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37-A-2A

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

CAREY VALLEY RESERVOIR COMPANY,  
a corporation,  
  
Plaintiff,  
  
vs.  
  
W. C. ELDREDGE, Watermaster,  
  
Defendant,  
  
and  
  
M. A. CONDIE, A. L. WELCH,  
WILLIAM BAIRD, WILLIAM BRIGGS,  
LEE ELLIOT, and STELLA HURST,  
  
Intervenors.

Numbered  
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FINDINGS OF FACT,  
CONCLUSIONS OF LAW  
and DECREE.

FINDINGS OF FACT.

I.

That plaintiff is, and at all times hereinafter mentioned has been a mutual non-profit irrigation corporation, organized and existing under the laws of the State of Idaho, for the purpose of impounding, storing and delivering water for the irrigation of the lands of its stockholders, and that during all such times has kept and maintained its office and principal place of business at Carey, Blaine County, Idaho.

II.

That Water District #25 of the State of Idaho is one of the water districts of the State of Idaho, organized and existing for the purpose of administering and distributing the waters of Fish Creek, a natural stream of the State of Idaho, situated within the County of Blaine; that the defendant W. C. Eldredge is the duly elected, qualified and acting watermaster of said Water District #25.

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III.

That on the 17th day of June, 1917, the plaintiff, for the purpose of securing water for the irrigation and reclamation of the lands of its various stockholders, which said lands are hereinafter fully described and set out, made and filed its certain application for a permit to construct a dam, and thereby create a reservoir in the bed of said Fish Creek for the purpose of storing therein 17,000 acre feet of the flood and winterflow waters of said stream; that such permit was duly issued, and acting thereunder this plaintiff did in due time and with reasonable diligence proceed with the construction of said dam, and the storing of said flood and winterflow waters of said stream, and actually applied the same to a beneficial use, viz., the irrigation of the lands of plaintiff's stockholders; that plaintiff did thereafter make proof of the completion of works.

IV.

That said plaintiff, immediately after the issuance of said permit, began the construction of said dam described therein, the same being a concrete, multiple arch structure grounded on bedrock with a free board of ninety-one feet, and two thousand feet in length; that work was pursued with such diligence, that in the latter part of 1919 some of the flood and winterflow waters of Fish Creek were actually impounded thereby, which said water so impounded was by the plaintiff put to a beneficial use in 1920; that the work was prosecuted with diligence and a greater amount of water was impounded and put to a beneficial use during the season of 1920-'21; that work was continued, the dam increased in height and the reservoir in capacity during the season of 1921-'22, and the waters impounded put to a beneficial use; and that said dam was in 1922 completed, proof of completion made, and the flood and winterflow of the waters of Fish Creek impounded therein from and after the 1st day of November, 1922, which said waters so impounded were by the plaintiff

put to a beneficial use; first, by storing for irrigation, and then by actual application to the lands of plaintiff's stockholders, which said lands are described in finding No. 7 hereof; that the maximum capacity of the reservoir created by said dam is 14,411 acre feet, and that the same has been filled to capacity several times since 1923;

V.

That the said plaintiff has, since the 1st day of November, 1922, been in open, notorious, peaceable, undisputed and adverse possession, under a claim of right, of all of the flood and winterflow waters of said Fish Creek up to the maximum capacity of said reservoir, viz: 14,411 acre feet, and has applied such water to a beneficial use, that is to say the irrigation of the lands of its stockholders, which land is described in finding No. 7 hereof; and that said plaintiff has, against all users of water from Fish Creek, acquired the right to store, divert and use 7,205.5 second feet of the flood and winterflow waters of said stream up to the maximum capacity of its reservoir, to-wit: 14,411 acre feet;

VI.

That at no time since November 1st, 1922 has any user of the waters of Fish Creek below the reservoir made beneficial use of the flood and winterflow waters of said Fish Creek, except at such times as the flow, cumulated, was in excess of 14,411 acre feet, and said reservoir actually overflowed; and that at no time since November 1st, 1922 have any user or users of the waters of Fish Creek below the reservoir broken or interrupted the continuity of possession and use of said flood and winterflow waters of Fish Creek, by the plaintiff, up to the maximum capacity of its reservoir, to-wit: 14,411 acre feet;

VII.

That the land of plaintiff's stockholders, heretofore referred to,

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are semi-arid in character and require the artificial application of water thereto, by irrigation, in order to produce ordinary agricultural crops.

The legal description of said land is as follows:

Twp. 1 N. Range 22 E.

Sec.	NE $\frac{1}{4}$	NW $\frac{1}{4}$	SW $\frac{1}{4}$	SE $\frac{1}{4}$	TOTALS
	NE $\frac{1}{4}$ :NW $\frac{1}{4}$ :SW $\frac{1}{4}$ :SE $\frac{1}{4}$ :	NE $\frac{1}{4}$ :NW $\frac{1}{4}$ :SW $\frac{1}{4}$ :SE $\frac{1}{4}$ :	NE $\frac{1}{4}$ :NW $\frac{1}{4}$ :SW $\frac{1}{4}$ :SE $\frac{1}{4}$ :	NE $\frac{1}{4}$ :NW $\frac{1}{4}$ :SW $\frac{1}{4}$ :SE $\frac{1}{4}$ :	
27 :	17 39	40 31 20 40	40 16 22 40	40 40	385
32 :				23	23
33 :	19 40		37 40	40 40 40	256
34 :	40 40	40 40 40 40	40 40 40 40	40 40	480
Twp. 1 S. Range 22 E.					
3 :	42 42	42 42	40 40	40 40	328
4 :	42 42	42 42	40 40	40 40	328
5 :	42 39	22	39 40	40 40	262
7, 8, 9, 16, 17, 18 :	all of each				3840
10 :	40 40 40 40	40 40 40 40	40 40 40 40	40 40	560
6 :			15 23	23 24	85
15 :	40 40	40 40 40 40	40 40 40 40	40 40	480
19 :	40 40 40 40	40 40 40 40			320
20 :	40 40 40	40 40 40 40			280
21 :	40 40 40 40	40	40		240
Twp. 1 S., Range 21 E.					
12 :	36 40	30	38 27 39	40 40 40 40	370
11 :			8 36 39	5 20 40 39	187
10 :				9	9
13 all :					640
14 :	40 40 40 40	40 40 22 40	38 40 35 3	40 31 28	517
15 :	5 20	5	28 38 40 40	40 37 40 40	333
16 :	12 27 40 39	37 37 40 40	40 40 40 40	40 40 40 40	582
17 :	30 18 40 40			40 39 5 28	248
21 :	40 40 40 40	40 32 40	40 40 40	40 40 40 40	542
22 all :					640
23 :	26 25	32 40 7	30 40 40 40	3 5 4	292
24 :	40 40 40 40	40 40 40 40	40 40		400
26 :	20 40 40	40 40 40 40	40 40 40 40	40 40 40 40	580
27 all :					640
28 :	40 40 40 40	40 40 40	40 40	40 40 40 40	520
33 :	40 40 40				120
34 all :					640
35 all :					640
Twp. 2 S., Range 21 E.					
2 :	40 40	40 40 40 40	40 40 40 40		400
3 all :					640
9 :	40 40				80
10 :	40 40 40 40	40 40 40 40			320
11 :		40 40 40 40			160

Total number of acres to be irrigated - - - - - 17,207

situated in the County of Blaine, State of Idaho, and that there has been, and is, applied thereto all the flood and winterflow waters of said Fish Creek up to the amount of 14,411 acre feet, or such part and portion thereof as has been available for such storage and distribution, and that such amount of water, since the completion of the works aforesaid, has been annually put

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to a beneficial use upon the lands of the plaintiff's stockholders.

VIII.

That on the 15th day of September, A. D., 1914, in a case then pending in the District Court of the Fourth Judicial District of the State of Idaho, in and for Blaine County, entitled Adelbert L. Potter et al. v. Joseph R. Patterson, et al, findings of fact, conclusions of law and decree, which are by this reference made a part hereof as if actually copied herein at length, were duly entered, adjudicating the waters of said Fish Cree ; that at the time of the making of the decree aforesaid, this plaintiff had not acquired the right above set out, that it was not a party to said suit, and that its aforesaid right was not determined thereby; that plaintiff does accept as binding upon it, the decree, findings of fact, and conclusions of law upon which the same was based and entered in said cause.

IX.

That the intervenor Stella Hurst did on the 1st day of May, 1923 divert and put to a beneficial use upon the lands described in her cross complaint, viz: SW $\frac{1}{4}$  SW $\frac{1}{4}$ , Sec. 3; S $\frac{1}{2}$  SE $\frac{1}{4}$  Sec. 2; N $\frac{1}{2}$  NE $\frac{1}{4}$  and NW $\frac{1}{4}$  NW $\frac{1}{4}$  Sec. 12; all in twp. 1 N., R. 22 E. B. M., containing about 340 acres, (78 inches) one and fifty-six hundredths second feet of the waters of Fish Creek, and that said intervenor ever since said first day of May, 1923, has continuously, uninterruptedly, open and notoriously, during the flood and freshet period when occurring on said stream during the irrigation season, taken, appropriated, diverted and beneficially used said amount of waters from said Fish Creek, adversely to the said plaintiff and to the other intervenors herein under claim of equal priority to plaintiff in said flood and freshet waters.

X.

That the plaintiff and all intervenors herein are bound by the findings of fact, conclusions of law and decree in the case of Potter et

al. v. Patterson et al., made and entered in this court on the 15th day of December, 1914.

XI.

That there originates, within the contour lines of the Fish Creek reservoir the waters of certain springs, which, supplemented and augmented by the flow of that portion of Crooks Creek situate below the high water contour lines of said reservoir and by the flow of that portion of the West Fork of Fish Creek situate below the high water contour lines of said reservoir, amount to four second feet (200 inches), which water is a part of the natural flow of Fish Creek subject to distribution under the terms of the decree in the case of Potter v. Patterson aforesaid; that said four second feet of water so contributed by said springs and by that portion of Crooks Creek and of the West Fork of Fish Creek situate below the high water contour lines of said reservoir, has, by consent, agreement and acquiescence of the plaintiff and all other users on the stream, been distributed since 1931 to the various users of Fish Creek under the terms and provisions of the decree of Potter v. Patterson.

XII.

That by the impounding of the flood and winter flow waters of Fish Creek in the reservoir, resulting in the drying or the partial drying of the bed of the stream below said reservoir, the plaintiff has disturbed the natural conditions of the channel below the dam and has caused an increased channel loss therein over and above the normal loss therein, which said normal loss is hereby fixed at 1.8 second feet (90 inches), which increased channel loss amounts at times to a maximum of 8.1 second feet (405 inches)<sup>11</sup> for a period of time not exceeding five days at the beginning of the irrigation season representing a total maximum increased loss during said period of 40.5 second feet (81 acre feet); that such increased channel

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loss was for a period of two irrigation seasons prior to the commencement of this action, by agreement charged to the stored water of said plaintiff in said reservoir.<sup>11</sup>

XIII.

That the intervenors M. A. Condie, A. L. Welch, William Baird, William Briggs, and Lee Elliot, did not, on the 15th day of April, 1915, or at any other time or at all, appropriate from Fish Creek and apply to a beneficial use, the amounts of water claimed by them in their cross-complaints, or any other amount of water for the irrigation of or domestic use of the lands described in said cross-complaint;

XIV.

That there were no unappropriated public waters of the State of Idaho flowing in Fish Creek on April 15th, 1915, but that said stream at such time had been largely over-appropriated, and that the intervenors, aforesaid, were, as to the amounts of water that could be appropriated and put to a beneficial use upon their lands described in said cross-complaint, bound by the terms of the decree in said case of Potter v. Patterson;

D. H. Sutphen

District Judge.

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### CONCLUSIONS OF LAW

By reason of the facts aforesaid, the court makes and enters its conclusions of law, viz:-

#### I.

That the plaintiff is entitled to divert, store and use for the irrigation of the land of its stockholders 7,205.5 second feet of the flood and winter flow waters of Fish Creek up to the capacity of its reservoir, to-wit: 14,411 acre feet; and that such right to so divert, impound, store and beneficially use such waters, should have a date of priority of November the first, 1922;

#### II.

That the intervenor Stella Hurst, should be awarded a right to divert and use for the irrigation of her land described in her cross-complaint, 78 inches, or 1.56 second feet of the waters of Fish Creek, with a date of priority of May first, 1923, such priority, however, during the flood and freshet period when such waters can be beneficially used for irrigation, should as to the parties hereto be deemed of equal priority with plaintiff's rights herein to be decreed as aforesaid;

#### III.

That the intervenors, M. A. Condie, A. L. Welch, William Baird, William Briggs and Lee Elliot, take nothing by reason of their cross-complaint;

#### IV. MAY 28 1926

That said Fish Creek should in the future be operated in strict compliance with the terms of the decree in the case of Potter et al. v. Patterson et al., aforesaid, as supplemented by the decree to be entered herein; and to that end, that the water originating within the contour lines of the reservoir, the same being the contribution of the flow of that portion of Crooks Creek situate below the contour lines of said Fish Creek reservoir and of the flow of that portion of the West Fork of Fish Creek situate below the contour lines of said Fish Creek reservoir and springs therein, amounting



to four second feet (200 inches) continue to be distributed as a part of the natural flow of Fish Creek under the provisions of the said decree of Potter v. Patterson, aforesaid, and agreement between the plaintiff and decreed users;

V.

That said plaintiff shall in the future as in the past, release from the stored water in said reservoir a sufficient amount of water to take up and compensate the additional loss in the bed of Fish Creek below the dam, not exceeding 8.1 second feet per day for a period of five days, or a total of 81 acre feet in any one season; and that no part of the water so released shall be subject to diversion, and use by the intervenors or any other decreed users under the decree of Potter et al. v. Patterson et al., aforesaid, said water to be used solely to restore the stream bed to its natural condition and allow the decreed users to receive the natural flow of Fish Creek under said decree; that by the term "additional loss" as used in this paragraph is meant the loss over and above the normal loss of 1.8 second feet (90 inches).

VI.

That each party hereto should pay his or its own costs incurred herein.

D. H. Sutphen

District Judge.

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DECREE

Now on this 19th day of April, 1939, the above cause came duly on for hearing in its regular order upon the docket, court being in regular session, the Hon. D. H. Sutphen, Judge thereof presiding, the plaintiff present by Bissell & Bird, its attorneys, the intervenors M. A. Condie, A. L. Welch, William Baird, William Briggs and Lee Elliot, present in person and by A. F. James their attorney, the intervenor Stella Hurst, present in person and by J. J. McFadden, her attorney.

Whereupon, the plaintiff introduced its evidence and rested, the various intervenors introduced their evidence and rested, and plaintiff introduced its rebuttal evidence and rested;

Whereupon, the court announced that the matter would be taken under advisement, and directed that all parties should file written briefs, and thereafter present oral argument;

And whereas, all parties having filed with the court their written briefs and arguments, the matter was by order of the court orally argued at Gooding, Idaho, within said district on the 21st day of November, 1939, and finally submitted to the court; the court being duly advised in the premises, and having made its findings of fact and conclusions of law herein;

IT IS HEREBY ORDERED, ADJUDGED AND DECREED, that the plaintiff be and hereby is, awarded the right to divert, impound, store and subsequently use for the irrigation of the land of its various stockholders, viz:

Twp. 1 N. Range 22 E., Blaine County, Idaho.

Sec.	NE $\frac{1}{4}$	NW $\frac{1}{4}$	SW $\frac{1}{4}$	SE $\frac{1}{4}$	TOTALS
27	17	39	40	40	385
32				23	23
33	19	40	37	40	256
34	40	40	40	40	480

Twp. 1 S. Range 22 E., Blaine County, Idaho.

3	42	42	40	40	328
4	42	42	40	40	328
5	42	39	30	40	262
7, 8, 9, 16, 17, 18	all of each				3840
10	40	40	40	40	560
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19	40	40	40	40	320
20	40	40	40	40	280
21	40	40	40	40	240

Twp. 1 S., Range 21 E., Blaine County, Idaho.

12		36	40	30	38	27	39	40	40	40	40	370	
11					8	36	39	5	20	40	39	187	
10											9	9	
13	all											640	
14	40	40	40	40	40	40	22	40	38	40	35	3	517
15			5	20		5		28	38	40	40	40	333
16	12	27	40	39	37	37	40	40	40	40	40	40	582
17	30	18	40	40				40	39	5	28		248
21	40	40	40	40	40	32	40	40	40	40	40	40	542
22	all												640
23	26			25		32	40	7	30	40	40	40	292
24	40	40	40	40	40	40	40	40	40	40			400
26		20	40	40	40	40	40	40	40	40	40	40	580
27	all												640
28	40	40	40	40	40	40	40	40	40	40	40	40	520
33	40	40	40										120
34	all												640
35	all												640

Twp. 2 S., Range 21 E., Blaine County, Idaho.

2	40	40	40	40	40	40	40	40	40	40	40	400
3	all											640
9	40		40									80
10	40	40	40	40	40	40	40	40				320
11	40	40	40	40								160

Total number of acres to be irrigated - - - - - 17,207

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seven thousand two hundred five and one-half second feet (7205.5 s. f.) of the flood and winter flow waters of Fish Creek, said diversion to be limited to the capacity of its reservoir, viz: fourteen thousand four hundred eleven acre feet

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(14,411 a. f.), such right to date from and have priority of November the first, 1922:

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That the intervenor, Stella Hurst, be and hereby is awarded the right to divert and use (seventy-eight inches) one and fifty-six hundredths second feet (1.56 s. f.) of the waters of Fish Creek for the irrigation of her land, viz: SW $\frac{1}{4}$  SW $\frac{1}{4}$ , Sec. 3; S $\frac{1}{2}$  SE $\frac{1}{4}$  Sec. 2; N $\frac{1}{2}$  NE $\frac{1}{4}$  and NW $\frac{1}{4}$  NW $\frac{1}{4}$  Sec. 12, all in twp. 1 N., R. 22 E. B. M., containing about 340 acres; said right to date from and have priority of May 1st, 1923; but as between the parties to this action said right shall during the flood and freshet period, when such waters can be beneficially used for irrigation, be deemed of equal priority with plaintiff's rights in said flood and freshet waters herein decreed.

That the waters of said Fish Creek be, in the future, administered under and in strict accordance with the terms, conditions and priorities fixed by the decree in the case of Potter et al. v. Patterson et al., made and entered in this court on the 15th day of December, 1914, as supplemented by this decree; and that for the purpose of administration, in arriving at the natural flow of Fish Creek, the agreement of the parties, and interpretation of the decree for the past eight years adopted and used, the natural flow of Fish Creek shall be such water as flows into the head of the reservoir from day to day, plus (200 inches) 4 second feet originating from springs within the contour lines of the reservoir and contributed by the flow of that portion of Crooks Creek situate below the high water contour lines of said Fish Creek reservoir and by the flow of that portion of the west fork of Fish Creek below the high water lines of said Fish Creek reservoir.

That in order to compensate for the increased loss by seepage and evaporation in the bed of Fish Creek below the said dam, that such plaintiff be, for the first five days of each recurring season, required to discharge through its head works a sufficient amount of stored water to compensate for said loss, not exceeding in any one season 40.5 second feet or 81 acre feet, and that none of such water, so discharged into said stream, shall be subject to diversion and use by any party to the said decree of

Potter v. Patterson; that in determining the amount of said increased loss, 1.8 second feet (90 inches) shall be considered and is hereby fixed as the normal loss in the bed of Fish Creek below said dam.

That the intervenors, M. A. Condie, A. L. Welch, William Baird, William Briggs and Lee Elliot, take nothing by reason of their cross-complaint herein;

That this decree is ancillary and supplemental to the decree entered in this court on the 15th day of December, 1914, in the case of Potter et al. v. Patterson et al., and that the awards herein made are in strict subjugation thereto;

That each party pay his or its own costs incurred herein.

Dated this twenty-ninth day of December, 1939.

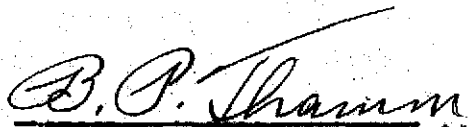
D. H. Sutphen

District Judge.

STATE OF IDAHO, )  
                  ) ss.  
County of Blaine, )

I, B. P. THAMM, Clerk of the District Court of the Fourth Judicial District of the State of Idaho, in and for the County of Blaine, do hereby certify that the foregoing is a full, true and correct copy of the original Findings of Fact, Conclusions of Law and Decree in the above entitled action now on file in my office and recorded in Book 11 of Judgments, Page 249, Records of Blaine County, State of Idaho.

Given under my hand and the seal of said Court in my office, at Hailey, this 11th day of January, 1940.

  
Ex-Officio Recorder, Clerk of the District Court

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