Duckwater Creek

IN THE FIFTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

IN AND FOR THE COUNTY OF NYE.

LOUISA IRWIN, Plaintiff, vs. JOSEPH C. TOGNONI, MYRTLE TOGNONI, his wife, JOSEPH TOGNONI, his son, and JOHN GROSS, Defendants. and MRS. BERTHA RISCH, (nee De Flon), CHARLES DE FLON, MARY DE FLON, W. F. MENDES, MRS. MARY MENDES, IMOGENE IRWIN, JOSEPH TOGNETTI alias BIRCH, MRS. ANNIE TOGNETTI alias BIRCH, CHARLES IRVING, Mrs. HERMIE IRVING, PAUL, IRWIN, RALPH IRWIN and FRED IRWIN, Co-defendants.	DECREE

This cause came regularly on for trial on November 17, 1909, before the Court sitting without a jury, - a jury trial having been duly waived in open Court by all the parties before the Court,-upon the complaint of Plaintiff,-the answer, counter claim and cross-complaint of the defendant, Joseph C. Tognoni, and the Answers of the Co-defendants Mrs. Bertha Risch (nee De Flon), Charles De Flon, Mary De Flon, W. F. Mendes, Mary Mendes, and Imogene Irwin to said cross-complaint of defendant, and the answer and disclaimer of co-defendants Paul Irwin, Ralph Irwin and Fred Irwin thereto;-the said Plaintiff Louisa Irwin and the co-defendants Imogene Irwin, Paul Irwin, Ralph Irwin and Fred Irwin appearing in person and by their attorneys , McIntosh

Cooke;-the said Defendant Joseph C. Tognoni appearing in person and be his attorneys Messrs. Burritt & Kepner and P. E. Keeler, Esqu:-and the said Mrs. Bertha Risch (nee De Flon), Charles De Flon, Mary De Flon, W. F. Mendes and Mary Mendes, co-defendants, appearing in person and by their attorneys, Messrs. Cheney, Massey & Price:--and the default of the defendants Myrtle Tognoni, Joseph Tognoni and John Cross, and the co-defendants Charles Irving, Hermie Irving his wife, and Joseph Tognetti, alias Birch, and Annie Tognetti, Alias Birch, being duly taken;--

Witnesses were sworn and examined and cross examined and documentary evidence adduced by the respective parties, and the trial of said cause proceeded with from said November 17, 1909 from day to day until December 1, 1909,--WHEREUPON, and before the completion of the trial and hearing of said cause, by consent and agreement in open court by all the parties before the court the evidence was closed and findings of fact and conclusions of law were by all the parties aforesaid waived;--and, subject to the approval of the Court, it was thereupon by said parties further consented and agreed in open Court that final judgement and decree be made and entered in this cause as hereinafter set forth.--

And said cause being thereupon duly by all the parties as aforesaid submitted to the Court for its decision, and the Court being fully advised in the premised,--the law and the facts and said consent and agreement of said parties being by the Court here considered and fully understood.--

IT IS HEREBY ORDERED, ADJUDGED AND DECREED:----------

FIRST:-That the Co-defendants Mrs. Bertha Risch (nee De Flon), Charles De Flon and Mary De Flon now are, and by and through their grantors and predecessors in interest have ever since the _____day of_____1866, have been the owners and

in the possession, occupation and use of the following described lands, to wit- E½ of E½ of Sec. 1 and E½ of N.E.¼ of Section 12 T. 12 N., R. 55 E;-W½ of Sec. 6; S.E.¼ of Sec. 6;-Sec. 7; S.W.¼ of N.W.¼ and W½ of S.W.¼ and S.E.¼ of S.W.¼ of Sec. 8; N.E.¼ of N.E.¼ of Sec. 18, and N.W.¼ of Sec. 17, T. 12 N., R. 56 E., M.D.B.&M.--situate on Duckwater Creek, in Nye County, Nevada:-

That said Co-defendants Mrs. Bertha Misch (nee De Flon), Charles De Flon and Mary De Flon now are, and by and through their grantors and predecessors in interest have ever since the_____ day of_____, 1866, been the owners and in the actual, continuous and beneficial possession and user of 4.2 cubic feet of water per second of time of the waters and flow of said Duckwater Creek, Nye County, Nevada, in connection with and for the irrigation of their said lands, measured at said Co-defendants' head-gates or points of diversion, and that same is hereby decreed to be a prior and preferred appropriation and right to the use of the waters of said creek over and superior to the right or appropriation of any other party hereto and is hereby adjudged and decreed to be forever quieted and confirmed in said co-defendants;- and the said Plaintiff and Defendants and remaining co-defendants and each and all of them, their and each of their agents, attorneys, successors in interest, grantees, assigns, heirs, executors and administrators, and all persons claiming by, through or under them or anyof them, are hereby strictly and absolutely restrained and enjoined perpetually from diverting, conducting or carrying away, or in any wise or manner whatsoever obstructing or interfering with the waters or flow of said Duckwater Creek so as aforesaid adjudged and decreed to and quieted and confirmed in said co-defendants Mrs. Bertha Misch (nee De Flon), Charles De Flon and Mary De Flon.

SECOND:- That the Plaintiff Louisa Irwin now is, and by and through her grantors and predecessors in interest has ever since the 20th day of August, 1867, been the owner and in the possession, occupation and use of the following described lands, to wit:-

N.E.¼ of the N.W.¼, N. ½ of the N.E.¼ and the S.E.¼ of the N.E.¼ of section3;-and the N.W.¼ of the N.W.¼ and the S½ of the N.W.¼, the E. ½ of the S.W.¼ and W. ½ of the S.E.¼ of Sec. 2, all in township 11 N., R. 56 E. M. D. B. & M., containing 480 acres and situate on Duckwater Creek, in Nye County, Nevada.

That said Plaintiff, Louisa Irwin, now is, and by and through her said grantors and predecessors in interest has ever since said 20th day of August 1867, been the owner and in the actual, continuous and beneficial possession and user of 7.15 cubic feet of water per second of time of the waters and flow of said Duckwater Creek, Nye County, Nevada, in connection with and for the irrigation of her said lands, measured at Plaintiff's head-gates or points of diversion,-and that, subject only to the prior appropriation and right hereinbefore adjudged and decreed to said Co-defendants Mrs. Bertha Risch (nee De Flon), Charles De Flon and Mary De Flon to 4.2 cubic feet per second of time of said waters, the said appropriation and right of said Plaintiff Louisa Irwin is hereby adjudged and decreed to be a prior and preferred appropriation and right over and superior to the right or appropriation of any other party hereto,-and, saving as to and subject to the said right and appropriation of said do-defendants herein, and each, every and all of them, their and each, every and all of their agents, attorneys, successors in interest, grantees, assigns, heirs, executors and administrators, and all persons claiming by, through or under them or any of them are hereby strictly and absolutely restrained and enjoined perpetually from diverting, conducting, carrying away, or in anywise or manner interfering with or obstructing the waters or flow of said Duckwater Creek so as aforesaid adjudged and decreed to and quieted and confirmed in said Plaintiff.

THIRD;-That the Co-defendants Imogene Irwin, M. P. Mendes

and Mary Mendes, his wife, now are, and by and through their grantors and predecessors in interest have ever since the_____day of _____, 18 68, been the owners and in the possession, occupation and use of the following described lands,-that is to say°-the said Co-defendant Imogene Irwin is the owner and in the possession and use of:-N.W.¼ of N.W.¼, S.W.¼ of N.W.¼ and N.W.¼ of S.W.¼ of section 27:-SE¼ of NE¼, NE¼ of SE¼, N½ of NE¼ and SW¼ of NE¼ of section 28, and SE¼ of SW¼, W½ of SE¼ and SE¼ of SE¼ of section 21, all in township 12 N., R. 56 E. M.D.B.&M., containing 480 acres, situate on Duckwater Creek, in Nye County, Nevada,--and

The said Co-defendants W. F. Mendes, and Mary Mendes, his wife, are the owners and in the possession and use of:-E½ of SE¼ of sec. 18:- W½ of NE¼ and S½ of section 17; SW¼ of SW¼ of section 16;- W½ of NW¼ and NE¼ of NW¼ and NW¼ of NE¼ and E½ of NE¼ of section 2-; and NW¼ of Section 21, - all in township 12 N., R. 56 E. M. D. B. & M., situate on Duckwater Creek in Nye County, Nevada.

The said Co-defendant Imogene Irwin, and W. F. Mendes and Mary Mendes, his wife, now are, and by and through their respective grantors and predecessors in interest have, ever since the said _____day of_____, 1868, been the owners respectively and in the actual, continuous and beneficial possession and user of certain of the waters and flow of said Duckwater Creek as follows:-

The said Co-Defendant Imogene Irwin of 7.15 cubic feet per second of time of the waters and flow of said creek, in connection with and for the irrigation of her said lands, measured at her headgates or points of diversion.

The said co-defendants, W. F. Mendes and Mary Mendes, his wife, of 4.2 cubic feet per second of time of the waters and flow of said creek, inconnection with and for the irrigation of their said lands, measured at their head-gates or points of diversion.

That the appropriation and use of the waters of said creek by said Co-defendant Imogene Irwin as aforesaid and by said co-defendants W. F. Mendes and Mary Mendes, his wife, as aforesaid, are contemporaneous and equal in point of time and right,-in the respective quantities to them above adjudged and decreed.

That, saving as to and subject to the said right and appropriation of 4.2 cubic feet per second of said waters hereinabove adjudicated to said co-defendants Mrs. Bertha Risch (nee De Flon), Charles De Flon and Mary De Flon, and the said right and appropriation of 7.15 cubic feet per second of time of said waters hereinabove adjudicated to said Plaintiff Louisa Irwin, the said respective rights and appropriations of said co-defendants Imogene Irwin and W. F. Mendes and Mary Mendes as aforesaid, are hereby adjudged and decreed to be quieted and forever confirmed in said co-defendants remaining co-defendants herein, and each, every and all of them, their and each of their agents, attorneys, successors in interest, grantees, assigns, heirs, executors and administrators and all persons claiming by, through or under them or any of them, are hereby strictly and absolutely restrained and enjoined perpetually from diverting, conducting, carrying away or in any wise or manner interfering with or obstructing the waters or flow of said Duckwater Creek so as aforesaid adjudged and decreed to and quieted and confirmed in said co-defendants Imogene Irwin and W.F. Mendes and Mary Mendes.-

FOURTH;-That the defendant J. J. Tognoni now is, and by and through his grantors and predecessors in interest has, ever since the _____day of_____,1870, been the owner and in the possession, occupation and use of the following described lands;- N½ of SW¼ and S½ of SW¼ of section 21:- S. W. ¼ of N. W. ¼ and W.½ of S.W.¼ of sec. 34;-and N.E.¼ of N.W.¼ of sec.28, all in T. 12 N., R. 56 E. M.D.B.&M., situate on Duckwater Creek in Nye County, Nevada.

That said Defendant J. C. Tognoni now is, and by and through his grantors and predecessors in interest has ever since said____ day of _____, 1870 been the owner and in the actual, continuous and beneficial user of 1.7 cubic feet of water per second of time of the water and flow of said Duckwater Creek, Nye County, Nevada, in connection with and for the irrigation of his said lands, measured at his head-gates or points of diversion at or near said above described lands, subject and subordinate however to each, all and every of the appropriations and rights hereinabove set out, described, adjudged and decreed, and saving as to, and subject and subordinate to each, all and every of the appropriations and rights hereinbefore decreed, said defendant, J.C.Tognoni's said appropriation and right to the use of 1.7 cubic feet per second of time of the waters and flow of said Duckwater Creek is hereby adjudged and decreed to be forever quieted and in him confirmed; and the said plaintiff and the co-defendants and the remaining defendants herein, and each, every and all of them, their and each of their agents, attorneys, successors, in interest, grantees, assigns, heirs, executors, and administrators, and all persons claiming by, through or under them or any of them, are, saving and excepting as to their respective rights hereinbefore decreed, hereby strictly and absolutely restrained and enjoined perpetually from diverting, conducting, carrying away, or in any wise or manner obstructing or interfering with the waters or flow of said Duckwater Creek as aforesaid adjudged and decreed to and quieted and confirmed in said defendant.

FURTHER ORDERED, ADJUDGED AND DECREED:

I.

That the said parties are the owners of and entitled to the use of the surplus waters and flow of said Duckwater Creek, if any there be, for the irrigation and cultivation of their said lands and for stock and domestic purposes, and that the same be divided among them pro-rata according to the amounts of their several rights and appropriations as hereinbefore decreed to them;-and that none

of the other parties appearing to or having defaulted in this action have any right to any of the said waters of said stream.

II.

That the portion of said Duckwater Creek known and described as and called the "West Channel" thereof shall be kept free and clear of debris and shall be kept cleaned out at the cost and expense of said Plaintiff Louisa Irwin, said Defendant J. C. Tognoni and said co-defendant Imogene Irwin, who shall divide and pay such cost and expense pro-rata according to the amounts of their several appropriations hereinbefore decreed to them.

III.

That on or before March 15,1910, each of the parties appearing hereto and whose rights have been decreed hereby shall install and thereafter maintain at or near their respective points of diversion of said Duckwater Creek good and substantial headgates and measuring wiers as provided by law, through which the waters to which the said parties are hereby respectively decreed shall flow.

IV.

That the costs of this cause shall be taxed as this court may hereafter order.

Done in open Court at Tonopah, Nye County, Nevada, this 1st day of December, 1909.

(Signed) Mark A. Averill,

Judge.

IN THE FIFTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

IN AND FOR THE COUNTY OF NYE.

LOUISA IRWIN,

Plaintiff,

vs.

JOSEPH C. TOGNONI, MYRTLE TOGNONI, his wife, JOSEPH TOGNONI, his son, and

JOHN CROSS,

Defendants.

and

MRS. BERTHA RISCH, (nee De Flon), CHARLES DE FLON, MARY DE FLON, W. F. MENDES, MRS. MARY MENDES, IMOGENE IRWIN, JOSEPH TOGNETTI alias BIRCH, MRS. ANNIE TOGNETTI alias BIRCH, CHARLES IRVING, Mrs. HERMIE IRVING, PAUL, IRWIN, RALPH IRWIN and FRED IRWIN,

Co-defendants.

1909

DECREE

This cause came regularly on for trial on November 17, 1909, before the Court sitting without a jury, - a jury trial having been duly waived in open Court by all the parties before the Court,-upon the complaint of Plaintiff,-the answer, counter claim and cross-complaint of the defendant, Joseph C. Tognoni, and the Answers of the Co-defendants Mrs. Bertha Risch (nee De Charles De Flon, Mary De Flon, W. F. Mendes, Mary Mendes, ogene Irwin to said cross-complaint of defendant, and the and disclaimer of co-defendants Paul Irwin, Ralph Irwin ed Irwin thereto;-the said Plaintiff Louisa Irwin and the endants Imogene Irwin, Paul Irwin, Ralph Irwin and Fred Irwin appearing in person and by their attorneys , McIntosh

Duckwater Creek

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Cooke;-the said Defendant Joseph C. Tognoni appearing in person and be his attorneys Messrs. Burritt & Kepner and P. E. Keeler, Esqu:-and the said Mrs. Bertha Risch (nee De Flon), Charles De Flon, Mary De Flon, W. F. Mendes and Mary Mendes, co-defendants, appearing in person and by their attorneys, Messrs. Cheney, Massey & Price:--and the default of the defendants Myrtle Tognoni, Joseph Tognoni and John Cross, and the co-defendants Charles Irving, Hermie Irving his wife, and Joseph Tognetti, alias Birch, and Annie Tognetti, Alias Birch, being duly taken;--

Witnesses were sworn and examined and cross examined and documentary evidence adduced by the respective parties, and the trial of said cause proceeded with from said November 17, 1909 from day to day until December 1, 1909,--WHEREUPON, and before the completion of the trial and hearing of said cause, by consent and agreement in open court by all the parties before the court the evidence was closed and findings of fact and conclusions of law were by all the parties aforesaid waived;--and, subject to the approval of the Court, it was thereupon by said parties further consented and agreed in open Court that final judgement and decree be made and entered in this cause as hereinafter set forth.--

And said cause being thereupon duly by all the parties as aforesaid submitted to the Court for its decision, and the Court being fully advised in the premised,--the law and the facts and said consent and agreement of said parties being by the Court here considered and fully understood.--

IT IS HEREBY ORDERED, ADJUDGED AND DECREED:----------

FIRST:-That the Co-defendants Mrs. Bertha Risch (nee De Flon), Charles De Flon and Mary De Flon now are, and by and through their grantors and predecessors in interest have ever since the _____day of_____1866, have been the owners and

in the possession, occupation and use of the following described lands, to wit- E½ of E½ of Sec. 1 and E½ of N.E.¼ of Section 12 T. 12 N., R. 55 E;-W½ of Sec. 6; S.E.¼ of Sec. 6;-Sec. 7; S.W.¼ of N.W.¼ and W½ of S.W.¼ and S.E.¼ of S.W.¼ of Sec. 8; N.E.¼ of N.E.¼ of Sec. 18, and N.W.¼ of Sec. 17, T. 12 N., R. 56 E., M.D.B.&M.--situate on Duckwater Creek, in Nye County, Nevada:-

That said Co-defendants Mrs. Bertha Risch (nee De Flon), Charles De Flon and Mary De Flon now are, and by and through their grantors and predecessors in interest have ever since the_____ day of_____, 1866, been the owners and in the actual, continuous and beneficial possession and user of 4.2 cubic feet of water per second of time of the waters and flow of said Duckwater Creek, Nye County, Nevada, in connection with and for the irrigation of their said lands, measured at said Co-defendants' head-gates or points of diversion, and that same is hereby decreed to be a prior and preferred appropriation and right to the use of the waters of said creek over and superior to the right or appropriation of any other party hereto and is hereby adjudged and decreed to be forever quieted and confirmed in said co-defendants;- and the said Plaintiff and Defendants and remaining co-defendants and each and all of them, their and each of their agents, attorneys, successors in interest, grantees, assigns, heirs, executors and administrators, and all persons claiming by, through or under them or anyof them, are hereby strictly and absolutely restrained and enjoined perpetually from diverting, conducting or carrying away, or in any wise or manner whatsoever obstructing or interfering with the waters or flow of said Duckwater Creek so as aforesaid adjudged and decreed to and quieted and confirmed in said co-defendants Mrs. Bertha Risch (nee De Flon), Charles De Flon and Mary De Flon.

SECOND:- That the Plaintiff Louisa Irwin now is, and by and through her grantors and predecessors in interest has ever since the 20th day of August, 1867, been the owner and in the possession, occupation and use of the following described lands, to wit:-

N.E.¼ of the N.W.¼, N. ½ of the N.E.¼ and the S.E.¼ of the N.E.¼ of section3;-and the N.W.¼ of the N.W.¼ and the S½ of the N.W.¼, the E. ½ of the S.W.¼ and W. ½ of the S.E.¼ of Sec. 2, all in township 11 N., R. 56 E. M. D. B. & M., containing 480 acres and situate on Duckwater Creek, in Nye County, Nevada.

That said Plaintiff, Louisa Irwin, now is, and by and through her said grantors and predecessors in interest has ever since said 20th day of August 1867, been the owner and in the actual, continuous and beneficial possession and user of 7.15 cubic feet of water per second of time of the waters and flow of said Duckwater Creek, Nye County, Nevada, in connection with and for the irrigation of her said lands, measured at Plaintiff's head-gates or points of diversion,-and that, subject only to the prior appropriation and right hereinbefore adjudged and decreed to said Co-defendants Mrs. Bertha Risch (nee De Flon), Charles De Flon and Mary De Flon to 4.2 cubic feet per second of time of said waters, the said appropriation and right of said Plaintiff Louisa Irwin is hereby adjudged and decreed to be a prior and preferred appropriation and right over and superior to the right or appropriation of any other party hereto,-and, saving as to and subject to the said right and appropriation of said do-defendants herein, and each, every and all of them, their and each, every and all of their agents, attorneys, successors in interest, grantees, assigns, heirs, executors and administrators, and all persons claiming by, through or under them or any of them are hereby strictly and absolutely restrained and enjoined perpetually from diverting, conducting, carrying away, or in anywise or manner interfering with or obstructing the waters or flow of said Duckwater Creek so as aforesaid adjudged and decreed to and quieted and confirmed in said Plaintiff.

THIRD;-That the Co-defendants Imogene Irwin, W. F. Mendes

and Mary Mendes, his wife, now are, and by and through their grantors and predecessors in interest have ever since the_____day of _____, 18 68, been the owners and in the possession, occupation and use of the following described lands,-that is to say°-the said Co-defendant Imogene Irwin is the owner and in the possession and use of:-N.W.¼ of N.W.¼, S.W.¼ of N.W.¼ and N.W.¼ of S.W.¼ of section 27:-SE¼ of NE¼, NE¼ of SE¼, N½ of NE¼ and SW¼ of NE¼ of section 28, and SE¼ of SW¼, W½ of SE¼ and SE¼ of SE¼ of section 21, all in township 12 N., R. 56 E. M.D.B.&M., containing 480 acres, situate on Duckwater Creek, in Nye County, Nevada,--and

The said Co-defendants W. F. Mendes, and Mary Mendes, his wife, are the owners and in the possession and use of:-E½ of SE¼ of sec. 18:- W½ of NE¼ and S½ of section 17; SW¼ of SW¼ of section 16;- W½ of NW¼ and NE¼ of NW¼ and NW¼ of NE¼ and E½ of NE¼ of section 2-; and NW¼ of Section 21, - all in township 12 N., R. 56 E. M. D. B. & M., situate on Duckwater Creek in Nye County, Nevada.

The said Co-defendant Imogene Irwin, and W. F. Mendes and Mary Mendes, his wife, now are, and by and through their respective grantors and predecessors in interest have, ever since the said _____day of_____, 1868, been the owners respectively and in the actual, continuous and beneficial possession and user of certain of the waters and flow of said Duckwater Creek as follows:-

The said Co-Defendant Imogene Irwin of 7.15 cubic feet per second of time of the waters and flow of said creek, in connection with and for the irrigation of her said lands, measured at her headgates or points of diversion.

The said co-defendants, W. F. Mendes and Mary Mendes, his wife, of 4.2 cubic feet per second of time of the waters and flow of said creek, inconnection with and for the irrigation of their said lands, measured at their head-gates or points of diversion.

That the appropriation and use of the waters of said creek by said Co-defendant Imogene Irwin as aforesaid and by said co-defendants W. F. Mendes and Mary Mendes, his wife, as aforesaid, are contemporaneous and equal in point of time and right,-in the respective quantities to them above adjudged and decreed.

That, saving as to and subject to the said right and appropriation of 4.2 cubic feet per second of said waters hereinabove adjudicated to said co-defendants Mrs. Bertha Risch (nee De Flon), Charles De Flon and Mary De Flon, and the said right and appropriation of 7.15 cubic feet per second of time of said waters hereinabove adjudicated to said Plaintiff Louisa Irwin, the said respective rights and appropriations of said co-defendants Imogene Irwin and W. F. Mendes and Mary Mendes as aforesaid, are hereby adjudged and decreed to be quieted and forever confirmed in said co-defendants remaining co-defendants herein, and each, every and all of them, their and each of their agents, attorneys, successors in interest, grantees, assigns, heirs, executors and administrators amd all persons claiming by, through or under them or any of them, are hereby strictly and absolutely restrained and enjoined perpetually from diverting, conducting, carrying away or in any wise or manner interfering with or obstructing the waters or flow of said Duckwater Creek so as aforesaid adjudged and decreed to and quieted and confirmed in said co-defendants Imogene Irwin and W.F. Mendes and Mary Mendes.-

FOURTH;-That the defendant J. C. Tognoni now is, and by and through his grantors and predecessors in interest has, ever since the _____day of_____,1870, been the owner and in the possession, occupation and use of the following described lands;- N½ of SW¼ and SW¼ of SW¼ of section 21:- S. W. ¼ of N. W. ¼ and W.½ of S.W.¼ of sec. 34;-and N.E.¼ of N.W.¼ of sec.28, all in T. 12 N., R. 56 E. M.D.B.&M., situate on Duckwater Creek in Nye County, Nevada.

That said Defendant J. C. Tognoni now is, and by and through his grantors and predecessors in interest has ever since said ____ day of _____, 1870 been the owner and in the actual, continuous and beneficial user of 1.7 cubic feet of water per second of time of the water and flow of said Duckwater Creek, Nye County, Nevada, in connection with and for the irrigation of his said lands, measured at his head-gates or points of diversion at or near said above described lands, subject and subordinate however to each, all and every of the appropriations and rights hereinabove set out, described, adjudged and decreed, and saving as to, and subject and subordinate to each, all and every of the appropriations and rights hereinbefore decreed, said defendant, J.C.Tognoni's said appropriation and right to the use of 1.7 cubic feet per second of time of the waters and flow of said Duckwater Creek is hereby adjudged and decreed to be forever quieted and in him confirmed; and the said plaintiff and the co-defendants and the remaining defendants herein, and each, every and all of them, their and each of their agents, attorneys, successors, in interest, grantees, assigns, heirs, executors, and administrators, and all persons claiming by, through or under them or any of them, are, saving and excepting as to their respective rights hereinbefore decreed, hereby strictly and absolutely restrained and enjoined perpetually from diverting, conducting, carrying away, or in any wise or manner obstructing or interfering with the waters or flow of said Duckwater Creek as aforesaid adjudged and decreed to and quieted and confirmed in said defendant.

FURTHER ORDERED, ADJUDGED AND DECREED:

I.

That the said parties are the owners of and entitled to the use of the surplus waters and flow of said Duckwater Creek, if any there be, for the irrigation and cultivation of their said lands and for stock and domestic purposes, and that the same be divided among them pro-rata according to the amounts of their several rights and appropriations as hereinbefore decreed to them;-and that none

of the other parties appearing to or having defaulted in this action have any right to any of the said waters of said stream.

II.

That the portion of said Duckwater Creek known and described as and called the "West Channel" thereof shall be kept free and clear of debris and shall be kept cleaned out at the cost and expense of said Plaintiff Louisa Irwin, said Defendant J. C. Tognoni and said co-defendant Imogene Irwin, who shall divide and pay such cost and expense pro-rata according to the amounts of their several appropriations hereinbefore decreed to them.

III.

That on or before March 15,1910, each of the parties appearing hereto and whose rights have been decreed hereby shall install and thereafter maintain at or near their respective points of diversion of said Duckwater Creek good and substantial headgates and measuring wiers as provided by law, through which the waters to which the said parties are hereby respectively decreed shall flow.

IV.

That the costs of this cause shall be taxed as this court may hereafter order.

Done in open Court at Tonopah, Nye County, Nevada, this 1st day of December, 1909.

(Signed) Mark R. Averill,

Judge.

IN THE FIFTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA,

IN AND FOR THE COUNTY OF NYE.

****

JOSEPH C. TOGNONI,
Plaintiff,

vs.

LOUISA IRWIN, CHARLES IRVING, HERMIE IRVING, PAUL IRWIN, RALPH IRWIN, IMOGENE IRWIN, FRED IRWIN, SALESTINO TOGNETTI, ANNIE TOGNETTI, WILLIAM F. MENDES, MARY MENDES, BERTHA RISCH (nee De Flon), CHARLES DE FLON and MARY DE FLON,
Defendants,

and

JOHN DOE and RICHARD ROE,
co-defendants.

1910

D E C R E E.

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THIS CAUSE came regularly on for trial on December 1, 1909, before the Court sitting without a jury - a jury trial having been duly waived - upon the Complaint of plaintiff, appearing in person and by his attorneys, Messrs. Burritt & Kepner, and P. E. Keeler, Esq.,- and upon the Separate Answer and Cross Complaint of defendant, Louisa Irwin; the Separate Answer and Cross Complaint of defendant, Imogene Irwin; the Answer and Disclaimer of defendants, Ralph Irwin, Paul Irwin, and Fred Irwin; all appearing in person and by their attorneys, Messrs. McIntosh & Cooke;- and upon the Separate Answer and Cross Complaint of defendants, W. F. Mendes and Mary Mendes; and the Separate Answer and Cross Complaint of defendants, Bertha Risch (nee De Flon), Charles De Flon, and Mary De Flon; all appearing in person and by their attorneys, Messrs. Cheney, Massey & Price, and C. L. Harwood, Esq.,-- whereupon witnesses were sworn, examined, and cross-examined, and documentary evidence adduced on behalf of the respective parties, and the

trial of said cause proceeded with from day to day, and from December 1, 1909, to December 10, 1909,- whereupon said cause was orally argued to the Court by the respective counsel, and, pursuant to stipulation and order of Court, Briefs were thereupon filed, and said cause was finally submitted onMay 9, 1910, whereupon the Court, having duly considered said cause and being fully advised in the premises, on June 13, 1910, made and filed herein its Opinion and Decision, and Findings of Fact and Conclusions of Law.

WHEREFORE, by reason of the law and the premises aforesaid--

IT IS CONSIDERED, ORDERED, ADJUDGED AND DECREED:

I.

That the plaintiff and said answering defendants are the owners of the several pieces and parcels of land in their said pleadings respectively set forth and described, and that at the time of the commencement of this action the said plaintiff and the said answering defendants respectively were, and their predecessors in interest for a long time prior thereto had been, the owners of said lands and in the possession and entitled to the possession thereof as set forth in said pleadings respectively.

II.

That that certain spring known as the Big Warm Spring, mentioned and described in the pleadings herein, is and has been the principal source of supply of water of that certain natural stream, mentioned and described in the pleadings herein as Duckwater Creek, and that the lake and swamp of the said Big Warm Spring at the time of the commencement of this action was, and for a long time prior thereto had been, and now is, one of the sources of the supply of water of Duckwater Creek.

III.

That prior to the year 1906, the waters of said Duckwater Creek had been appropriated, diverted and used for a beneficial purpose, at the time, by the persons, in the order of priority, in the amounts and quantity, and in connection with the lands mentioned and described in that certain judgment and decree made and entered in this Court on the 1st day of December, 1909, in that certain action entitled Louisa Irwin, plaintiff, vs. J. C. Tognoni, Myrtle Tognoni, his wife, Joseph Tognoni, his son, and John Cross, defendants, and John Doe, Richard Roe, William Woe, Ivan Ioe, and Mary Moe, co-defendants,- which said judgment and decree is still in full force and effect.

IT IS ORDERED, ADJUDGED AND DECREED that nothing in this judgment granted, ordered, adjudged or decreed shall in any manner impair, modify, lessen or alter the rights and things in and by said judgment and decree of December 1st, 1909, adjudicated and determined, or any of the rights of the parties thereto or thereunder to the waters of said Big Warm Spring.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the diversion and appropriation by the plaintiff herein under and by virtue of the permit of the State Engineer, set forth in said plaintiff's Complaint, bearing date of September 5th, 1908, was wrongful and without authority of law, and the said plaintiff, Joseph C. Tognoni, his servants, agents, attorneys and persons acting by or under him are perpetually enjoined and restrained from taking, diverting, using or interfering with any of the waters of said Big Warm Spring or Big Warm Lake or Slough, or in any manner interfering with the free and natural flow therefrom down to and into said Duckwater Creek, otherwise than when and in the manner hereinafter specifically permitted and

conditionally set forth and described.

IV.

That the defendants Bertha Risch (nee De Flon), Charles De Flon and Mary De Flon are, and they and their predecessors in interest since the year 1882 have been, the owners by diversion, appropriation and use for a beneficial purpose of two cubic feet of water per second, whenever the same is needed for the irrigation of the lands described in their answer herein, from the overflow of the Big Warm Spring Lake, and that said diversion shall be effected by means of head gates or wiers constructed as required by the laws of the State of Nevada, and that said ditches or other means of conveyance of said water shall be constructed so as to carry said water to the place of the use without unnecessary loss or waste. But their right to the diversion and use of said waters for said, or any, purpose is subordinate to the right of the several parties to the quantity of water to them definitely decreed and the priority mentioned in said decree of December 1st, 1909, though the right of said Bertha Risch (nee De Flon), Charles D e Flon and Mary De Flon to the use of said two cubic feet per second of said water for irrigation is superior to any right or title set forth or claimed by the plaintiff in this action, or which said plaintiff may acquire upon compliance with the terms of this decree as hereinafter set forth.

V.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that there is a present undeterminable quantity of unappropriated water in the supply upon the Big Warm Spring Plateau, the appropriation and diversion of which is hereby declared to be detrimental to the public welfare, and to invade or impair the rights of the appropriators of the waters of said Duckwater

Creek, unless works of control are constructed as hereinafter set forth, under the control of this Court and under its supervision, and to be exercised through an officer of this Court properly authorized, And that the plaintiff herein shall bear the expense of all works of control necessary to secure to the users of water below him their appropriations as fixed by decrees of this Court, and to ascertain and secure to himself an appropriation of said unappropriated waters, and that the amount of the unappropriated waters of said Big Warm Spring and said Big Warm Spring Slough or Lake can be practically determined only by the construction and operation of works of control.

VI.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that said works of control shall consist of the following:

a. Of a canal sufficiently large to carry all the outflow of B ig Warm Spring from the channel of B ig Warm Spring to Duckwater Creek proper a short distance below King Spring without leakage or overflow, said canal to be free from sharp turns or angles.

b. Of a water-tight dam, at the point where said canal leaves the Big Warm Spring Channel, of proper size, structure and strength to hold the water of said channel within said channel, and provided with a gate of sufficient size and strength to control absolutely the flow of said water into said canal, or to prevent absolutely its flow into said canal, whenever necessary.

c. Of a water-tight dam, across the channel of Big Warm Spring below the point of beginning of said canal, or proper size, structure and strength to turn the water of said channel into said canal, and provided with a gate of sufficient size and strength to control absolutely the flow of said waters through said channel.

d. Of wiers at all points of diversion by ditches along said canal, having gates of sufficient size and strength to control absolutely the flow of water into said ditches.

All of said works of control shall be of a permanent and substantial character, and all of said gates shall be easy and effective of operation, and so arranged that they may be locked in place whether opened, partly opened, or wholly closed, and shall be provided with locks, the keys of which shall be held by the water Commissioner, hereinafter referred to, or in the event of his non-appointment, by such officer of this Court as may be exercising supervision under this decree.

VII.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the necessity of complete protection to those entitled to the use of the water of Duckwater Creek requires that this Court should maintain supervision over the distribution and use of the water on the upper reaches of said stream, and over all the works of control herein authorized to be maintained and constructed, to which condition said plaintiff must agree in writing, duly signed and filed herein, before this decree shall in any manner go into effect in his behalf.

VIII.

The appointment of a Water Commissioner for the months of May, June, July, August and September of each year, until the further order of this Court, shall be secured from the State Board of Irrigation, subject to the approval of this Court; and if, for any reason, such officer shall not be appointed by said Board this Court reserves the right to select some suitable person to supervise the works of control herein described and the distribution of water in connection therewith. Said Water Commissioner, or other person, shall act under and in accordance

with this decree.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED, that at all times a flow of water shall be maintained in said canal and through the same into Duckwater Creek sufficient to keep the said Creek up to a point that marks the normal flow of the stream, and no diversion shall at any time be allowed that will reduce the said Creek below the volume needed to supply its normal flow, or which will deprive the users of water on said Duckwater Creek of any portion of the amount which they are entitled to have under the decrees of this Court heretofore made and entered, based upon said normal flow in the vicinity of the old stone mill.

IX.

IT IS FURTHER ORDERED, ADJUDGE D AND DECREED that the plaintiff herein, his agents, servants, employees or any other person acting under him shall not divert any water from the Big Warm Spring or any other body of water on the B ig Warm S pring P lateau, or in the vicinity thereof, until the said works of control shall be completed and approved by this Court, or an officer thereof appointed for the purpose, and thereafter only in accordance with this decree, and that the State Engineer's permit to the plaintiff, set forth in his complaint herein, bearing date of S eptember 15th, 1908, is annulled or modified to the extent necessary to render it consistent with this decree.

X.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that whenever, after the completion and approval of said works of control as herein provided, the waters of Big Warm Spring are not in use under this decree, and are not needed to keep up the normal flow of Duckwater Creek, the gate of the dam in the channel of Big Warm Spring shall be left open so that water may flow into Big Warm Spring Lake, swamp and ponds.

XI.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that if any other person than a State Water C ommissioner shall exercise supervision under this decree his services must be paid for by the plaintiff herein, but he shall be paid for only such services as he may render, and if possible such person shall be selected from the residents of the Duckwater region so that this expense may be kept at a low figure.

XII.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the temporary injunction and restraining order heretofore issued in this action in favor of the said plaintiff and against the said defendant, or either of them, be, and the same is, hereby set aside, vacated and annulled.

XIII.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that unless said plaintiff shall, on or before the 1st day of August, 1910, make and file herein the acknowledged written consent, hereinbefore mentioned, and shall on or before the 1st day of April, 1911, construct to the satisfaction and approval of this Court, or the Judge thereof, the works of control herein described and required, the foregoing decree and injunction against said plaintiff shall thereupon become absolute, and the permission hereby given to plaintiff to construct said works of control and appropriate the water saved thereby shall thereupon wholly cease, terminate and thereafter beof no further validity, force or effect.

XIV.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the plaintiff herein, his agents, servants, employees and any and all persons whomsoever acting or claiming by, through or under said

plaintiff, are hereby perpetually enjoined from making any appropriation of waters from said Big Warm Spring, or the Big Warm Spring S lough or Lake, or diverting any waters therefrom, save as hereinabove expressly permitted and conditionally allowed, and in the event said plaintiff shall, for any reason, fail, neglect or refuse to keep and compl y with all and singular the conditions of this decree to be by him kept and complied with in the time and manner as specified, or in the event said plaintiff shall, for any reason, fail or refuse to do and perform all and singular the conditions precedent as required by this decree before plaintiff shall be entitled to divert any waters from said Big Warm Spring or Lake, in the time and manner as by this decree specified, then and in such event said plaintiff and all persons whomsoever acting by, through or under him, are perpetually enjointed from diverting any of said waters, and from digging any ditches, drains or canals leading therefrom, or in any wise or manner whatsoever interferring with said Big Warm Spring, or the said Big Warm Spring Slough or Lake.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the said answering defendants do have and recover from the said plaintiff their respective costs and disbursements herein, taxed at $90.10 in the aggregate in favor of the defendants Louis a Irwin and Imogene Irwin; and $_____) in the aggregate in favor of the defendants William Mendes, Bertha Risch, Charles De Flon and May De Flon.

DONE in open Court this 20th day of June, 1910.

Mark R. Averill.
District Judge.

CERTIFICATE OF CLERK

E OF NEVADA,
County of Nye } ss.

I, Robert G. Pohl, County Clerk of Nye County, State of Nevada, and Ex-Officio f the District Court of the Fifth Judicial District of the State of Nevada, in and County of Nye, do hereby certify the foregoing and annexed to be a true and correct the DECREE in the case of Joseph C. Tognoni, plaintiff, v. ouisa Irwin, et. al., defendants, being case No. 2238.--

x

x

x

x

ne appears on file and of record in my office at Tonopah, County and State afore-

Attest my hand and seal of said Court, this 15th *day of* February, 1912. *A. D. 190*

Robert G. Pohl. *Clerk.*

By Lowell Daniels *Deputy.*

Duckwater Creek

IN THE FIFTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

IN AND FOR THE COUNTY OF NYE.

JOSEPH C. TOGNONI,

Plaintiff.

Vs.

LOUISA IRWIN, CHARLES IRVING, HERMIE IRVING, PAUL IRWIN, RALPH IRWIN, IMOGENE IRWIN, FRED IRWIN, SALESTINO TOGNETTI, ANNIE TOGNETTI, WILLIAM F. MENDES, MARY MENDES, BERTHA RISCH (nee DE Flon) CHARLES DE FLON AND MARY DE FLON,
Defendants,

and

JOHN DOE AND RICHARD ROE
Co-defendants.

D E C R E E

This cause came regularly on for trial on December 1, 1909, before the Court, sitting without a jury-a jury trial having been duly waived-upon the Complaint of Plaintiff, appearing in person and by his attorneys, Messrs. Burritt & Kepmer, and P. E. Keeler, Esq., and upon the separate answer and cross complaint of defendant, Louis Irwin: the Separate Answer and Cross Complaint of defendant, Imogene Irwin; the answer and disclaimer of defendants, Ralph Irwin, Paul Irwin; and Fred Irwin; all appearing personally and by their attorneys, Messrs. McIntosh & Cooke:-and upon the separate Answer and Cross Complaint of Defendants, W. F. Mendes, and Mary Mendes; and the Separate Answer and Cross Complaint of Defendants, Bertha Risch (nee De Flon), Charles De Flon, and Mary De Flon; all appearing in person and by their attorneys, Messrs. Cheney, Massey & Price, and C. L. Harwood, Esq.;--whereupon witnesses were sworn, examined and cross-examined, and documentary evidence adduced on behalf of the respective parties, and the trial of said cause proceeded with

from day to day, and from December 1, 1909, to December 10, 1909, whereupon said cause was orally argued to the court by the respective counsel, and, pursuant to stipulation and Order of Court, Briefs were thereupon filed, and said cause was finally submitted on May 9, 1910, whereupon the court, having duly considered said cause and being fully advised in the premises, on June 13, 1910, made and filed herein its Opinion and Decision, and Findings of Fact and Conclusions of Law.

WHEREFORE, by reason of the law and the premises aforesaid-

IT IS CONSIDERED, ORDERED, ADJUDGED AND DECREED:

I.

That the plaintiff and said answering defendants are the owners of several pieces and parcels of land in their said pleadings respectively set forth and described, and that at the time of the commencement of this action the said plaintiff and the said answering defendants respectively were, and their predecessors in interest for a long time prior thereto had been, the owners of said lands and in the possession and entitled to the possession thereof as set forth in said pleadings respectively.

II.

That certain spring known as the Big Warm Spring, mentioned and described in the pleadings herein, is and has been the principal source of supply of water of that certain natural stream, mentioned and described in the pleadings herein as Duckwater Creek, and that the lake and swamp of the said Big Warm Spring at the time of the commencement of this action was, and for a long time prior thereto had been, and now is, one of the sources of the supply of water of Duckwater Creek.

III.

That prior to the year 1906, the waters of said Duckwater

creek had been appropriated, diverted and used for a beneficial purpose, at the time, by the persons, in the order of priority, in the amounts and quantity, and in connection with the lands mentioned and described in that certin judgment and decree made and entered in this Court on the 1st day of December, 1909, in that certin action entitled Louisa Irwin, Plaintiff, vs. J. C. Tognoni, Myrtle Tognoni, his wife, Joseph Tognoni, his son , and John Cross. Defendants, and John Doe, Richard Roe, William Woe, Ivan Ioe, and Mary Moe, Co-defendants,-which said judgment and decree is still in force and effect.

IT IS ORDERED, ADJUDGED AND DECREED that nothing in this judgment granted, ordered, adjudged or decreed shall in any manner impair, modify, lesson or alter the rights and things in and by said judgment and decree of December 1st, 1909, adjudicated and determined, or any of the rights of the parties thereto or thereunder to the waters of said Big Warm Spring.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the diversion and appropriation by the plaintiff herein under and by virtue of the permit of the State Engineer, set forth in said plaintiff's Complaint, bearing date September 5th, 1908, was wrongful and without authority of law, and the said plaintiff, Joseph C. Tognoni, his servants, agents, attorneys and persons acting by or under him are perpetually enjoined and restrained from taking, diverting, using or interfering with any of the waters of said Big Warm Spring or Big Warm Lake or Slough, or in any manner interfering with the free and natural flow therefrom down to and into said Duckwater Creek, otherwise than when and in the manner hereinafter specifically permitted and conditionally set forth and described.

IV.

That the defendants Bertha Risch (nee De Flon), Charles De Flon and Mary De Flon are, and they and their predecessors in interest since the year 1882 have been, the owners by diverion, appropriation and use for a beneficial purpose of two cubic feet of water

per second, whenever the same is needed for the irrigation of the lands described in their answer herein, from the overflow of the Big Warm Spring Lake, and that said diversion shall be effected by means of head gates or weirs constructed as required by the laws of the State of Nevada, and that said ditches or other means of conveyance of said water shall be constructed so as to carry said water to the place of the use without unnecessary loss or waste. But their right to the diversion and use of said waters for said, or any, purpose is subordinate to the right of the several parties to the quantity of water to them definitely decreed and the priority mentioned in said decree of December 1st, 1909, though the right of said Bertha Risch (nee De Flon), Charles De Flon and Mary De Flon to the use of said cubic feet per second of said water for irrigation is superior to any right or title set forth or claimed by the plaintiff in this action, or which said plaintiff may acquire upon compliance with the terms of this decree as hereinafter set forth.

V.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that there is a present undeterminable quantity of unappropriated water in the supply upon the Big Warm Spring Plateau, the appropriation and diversion of which is hereby declared to be detrimental to the public welfare, and to invade or impair the rights of the appropriators of the waters of said Duckwater Creek, unless works of control are constructed as hereinafter set forth, under the control of this Court and under its supervision, and to be exercised through an officer of this Court properly authorized. And that the plaintiff herein shall bear the expense of all works of control necessary to secure to the users of water below him their appropriations are fixed by decrees of this Court, and to ascertain and secure to himself an appropriation of said unappropriated waters, and that the amount of the unappropriated waters of said Big Warm Spring and said Big Warm Spring Slough or Lake can be practically determined only by the construction and operation of works of control.

VI.

IT IS FURTHER ORDERED ADJUDGED AND DECREED that said works of control shall consist of the following:

a. Of a canal sufficiently large to carry all the out-flow of Big Warm Spring from the channel of Big Warm Spring to Duckwater Creek proper a short distance below King Spring without leakage or overflow, said canal to be free from sharp turns or angles.

b. Of a water-tight dam, at the point where the said canal leaves the Big Warm Spring Channel, or proper size, structure and strength to hold the water of said channel within said channel, and provided with a gate of sufficient size and strength to control absolutely the flow of said water into said canal, or to prevent absolutely its flow into said canal, whenever necessary.

c. Of a water-tight dam, across the channel of Big Warm Spring below the point of beginning of said canal, or proper size structure and strength to turn the water of said channel into said canal, and provided with a gate of sufficient size and strength to control absolutely the flow of said waters through said canal.

d. Of wiers at all points of diversion by ditches along said canal, having gates of sufficient size and strength to control absolutely the flow of water into said ditches.

all of said works of control shall be of a permanent and substantial character, and all of said gates shall be easy and effective of operation, and so arranged that they may be locked in place whether opened, partly opened, or wholly closed, and shall be provided with locks, the keys of which shall be held by the Water Commissioner, hereinafter referred to, or in the event of his non-appointment, by such officer of this Court as may be exercising supervision under this decree.

VII.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the necessity of complete protection to those entitled to the use of the

water of Duckwater Creek requires that this court shall maintain super-vision over the distribution and use of the water on the upper reaches of said stream, and over all the works of control herein authorized to be maintained and constructed, to which condition said plaintiff must agree in writing, duly signed and filed herein, before this decree shall in any manner go into effect in his behalf.

VIII.

The appointment of a Water Commissioner for the months of May, June, July, August and September of each year, until the further order of this court, shall be secured from the State Board of Irrigation, subject to the approval of this Court; and if, for any reason, such officer shall not be appointed by said Board this court reserves the right to select some suitable person to supervise the works of control herein described and the distribution of water in connection therewith. Said Water Commissioner, or other person, shall act under and in accordance with this decree.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED, that at all times a flow of water shall be maintained in said canal and through the same into Duckwater Creek sufficient to keep the said Creek up to a point that marks the normal flow of the stream, and no diversion shall at any time be allowed that will reduce the said creek below the volume needed to supply its normal flow, or which will deprive the users of water on said Duckwater Creek of any portion of the amount which they are entitled to have under the decrees of this court heretofore made and entered, based upon said normal flow in the vicinity of the old stone mill.

IX.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the plaintiff herein, his agents, servants, employees or any other person acting under him shall not divert any water from the Big Warm Spring or any other body of water on the Big Warm Spring Plateau,

or in the vicinity thereof, until the said works of control shall be completed and approved by this Court, or an officer thereof appointed for the purpose, and thereafter only in accordance with this decree, and that the State Engineers permit to the plaintiff, set forth in his complaint herein, bearing date of September 15th, 1908, is annulled or modified to the extent necessary to render it consistent with this decree.

X.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that whenever, after the completion and approval of said works of control as herein provided, the waters of Big Warm Spring are not in use under this decree, and are not needed to keep up the normal flow of Duckwater Creek, the gate of the dam in the channel of Big arm Spring shall be left open so that water may flow into Big Warm Spring Lake, swamp and ponds.

XI.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that if any other person than a State Water Commission er shall exercise supervision under this decree his services must be paid for by the plaintiff herein, but he shall be paid for only such services as he may render, and if possible such person shall be selected from the residents of the Duckwater region so that this expense may be kept at a low figure.

XIII.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the temporary injunction and restraining order heretofore issued in this action in favor of the said plaintiff and against the said defendants, or either of them, be, and the same is, hereby set aside, vacated and annulled.

XIII.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that unless said plaintiff shall, on or before the _____day of_____ 19___, make and file herein the acknowledged written consent hereinbefore mentioned, and shall on or before the 1st day of April

1911, construct to the satisfaction and approval of this Court or the Judge thereof, the works of control herein described and required, the foregoing decree and injunction against said plaintiff shall thereupon become absolute, and the permission hereby given to plaintiff to construct said works of control and appropriate the water saved thereby shall thereupon wholly cease, terminate and thereafter be of no further validity, force or effect.

XIV.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the plaintiff herein, his agents, servants, employees and any and all persons whomsoever acting or claiming by, through or under said plaintiff, are hereby perpetually enjoined from making any appropriation of waters from said Big Warm Spring, or the Big Warm Spring Slough or Lake, or diverting any waters therefrom, save as hereinabove expressly permitted and conditionally allowed, and in the event said plaintiff shall, for any reason, fail, neglect, or refuse to keep or comply with all and singular the conditions of this decree to be by him kept and complied with in the time and manner as specified, or in the event said plaintiff shall, for any reason, fail or refuse to do and perform all and singular the conditions precedent as required by this decree before plaintiff shall be entitled to divert any waters from said Big Warm Spring or Lake, in the time and manner as by this decree specified, then and in such event said plaintiff and all persons whomsoever acting by, through or under him, are perpetually enjoined from diverting any of said waters, and from digging any ditches, drains or canals leading therefrom, or in anywise or manner whatsoever interfering with said Big Warm Spring, or the said Big Warm Spring Slough or Lake,

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the said answering defendants do have and recover from the said plaintiff their respective costs and disbursements herein taxed at $___ in the aggregate.

Done in open court this 20th day of June, 1910.

(Signed) Mark H. Averill - District Judge

Duckwater Creek

[illegible]

[illegible] to December 10, 1909, [illegible] by the Court by the respective [illegible] and Order of Court, briefs [illegible] 7, 1910, [illegible] having [illegible] and being fully advised in the premises, on June 15, 1910, [illegible] and filed herein its Opinion and Decision, and Findings of Fact and Conclusions of Law,

WHEREFORE, by reason of the law and the premises aforesaid-

IT IS CONSIDERED, ORDERED, ADJUDGED AND DECREED:

I.

That the plaintiff and said answering defendants are the owners of the several pieces and parcels of land in their said pleadings respectively set forth and described, and that at the time of the commencement of this action the said plaintiff and the said answering defendants, respectively were, and [illegible] in interest for a long time prior thereto had been the owners of said lands and in the possession and entitled to the possession thereof as set forth in said pleadings respectively.

II.

That that certain spring known as the Big Warm Springs mentioned and described in the pleadings herein [illegible] the [illegible] and that the [illegible] at the time of the commencement of this action was, and for a long time prior thereto had been, and [illegible] of the supply of water of [illegible].

III.

That prior to the year 1905, the waters of said Duckwater

Creek had been [illegible] for a [illegible] purpose, at [illegible] by the [illegible] order [illegible] in the [illegible] and in [illegible] with [illegible] [illegible] certain judgment and decree made and [illegible] [illegible] plaintiff, [illegible] Myrtle Tognoni, his wife, Joseph Tognoni, his son, and [illegible] [illegible] and John Doe, [illegible] Roe, William Roe, Ivan Doe, [illegible] [illegible] in force and effect.

IT IS ORDERED, ADJUDGED AND DECREED that nothing in this judgment granted, ordered, adjudged or decreed shall in any manner impair, modify, lessen or alter the rights and things in and by said judgment and decree of December 1st, 1909, [illegible] [illegible] or any of the rights of the [illegible] to the waters of said Big Warm Spring.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the diversion and appropriation by the plaintiff herein under and by virtue of the permit of the State Engineer, set forth in said [illegible] Complaint, bearing date September 8th, 1909, was wrongful and without authority of law, and the said plaintiff, Joseph C. Tognoni, his servants, agents, attorneys and persons acting by or under him are perpetually enjoined and restrained from taking, diverting, using or interfering with any of the waters of said Big Warm Spring or Big Warm Lake or [illegible] in any manner interfering with the free and natural flow [illegible] into said [illegible] Creek, otherwise than then and in the manner hereinafter specifically permitted and conditionally set forth and decreed.

IV.

That the defendants Bertha Rich (nee De Flon), Charles De Flon and Mary De Flon are, and they and their predecessors in interest since the year 1888 have been, the owners by diversion, appropriation and use for a beneficial purpose of two cubic feet [illegible]

[illegible]

overflow, said canal to be free from [illegible]

b. Of a [illegible] [illegible]

[illegible]

c. Of [illegible]

[illegible]

d. Of [illegible] said canal, having gates of [illegible] absolutely the flow of water into [illegible].

All of said works of control shall be of a permanent and substantial character, and all of said gates shall be [illegible] of operation, and so arranged that they [illegible] partly opened, [illegible] be provided with locks, [illegible] Water Commissioner, hereinafter referred to, or in the event of his non-appointment, by such officer of this Court [illegible] exercising supervision [illegible].

VII.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the [illegible] of complete protection to those entitled to the use of the water

[illegible] requires that this [illegible]

[illegible] use of the [illegible]

[illegible]

[illegible] to be maintained and [illegible]

[illegible] plaintiff must agree in writing [illegible]

[illegible] shall in [illegible]

half.

VIII.

The appointment of a Water Commissioner for [illegible] May, June, July, August and September [illegible] ther order of this court, shall be secured [illegible] of Irrigation, subject to the approval of this Court [illegible] any reason, such officer shall not be appointed by said [illegible] [illegible] reserves the right to select [illegible]

[illegible]

[illegible] a flow of water [illegible] through the same into [illegible] Creek up to a point that [illegible] no diversion shall at any time be allowed that will reduce the said creek below the volume needed to supply its normal flow, or which will deprive the users of water on said Deckwater Creek of any portion of the amount which they are entitled to have under the decrees of this Court heretofore made and [illegible] upon said normal flow in the [illegible]

IX.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the plaintiff herein, his agents, servants, employees or any other person acting under his [illegible] any water from the Big Warm Spring or any other body of water on the Big Warm Spring Plateau,

[illegible] thereof, until the said works of control shall [illegible] approved by [illegible] Court [illegible] for the purpose, and [illegible] only in [illegible] [illegible] plaintiff, [illegible]

X.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED, that whenever, after the completion and approval of said works of control as herein provided, the waters of [illegible] [illegible] Creek, the gate of the dam [illegible] Spring shall be left open so that water may flow [illegible] Spring Lake, [illegible] ponds.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED [illegible] [illegible] plaintiff herein, but he shall be [illegible] he may render, [illegible] the residents of the Duckwater region [illegible] kept at a low figure.

XII.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the temporary injunction and restraining order [illegible] action in favor of the said plaintiff [illegible] [illegible] or either of them, [illegible]

XIII.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that [illegible] plaintiff shall, on or before the [illegible] day of _____ 19____, make and file herein the acknowledged written consent herein inbefore mentioned, and shall, on or before the 1st day of [illegible]

[redacted]