and in the absence of such averments no superiority of right could be adjudged.

(5) Beginning with the first application of water in Colorado to beneficial uses, the right of preference to such use between respective claimants has been made to depend upon prior appropriation and necessity of use. This doctrine has become thoroughly entrenched in our jurisprudence, through constitutional and statutory provisions, and by a uniform and unbroken line of judicial decisions. The complaint is framed upon a theory in direct conflict with this well settled doctrine, and to hold that it states a cause of action would completely overturn and nullify this primary and fundamental rule."

Comstock v. Larimer etc.,140 Pac.700.

Section 5612 of the Idaho Compiled Statutes provides:

> "Said water masters 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, and they shall not continue performing services after the necessity thereof shall cease, which shall be determined by the department of reclamation, and in no event after the 1st of November of each year."

The complaint fails to allege that the water master had been at the time this action was filed, or at any time, called upon by three or more owners or managers of ditches or persons controlling ditches, by application in writing, and until this has been done the watermaster is neither required nor permitted to act.

> "This provision is mandatory and the water master cannot recover for services unless the services were rendered after such written application has been presented to him;"
> Walker v. Elmore Co., 16 Idaho 696, 102 Pac. 289.

By the amended complaint and the Foster decree, which is made a part of the original complaint, it is shown that the Minidoka Project is a reclamation project constructed by the United States under the National Reclamation Act. It must follow then that the Minidoka Project and the water appropriations in connection therewith are not the property of the Secretary of the Interior, but of the United States, and subject to alienation only in the manner which Congress may prescribe.

Without having alleged in what manner the court in entering the Foster Decree obtained jurisdiction of property of the United States, that decree is void in so far as it

seeks to decree the rights of the United States, and cannot therefore become a basis for the present action.

Stanley v. Schwalby, 162 U.S.255; 40 L.ed.960.
Belknap v. Schild, 161 U.S.10; 40 L.ed. 599.
Carr v. United States, 98 U.S.433; 25 L.ed. 209.
Welch v. Hamilton, 33 Fed. (2) 224.

In the case of Stanley v. Schwalby, it was held:

> "It is a fundamental principle of public law, affirmed by a long series of decisions of this court, and clearly recognized in its former opinion in this case, that no suit can be maintained against the United States or against their property, in any court, without express authority of Congress. 147 U.S.512 (37:261). See also Belknap v. Schild, 161 U.S.10 (ante, 599). The United States by various acts of Congress, have consented to be sued in their own courts in certain classes of cases; but they have never consented to be sued in the courts of a state in any case. Neither the Secretary of War nor the Attorney General, nor any subordinate of either, has been authorized to waive the exemption of the United States from judicial process, or to submit the United States or their property to the jurisdiction of the court in a suit brought against their officers."
>
> Stanley v. Schwalby, supra.

The Court will take judicial notice of the succession in office of the United States cabinet officers.

Long prior to the time of filing of amended complaint by the plaintiff, Hubert Work the defendant named therein as Secretary of the Interior of the United States had resigned such office, and he was succeeded by Roy O. West, who in turn resigned and was succeeded by Ray Lyman Wilbur who is now the Secretary of the Interior of the United States, so that at the time the amended complaint was filed, Hubert Work was not the Secretary of the Interior who is charged with the administration of Federal Reclamation works under the Reclamation Laws, and which office

holds in trust the water rights of the Minidoka Project.

The case of Davidson v. Payne in the circuit court of appeals for the Eighth Circuit, reported in 289 Federal, page 69, is an action for compensation under the Workmen's Compensation Act for the State of Kansas, against John Barton Payne who was designated by the President of the United States pursuant to the Transportation Act of 1920.

The defendant demurred to the complaint upon two grounds, one of which was that the complaint failed to state a cause of action against the defendant. It was suggested to the Court, and the Court did take judicial notice of the resignation of John Barton Payne as agent, and his succession by James C. Davis.

A motion to dismiss was made in the lower court on the ground that the plaintiff had not within twelve months after the change in office moved the substitution of the successor, which the Court held to be inapplicable. However, the court in its opinion states with respect to the general demurrer, as follows:

> "This is not a case where the plaintiff has failed to move the substitution of the successor of the defendant Payne as agent within 12 months from the date of his resignation. It is a case where John Barton Payne has been sued as such agent after he had resigned the office and after his successor, Davis, had been appointed. Since his resignation on March 28, 1921, John Barton Payne has had no authority to represent the President of the United States in any litigation arising out of the operation of railroads during the World War. Appellant brought suit against the wrong party, and must abide the consequences of his mistake.
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> N.Y.S.M. Milk Pan Ass'n v. Rem.Ag.M'ks, 89 N.Y.22;
> Zukowski v. Armour, 107 Ill. App. 663;
> Jordan v. Chicago & A.Ry.Co., 105 Mo. App. 446, 79 S.W.1155;

Hall v. School Dist. No. 4, 36 Mo.App.21;
Hunnicutt et al., Commissioners, v. Stone,
Ordinary, 85 Ga. 435, 11 S.E.663.
The suit cannot be maintained against John Barton Payne, and the court below did not err in sustaining his demurrer to the complaint."
Davidson v. Payne, 289 Fed. 69-71.

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