

IN
THE SUPREME COURT
OF THE
STATE OF OREGON

PENDLETON, MAY TERM, 1917.

IN THE MATTER OF THE DETERMINATION OF
THE RELATIVE RIGHTS OF THE VARIOUS
CLAIMANTS TO THE WATERS OF THE UMA-
TILLA RIVER AND ITS TRIBUTARIES, A TRIBU-
TARY OF THE COLUMBIA RIVER IN UMATILLA
COUNTY, OREGON.

Appellant's Abstract of Record

APPEAL FROM THE JUDGMENT OF THE CIRCUIT COURT FOR
UMATILLA COUNTY.

On the 7th day of May, 1909, in accordance with the provisions of Chapter 216, General Laws, 1909, there was filed in the office of the State Water Board, State of Oregon, a petition for and on behalf of the United States of America, a water user on the Umatilla River, requesting a determination of the relative rights of the various claimants to the waters of said stream, and thereupon the said State Water Board, after full investigation and due consideration of said petition, found the facts and con-

Exhibit 3

ditions such as to justify the making of a determination of the relative rights of the various claimants of the waters of said stream and its tributaries, and thereupon made and entered its order fixing a time and place for the beginning and taking of testimony by the Superintendent of Water Division No. 2, the time and place so set for the taking of testimony being Monday, the 16th day of May, 1910, at ten o'clock a. m., in the building known as the City Hall, in the Town of Echo, Umatilla County, Oregon, and Thursday, the 19th day of May, 1910, at ten o'clock a. m., in the Circuit Court Room in the Court House in the City of Pendleton in said county.

At the time and place set for taking the testimony of the various claimants, the following parties to this appeal, whose rights may be affected by the determination thereof, filed their several verified statements and proof of claim, in substance as follows:

I.

(1) The Western Land & Irrigation Company, appellant, in its Statement and Proof of Claim set forth that its post-office address was Echo, Oregon; that it claimed the right to the waters of Umatilla River, said waters to be diverted from the main stream, for irrigation and domestic use.

(2) That its claim is based on the following appropriations of water and diversion and use thereunder:

An appropriation of 10,000 inches, miner's measurement, made by Umatilla Meadows and Butter Creek Canal Company on March 8, 1891, and recorded March 11, 1891, in Umatilla County, Oregon, in Book "A" of Water Rights and Miscellaneous Contracts on page 201;

An appropriation of 50,000 cubic inches, miner's measurement, made by J. M. Jones, et al, on March 25, 1891, and recorded March 31, 1891, in Umatilla County, Oregon, in said Book "A" on page 214;

An appropriation of 80,000 inches, miner's measurement, made by the Columbia Valley Land & Irrigation Company on October 24, 1891, and recorded on November 3, 1891, in Umatilla County, Oregon, in said Book "A" on page 257; and

An appropriation of 225,000 cubic inches of water, miner's measurement, made by the Hinkle Ditch Company on March 14, 1903, and recorded on March 18, 1903, in Umatilla County, Oregon, in Book "2" of Water Rights and Miscellaneous Contracts on page 194, each and all of said appropriations having been made by predecessors in interest of the Western Land & Irrigation Company.

(3) That the dates of initiation of the water rights which it claims to own are as follows:

March 8, 1891, by the Umatilla Meadows and Butter Creek Canal Company under its appropriation;

November, 1891, by the Columbia Valley Land & Irrigation Company under its appropriation, and under the appropriation of the Umatilla Meadows and Butter Creek Canal Company and J. M. Jones, et al, to whose rights the Columbia Valley Land & Irrigation Company has succeeded;

March, 1903, by the Hinkle Ditch Company under its appropriation, and the other appropriations above mentioned to which the Hinkle Ditch Company succeeded.

(4) That water was first used for irrigation or other beneficial purpose under said appropriation in the spring of 1891, by the Umatilla Meadows and Butter Creek Canal Company; that the means of utilizing said water is by distribution through ditches and canals and by pumping from the ditch to lands in the South half of Section 1, Township 4 N. R. 28; West 480 acres of Section 29, Township 5 N. R. 28; Section 1, Township 4 N. R. 27; and 200 acres in South half of Southeast quarter and Southwest quarter of Section 17, Township 3 N. R. 29; and

that the ditch was originally known as the Umatilla Meadows and Butter Creek Ditch, then as the Hunt or Columbia Valley Land & Irrigation Company Ditch, and is now known as the Hinkle Ditch, or the Western Land & Irrigation Company Ditch, and is owned by the Western Land & Irrigation Company; that the beginning of construction was March, 1891, and that the construction thereof is not yet completed.

(5) With reference to enlargements and date of beginning and completion of each successive enlargement, the Umatilla Meadows and Butter Creek Canal Company commenced construction in March, 1891, built the first two miles of the ditch that spring and used 1,000 to 1,200 miner's inches through it that spring.

First Enlargement: The Columbia Valley Land & Irrigation Company commenced work in November, 1891, and finished in 1892. Said Company put in a new headgate and enlarged the first two miles of the ditch and extended the ditch from Section 18, Tp. 3 N. R. 29, to Section 15, Tp. 3 N. R. 28, a distance of about seven miles from the headgate and used about 2,000 miner's inches of water thru the ditch in 1892. In 1893, water was delivered thru the ditch, but construction work was suspended on account of the panic that year.

Second Enlargement: In 1903, the Hinkle

Ditch Company commenced work and cleaned out the ditch and repaired the headgate. In 1904, they put in a new headgate and a new check-gate. The Butter Creek Canal Company under contract with the Hinkle Ditch Company commenced work in November, 1903, and extended the ditch from Section 15, Tp. 3 N. R. 28. Butter Creek by March, 1904, and during 1904 and 1905, extended the ditch to Section 30, Tp. 4 N. R. 28; built two miles of the "high line" from Butter Creek drop to Section 8, Tp. 3 N. R. 28, and completed their work in the fall of 1905, or winter of 1906.

Third Enlargement: In February, 1905, the Cold Springs Company, under contract with the Hinkle Ditch Company, enlarged the ditch from a point about two miles from the headgate to Section 15, Tp. 3 N. R. 28, completing the work about November, 1905.

Fourth Enlargement: In the fall of 1906, the Hinkle Ditch Company repaired the ditch and enlarged same from Section 15, Tp. 3 N. R. 28 to Butter Creek and in spring of 1907, enlarged the ditch from Butter Creek to Section 30, Tp. 4 N. R. 28, and extended the same to Section 12, Tp. 4 N. R. 27.

Fifth Enlargement: During the fall of 1907, the Hinkle Ditch Company enlarged the low line to Section 7, Tp. 4 N. R. 28, and enlarged the main ditch from Section 15, Tp. 3 N. R. 28,

to Butter Creek. The work of enlarging and extending the ditch was commenced by the Hinkle Ditch Company in March, 1903, and continued from that time on, except during the irrigating season, to February 15, 1908, when the work was taken up by the Western Land & Irrigation Company.

Sixth Enlargement: The Western Land & Irrigation Company commenced work in February, 1908, and extended the low line from Section 12, Tp. 3 N. R. 27, to the center of Section 5, Tp. 4 N. R. 28, and enlarged the high line from Section 4, Tp. 3 N. R. 28 to Section 8, Tp. 3 N. R. 28, and extended this line to Section 1, Tp. 3 N. R. 27; and during the summer and fall of 1908 enlarged the main canal from Section 15, Tp. 3 N. R. 28 to Butter Creek drop in Section 33, Tp. 4 N. R. 28. During 1909, the Company cleaned out and deepened the canal from the headgate to Section 18, Tp. 3 N. R. 28, and strengthened the banks and put in a concrete headgate, and concrete weir wasteway during December, 1908, and January, 1909. During 1909, the Company extended high line from Section 1, Tp. 3 N. R. 27, to Sec. 9, Tp. 3 N. R. 27 and extended the "F" lateral, leaving the low line in Sec. 19, Tp. 4 N. R. 28, about one mile; and that in 1910 said company had extended and enlarged "F" lateral about three and one-half miles to Sec. 33, Tp. 5 N. R. 28, and strengthened and raised the banks on the main

canal for eight miles between Sec. 18, Tp. 3 N. R. 29 to Sec. 33, Tp. 4 N. R. 28, and had widened the low line and raised its banks from said Sec. 33, Tp. 4 N. R. 28 to Sec. 19, Tp. 4 N. R. 28, and raised the banks of said line to Sec. 5, Tp. 4 N. R. 28, and had extended said low line from the East side of Sec. 6, Tp. 4 N. R. 28 to Sec. 32, Tp. 5 N. R. 28; that it would take several years to build the necessary extensions and laterals to cover fully the lands under the project and that the work of construction and improvement had been going on continuously, except during the irrigating season, and was still incomplete.

(6) That the dimensions of the ditch as originally constructed and of each of the successive enlargements were as follows:

As originally constructed: width, top 18 feet; bottom 10 feet; depth 4 feet; grade about .3 feet.

First enlargement by Columbia Valley Land & Irrigation Company, in 1892, from headgate to Sec. 18, Tp. 3 N. R. 29; width, top 48 feet; bottom 30 feet; depth 4 to 5 feet; grade .3 feet. From Sec. 18, Tp. 3 N. R. 29 to Sec. 15, Tp. 3 N. R. 28; width, top 20 feet; bottom 12 feet; depth 3 feet; grade about .3 feet.

Second enlargement by Butter Creek Company for Hinkle Ditch Company in 1904, Sec.

15, Tp. 3 N. R. 28 to Butter Creek; width, top 18 feet; bottom 10 feet; depth 3 feet; grade .2 feet. Extension Butter Creek to Sec. 30, Tp. 4 N. R. 28; width, top 18 feet; bottom 10 feet; depth 2 feet; grade .2 feet.

Third enlargement by Cold Springs Company for Hinkle Ditch Company in 1905, from point two miles from headgate to Sec. 15, Tp. 3 N. R. 28; width, top 48 feet; bottom 30 feet; depth 4 feet; grade .3 feet.

Fourth enlargement by Hinkle Ditch Company in 1906, from Sec. 15, Tp. 3 N. R. 28, to Butter Creek; width, top 24 feet; bottom 12 feet; grade about .3 feet; from Butter Creek to said Sec. 30, Tp. 4 N. R. 28, width, top 24 feet; bottom 12 feet; depth $2\frac{1}{2}$ feet; grade .3 feet; extension from Sec. 30, Tp. 4 N. R. 28 to Sec. 12, Tp. 4 N. R. 27, width, top 16 feet; bottom 6 feet; depth 2 feet; grade .4 feet.

Fifth enlargement by Hinkle Ditch Company in fall of 1907, from Sec. 15, Tp. 3 N. R. 28 to Butter Creek, width, top 25 feet; bottom 15 feet; depth $2\frac{1}{2}$ feet; grade .3 feet; from Butter Creek to Sec. 19, Tp. 4 N. R. 28, width, top 20 feet; bottom 12 feet; depth $2\frac{1}{2}$ feet; grade .4 feet.

Sixth enlargement by Western Land & Irrigation Company in 1908. Enlarged the high line from Section 4, Tp. 3 N. R. 28 to Section

8, Tp. 3 N. R. 28, width top 28 feet; bottom 10 feet; depth $4\frac{1}{2}$ feet; grade about .2 feet. In 1909, enlarged main canal from Sec. 15, Tp. 3 N. R. 28 to Butter Creek, width, top 40 feet; bottom 20 feet; depth 5 feet; grade .3 feet. During 1909 the main canal was enlarged somewhat by clearing out and deepening the canal from headgate to Sec. 18, Tp. 3 N. R. 28, increasing the carrying capacity but not materially changing the dimensions. In 1910 the banks were raised and strengthened by which the capacity was increased; that the "F" lateral was enlarged in 1910 to: width, top 15 feet; bottom 5 feet; depth $2\frac{1}{2}$ feet; grade about .5 feet; and that the concrete headgate at head of the ditch has seven openings each $5\frac{1}{2}$ feet by 2 feet in size.

(7) That the area of land irrigated in 1891, 1892, and 1893, was from 300 to 400 acres; in 1904, 300 acres, in 1905, 600 acres, in 1906, 700 acres, in 1907, 1000 acres, in 1908, 1100 acres, in 1909, 1500 acres, and 1910, the date of filing statement, 1938 acres; that the total acreage irrigated at the time the statement was made was 1938 acres located in Townships 3 and 4, Range 27; Township 3, Ranges 28 and 29, and Township 4 Range 28, E. W. M.; that the land intended to be irrigated thru said ditch is 17,159.57 acres located in Townships 3 and 4, Range 28, Townships 3 and 4 in

Range 27; Township 5 in Range 28, and Township 2 in Range 29 East of W. M.

(8) That the soil in said area is a sandy loam, about 500 acres being gravelly, and that the crops grown thereon are hay, grain, alfalfa, vegetables and all kinds of fruit.

That the plat prepared by the State Engineer did not show all lands actually irrigated at the time the Statement was filed, nor all of the lands which are intended to be irrigated from the ditch, and that the Company desired to file a map showing all lands proposed to be irrigated under its project.

(9) That the irrigation season extended thruout the year whenever water was available, but particularly in March, April and May; that the amount of water which had been put to a beneficial use by the claimant was 6,000 miner's inches of water for irrigation and domestic purposes in 1910, and that it claimed 21,450 miner's inches of water for said purpose under its appropriations for the lands under its project; that there were 17,159 acres of land under the project which would require one (1) miner's inches per acre for their proper and extensive irrigation; that contracts were outstanding calling for one (1) miner's inch per acre for more than 8,280 acres of said lands; that the Company also owned 5,208 acres of land under the ditch which had not yet been irri-

gated, and to most of which ditches and laterals had not been extended; that there was a loss of from 25 to 30 per cent from seepage and evaporation in the ditches and canals, and that the company had been unable to deliver more than seventy per cent of the water diverted at the headgate and claimed that it required one (1) miner's inch per acre for all lands under its project, plus 25% for seepage and evaporation, the total claim being for 21,450 miner's inches of water, and asked that it be awarded that amount under its appropriations, and according to its priorities; that most of the water is used for irrigation during March, April and May, that being flood season when water is most abundant, but it is also used during the fall and winter months whenever water is available; that water in the Umatilla River is very low during the summer months, the shortage usually beginning from May 15 to June 15, and continuing until October or November, and that it was necessary to use the available water in the fall or winter to saturate the soil so crops can be successfully grown with further flood irrigations in the spring.

That the water is not used for power and that the Company had not had sufficient water each year, the scarcity beginning from the 15th of May to the first of June and lasting until October, due to a scarcity of water in the summer and early fall; that the Company owns the

ditch and water rights and about 5,280 acres of land under the ditch; that the company sells the land with a water right and charges an annual maintenance fee for keeping up the ditch; and to this statement was appended a list of the holders of company contracts, a description by legal subdivisions of 720 acres of lands cleared and planted to crops and in course of irrigation; and a description by legal subdivisions of 480 acres of land cleared ready for planting and irrigation.

II.

(1) The United States of America, one of the respondents herein, in its Statement and proof of Claim set forth the post-office address where process and notices in this proceeding should be served upon it, and alleged that it claimed a right to the waters of the Umatilla River, said waters to be diverted from the main stream and to be used for irrigation.

(2) That its claims are based upon appropriations by the Minnehaha Irrigation Company and the Maxwell Land & Irrigation Company, respectively, the rights of said companies having been acquired by the United States by purchase and upon appropriations by and grants to the United States in pursuance of Section 2 of the Act of the Legislative

That after the control thereof passed to the United States, the Maxwell System had been a component and essential part of the Umatilla Project and water diverted at the intake of the main canal of the Maxwell System had been utilized not only thru the older canals laterals, ditches and pipe lines of that system, but also thru more recently constructed distributaries of the said Umatilla Project, and that it was the intention to fully utilize the water rights of and the water diverted thru the Maxwell System, not only by means of the distributaries of that system as originally constructed, but also by means of the canals, laterals, ditches, pipe-lines, etc., of the Umatilla Project distribution system that had been and were to be constructed for that purpose, as well as for the purpose of utilizing waters of the feed canal and reservoir.

For the Feed Canal, Cold Springs Dam and Distribution System, test pits were dug, borings made and topography taken in the fall of 1905, and spring of 1906. The contract for construction of the feed canal was let in 1906 and construction began September 1, and was completed August 6, 1907; that after that date additional construction consisted in placing about two miles of concrete lining in the canal and constructing two spill-ways. The construction of the canal included the construction of certain relative structures, to-wit: diversion

and regulating works, concrete diversion dam and head-gate, by-pass, two waste-ways and four water-ways, railway crossing, bridges, etc.; that construction of Cold Springs Dam began in the fall of 1906, and was pushed vigorously until completion about June 15, 1908. The construction of the distribution system began in the fall of 1906, and progressed continuously to date of filing statement and proof of claim, at which time the project as a whole was about seventy per cent completed.

The dimensions of the main canal of the Minnehaha Irrigation Company as originally constructed were: Width (top at water line), 12 feet; (bottom), 8 feet; (depth of water), 1.6 feet; grade, .6 feet; height of diversion dam, 4 feet.

First Enlargement: Width, top 18 feet; bottom, 6 feet; depth, 3 feet; grade, .6 feet.

Second Enlargement: Main canal of Maxwell Irrigation Company, being an enlargement of the main canal of the Minnehaha Irrigation Company; width (top at water line), 28 feet; width (bottom), 12 feet; (depth of water), 4 feet; (grade), .3; height of diversion dam, 9 feet.

Feed Canal: Width (top at water line), 37 to 32 feet; width (bottom), 14 to 17 feet; depth of water, 5.8 feet, average grade .2; height of diversion dam, 2.5 feet.

Cold Springs Dam: Extreme maximum height, 98 feet; maximum height above general level of valley, 88 feet; length of crest, 3800; volume, 757,000 feet.

Main Distributary Dam: Width (top at water line), 35 feet; width (bottom), 15 feet; depth of water, 5 feet; grade, .15 feet.

(6) That the Minnehaha Irrigation Company during its first year of operation irrigated about 25 acres of land; 45 acres the second year and a gradual increase until it reached about 80 acres in 1898. This being the total area irrigated by the Minnehaha Irrigation Company up to the time of the transfer of its system to the Maxwell Land & Irrigation Company; that the Maxwell Land & Irrigation Company, in pursuance of the appropriation of the Minnehaha Irrigation Company, and in accordance with its own appropriation, irrigated land as follows:

In 1905, 300 acres; 1906, 785 acres; 1907, 953 acres; in 1908, the first year of operation of the Umatilla Project, about 1,500 acres; in 1909, 2,000 acres and 4,137 acres in 1910.

That the United States had made provision for the full utilization of the Minnehaha and Maxwell water rights by the application of such waters to lands originally proposed and intended to be irrigated by said companies, and that a large portion of said lands, in addition

to those irrigated by said companies prior to the transfer of their rights to the United States, had been irrigated by the United States in that manner; that the total area irrigated under the Umatilla Project at the time the settlement was made was 4,137 acres, the total irrigable area under said Project 15,129 acres, and the total area then cultivated 3,753 acres; that the 10,435 acres of lands under the Project situated in Townships 4 and 5 N. R. 28, E. W. M. and in Townships 4 and 5 N. R. 29 E. W. M., were intended to be irrigated by the Minnehaha and Maxwell rights by means of water diverted thru the Maxwell canal, with supplemental irrigation with water drawn for that purpose from the Cold Springs Reservoir; that 25,000 acres, including the above mentioned Maxwell area situated in Townships 4 and 5 N. R. 28 and Townships 4 and 5, Range 29, at the time of the appropriation by the United States were and are intended to be irrigated by water diverted from the river thru the feed canal and supplied to the land by way of the distribution system direct from the feed canal and thru the reservoir.

(7) That the surface soil is a mixture of sand, volcanic ash and other fine materials, is generally free from alkali and has little hardpan, and the crops successfully grown are alfalfa, clover and other forage products,

strawberries, gooseberries, blackberries and small fruits generally, including melons and garden products and orchards of apples, pears, cherries, prunes, grapes, etc.

(8) That claimant did not accept the plat prepared by the State Engineer for the reason that the same failed to show correctly the location of a large portion of the structures constituting its system, and do not show correctly the land which is or can be irrigated from the works of the Umatilla Project; and therefore supplements its Statement and Proof of Claim with maps prepared by its Engineer as designated Exhibits "B" and "C".

(9) That the irrigation season begins about March 15 and continues until about October 15 of each year; that an amount of water, including all legitimate requirements of new lands, unavoidable and legitimate losses by evaporation, seepage, priming, etc., sufficient to reclaim and irrigate the lands mentioned in Statement and Claim, had been put to a beneficial use, and that the United States claims waters of the Umatilla River, as follows:

Water right acquired by purchase from the Minnehaha Irrigation Company thru the Maxwell Land & Irrigation Company, 25 cubic feet per second; water right acquired by purchase from Maxwell Land & Irrigation Company

founded on the notice of appropriation by said Company, 114 cubic feet per second; water rights granted to and initiated by the United States and diverted from the river by way of the feed canal, 350 cubic feet per second; that the water will be used during the irrigation season beginning about March 15, and continuing until about October 15 of each year, and will be diverted thru the feed canal during other periods of the year also; that the development of irrigable area under the Umatilla Project has been consistent and the supply of water has been adequate; and that the United States of America is the owner of the works, including the feed canal, Maxwell Canal, Cold Springs Reservoir, and all other canals, pipe lines and structures of the Umatilla Project, including the Maxwell System.

III.

In addition to the foregoing the United States also filed a statement and proof of claim for waters of the Umatilla River for irrigation, based upon application filed in the office of the State Engineer on March 28, 1909, being application No. 13 for permit to construct a reservoir, and application No. 237 for permit to appropriate public waters of the State of Oregon, the above applications being for the so-called West Extension of the Umatilla Project. The terms of the Statement and

Proof of Claim based on said application are omitted from this abstract for the reason that they were made in March, 1909, and are apparently in no way affected by the questions raised by this appeal.

IV.

(1) The Dillon Company, respondent herein, in its Statement and Proof of Claim set forth the post-office address of its officers and alleged that it claimed a right to the waters of the Umatilla River, said waters to be diverted from the main channel of the river for irrigation, domestic and stock purposes.

(2) That its claim is based upon appropriation, diversion and use and adverse use for more than ten years; that its right was initiated November 17, 1897, by the Dillon Irrigation Company, and was first used for irrigation or other beneficial use in April, 1898, by said Company by diversion thru a ditch known as the Dillon Irrigation Company's main canal and its laterals, which ditch is owned by said Company.

(3) That the beginning of construction thereof was November, 1897, and the date of completion of construction March, 1898, and that there have been no enlargements thereof made; that the dimensions of the ditch as originally constructed are as follows:

Width, top, 10 feet; bottom 4 feet at water line; depth, 3 feet; grade, 1 foot fall per thousand, measurement of ditch being at a point immediately below the diversion box where the water coming from the common head-gate and intake of the Maxwell Irrigation Company is divided 300 feet below the diversion from the river, the ditch from said point to the river being owned or controlled jointly by the Dillon Irrigation Company and the Maxwell Irrigation Company; the area of land irrigated each year being as follows:

1898, 325 acres; 1899, 390 acres; 1900, 430 acres; 1901, 450 acres; 1902, 450 acres; 1903, 470 acres; 1904, 510 acres; 1905, 595 acres; 1906, 630 acres; 1907, 695 acres; 1908, 810 acres; 1909, 840 acres; 1910, 900 acres; and that the total area irrigated at the time of filing its statement was 900 acres, and the total irrigable area is 2,032.50 acres, situated in Townships 3 and 4, North of Range 28 East, and Townships 3 and 4, North of Range 29 East of W. M.

(4) That the soil is black loam and sand loam and the crops cultivated thereon are alfalfa, wheat, barley, orchards, small fruits, vegetables, timothy and wild grasses.

(5) That the claimant does not accept the plat prepared by the State Engineer as showing correctly the location of its ditch and the

lands which can be irrigated therefrom, because the map prepared by the State Engineer does not show the correct amount of irrigated and irrigable lands; that the irrigation season is in May, June, July and August of each year, and that the amount of water which has been put to beneficial use was 25 second feet for irrigation, domestic and stock purposes, and that the same was used for irrigation during the months of May, June, July and August, and for stock and domestic purposes all the year around; that the claimant has had sufficient water each year for all purposes and that said ditch and water right is the property of the Dillon Irrigation Company, a corporation, which supplies water to the land above mentioned, each of the several owners of said land owning stock in the company.

V.

(1) The Furnish Ditch Company, one of the respondents herein, in its Statement and Proof of Claim, alleged that its post-office address was Pendleton, Oregon; that it claimed a right to the waters of the Umatilla River, said waters to be diverted from the main stream for irrigation and domestic use.

(2) That its claim is based upon appropriation, diversion and beneficial use and was initiated March 8, 1905; that was water first

used for irrigation or other beneficial purpose in 1906 and 1907; that the waters are diverted and utilized by means of ditches, canals, flumes head-gate, dams, reservoir and laterals, the ditch being known as the Furnish Ditch and the reservoir as the Horseshoe Reservoir, which are owned by the Furnish Ditch Company.

(3) That construction was begun in April, 1905, and is not yet completed; that the dimensions of the ditch as originally constructed just below the wasteway of the headgate was: width, top, 22 feet; bottom, 10 feet; depth, $4\frac{1}{2}$ feet; grade, 1.8 feet to the mile; that at the time the Statement was filed there was 2,747 acres irrigated, and 2,621 acres to which laterals were constructed, 407 acres of raw land under the system not the property of the company and 2,459 acres of the Company's land not irrigated, and about 1,766 acres of land adjacent to the ditch to be supplied with water therefrom, all situated in Townships 3 and 4 N. R. 29 East, and township 3 N. R. 28 East, and that the total area of lands under the system is 10,000 acres.

(4) That the soil in said area is a light sandy volcanic ash and the crops which are grown thereon are alfalfa, gardens, orchards, fruits and berries; that the acreage under the company's system is being increased daily

and is in excess of the area shown on the State Engineer's plat; that the irrigation season is continuous at all times when water is obtainable; and that the Company had used 10,000 miner's inches of water under six-inch pressure, or its equivalent in second feet, and that the same was used continuously when obtainable from the natural flow of the river, or from storage in the Horseshoe Reservoir; that the Company had not had sufficient water each year for the use for which an appropriation was claimed; that there is not sufficient water in all of the summer months but that the deficiency was expected to be obviated by the Horseshoe Reservoir; that the Furnish Ditch Company owns the water and its associate company, the Inland Irrigation Company owns most of the land to be supplied, to which Statement and Proof of Claim was appended certified copy of notice of appropriation of 10,000 inches of water by the Inland Irrigation Company posted on the 14th day of April, 1905, and recorded in Umatilla County, Oregon, on the 15th day of April, 1905, together with a deed from the Inland Irrigation Company to the Furnish Ditch Company, dated May 20, 1907, conveying to the Furnish Ditch Company all rights under said appropriation.

And to which was also appended:

List One. Land under the Furnish Ditch

Company, irrigated May 20, 1910, aggregating 2,747 acres.

List Two. Land not yet irrigated but laterals constructed to land, aggregating 2,621 acres.

List Three. Raw lands under the system not the property of the Inland Irrigation Company aggregating 407 acres, and

List Four. Raw lands the property of the Inland Irrigation Company, aggregating 2,459 acres; also a list of lands adjacent to the Furnish Ditch to be supplied with water therefrom aggregating 1,766 acres.

VI.

UNITED STATES OF AMERICA VS. WESTERN LAND & IRRIGATION CO.

Contest No. 93.

That at the time appointed therefor, the United States of America contested appellant's Statement and Proof of Claim, and thereafter on June 5, 1911, by leave of the Superintendent of Water Division No. 2, before whom said proceedings were pending, filed an

AMENDED CONTEST

of appellant's Statement and claim, alleging as a ground of contest:

"(1) Contestant alleges that any right

in and to the waters of Umatilla River that claimant now has or claims to have in excess of 41.6 cubic feet per second of said waters is subject to prior rights of the contestant as follows:

Right in and to said waters to the extent of 25 cubic feet per second of said waters, initiated by the Minnehaha Irrigation Company on November 14, 1894, and now owned by contestant.

Right in and to said waters to the extent of 114 cubic feet per second of said waters, initiated by the Maxwell Land & Irrigation Company on February 25, 1904, and now owned by contestant.

Right in and to said waters to the extent of 350 cubic feet per second of said waters, initiated by contestant on September 6, 1905.

(2) Contestant further alleges that any and all rights of claimant in and to the waters of said stream are in any event subject to the aforesaid prior right of contestant to the extent of 25 cubic feet per second of said waters, initiated November 24, 1894.

(3) Contestant alleges that the ditches and works and alleged rights of the Umatilla Meadows and Butter Creek Canal Company, of J. M. Jones, et al., and of the Columbia Valley Land & Irrigation Company, if any such existed—stated by claimant to have been purchased and succeeded to buy it—were, long prior to

the 14th day of March, 1903, entirely and wholly abandoned; that there was a failure at all times to exercise diligence in connection with said claims; and further, that there never were, under and pursuant to the said alleged appropriations, any lands of any character irrigated, and that the lands alleged to have been irrigated were irrigated, if at all, under some other system, and under and pursuant to other rights to the waters of the said stream and not by any of the predecessors in interest of claimant.

(4) Contestant denies that the alleged water right of claimant was initiated in any manner or at any time prior to March 14, 1903, and denies that the said Umatilla Meadows & Butter Creek Canal Company, J. M. Jones, et al., or Columbia Valley Land & Irrigation Company were, or ever have been, in any manner or for any purpose the predecessors in interest of claimant.

(5) Contestant further denies that the ditch and works of claimant were at the time of the initiation of its alleged water right or at any time prior to their purchase in February 1908 by claimant and subsequent enlargement thereby intended to irrigate the 17,159.57 acres of land described in Statement and Proof of claimants, or any amount in excess of 3,330 acres; and alleges that none of the said 17,159.57 acres, save the 3,330 acres aforesaid, were prior to said enlargement susceptible of irrigation from the ditch and

works of claimant, and that said ditch and works were prior to said time not capable of irrigating, or planned to irrigate more than the said 3,330 acres.

(6) Contestant alleges that at all times prior to the month of March, 1908, and up to and until the transfer of its property and alleged rights to claimant, the Hinkle Ditch Company, predecessor in interest of claimant, was a moribund and inactive concern, and allowed its ditch and works to become out of repair and difficult of even limited operation, and failed to exercise reasonable diligence in developing its said claims and property; and that there were not at any time prior to said month of March, 1908, more than 750 acres of land irrigated through and by means of said ditch and works; and contestant denies that 1938 acres were irrigated at the time of filing of Statement and Proof of claimant, or at any time prior thereto, or that any amount of land was irrigated at that time or at any time prior thereto in excess of 1,470 acres.

(7) Contestant alleges that the dimensions and grades of the ditch and works of claimant, and of the enlargements thereof as given in his Statement and Proof are inaccurate and incorrect, and denies that they are true insofar as they show that said ditch and works were capable at any time prior to their enlargement by claimant of taking and carrying more than 50 cubic feet of water per

second, and insofar as they show said ditch and works has now or had since said enlargement a capacity of more than 150 cubic feet per second, and alleges that said ditch and works, did not at any time prior to said enlargement have a capacity in excess of fifty cubic feet per second of water, and have not had since said enlargement of a capacity of more than 150 cubic feet per second.

(8) Contestant alleges that at or about the time of said purchase there was also purchased from other parties a large body of land not theretofore intended to be irrigated by said ditch and works of claimant and not theretofore controlled by said claimant or his predecessors in interest; and that claimant did then and there proceed to greatly enlarge said ditch and works, so that the same now have a capacity of 150 cubic feet per second and no more, as aforesaid, and to adopt and carry out plans for the irrigation of lands not theretofore intended to be irrigated or capable of irrigation from said ditch and works; and did so increase and enlarge upon the project of the Hinkle Ditch Company, and did so change and alter the plans and intentions thereof, as to render any right in and to the waters of the Umatilla River that claimant might initiate or acquire for the irrigation of lands in excess of said 3,330 acres subject not only to the right of the contestant in and to the waters of said Umatilla River initiated November 14, 1894, but also to

rights of contestant initiated February 25, 1904 and September 6, 1905, as aforesaid (and as to any claim or right by claimant for the irrigation of more than 12,000 acres, subject as well to the right of contestant initiated March 28, 1909).

(9) Contestant denies that the ditch and works of claimant since their enlargement as aforesaid by claimant or at any time have been intended to irrigate the 17,159.57 acres of land mentioned in Proof and Statement of claimant, or any land, or any amount of land in excess of 12,000 acres, and alleges that none of the said 17,159.57 acres of land save the said 12,000 acres aforesaid were at the time of said enlargement or ever have been susceptible of irrigation from the ditch and works of claimant as thus enlarged, or otherwise; that said ditch and works as thus enlarged are not and never have been capable of irrigating more than the aforesaid 12,000 acres of said land, and that prior to said enlargement said ditch and works were not capable of irrigating more than 3,330 acres of land. Contestant alleges that all claims of claimant to water right in excess of a total of 150 cubic feet per second are and will be subject to all rights of contestant in and to the waters of the Umatilla River, as set out in its Statements and Proofs filed herein.

(10) And contestant further alleges that none of the desert land entries that depend upon the ditch and works of claim-

ant for their water rights and water supply are included within the 3,330 acres aforesaid; that claimant cannot furnish water to lands in addition to the said 3,330 acres, except during times of extreme flood flow in said Umatilla River, if at all, and then only for a very brief period in an entirely inadequate manner and quantity, and at a time when the same cannot be beneficially used, for the reason that water is not otherwise available in the river for that purpose, as the claim of claimant of the right to divert and use more than 41.6 cubic feet per second of said water is subject to all rights upon the said stream initiated prior to the enlargement of claimant's ditch and works in 1908, including those of contestant; and that as to any lands in addition to the said 12,000 acres claimant cannot by reason of the premises furnish any water supply.

(11) Contestant denies that claimant's irrigation season is as stated in said Statement and Proof or that there is any such season or any irrigation season at all in any year of more than 100 days from and after the 1st day of March of any and all years; and contestant denies that the waters of said stream have been beneficially used in any manner by claimant through and by means of the ditch and works of the claimant, or otherwise, at any time in any year, save during the 100 days aforesaid; and alleges that said waters have never been beneficially used through and by means of said ditch and works for any

other purpose than the irrigation of said land; and contestant further alleges that all use by claimant has been very limited in latter half of the said 100-days period and at all times has been subject to the prior rights of contestant to use said waters as herein set out.

(12) Contestant denies that claimant, or its predecessors in interest, or any other persons, firms or corporations have or have initiated, or can establish or perfect, any right in and to the waters of said stream in excess to one-eightieth of one cubic foot per second per acre for the irrigation of lands for and in connection with which a water right is claimed by claimant, or have, or have initiated, or can establish or perfect, any right in and to said waters, except that they be subject to the prior rights of contestant in and to said waters as hereinbefore stated; and denies that claimant, or its predecessors in interest, or any other persons, firms or corporations, have used the waters of said Umatilla River for any other purpose than that of irrigation, and denies that said claimant, or its predecessors in interest, or any other persons, firms or corporations, have or have initiated or established any other right of any character or for any other purpose than irrigation in and to said waters.

WHEREFORE, contestant prays that all claims of claimant that are against fact, without right, wrongful, improper

or excessive, as in the foregoing set out, or otherwise, be disallowed and held for naught, and that all and every right of said claimant in and to the waters of the Umatilla River be determined to be subject to the prior right of contestant in and to said waters, initiated November 14, 1894; that it be determined that all and every right of claimant in and to the waters of said river in excess of any in addition to the said 41.6 cubic feet per second of said waters hereinbefore mentioned, be determined to be subject to the prior rights of contestant, in and to said waters initiated respectively on November 14, 1894, February 25, 1904, and September 6, 1905; that all and every right of claimant in and to said waters be determined — subject in any event to prior rights of contestant, as aforesaid—to be in the aggregate not in excess of one-eightieth of one cubic foot per second of the waters of said stream for each acre of such lands as shall be found in this proceeding to be entitled to irrigation under and by way of said rights; that all claims of water right by claimant in excess of 150 cubic feet per second be determined to be subject in any event to all rights of contestant in and to said waters as set out in its Statements and Proofs filed herein; that all claims of claimant to water rights of any other character or for any other purpose than irrigation, be disallowed and held for naught; and that contestant have and recover of claimant its costs and disbursements herein."

On the 29th day of June, 1911, appellant filed a

DEMURRER

to paragraph 10 of said contest, setting up the following grounds:

"(1) That the Board of Control has no jurisdiction of the persons of the desert land entrymen whose rights the United States seeks to have adjudicated in this proceeding under the allegations of said paragraph.

(2) That the Board of Control has no jurisdiction of the subject matter of said paragraph, to-wit: what constitutes a sufficient water right for a desert land entry, and whether this claimant can furnish and deliver to the desert land entrymen who hold contracts from it sufficient water to reclaim their lands in accordance with the laws of the United States.

(3) That said paragraph does not state facts sufficient to constitute a ground of contest herein.

(4) And that there is a defect of parties defendant in that the desert land entrymen whose rights are affected are not made parties to or defendants in this contest.

(5) That said ground of contest was not set forth or alleged within the time limited by law, to-wit: within five days after the expiration of the period fixed by the Board of Control for the inspection

of evidence in the above entitled proceeding."

And on said 29th day of June, 1911, appellant also filed a

MOTION TO STRIKE

portions of said amended contest, to-wit:

"The words 'and as to any claim of right by claimant for the irrigation of more than 12,000 acres, subject as well to the right of contestant initiated March 28, 1909,' for the reason that the matters and things attempted to be alleged thereby are frivolous, immaterial and sham.

To strike out all of paragraph 10 of said amended contest on the ground and for the reason that the same does not allege or state any ground of contest; that the matters and things therein alleged are frivolous, irrelevant, immaterial and sham; and that the Board of Control has no jurisdiction of the subject matter of said paragraph and no power to determine the sufficiency of the water right for a desert land entry, and has no jurisdiction of the persons of the various desert land entrymen the sufficiency of those water rights contestant is seeking to have adjudicated in this proceeding.

And to strike out all that part of paragraph 12 of said amended contest beginning with the word 'or' in the first line of said paragraph and ending with the

word 'interest' in the eleventh line thereof, for the reason that the matters and things therein alleged are immaterial, frivolous and sham; that the said matters asked to be stricken out allege a conclusion of law and not an issuable fact, present matters which it is the province of the Board of Control to determine, and are not responsive to any allegation in claimants statement and proof of claim heretofore filed herein."

And on June 29th, 1911, subject to said demurrer and motion to strike, appellant filed its

ANSWER

to said contest of the United States of America, as follows:

"(1) Admits that Oliver P. Morton is Assistant to the United States Attorney for the District of Oregon; that he is duly authorized by the Attorney General of the United States and is acting for and on behalf of the United States in the premises and in that behalf has contested the water rights of claimant as set forth and claimed in the Statement and Proof of Claim heretofore filed herein by this claimant.

(2) Claimant denies each and every material allegation, matter and thing in said amended contest alleged, and denies specifically and severally each and every paragraph of said amended contest, and the whole thereof, except as specifically admitted in paragraph 1 hereof."

And for further and separate answer and defense to said amended contest claimant alleges:

"(1) Claimant reiterates and reaffirms all the allegations, matters and things set forth and alleged in this claimants Statement and Proof of Claim heretofore filed herein, which said Statement and Proof of Claim is hereby referred to and made a part hereof. And claimant alleges that in addition to the amount of land which was irrigated from its ditches and under its project as set forth in said Statement and Proof of Claim claimant has furnished water for the irrigation of at least two thousand additional acres during the year 1911 and that said additional quantity of land has been successfully and fully irrigated and placed in cultivation under its project since said Statement and Proof of Claim were filed herein.

(2) Claimant alleges that the rights of contestant, if any it has, under the alleged appropriation of the Minnehaha Irrigation Company initiated November 14, 1894, are limited to 2½ second feet of water, or so much thereof as may be necessary to properly irrigate 80 acres of land, that being the total amount of land at any time irrigated or reclaimed under said alleged right as claimed by contestant in its statement and proof of claim heretofore filed herein. Claimant further alleges that all rights and claims of said Minnehaha Irrigation Company in and to the

waters of the Umatilla River were wholly abandoned and lost long before contestant acquired or attempted to acquire any interest therein and that contestant never acquired and has not now any interest in and to the waters of the Umatilla River under said alleged right claimed to have been initiated by the Minnehaha Irrigation Company.

Claimant further alleged that the rights of contestant, if any it has under said alleged Minnehaha Irrigation Company appropriation are subsequent in time and inferior in right to all rights and claims of this claimant, except the right of this claimant based on the appropriation made by the Hinkle Ditch Company on March 14, 1903; and that all other rights and claims of contestant whenever initiated or however acquired are subsequent in time and inferior in right to all the rights and claims of this claimant as set forth in its Statement and proof of Claim heretofore filed herein.

(3) Claimant further alleges that the contestant is not entitled to have or claim any of the waters of the Umatilla River in excess of 25 second feet under the right claimed to have been initiated by the Maxwell Land & Irrigation Company on February 25th, 1904, for the reason that at the time the said contestant acquired said right the full capacity of said Maxwell ditch was 25 second feet and the grantors of contestant had never diverted or applied

to a beneficial use more than 25 second feet of water under said right."

For further and separate answer and defense to said amended contest claimant alleges:

"(1) That the contestant has no power or authority or right by law or otherwise to appropriate, claim, acquire or use any of the waters of the Umatilla River or any of its tributaries for any of the objects, purposes, rights or claims set forth in its Statement and Proof of Claims heretofore filed herein, and has no legal capacity to participate in this adjudication of the relative rights to the waters of the Umatilla River and its tributaries or to ask, take, receive or obtain any rights under any adjudication which may be made herein."

For further and separate answer and defense to the grounds of contest attempted to be set up in paragraph 10 of said amended contest, claimant alleges:

"(1) That the Board of Control of the State of Oregon has no jurisdiction to determine the sufficiency of a water right for desert land entries and has no jurisdiction of the desert land entrymen whose rights are sought to be affected and called in question by the allegation of said paragraph.

"Wherefore claimant prays that its claim as heretofore presented and filed herein be allowed and that claimant's

rights be adjudged and decreed to be superior in time and right to any and all claims of contestant, that contestant's notice of contest be dismissed and that claimant recover from contestant the costs and disbursements of this proceeding."

Thereafter on May 13, 1912, the United States of America filed its

REPLY

to said answer, as follows:

"(1) Contestant denies each and every and all material allegations and statements made and contained in the first further and separate answer and defense of said answer (or reply) of claimant, except as set forth herein and in contestant's said amended notice of contest and in statements and proofs by contestant filed in this proceeding; and further replying to said first, further and separate answer and defense contestant, without admitting that the irrigation of any amount of additional lands during the year 1911 and since the filing of claimant's said statements and proofs is material to the present controversy, not having sufficient knowledge of the matters and things alleged by claimant in that regard, denies upon information and belief that any water was furnished by claimant during the year 1911 and since the said statements and proofs of claimant were filed herein for the irrigation of said two thousand (2,000) additional acres or any

part thereof, and denies that said additional quantity of land or any quantity of land has been successfully and fully irrigated and placed in cultivation, or partially so or at all, by claimant since said statements and proofs were filed herein; and in confirmation of the foregoing and in further reply to the said first, further and separate answer and defense of claimant, contestant reiterates and affirms the matters and things set forth in said amended notice of contest and said statements and proofs, and does herein refer thereto and make the same a part hereof.

(2) Contestant denies each and every and all material allegations and statements made and contained in the second further and separate answer and defense of the said answer (or reply) of claimant, except as set forth in contestant's said amended notice of contest and in statements and proofs by contestant filed in this proceeding; and in confirmation of the foregoing and in further reply to the said second further and separate answer and defense of claimant contestant reiterates and affirms the matters and things set forth in said amended notice of contest and said statements and proofs, and does herein refer thereto and make the same a part hereof.

(3) Contestant denies each and every and all material allegations and statements made and contained in the third further and separate answer and defense of the said answer (or reply) of claimant, except as set

forth in contestant's said amended notice of contest and in statements and proofs by contestant filed in this proceeding; and in confirmation of the foregoing and in further reply to the said third further and separate answer and defense, contestant reiterates and affirms the matters and things set forth in said amended notice of contest and said statements and proofs, and does herein refer thereto and make the same a part hereof.

WHEREFORE, contestant prays that the said answer (or reply) of claimant be held for naught; that the rights and claims of contestant as asserted and presented in its said statements and proofs be established and allowed as against claimant; that the rights and claims of claimant be defined, limited and established in accordance with contestant's said amended notice of contest and the prayer thereof; and that contestant have and recover of claimant its costs and disbursements in this contest."

VII.

WESTERN LAND & IRRIGATION CO. VS. UNITED STATES.

Contest No. 38.

That at the time appointed therefor, to-wit, on or about September 23, 1910, the appellant

contested the statement and claim of the United States of America and alleged that it did contest and protest against the right and claim of the United States to any of the waters of the Umatilla River, or any of its tributaries, for irrigation or any other purpose based on the appropriation of The Minnehaha Irrigation Company, to whose rights the United States claims to have succeeded, except for $2\frac{1}{2}$ cubic feet of water per second, which this contestant concedes to said right, prior or superior to the right of this contestant initiated March 14, 1903, and it also contests and protests against the right and claim of the United States to any of the waters of the Umatilla River or any of its tributaries, based on the appropriation of the Maxwell Land & Irrigation Company, to whose rights the United States claims to have succeeded, prior or superior to the rights of the contestant, or at all, for the following reasons:

"(1) That said Minnehaha Irrigation Company did not use due diligence in applying the water to which it was entitled to a beneficial use, and the proofs submitted in support of said right show that only 80 acres were irrigated under said right from the initiation thereof in 1894 up to 1904 and said Company lost any rights it ever had, except for the quantity of water required for the irrigation of said 80 acres, by abandonment and failure to apply the same to a beneficial use long before the

United States acquired any right or interest in or to said appropriation.

(2) That the claim of the United States to 25 cubic feet per second under said Minnehaha Irrigation Company right is excessive to the extent of 23 cubic feet per second, 2 cubic feet per second being all the water said Minnehaha Irrigation Company ever applied to a beneficial use under its said appropriation.

(3) That the Maxwell Land & Irrigation Company never irrigated more than 300 acres of land under its alleged appropriation, and wholly abandoned said appropriation and right except as to the quantity of water required to irrigate 300 acres of land, and the United States, after it succeeded to the rights of the Maxwell Land & Irrigation Company, abandoned all the ditches and canals constructed by said Maxwell Land & Irrigation Company, except such as were necessary for the irrigation of said 300 acres of land, and ceased to use the same for the irrigation of any lands under said Maxwell Land & Irrigation Company appropriation."

On June 12, 1911, the United States filed its

ANSWER

in said Contest No. 38, and alleged:

"(1) Alleges in answer and reply to the introductory paragraph of said notice of contest that the United States is the suc-

cessor in interest and has succeeded to the rights of the Minnehaha Irrigation Company and Maxwell Land & Irrigation Company, and that in pursuance of the respective appropriations of water by said companies the United States has rights to divert and use the waters of the Umatilla River initiated November 14, 1894, and February 25, 1904, to the extent of 25 cubic feet per second and 114 cubic feet per second, respectively; that the said right to divert and use 25 cubic feet per second of said waters is prior in time and superior in right to all claims and rights of the Western Land & Irrigation Company, and that the said right to divert and use the said 114 cubic feet per second is prior in time and superior in right to all claims and rights of the said company in excess of 41.6 cubic feet per second.

(2) Denies each and every allegation contained in paragraph 1 of said notice of contest, except in so far as the same may be specifically admitted in the allegations and statements made on behalf of the United States in its Statements and Proofs filed in this proceeding, and alleges that it was at all times the intention of the Minnehaha Irrigation Company and of its successors in interest, the Maxwell Land & Irrigation Company and the United States, through and by said Minnehaha Irrigation system and water right to irrigate 2,000 acres of the land shown in the Statement and Proof of the United States as capable and susceptible of and intended to be irrigated under

and by means of the systems of the Minnehaha Irrigation Company and the Maxwell Land & Irrigation Company; that neither said Minnehaha Irrigation Company nor its successors in interest, the Maxwell Land & Irrigation Company and the United States at any time or for any purpose ever abandoned or failed to apply water to a beneficial use under and in pursuance of the appropriation of the Minnehaha Irrigation Company; that from the commencement of the construction of the Minnehaha Irrigation Company's system and up to the present day the same has been diligently and consistently constructed, as shown in said Statement and Proof; that through and by means of the said Minnehaha system and water rights and in entire conformity with the law the Minnehaha Irrigation Company and its successors in interest have consistently and with due diligence irrigated increasing areas of land, as shown in said Statement and Proof, and have as thus shown in pursuance of the appropriation of the said Minnehaha Irrigation Company applied all of the said 25 cubic feet per second to a beneficial use, that the Minnehaha system was as originally constructed, ever since has been, and is now, capable of furnishing a water supply for the irrigation of 2,000 acres of land; that by reason of the premises and for the further reasons set out in that certain notice of contest and contest filed by the United States in this proceeding against the Western Land & Irrigation Company, as modified in the proposed

amendment thereof, copy of which is hereto attached and made a part hereof, the United States has and has duly acquired the right to divert and apply to a beneficial use the waters of the said Umatilla River to the extent of 25 cubic feet per second in pursuance of the said appropriation of the Minnehaha Irrigation Company prior in time and right to every and all claims or rights of the Western Land & Irrigation Company in and to said waters.

(3) Denies each and every allegation contained in paragraph II of said notice of contest and denies that the said claim of the United States to 25 cubic feet per second in pursuance of the Minnehaha Irrigation Company's appropriation is excessive in the amount of 23 cubic feet per second, or in any amount; and alleges that all of said 25 cubic feet per second has with all due diligence been put to a beneficial use through and by means of said Minnehaha Irrigation Company's system by the said Minnehaha Irrigation Company and its successors in interest.

(4) Denies each and every allegation contained in paragraph III of said notice of contest, and alleges that it was at all times the intention of the Maxwell Land & Irrigation Company and of its successor in interest, the United States through and by means of the Maxwell Land & Irrigation Company's system and in pursuance of said Company's appropriation to irrigate more than 9,000 acres of land, as

shown in said Statement and Proof of the United States; that from the commencement of the construction of the said Maxwell Land & Irrigation Company's system and up to the present day the same has been diligently and consistently constructed and developed, as shown in said Statement and Proof; that through and by means of the said Maxwell system and water rights the Maxwell Land & Irrigation Company and its successor in interest have consistently and with due diligence irrigated increasing areas of land, as shown in said Statement and Proof, and have as thus shown in pursuance of the appropriation of the said Maxwell Land & Irrigation Company, applied a very large part of the said 114 cubic feet per second to beneficial use, and have constructed canals, laterals, ditches, turnouts, and other irrigation appliances for the immediate application to such use of all of the water thus appropriated and for the irrigation of all of the said land intended and proposed to be irrigated as aforesaid, and that more than 3,000 acres have been irrigated by the Maxwell Land & Irrigation Company and its successor in interest through and by means of said Maxwell system pursuant to said appropriation; that by reason of the premises the United States has and has duly acquired the right to divert and apply to a beneficial use the waters of said Umatilla River to the extent of 114 cubic feet per second of said waters in pursuance of the said appropria-

tion of the Maxwell Land & Irrigation Company prior in time and right to every and all claims or rights of the Western Land & Irrigation Company save the right to divert and use 41.6 cubic feet per second of said waters.

And in further answer and reply to said notice of contest reference is hereby made to Statements and Proofs filed on behalf of the United States in this proceeding, and the same are made a part hereof, and the allegations therein contained are reiterated and confirmed; and reference is also made to that certain notice of contest and contest filed in this proceeding on behalf of the United States against the Western Land & Irrigation Company as modified in the proposed amendment thereof, copy of which is hereto attached, and made a part hereof, and the denials, admissions and allegations therein contained are hereby reiterated and confirmed.

WHEREFORE, the United States prays that this contest be dismissed and held for naught; that all rights and claims of the Western Land & Irrigation Company in and to the said waters of the Umatilla River be determined to be subject to the prior right of the United States to divert and use the same to the extent of 25 cubic feet per second, and that all claims of right in and to said waters of said company in excess of 41.6 cubic feet per second be determined to be subject to

all rights of the United States in and to said waters, as set out in its Statement and Proofs filed herein, including the aforesaid right to divert and use 114 cubic feet per second, and that the United States have and recover of the Western Land & Irrigation Company its costs and disbursements herein."

That on June 29, 1911, appellant filed its

REPLY

as follows:

"(1) Denies each and every allegation in paragraph I of said answer contained except that the United States has succeeded to the rights of the Minnehaha Irrigation Company and the Maxwell Land & Irrigation Company, as therein alleged.

(2) Denies each and every allegation of affirmative matter in paragraph II of said answer contained.

(3) Denies each and every allegation of affirmative matter in paragraph III of said answer contained.

(4) Denies each and every affirmative allegation in paragraph IV of said answer contained.

And for reply to the matters and things set out and alleged as a further answer and reply in contestee's answer herein, contestant denies each and every allegation, matter and thing therein alleged, except as admitted in the notice of contest against

the United States heretofore filed by this contestant herein.

WHEREFORE contestant prays for decree herein limiting the rights of the United States as against this contestant to 2 and 1/2 cubic feet of water per second under the Minnehaha Irrigation Company right, which contestant concedes to said right prior and superior to the rights of this contestant under its appropriation of March 14, 1903, and limiting the Maxwell Land & Irrigation Company right to the quantity of water necessary to irrigate three hundred acres of land, and adjudging said Maxwell right and all other rights and claims of the United States to be inferior in right and subsequent in time to the rights and claims of this claimant, and for the costs and disbursements of this contest."

VIII.

DILLON IRRIGATION COMPANY VS. WESTERN LAND & IRRIGATION COMPANY.

Contest No. 12.

On September 28th, 1910, the Dillon Irrigation Company filed its

NOTICE OF CONTEST

against appellant's Statement and Claim, and alleged:

"(1) That contestant is a corporation organized and existing under and by virtue of the laws of the State of Oregon, and for the purpose of diverting waters of the Umatilla River and distributing the same to certain lands adjacent thereto, of owning and constructing operating dams, diversion works, flumes and ditches and doing all things necessary to be done in carrying and distributing the said waters to the said lands. That heretofore and during the period designated by the above entitled board the contestant duly filed its Proof of Claim with the said board wherein and whereby it set out its right to the use of the waters of the Umatilla River in manner and form as by the said board required and the said Proof of Claim is now referred to and made a part hereof. That as set forth in the said Proof of Claim the contestant has acquired and now owns and enjoys by appropriation, diversion and application all the beneficial uses therein described and right to the use of the waters of the Umatilla River which said right was initiated by posting notice in November, 1897. That pursuant to the said notice contestant commenced diversion of the waters of the said River in March, 1898, and during all the times since said date contestant has used and now is diverting and using the said waters for the reclamation of arid lands and for domestic and live stock purposes and by its said continuous application and beneficial uses contestant is now entitled to a right to use sufficient

of the said waters for the irrigation of 2,008.5 acres of land and for the other above mentioned purposes.

That the said diversion has been made through the contestant's ditch known as the Dillon Irrigation Company's ditch, which said ditch is built and located as in contestant's certain map heretofore duly filed herein and referred to as a part of this notice of contest. And that the waters so diverted by contestant have been diverted by means of contestant's certain dam and diversion works and through contestant's said ditch. That the upper end of contestant's ditch is known as the Maxwell ditch and is used by this contestant in common with a certain other claimant to the right to the use of the waters of the Umatilla River and the use so made through the said ditches by this contestant has been during all the times since March, 1898, open, notorious, continuous, adverse and under a claim of right to the waters so used and have during the said period been applied to the beneficial uses hereinabove referred to. That contestant has entered into valid subsisting contracts with land owners and water users located under its line of ditch, the said contracts covering and aggregate acreage of 2,008.5 acres as aforesaid.

(2) That heretofore and during the period designated by the above entitled board for filing proof of claims in the matter of the determination of the relative

rights to the waters of the Umatilla River, contestee herein under the name of the Western Land & Irrigation Company, a corporation, filed herein its claim to the right to use certain waters of said river, which said claim is hereby referred and made a part of this notice of contest. The said claim is erroneous, false and misleading in this, to-wit: That the contestee has not used the water claimed by it nor any part thereof for any beneficial purpose or at all excepting only during the spring months and prior to the 15th day of June. That the contestee does not supply and cannot deliver with its line of ditch the amount of water claimed by it or for the acreage as in its claim stated. That the contestee is not the successor in interest of the so-called Umatilla Meadows & Butter Creek Canal Company as in their Proof of Claim stated, and that no water was conveyed through their said ditch until at or about the year 1904, and that the line of ditch constructed by the said Umatilla Meadows & Butter Creek Canal Company was never completed and did not extend within many miles of the lands now irrigated by contestee through the exercise of its pretended water right. That if the said Umatilla Meadows & Butter Creek Canal Company had acquired any right to the use of the waters of the Umatilla River said right has been long since lost and abandoned by non-user and the acts of the said Company. That in truth and in fact the only relation between contestee and its

alleged predecessor in interest is that contestee has constructed its ditch over a part of the line of ditch of its said alleged predecessor and diverts water from the Umatilla River during the spring months of the year at or near the point where its said alleged predecessor first constructed the head of its ditch. That the said line of ditch now usurped and used by the contestee is used jointly by it with the Allen Ditch Company, a corporation and that the said Allen Ditch Company likewise in its Proof of Claim filed herein pretends to be the successor in interest of the said Umatilla Meadows & Butter Creek Canal Company.

That any pretended right of contestee is subsequent in time and inferior in right and equity to the right of this contestant. That the line of ditch and diversion works of contestee is by a long line of conveyances, many times changed hands, and that the predecessors in title and the pretended predecessors in title of contestee never at any time contemplated the reclamation of the lands for which contestee now claims a right to the use of the waters of the Umatilla River. That the enlargement of the said ditch and the extension thereof and the application of water through the same was not contemplated until on or about 1903, and that theretofore the said ditch had been a failure and no beneficial use of any waters had been made through the same. That if contestee is permitted to divert the waters of the Umatilla River

in the amounts and for the purposes as in his proof of claim described great and irreparable injury will be done to this contestant and to its established water right.

WHEREFORE for the reasons hereinabove stated contestant contests the claim of contestee to the right to the use of the waters of the Umatilla River and prays that said claim may be allowed if at all only subordinate and inferior to the right of contestant and that contestee pay the costs in this contest incurred."

Thereafter appellant filed its

ANSWER

to said contest, as follows:

"(1) For answer to paragraph I of said notice of contest claimant alleges that it has no knowledge or information sufficient to form a belief as to whether or not the Dillon Irrigation Co. ever posted any notice of appropriation of the waters of the Umatilla River for any purpose at any time, or as to whether or not said Company commenced the diversion of water from said River in March, 1898, or as to whether it is entitled to sufficient water to irrigate 2,008.5 acres of land as alleged in said paragraph, and therefore denies the same.

As to whether said Company has contracts with land owners and water users covering 2,008.5 acres of land claimant has

no knowledge or information sufficient to form a belief and therefore denies the same.

Claimant denies that said Dillon Irrigation Company ever made any use of the waters of the Umatilla River adverse to the rights and claims of claimant and its predecessors in interest, either as alleged in said notice of contest or otherwise or at all. Claimant alleges that said Dillon Irrigation Company has never at any time, disputed or questioned the rights of claimant and its predecessors in interest in and to the waters of the Umatilla River to the extent and of the priorities set forth in claimant's Statement and Proof of Claim filed herein until said Company attempted to set up a right based on adverse use as set out in its notice of contest herein.

Claimant admits that the rights of the Dillon Irrigation Co. if any it has, are superior to any rights of claimant under the appropriation made by the Hinkle Ditch Company on March 14, 1903, but alleges that the rights of said Dillon Irrigation Company, if any it has, are inferior and subsequent to all other rights of claimant as set forth in its Statement and Proof of Claim filed herein.

(2) For answer to paragraph II of said notice of contest claimant denies that its claim of right to the use of the waters of the Umatilla River heretofore filed herein is erroneous, false or misleading in any particular.

Claimant admits that at the present time it does not supply and cannot deliver with its ditch at the present time, the amount of water claimed by it for the acreage under its project, but alleges that claimant and its predecessors in interest have constantly and consistently and continuously from year to year enlarged, increased and extended its ditch and irrigation system, and that claimant expects and intends to continue to enlarge, extend and develop the same so as to supply and deliver the full amount of water claimed by it to the acreage of lands under its project, as set forth in claimant's Statement and Proof of Claim filed herein, which is hereby referred to, adopted and made a part of this answer.

Claimant admits that its main ditch for a distance of about one-fourth mile below its headgate is used at the present time jointly with the Allen Ditch Company, and alleges that such joint use is under a written lease heretofore made with said Allen Ditch Co., granting to said Company the right to divert its water through claimant's headgate and carry the same through claimant's main ditch for the distance aforesaid in consideration of an annual rental paid to claimant for said privilege.

WHEREFORE claimant prays judgment against contestant for its costs and disbursements in this contest."

IX.

That thereafter the following contests were filed with the Superintendent of Water Division No. 2, within five days after the close of inspection of the statements and proofs of claim of the various claimants to the waters of said river, to-wit:

Contest No. 8, Courtney Irrigation Co. vs. Western Land & Irrigation Company;

Contest No. 12, Dillon Irrigation Co. vs. Western Land & Irrigation Company;

Contest No. 34, Oregon Land & Water Company vs. Western Land & Irrigation Company;

Contest No. 36, W. T. Walton vs. Western Land & Irrigation Company;

Contest No. 37, Sidney Walton vs. Western Land & Irrigation Company;

Contest No. 39, Western Land & Irrigation Co. vs. Pioneer Irrigation Company;

Contest No. 40, Western Land & Irrigation Co. vs. Courtney Irrigation Company;

Contest No. 41, Western Land & Irrigation Co. vs. Harry R. Newport;

Contest No. 42, Western Land & Irrigation Co. vs. Brownell Ditch Company;

Contest No. 43, Western Land & Irrigation Co. vs. John J. and Thomas W. Peters;

Contest No. 44, Western Land & Irrigation Co. vs. Oregon Land & Water Company;

Contest No. 45, Western Land & Irrigation Co. vs. F. H. Gritman;

Contest No. 46, Western Land & Irrigation Company vs. H. G. Hurlburt;

Contest No. 47, Western Land & Irrigation Co. vs. Frank E. Fowler and Julia C Fowler;

Contest No 48, Western Land & Irrigation Co. vs. Maxwell Irrigation Company;

Contest No. 93, United States vs. Western Land & Irrigation Company.

(Statements and proofs of claim of the respondents Courtney Irrigation Company, Brownell Ditch Company, Oregon Land & Water Company, Pioneer Irrigation Company, Maxwell Irrigation Company, W. T. Walton, Sidney Walton, Harry R. Newport, F. H. Gritman, H. G. Hurlburt, Frank E. Fowler, Julia C. Fowler, John J. Peters and Thomas W. Peters, who are named as respondents herein, by virtue of the provisions of Sec. 6650, L. O. L., as amended by Chapter 97, Laws of 1913, are omitted because the rights of said respondents do not appear to be affected by this appeal.)

After said contests were filed, the Superintendent of Water Division No. 2 fixed June 21, 1911, as the date for hearing thereon and when said contests had all been heard and determined, to-wit, on March 29, 1915, the State Water Board filed in the Circuit Court of Umatilla County, Oregon, its Findings of Fact and Order of Determination, as follows:

FINDING NO. 9

Contest No. 8. The Courtney Irrigation Company, contestant, vs. Western Land & Irrigation Company, contestee, was settled by stipulation wherein and whereby it was agreed that the Courtney Irrigation Company should have a right prior to the Western Land & Irrigation Company for an amount of water not exceeding 1500 inches, miner's measurement, under a six-inch pressure.

Contest No. 11. Courtney Irrigation Company, contestant, vs. United States of America, contestee. The claim of the United States of America is divided into two parts; that part of the claim represented by Engineer's permits under Application No. 13, and Application No. 237, initiated March 28, 1909, not being completed rights are not in any wise determined by this decree of adjudication, but shall be determined and approved in accordance with Sections Nos. 6624, 6627, 6628, 6630, 6631, 6632 and 6633 of Lord's Oregon Laws.

That the second basis of claim of the United States of America is based upon what is called the Minnehaha and Maxwell rights. * * * That about eighty acres is what the water was put over under the Minnehaha rights, and a water right for eighty acres of the priority date of 1894 has been established under the Minnehaha right. That on the 25th day of February,

1904, the Maxwell Land & Irrigation Company posted a notice of appropriation, and map filed therewith shows that the water was appropriated for the acreage as stated forthwith under the claim of the United States. That due diligence has been shown in the bringing of the lands thereunder into cultivation and irrigation, and that the United States Government should have under date of February 25, 1904, the lands as hereinafter tabulated; that this tabulation shall include the claim of the Maxwell Land & Irrigation Company and claimants thereunder, which will make the claim of the United States of America as tabulated, include the claims of the United States of America, Maxwell Land & Irrigation Company, J. F. McNaught, S. R. Oldaker and Chas. E. Baker.

Contest No. 12. Dillon Irrigation Company, contestant, vs. Western Land & Irrigation Company, contestee. The contestee bases its rights upon three appropriations made in 1891, and upon a second appropriation made in 1903 (see Exhibits 25A, 25B, 25C and 25D). The appropriation made by J. M. Jones was afterward transferred to the Columbia Valley Land & Irrigation Company (see Exhibit 25E). That under the appropriation of J. M. Jones water was diverted, and in the year 1892 a couple of hundred acres were irrigated (Vol. 32, Book c, p. 670). In 1893 there was no water diverted through the ditch (Vol. 32, p. 670A). The ditch

then fell into disuse and no further use was made of it until the rights were purchased by the Hinkle Ditch Company, which was succeeded by the Western Land & Irrigation Company. The Hinkle Ditch Company made a new appropriation on March 14, 1903. The priority date, therefore, of the Western Land & Irrigation Company begins with the appropriation of the Hinkle Ditch Company, and the same is hereby established as March 14, 1903.

Contest No. 34. Oregon Land & Irrigation Company, contestant, vs. Western Land & Irrigation Company, contestee, was settled by stipulation, wherein the contestee is acknowledged to have a prior right to the contestee of 75 second feet of water.

Contest No. 36. William T. Walton, contestant, vs. Western Land & Irrigation Company, contestee, was dismissed in open court without costs or prejudice to either party, it appearing that the rights of the parties had been settled between themselves.

Contest No. 37. Sidney Walton, contestant, vs. Western Land & Irrigation Company, contestee, was dismissed without costs or prejudice to either party, it appearing that the rights of the parties had been settled between themselves.

Contest No. 38. Western Land & Irrigation Company, contestant, vs. United States of America, contestee, involves the same matters as Con-

test No. 11, Courtney Irrigation Co., contestant, vs. U. S. of America, contestee, and shall be governed by the findings therein.

Contest No. 39. Western Land & Irrigation Company, contestant, vs. Pioneer Irrigation Company, contestee, was settled by stipulation of the parties, wherein it was agreed that as against contestant the contestee should have a prior right to the use of not to exceed 1005 inches of water, miner's measurement, under a six-inch pressure.

Contest No. 40. Western Land & Irrigation Company, contestant, vs. Courtney Irrigation Company, contestee, was settled by stipulation and is governed by the findings under Contest No. 8.

Contest No. 41. Western Land & Irrigation Company, contestant, vs. Harry R. Newport, contestee, was settled by stipulation, wherein and whereby the rights of the contestee were agreed to be subsequent in time and inferior in right to the rights of the contestant.

Contest No. 42. Western Land & Irrigation Company, contestant, vs. Brownell Ditch Company, was settled by stipulation, wherein it was agreed that the rights of the contestee herein were prior in time and superior in right to any and all rights claimed by the contestant, except as to such rights as the contestant and its pre-

decessors in interest may have secured with a priority date prior to March 14, 1903.

Contest No. 43. Western Land & Irrigation Company, contestant, vs. John J. and Thomas W. Peters, contestees. Upon default of contestees it was adjudged that they have no right, title or interest in and to the use of any of the waters of the Umatilla River upon the lands described in their claim as being the east half of the southwest quarter of Sec. 8, Tp. 4 N, R. 28 E., W. M.

Contest No. 44. Western Land & Irrigation Company, contestant, vs. Oregon Land & Irrigation Company, contestee, was settled by stipulation to the same effect as Contest No. 34, and the findings in Contest No. 34 shall govern as to this contest.

Contest No. 45. Western Land & Irrigation Company, contestant, vs. F. H. Gritman, contestee, was awarded a priority date of 1908 for sixty (60) acres of land.

Contest No. 46. Western Land & Irrigation Company, contestant, vs. H. G. Hurlburt, contestee, was settled by stipulation, wherein it was agreed that whatever rights the contestee might have in the use of the waters of the Umatilla River were subsequent in time and inferior in right to the rights of the contestant.

Contest No. 47. Western Land & Irrigation

Company, contestant, vs. Frank E. Fowler and Julia C. Fowler, contestees, upon default of contestees, it was adjudged that they have no right in or to the use of any of the waters of the Umatilla River.

Contest No. 48. Western Land & Irrigation Company, contestant, vs. Maxwell Land & Irrigation Company, contestee, was settled by stipulation, wherein said contestee is entitled to a right prior in time and superior in right to the contestant to an amount not to exceed 462 inches of water, miner's measurement, under a six-inch pressure.

Contest No. 93. United States of America, contestant, vs. Western Land & Irrigation Company, contestee. The contestee bases its priority upon three appropriations made in 1891 and upon a second appropriation made in 1903 (see Ex. 25A, 25B, 25C and 25D). The appropriation made by J. M. Jones was afterward transferred to the Columbia Valley Land & Irrigation Company (see Ex. 25E); that the appropriation of J. M. Jones shows it was diverted in the year 1892, and in the year 1892 a couple of hundred acres were irrigated (Vol. 32, p. 670A). The ditch then fell into disuse and no further use was made of it until the rights were purchased by the Hinkle Ditch Company, who were succeeded by the Western Land & Irrigation Company. About in the year 1903, the

Hinkle Ditch Company made a new appropriation, on March 14, 1903, the old appropriation of Jones having evidently been abandoned. The priority date, therefore, of the Western Land & Irrigation Company begins with the appropriation of the Hinkle Ditch Company and the same is hereby established as March 14, 1903.

FINDING NO. 20

That the Umatilla River and its tributaries form a perennial stream with well defined bed and banks, wholly within the Counties of Umatilla and Morrow, but principally within the County of Umatilla, State of Oregon, having its source near the eastern boundary of Umatilla County, in the Blue Mountains, and flowing in a westerly and northwesterly direction, and empties its water into the Columbia River. Then the flow of this stream and its tributaries is torrential in its nature, flowing large quantities in the spring time when the winter snows are melting, and the main stream almost going dry in the dry part of the summer, and most of the tributaries do go dry.

That upon the tributaries it is necessary, therefore, to use the waters for irrigation during the flood time, or the irrigators will not be able to divert any water whatever. That along the main stream the supply of water during the dry part of the summer is so short that a great

many of the irrigators must divert water for irrigation during the flood time, or not be able to divert any water whatever. That the spring freshets beginning at different times each year, depending upon the time of the break of winter, and its quantity and duration is dependent upon the extent of the snowfall, the time when and the degree of temperature prevailing while the winter snows are melting; that ordinarily winter begins to break up about the first of February of each year. That it is customary among the irrigators to use the water from the various streams at any time of the year they can get it; that various irrigators irrigate their lands during the fall and winter, thereby storing sufficient water in their lands to carry them over the dry part of the summer season.

FINDING NO. 21

That the soil of the watershed of the Umatilla River varies, in places there is a heavy sandy loam, other places a light sandy loam, others gravelly loam, others sagebrush and desert land, other places a black loam, and in others a volcanic ash. That the annual rainfall in said watershed varies and the necessity for irrigation varies according to that rainfall; that, in general, irrigation is necessary in order to produce crops; that that part of the Umatilla watershed lying east and above the Furnish Reservoir has a greater rainfall than that part lying west of

and below said reservoir; that said part above said reservoir shall be called and known, in these Findings, as the Upper River, and that part below said reservoir shall be known as and called, in these Findings, the Lower River. That along the tributaries the amount of water necessary to irrigate an acre of land varies according to the rainfall, and the kind and quality of the land; that gravelly places along the river require more water to irrigate than a loam soil.

FINDING NO. 22

In no case, where water is stored, shall there be diverted from the stream more than the number of acre feet of water as represented by the number of acres to be irrigated with such stored water, multiplied by the number of acre feet that is sufficient for the irrigation of one acre, as found in these Findings, and the diversion for storage shall be the number of second feet appropriated for that purpose, diverted at any time there is water, according to the date of priority.

FINDING NO. 23

In order to successfully irrigate a piece of ground it is necessary to have a sufficient head of water; the flow of one-eightieth of a second-foot of water for the period of 120 days would approximately supply three acre feet of water.

That a head of one-eightieth of a second-foot is inadequate for the purpose of irrigating an acre of land. That in order to irrigate any land, it is not necessary to keep a continuous flow of water upon each and every acre of said land. That it is necessary to irrigate an acre of land once in about every three weeks during the growing season. That the intermittent use of water upon an acre of ground makes it possible for the arrangement of satisfactory systems of rotation, so that the head of water necessary for the irrigation of an acre of land can be increased. That the head of water required to irrigate any land varies according to the season, rainfall, the heat, soil, crops, and humidity.

FINDING NO. 24

That all claimants herein to water for irrigation shall be entitled to use such water for stock and domestic purposes; that the rights of use for stock and domestic purposes is hereby confirmed and entitles the owner of such right to divert and use such a quantity of water as is reasonably necessary for his household and stock use, and for stock use, the amount so diverted and used shall not exceed the rate of one-fortieth of one cubic foot per second for each one thousand (1000) head of stock, and the quantity diverted for irrigation purposes during the irrigation season shall include when it is so diverted such an amount as may be rea-

sonably necessary for said stock and domestic purposes, and the right to divert and use the waters of said stream and its tributaries, for stock and domestic purposes, continues throughout the year.

FINDING NO. 25

That in all cases where any person, firm or corporation has a right under this decree to supply and deliver water to others and charge for the same, or may hereafter acquire such right, it is the duty of such person, firm or corporation to supply water to any and all persons, firm or corporation, or who can be reasonably supplied with water from said works under reasonable and uniform contracts and for reasonable and uniform charges up to the limit of the capacity of said works, so long as said person so taking such water complies or is ready to and able to comply with the terms of such contract. Such contract may provide for any reasonable and uniform method of pro rata distribution of water, and such person, firm or corporation may make such reasonable and uniform rules and regulations as may be necessary to facilitate such distribution. In case such contract does not provide for such distribution of water then such water shall be supplied to the water users in the order of, and according to the date of priority of use upon the land, or at the place upon which such water is to be used, and sub-

ject to rotation as in this decree generally provided; *provided*, that no contract shall be made to deliver water to lands or places not theretofore supplied, to such an extent as to deprive any land or place of water which has been previously supplied, and *provided further*, that no contract shall be made to deliver water for irrigation or power unless the land or place where said water is to be used entitled to such use under a right granted by this decree, by a permit of the State Engineer, or by a water right certificate.

FINDING NO. 26

In all cases in this decree wherein the right to use water out of more than one stream for the same kind is confirmed, the amount of water herein determined for said right may be used out of either or both of said streams, so long as the amount of water taken does not exceed the volume named in this decree, and each stream may be used to supplement the other in furnishing said amount of water.

FINDING NO. 27

That a right to store water is a separate and distinct right from the right to use such water for irrigation, and a water right for irrigation does not give the water user entitled thereto the right to store such water. In all cases in these findings wherein a water user has both the right

to store water and also the right to use such water for irrigation, he shall have the right to divert such water from the stream, according to the respective priority dates of such rights, and said right to store water may be used to supplement the diversion for irrigation; that is, when the water in said stream becomes so scarce that his right to the diversion of water for such irrigation right is cut off, then he shall have the right to use the water so stored by him for the purpose of supplementing the right of irrigation, and of increasing the length of the irrigation season upon the lands for which he has such irrigation right.

FINDING NO. 28

That in all cases where water is stored by any claimant, said water shall be taken at any season of the year for said storage according to the dates of relative priority, and in case the owner of any reservoir desires to use the bed of any of the streams for the purpose of carrying such stored water from the reservoir to the consumer thereof, said owner of such reservoir shall install such headgates and measuring devices as the Superintendent of the Division, or the water master of the district in which the water is situated and used shall order. Said stored water may be used at any time during the year that the owner thereof may desire. Whenever said owner of such reservoir desires

to use such stored water, he shall notify the water master of the district in which the stored water is to be used, giving the date when it is proposed to discharge water from such reservoir, its volume and the names of all persons and ditches entitled to its use. Said water master shall then determine the percentage of loss by seepage, evaporation or other causes, between the place of discharge from the reservoir into the stream, and the place of diversion from the stream, and shall close or so adjust the headgates of all ditches from the stream as will enable those having such right to secure the volume discharged from the reservoir less the determined loss. That in all cases where reservoirs are built so as to include within their boundaries the bed of any stream, the waters of which are herein adjudicated and determined, the owner, manager or lessee of such reservoir shall install in the stream above and below said reservoir, such measuring devices as the Superintendent of the Division or the water master of the district in which said reservoir is situated may order; the plans for the construction of said measuring devices shall be approved by the State Engineer. The said water master shall measure all water of such stream running into said reservoir and shall discharge from said reservoir sufficient water (not exceeding the volume of water running into said reservoir) to supply such prior rights as may be entitled

to use said water, such discharge of water shall only be necessary during the time or season in which such prior rights are entitled to use the same. The water master shall keep a true and just account of the time spent by him in the discharge of his duties as defined in this finding, and shall file the same with the County Court of Umatilla County, sitting for the transaction of county business. Said County Court shall present a bill of one-half the expenses so incurred to the reservoir owner, manager, or lessee, and if such owner, manager or lessee shall neglect for thirty days after the presentation of such bill of costs to pay the same, the said costs shall be made a charge upon said reservoir, and shall be collected as delinquent taxes until the complete payment of such bill of costs has been made, and the rights of appropriation herein confirmed confer no rights to the diversion and use of waters which have been lawfully impounded in reservoirs and other storage works which have been, or may be hereafter constructed in accordance with law, when the same are discharged into the natural channel of said stream, or any tributary thereof, in a lawful manner by those having a lawful right to do so, but the said rights of appropriation herein confirmed are limited and confined to the waters flowing naturally in the natural channel of said stream and its tributaries.

FINDING NO. 29

That the rights of appropriation hereby confirmed are appurtenant to the lands herein described for irrigation purposes, and the rights of use of the waters of said stream and its tributaries by virtue of such rights of appropriation, are limited and confined to the irrigation of the lands herein described to the extent of said lands as herein set forth, and the priorities herein confirmed confer no right or use of the waters of said stream, and its tributaries, on the lands other than those specified tracts to which such rights of appropriation are herein set forth as appurtenant, and each and every person shall be and hereby is prohibited, restrained and enjoined from diverting and using water from said stream on such other lands without lawful permit from the State Engineer.

FINDING NO. 30

That the order of the rights of the respective appropriators of the waters of said stream and its tributaries, and in which order they are entitled to divert and use the said water shall be and is according to the date of the relative priority of the right as herein set forth and determined, and the first in order of time according to the date of relative priority shall be and is the first in order of right, and so on, down to the

date of the latest priority, and those having prior rights are entitled to divert and use the waters of said stream and its tributaries, when necessary for the beneficial use in connection with the irrigation of their respective lands, or other useful and beneficial purposes for which they are decreed a right of use, at all times and against those having subsequent rights, without let or hindrance, and whenever the water is not required by the appropriator having a prior right to its use for the purpose for which said water was appropriated, he must and shall permit it to flow down in the natural channel of the stream as it was wont to flow in its natural course, without hindrance or diversion thereof, and those having subsequent rights are entitled to the use of such water and to divert the same to the extent of their rights or appropriations, according to the order of their priority rights; and at all times the waters diverted shall be beneficially, economically and reasonably used without waste by those having a right to do so by reason of their priority of their rights, and no rights of appropriation are hereby confirmed to divert a greater quantity of water into the head of the ditch or ditches of the appropriator having a valid right to divert the water than such appropriator can beneficially use for the purposes to which the water is to be put, and in no event shall the water diverted exceed the quantity herein as the quantity to which such

appropriator is entitled, as the same is necessary for the proper and beneficial irrigation of his lands and has been actually put to a beneficial use.

FINDING NO. 31

The United States of America, by its attorney in open session, waived any priorities based upon failure or adverse use, as made under the state laws by the government or its predecessors in interest, that the United States may have as to all of the contestees upon Birch Creek and McKay Creeks, and that part of the Umatilla River and its tributaries lying east of and above the City of Pendleton, who have acquired rights that have been initiated prior to February 24, 1909. This waiver shall be construed in connection with the tabulation of water rights herein set forth so as to give it full effect and force, but said waiver shall not be enforced at any time so as to infringe upon any of the water rights to which said waiver does not appertain (Vol. 31, p. 552).

FINDING NO. 32

That the amount of water to be used for the irrigation of the lands in the tabulation herein described is limited to a continuous flow of not to exceed one-fortieth (1-40) of a second-foot for each acre of land during the months of

April and May, and not to exceed 1-80 of a second-foot for each acre of land during any other month of the year. That to get a sufficient head of water, the water master of the district in which such water is situated shall arrange such a system or systems of rotation as may be best applicable to either: First, by giving a greater amount of water for an appropriator for a proportionately less time, provided that the giving of such greater amount does not infringe upon any of the rights confirmed by this decree, and provided further, that the amount of water taken by an appropriator does not exceed the number of acre feet as found in these findings to be necessary for the irrigation of the land during the irrigation season; second, or in the absence of an agreement between such appropriators arranging for such rotation, and the manner in which such water shall be used in such rotation, the water master of the district in which such stream and its tributaries is situated shall arrange such appropriators in groups or systems of rotation, first giving to the appropriator in such group a quantity of water equal to the combined appropriations, as the appropriators in said group or system for a length of time bearing the same ratio to the whole time required to make the complete rotation through the whole group of appropriators, bears to the combined appropriation of said group, and shall next serve another appro-

priator with a like quantity of water for his proportionate time, and so on, until all the appropriators in said group or system are served, then the distribution of water shall be repeated in the same manner throughout the irrigation season.

The determination as to who shall be first served in said group or system of appropriators shall be left to the judgment of the water master.

Third, or where two or more appropriators agree as between themselves as to the manner of said rotation in the use of water, said water master shall distribute the water in accordance with such agreement, provided always, that such arrangements into groups or systems of rotation shall not interfere with the prior rights of any appropriator, not a member of such group or system, and provided further, that such agreement shall be in writing, and filed by said appropriators with the water master.

That in all instances where water is stored, the water is run into the reservoirs during the high water time of the season, and stored until needed for use during the dry part of the summer season; that where storage is available, irrigators ordinarily use water during the growing season for their crops, provided their storage is sufficient to supply them with water for this growing season. The irrigation season ordinarily is between the first day of March and the

first day of November of each year. In all cases where storage is not used and the water right of the irrigator is of a sufficient early date, and the flow of water in the stream sufficient to supply such irrigator with water during the growing season, the irrigation season for such irrigators is from the 15th day of September of each year; in all other cases the irrigation season for each irrigator is any time of the year that there is or may be a supply of water sufficient for such irrigator to carry on his irrigation, provided that during the months of November, December, January and February all storage rights shall have priority over all irrigation rights and upon all the tributaries of the Umatilla River there shall be no limit as to the irrigation season and the irrigator shall have the right to use the water at any time of the year it can be secured.

That along the tributaries of the Upper River the irrigation of land is generally carried on upon bottom lands adjoining the streams and very little irrigation is carried on upon the hills and uplands. That the lands along and adjoining such tributaries are gravelly and require more water per acre to irrigate than the uplands would require. That the irrigation along the main stream of the Upper River is generally confined to the bottom lands adjoining the stream and not to the uplands. That the bot-

tom lands of the Upper River west and below the City of Pendleton require more water for irrigation than does the bottom land along the main stream east of and above said City of Pendleton on account of the difference in rainfall. That the bottom lands of the Upper River west of and below the City of Pendleton require about the same amount of water for irrigation as do the tributaries of said Upper River. That four and one-half ($4\frac{1}{2}$) acre feet of water per acre per year is sufficient water for the irrigation of the bottom lands along the tributaries of said Umatilla River and also along the bottom lands of said Upper River west of and below the City of Pendleton. That three acre feet of water per acre per year is sufficient water for the irrigation of the bottom lands of said Upper River east of and above the City of Pendleton, and for the irrigation of the uplands of said Upper River. That the lands of the Lower River shall be divided into the following classes: First, the lands along the tributaries; second, the bottom or meadow lands of the Umatilla River; third, the raw sagebrush lands of the upland, and, fourth, such uplands as have been reduced to cultivation and irrigation and subdued from its wild state.

That along the tributaries of the Lower River the same duty of water shall prevail as along the tributaries of the Upper River. That

the meadow and bottom land of said Lower River is easily watered, and in a great many cases needs drainage, but that such need of drainage does not obviate the necessity of irrigation. That the rainfall of the Lower River is such that all the land needs irrigation to a large extent. That three acre feet of water per acre a year is a sufficient amount of water for the irrigation of such meadow and bottom lands of said Lower River. That along said Lower River there are a number of large irrigation projects partially developed. That it is the experience of the irrigators upon said projects that, in order to reduce the raw lands upon said projects to a state of cultivation and irrigation, it is necessary to use a larger amount of water upon said lands during the process of such reduction.

That after irrigation of a tract of land for a number of years, the amount of water necessary for the irrigation of such land materially decreases. That during the reduction of said lands from a raw state into a state of cultivation, six acre feet of water per acre, per year, is a sufficient amount of water for the irrigation thereof. That after said land has been reduced to a state of cultivation and irrigation, three acre feet of water per acre per year is a sufficient amount of water for the irrigation thereof.

That the specification of a definite amount of water per acre in the foregoing finding for

certain classes of land shall not be taken as granting that specific amount of water to any water user, but shall only be taken as a rule and guide for the water master in the distribution of a maximum amount of water due any water user; and it shall be in the discretion of such water master to cut down the amount of water given for any particular acreage of land and turn the water to other land at any time that such land becomes fully irrigated upon a less amount of water; and the water master shall have the right, at his discretion, to cut off the supply of water to any territory at any time in the distribution of water when the date of priority of such land is such that as the water becomes short and scarce there would not be sufficient water to deliver any to such land.

FINDING NO. 34

The following appropriators have, in their statements and proofs of claim, applied to the State Water Board to prescribe the time within which the full amount of water appropriated shall be applied to a beneficial use, and it appears to the said State Water Board that the appropriations of said appropriators, and each of them, were made prior to February 24, 1909, and that actual construction work had been commenced in good faith prior to said date.

The State Engineer is hereby directed to

issue a certificate to each of said appropriators showing the time fixed by this finding within which the water appropriated by such appropriators shall be applied to a beneficial use. The extent of such appropriation shall be limited to such an amount or volume of water as shall have been put to a beneficial use by the expiration of the time fixed in this finding.

That the name and address of each appropriator of water from said Umatilla River and its tributaries, who has not completed such appropriation, and who has so applied to the State Water Board to prescribe the time within which the full amount of water shall be applied to a beneficial use, are hereinafter in this finding arranged in alphabetical form, together with the date of relative priority of each of such appropriators, the limiting date for the complete application of the full amount of water appropriated to a beneficial use, the use or uses for which such water was appropriated and is to be applied, the number of acres now irrigated and the number of acres to be irrigated in case such appropriation is for irrigation, the name of the ditch or ditches through which such appropriation is to be applied to a beneficial use, and to which such use is limited, arranged in alphabetical order and set opposite the name and post-office address of each such appropriator are as follows, to-wit:

	Date of Rel. priority.	Amount cu. ft. per sec.	Time for complete app.	Use—Acre and Irr. season.
Dillon Irri. Company				
Finding No. 9.....	Nov. 1897	4.76	Vested	380 acres
Contest 12, 13, 17, 92.	1907	5.00	Vested	399 acres
.....	1907	....	Jan. 1, 1918	1213.9 acres
Reeves, W. T.	1907	1.41	Vested	113 acres
Densler, F. H.	"	.19	Vested	15 "
Myrick, B. F.	"	.13	Vested	10 "
Rector, B. F.	"	.18	Vested	14 "
Dixon, B. F.	"	.27	Vested	22 "
Umatilla Ranch Co.	"	4.03	Vested	322 "

Dillon Ditch—All in townships 3 and 4, R. 28, and 3 and 4, R. 29, E. W. M.

Furnish Ditch Co...	Mar. 8, 1905	40.91	Vested	3272.81 Irr.
Finding No. 9.....	Feb. 23, 1909	.....	.....	Storage of 5500 ac. ft.
Contest No. 95.....	Mar. 9, 1905	.....	Jan. 1, 1920	9670.05 Irr.

Furnish Ditch—All in townships 3, R. 28; 4, R. 28; 4, R. 29; 3, R. 29.

United States of America.....	Mar. 28, 1909	U. S. R. S. Maxwell	Application under this date not complete. See App. No. 13, and 237 to the St. Engineer for permit.	
	Nov. 14, 1894	1 sec. ft.	Vested	80 acres Irr.
	Feb. 25, 1904	50.4	Vested	4031 Max- well & Cold Spring Reservoir
	Sept. 6, 1905	350 head for both Irr. and Storage	Vested	Storage of 50,000 ac. ft.
	Feb. 25, 1904	.....	Jan. 1, 1920	11011 U. S. R. S. Feed Canal
	Sept. 6, 1905	.....	Jan. 1, 1920	947.5

All in townships 5, R. 29; 4, R. 28; 4, R. 29; and 5, R. 28.

Western Land & Irr. Co.	Mar. 14, 1903	38.33	Vested	3086 Irr.
Finding No: 9.....	Mar. 14, 1903	.....	Jan. 1, 1920	14,127.09 Irr
Contests 8, 12, 34 to 48, inc., 93.....				

Hinkle Ditch—All in townships 3, R. 28; 3, R. 27; 5, R. 28; 4, R. 28; 4, R. 27; 3, R. 29.

FINDING NO. 35

Each of the appropriators in the foregoing Finding No. 34 herein shall complete their appropriation, including the construction work and application of the water to a beneficial use, on or before the date set in such tabulation as being the limiting date for the complete application of such water to a beneficial use; or within such time as the State Water Board, for a good cause shown, may extend, as provided by law. Upon the expiration of said time for the complete application of the water to a beneficial use as in this finding provided, or any extension thereof, the State Water Board shall cause due proof to be taken of such application of the waters to a beneficial use and grant such water right certificate as said State Board may ascertain that such appropriator is entitled to receive by virtue of such proof.

And the State Water Board, being fully advised in the premises, it is hereby considered and ordered that the relative rights to the use of the waters of the Umatilla River and its tributaries, a tributary of the Columbia River, be and the same are hereby adjusted, determined and settled in accordance with and as set out in the foregoing findings.

It is further considered and ordered that each and every appropriator owning permits

for the appropriation of water from said Umatilla River and its tributaries shall have such water right thereunder, as is provided by law, and the rights of such appropriators shall be entered in the manner provided by law for the issuing of water right certificates in such cases.

X.

That on the 15th day of May, 1915, appellant filed the following exceptions to said findings and order of determination of the State Water Board:

(1) Claimant excepts to so much of Finding No. 9 relative to Contest No. 12, Dillon Irrigation Company, contestant, vs. Western Land & Irrigation Company, contestee, as finds that no water was diverted through claimant's ditch under the J.M. Jones appropriation in said finding referred to in 1893, and that said ditch fell into disuse and no further use was made of it until the rights were purchased by the Hinkle Ditch Company, upon the ground and for the reason that said finding is not supported by the evidence, and is contrary to the evidence, and to so much of the finding in said contest as gives claimant a priority date of March 14, 1903, and of no other date.

Claimant further excepts to the failure of the Board to find that claimant was entitled to a water right upon the appropriations made in 1891 and referred to in said Finding No. 9, Contest 12, and shown by claimant's exhibits 25A,

25B and 25C, and to the failure of the Board to find the date of priority of such rights and the amount and extent thereof.

Claimant excepts to so much of Finding No. 9, in Contest No. 42, Western Land & Irrigation Company, contestant, vs. Brownell Ditch Company, contestee, as holds that claimant's date of priority shall be as shown and established in the tabulation of priorities herein, to-wit, March 14, 1903; and also excepts to the failure of the that claimant was entitled to a priority under its appropriations made in 1891, and the failure of Board to make a finding in said Contest No. 42, the Board to find the amount or extent thereof.

Claimant excepts to so much of Finding No. 9, in Contest No. 93, United States of America, contestant, vs. Western Land & Irrigation Company, contestee, as finds in effect that its ditch fell into disuse after 1892, and no further use was made of it until the rights were purchased by the Hinkle Ditch Company, a predecessor in interest of the Western Land & Irrigation Company, about the year 1903, and to so much of the findings in said contest No. 93 as finds in effect that the old appropriation of Jones et als had evidently been abandoned, because same are contrary to the evidence.

Claimant also excepts to so much of said findings in Contest No. 93 as finds that all the date of priority to which claimant is entitled is that of March 14, 1903, and to the failure of the Board to find in said Contest No. 93 that claimant was entitled to a further priority as of 1891 upon the appropriations made by J. M. Jones et

als, as shown in claimant's proofs, and to the failure of the Board to find the extent or amount of such priority.

(2) Claimant excepts to so much of Finding No. 25 as finds in effect that in case contracts of companies or corporations having the right to deliver water, do not provide for distribution of water as in said finding set forth, then such water shall be supplied to the water user in the order of and according to the date of priority of use upon the land or at the place upon which said water is to be used, and to so much of said finding as finds in effect that contracts not made in accordance with the terms and conditions therein prescribed shall be void, upon the ground and for the reason that the matters and things in said findings set forth are not within the issues in this proceeding, and are not supported by the evidence.

(3) Claimant excepts as to so much of Finding No. 30 as finds in effect that in no event shall the quantity of water diverted exceed the quantity of water in said decree specified as the quantity to which an appropriator is entitled as the same is necessary for the proper and beneficial irrigation of his lands, and has actually been put to beneficial use, upon the ground and for the reason that said finding is in effect that the total amount an appropriator may divert at his headgate is the amount determined by the Board to be sufficient for the irrigation of his lands without any loss for seepage and evaporation, and interferes with the vested right of an appropriator to divert from the stream at his headgates through his ditch or canal to the land

to be irrigated and furnish a sufficient quantity of water to properly irrigate such lands, and claimant further excepts to the failure of the Board in said Finding No. 30 to make an allowance for seepage and evaporation between the point of diversion and the point of delivery to the land, and to its failure to award appropriators an amount sufficient to cover or offset such loss.

(4) Claimant excepts to so much of Finding No. 32 as limits the amount of water to be used for irrigation to not exceed an eightieth of a second foot for each month of the year, except the months of April and May insofar as such limitation denies to an appropriator the right to use not to exceed one-fortieth of a second foot on each acre of land during the months of March and June, upon the ground and for the reason that said finding is contrary to the evidence, unsupported by the evidence and limits the right to use water no matter how great the need may be, or how much water may be available, to one-eighthieth of a second foot in all months of the year except April and May, and interferes with the vested rights of claimant.

Claimant also excepts to so much of Finding No. 32 as allows storage rights to have priority over other irrigation rights during the months of November, December, January and February of each year, on the ground and for the reason that the allowance of such priority is an interference with the vested rights of claimants having a priority over such storage rights.

Claimant also excepts to so much of said Finding No. 32 as finds that three acre feet of

water per acre is a sufficient amount of water for the irrigation of all meadow and bottom lands on the Lower River and that $4\frac{1}{2}$ acre feet of water per acre is a sufficient amount of water for the irrigation of lands during the period of reduction or reclamation thereof, and that after such land has been reclaimed or reduced to a state of cultivation three acre feet per year is a sufficient amount of water for the irrigation thereof, upon the ground and for the reason that said finding as to the quantity of water necessary to be used in the irrigation of all bottom lands on the Lower River does not take into account the fact that large areas of such lands are gravelly and require more than three acre feet of water per year for the irrigation thereof, and is contrary to the evidence and unsupported by the evidence, and does not allow claimants a sufficient quantity of water for the proper irrigation of their lands during the process of reclamation, and does not allow to this claimant a sufficient quantity of water to successfully irrigate its reclaimed lands as shown by the testimony and evidence herein.

Claimant also excepts to the failure of the Board to find upon the issue of loss by seepage and evaporation in its ditches and canals between the point of diversion and point of delivery to the land as set forth and claimed in its proof of claim, and the testimony herein, and to the failure of the Board to allow claimant an amount of water at its point of diversion sufficient to offset or cover such loss by seepage and evaporation, and excepts to the determination of the Board insofar as the same determines or limits the water to which claimant is entitled at

this point of diversion to $4\frac{1}{2}$ acre feet for lands in process of reclamation, and to 3 acre feet for lands which have been reclaimed, for the reason that the same does not allow for loss by seepage and evaporation as shown by the proofs herein, and does not allow claimant a sufficient amount of water to properly reclaim and irrigate its lands and deprives claimant of water to which it has a vested right.

(5) Claimant excepts to the finding and tabulation herein with reference to the lands upon which it is entitled to a vested water right for the reason that said finding is contrary to the evidence in that it gives claimant a vested right for a lesser area than it is entitled to, the description of the lands to which claimant is entitled to a vested water right is erroneous and includes some legal subdivisions for which claimant is not entitled to a vested right at this time, and omits many subdivisions for which claimant is now entitled to a vested right, and in some cases gives claimant in the subdivisions as specified, a greater area and in some cases a lesser area than it is entitled to under the proofs herein.

(6) Claimant excepts to so much of the order of determination herein settling and determining the rights of the claimant to the waters of the Umatilla River and its tributaries in accordance with and as set out in the findings of fact herein, insofar as said findings of fact are excepted to by this claimant, and insofar as said order of determination fails to award this claimant any priority under its appropriations made in 1891, or to determine the extent thereof, and insofar

as said order of determination limits the amount of claimant's right to $4\frac{1}{2}$ acre feet of water while its lands are being reclaimed, and to 3 acre feet of water after they are reclaimed, and insofar as it limits claimant's rights to deliver water to one-eightieth of a second foot per acre during the months of March and June of each year when water is available, and insofar as it fails to allow claimant an amount of water at the point of diversion sufficient to offset the loss by seepage and evaporation in its canals between the point of diversion and point of delivery to the land, and insofar as it does not specifically provide that the water awarded to the claimant shall be measured and determined by the amount delivered at the lands to be irrigated.

XI.

That on the 15th day of May, 1915, the respondent, United States of America, filed the following general exceptions to said Findings and Order of Determination of the State Water Board:

Exception One—Finding No. 32 is against the law and the evidence for that the evidence in fact and in law shows that in cases where storage is not used and the water right of the irrigator is of sufficiently early date and the flow of the water in the stream sufficient to supply such irrigator with water during the growing season, the limits of the irrigation system for such irrigator is from the first day of

March to the first day of November of each year; reference being had to Finding No. 32, page 54, line 5, wherein the irrigating season of such irrigators is found to be "from the 15th day of September of each year," it being the evident intention to say therein "from the first day of March to the 15th day of September of each year."

Exception Two—Finding No. 34 is against the law and the evidence for that the evidence in fact and in law shows that the evidence has acquired and now has under the United States Minnehaha appropriation a water right for 2,000 acres of the priority date of November 14, 1894; reference being had to Finding No. 34, pages 83 and 93, wherein it is found that the United States under the appropriation of the Minnehaha Irrigation Company has a water right of the priority date of November 14, 1894, for only eighty acres.

Exception Three—Findings No. 34 and No. 35 are against the law and the evidence for that the evidence in fact and in law shows that the appropriations, reservations and water rights, in addition to the aforesaid Minnehaha appropriation and rights described in State Engineer's permits, acquired and now owned by the United States are as follows:

A water right as of the priority date of February 25, 1904, through the so-called

"Maxwell Canal" and under the appropriation of the Maxwell Land and Irrigation Company, including the portion thereof that has become vested, for the 10,435 acres described in the answer to question No. 16 of the Statement and Proof of the United States filed herein, and shown upon "Exhibit A" in yellow borders and in cross hatching on sheets 2, 3, 4 and 5 of Exhibit "C" attached to said Statement and Proof and made a part thereof;

A water right as of the priority date of September 6, 1905, to-wit: 350 cubic feet per second through the Feed Canal for storage in Cold Springs reservoir, and for irrigation direct and from storage of the 25,000 acres of land—including the 10,435 acres aforesaid—described in answer to question No. 16 of the Statement and Proof of the United States filed herein, and shown upon Exhibit "A" in red borders and also upon sheets 2, 3, 4 and 5 of Exhibit "C" attached to and made a part of said Statement and Proof;

reference being had to Findings No. 34 and No. 35, pages 83, 94, 95, 96, 97, 98 and 102, wherein there is found in the United States water rights as follows:

A vested water right with priority date of February 25, 1904, for 4,031 acres therein described, name of ditch not being given;

A vested water right for 350 cubic feet per second with priority date of September

6, 1905 (head for both irrigation and storage).

A water right with priority date of February 25, 1904, conditioned upon beneficial use prior to January 1, 1920, or within such extensions of time as the State Water Board may determine for good cause shown, for 11,011 acres therein described, "U. S. R. S. Feed Canal" being given under name of ditch.

A water right with priority date of September 6, 1905, conditioned upon the beneficial use prior to January 1, 1920, or within such extension of time as the State Water Board may determine for good cause shown, for 9,947½ acres of land therein described, "U. S. R. S. Feed Canal" being given under name of ditch.

Exception Four—Findings Nos. 34 and 35 are against the law and the evidence for that the evidence in fact and in law shows that by the appropriation and reservation made on September 6, 1905, in pursuance of section 2, chapter 228 of the General Laws of Oregon for 1905, (Lord's Oregon Laws, Sec. 6588), the United States acquired and is now the owner of an appropriated and reserved right as of said date of priority of September 6, 1905, now vested, to the extent of 350 cubic feet per second, for storage, and for the irrigation district and for storage of the 25,000 acres described in the Statement and Proof filed by the United

States and shown upon exhibits "A" and "C," attached thereto, which in no manner is or can be made subject to a time limit of any character in the matter of application to beneficial use; reference being had to Findings No. 34 and No. 35, pages 83, 94, and 95, 96, 97, 98 and 102 wherein it is found,—including an erroneous statement that application had been made in that regard—that the water under a portion of the said water right of the priority date of September 6, 1905, shall be applied to a beneficial use prior to January 1, 1920, or within such extension of time as the State Water Board may determine for good cause shown.

And on said 15th day of May, 1915, the respondent, United States of America, filed the following exceptions in Contests No. 38 and No. 93:

Exception One—Finding No. 9 is against the law and the evidence for that the evidence in fact and in law shows that the claim and water rights of the United States include also the appropriation and reservation initiated on September 6, 1905, in pursuance of Section 2 of Chapter 228 of the General Laws of Oregon for 1905 (Lord's Oregon Laws, Sec. 6588); reference being had to Finding No. 9, page 17, Contest No. 38 (designated as governed by the findings for Contest No. 11, page 13, Finding

No. 9) wherein it is found that the claim of the United States is divided into two parts, the first part being represented by engineer's permits under applications numbered 13 and 237, and the second part being based upon what are called the Minnehaha and Maxwell rights, initiated respectively November 14, 1894, and February 25, 1904.

Exception Two—Finding No. 9 is against the law and the evidence for that the evidence in fact and in law shows that the United States has acquired and now has under the so-called Minnehaha appropriation a water right for 2000 acres of the priority date of November 14, 1894; reference being had to Finding No. 9, page 17, Contest No. 38 (designated as governed by the findings for Contest No. 11, page 13, Finding No. 9) wherein it is found that the United States under the appropriation of the Minnehaha Irrigation Company has a water right of the priority date of November 14, 1894, for only 80 acres.

Exception Three—Findings No. 9 and No. 34 are against the law and the evidence for that the evidence in fact and in law shows that a vested water right, as of the priority date of March 14, 1903, has not been acquired by the Western Land & Irrigation Company for more than 1112 acres of the 3086 acres named in said finding, and that such water right as may

exist for the balance of said area of 3086 acres is of a priority date long subsequent to September 6, 1905; reference being had to Finding No. 9, pages 24 and 25, Contest No. 93, and to Finding No. 34, pages 83, 98, 99 and 100, wherein it is found that the Western Land & Irrigation Company, as of the priority date of March 14, 1903, has a vested water right for 3086 acres.

Exception Four—Findings No. 9, No. 34 and No. 35 are against the law and the evidence for that the evidence in fact and in law shows that the Western Land & Irrigation Company, including such vested right as it may now have, neither has nor can acquire by application to beneficial use prior to January 1, 1920, or within any extension of time or otherwise, a water right as of the priority date of March 14, 1903, or as of any date except it be long subsequent to September 6, 1905, for more than 3330 acres of land; and said Findings No. 9, No. 34 and No. 35 are against the law and the evidence for that the evidence in law and in fact shows that said company neither has nor can acquire by application to beneficial use within any stated time or extensions thereof or otherwise a water right, except it be of a priority date long subsequent to March 28, 1909, for more than 8566 acres in addition to the 3330 acres aforesaid; reference being had to Finding No. 9, pages 24 and 25, Contest No. 93, and to Findings No. 34

and No. 35, pages 83, 98, 99, 100, 101 and 102, wherein it is found that the Western Land & Irrigation Company, as of the priority date of March 14, 1903, has a vested water right for 3086 acres and a so-called inchoate or potential water right, conditioned upon application to beneficial use prior to January 1, 1920, or within such extension of time as the Water Board may determine for good cause shown, for 14,127.09 acres.

And on the 15th day of May, 1915, the respondent, Dillon Irrigation Company, filed the following exceptions to said findings and order of determination of the State Water Board:

This exceptor excepts to that portion of paragraph 33 of the findings containing the schedule of determination as the same appears on pages 86 and 87 thereof in the following particulars:

(1) Excepts generally to all the acreage findings appearing in said paragraph upon said pages and relating to this exceptor for the reason that the same is incorrect, and is not sustained by the statement and proof of claim filed by this company, nor by the evidence in the case, and requests that a finding be made in accordance with the facts set forth in the statement and proof of claim by this company herein filed, which statement and proof of claim is hereby expressly referred to and made a part hereof for the purpose of these exceptions.

(2) Excepts specially to the findings and determination appearing in said paragraph and upon said pages as relates to the Dillon Irrigation Company in the matter of acreage where the water right has vested and in the matter of acreage where the time limit for completion is made to expire January 1, 1918, and in the matter of acreage both vested and unreclaimed for the reason that the same is inaccurate and incorrect and not sustained by the evidence or by the statement and proof of claim herein filed, and this company prays the court for a modification so that the acreage irrigated shall be in accord with the statement and proof of claim above referred to and sustained by the evidence in the case, and the acreage which it is proposed to irrigate shall be in accord with the evidence and proof of claim, and that the total acreage may be in accord with the said statement and proof of claim by this company filed, above referred to and made a part hereof.

(3) Excepts to the finding and determination by the Board in said paragraph and upon said pages so far as the same relates to W. T. Reeves, whose land is served by this company, for the reason that the same is incorrect and inaccurate in the number of acres, and not in accordance with the statement and proof of claim, which is made a part hereof as aforesaid, and not in accordance with the evidence in the case, and this exceptor requests that in the case

of said W. T. Reeves the finding be amended so that the acreage allowed to him shall be in accord with the statement and proof of claim aforesaid, and in accord with the evidence in the case.

(4) Excepts to the finding and determination by the Board in said paragraph and upon said pages so far as the same relates to F. H. Denzler, whose land is served by this company, for the reason that the same is incorrect and inaccurate in the number of acres, and not in accordance with the statement and proof of claim, which is made a part hereof as aforesaid, and not in accordance with the evidence in the case, and this exceptor requests that in the case of said F. H. Denzler the finding be amended so that the acreage allowed to him shall be in accord with the statement and proof of claim aforesaid, and in accord with the evidence in the case.

(5) Excepts to the finding and determination by the Board in said paragraph and upon said pages so far as the same relates to B. F. Myrick, whose land is served by this company, for the reason the same is incorrect and inaccurate in the number of acres, and not in accordance with the statement and proof of claim, which is made a part hereof as aforesaid, and not in accordance with the evidence in the case, and this exceptor requests that in the case of

said B. F. Myrick the finding be amended so that the acreage allowed to him shall be in accord with the statement and proof of claim aforesaid, and in accord with the evidence in the case.

(6) Excepts to the finding and determination by the Board in said paragraph and upon said pages so far as the same relates to B. F. Rector, whose land is served by this company, for the reason that the same is incorrect and inaccurate in the number of acres, and not in accordance with the statement and proof of claim, which is made a part hereof as aforesaid, and not in accordance with the evidence in the case, and this requestor requests that in the case of said B. F. Rector the finding be amended so that the acreage allowed to him shall be in accord with the statement and proof of claim aforesaid, and in accord with the evidence in the case.

(7) Excepts to the finding and determination by the Board in said paragraph and upon said pages so far as the same relates to B. F. Dixon, whose land is served by this company, for the reason the same is incorrect and inaccurate in the number of acres, and not in accordance with the statement and proof of claim, which is made a part hereof as aforesaid, and not in accordance with the evidence in the case, and this exceptor requests that in the case of said B. F. Dixon the finding be amended so that

the acreage allowed to him shall be in accord with the statement and proof of claim aforesaid, and in accord with the evidence in the case.

(8) Excepts to the finding and determination by the Board in said paragraph and upon said pages so far as the same relates to the Umatilla Ranch Company, whose land is served by this company, for the reason that the same is incorrect and inaccurate in the number of acres, and not in accordance with the statement and proof of claim, which is made a part hereof as aforesaid, and not in accordance with the evidence in the case, and this exceptor requests that in the case of said Umatilla Ranch Company the finding be amended so that the acreage allowed to said company shall be in accord with the statement and proof of claim aforesaid, and in accord with the evidence in the case.

(9) Excepts to the finding and determination by the Board in said paragraph and upon said pages so far as the same relates to Frank Saling, whose land is served by this company, for the reason that the same is incorrect and inaccurate in the number of acres, and not in accordance with the statement and proof of claim, which is made a part hereof as aforesaid, and not in accordance with the evidence in the case, and this exceptor requests that in the case of said Frank Saling the finding be amended

so that the acreage allowed to him shall be in accord with the statement and proof of claim, as aforesaid, and in accord with the evidence in the case.

(10) Excepts to the finding and determination by the Board in said paragraph and upon said pages so far as the same relates to Horace Walker, whose land is served by this company, for the reason that the same is incorrect and inaccurate in the number of acres, and not in accordance with the statement and proof of claim, which is made a part hereof as aforesaid, and not in accordance with the evidence in the case, and this exceptor requests that in the case of said Horace Walker the finding be amended so that the acreage allowed to him shall be in accord with the statement and proof of claim aforesaid, and in accord with the evidence in the case.

(11) Excepts to the finding and determination by the Board in said paragraph and upon said pages so far as the same relates to W. J. Haney, whose land is served by this company, for the reason that the same is incorrect and inaccurate in the number of acres and not in accordance with the statement and proof of claim, which is made a part hereof as aforesaid, and not in accordance with the evidence in the case, and this exceptor requests that in the case of said Frank Saling (should be Haney) (J. S. B.) the finding be amended so that the acreage

allowed to him shall be in accord with the statement and proof of claim aforesaid, and in accord with the evidence in the case.

(12) Further this exceptor excepts to the failure of the Board in said paragraph and on said pages and its findings relating to this corporation, and the foregoing parties who are served by it, to allow a time limit for completion of irrigation, for the reason that apparently in all cases referred to except the Dillon Irrigation Company, which is allowed until January 1, 1918, for reduction of its lands to cultivation, there is no finding and no allowance of time whatever, and said oversight and failure to make finding on the part works serious injury to all of the parties above named.

XII.

That thereafter, on September 9, 1916, the Circuit Court of Umatilla County, Oregon, entered its findings and decree in the above entitled proceedings modifying the findings and order of determination of the State Water Board, as follows:

Contest No. 11. Courtney Irrigation Company, contestant, vs. United States of America, contestee. The claim of the United States of America is divided into three parts; that part of the claim represented by Engineer's permits under Application No. 13 and Application No. 237, initiated March 28, 1909, not being

completed rights are not in anywise determined by this decree of adjudication, but shall be determined and approved in accordance with Sections Nos. 6624, 6626, 6627, 6628, 6630, 6631, 6632 and 6633 of Lord's Oregon Laws.

That the second basis of claim of the United States of America is based upon what is called the Minnehaha and Maxwell rights. * * * That about eighty acres is what the water was put over under the Minnehaha rights, and a water right for eighty acres of the priority date of 1894 has been established under the Minnehaha right. That on the 25th day of February, 1904, the Maxwell Land & Irrigation Company posted a notice of appropriation, and map filed therewith shows that the water was appropriated for the acreage as stated forthwith under the claim of the United States. That due diligence has been shown in the bringing of the lands thereunder into cultivation and irrigation, and that the United States Government should have under date of February 25, 1904, the lands as hereinafter tabulated; that this tabulation shall include the claim of the Maxwell Land & Irrigation Company and claimants thereunder, which will make the claim of the United States of America as tabulated, include the claims of the United States of America, Maxwell Land & Irrigation Company, J. F. McNaught, S. R. Oldaker and Chas. E. Baker.

The third basis of claim of the United States of America is based upon the appropriation of September 6, 1905, wherein the water rights are reserved to the United States under a statute of

the State of Oregon appearing as Chapter 228, Gen. Laws of Oregon for 1905. This right is tabulated and described with the other rights of the United States in Finding No. 34.

Contest No. 12. Dillon Irrigation Company, contestant, vs. Western Land & Irrigation Company, contestee. The contestee bases its rights upon three appropriations made in 1891, and upon a second appropriation made in 1903 (see Exhibits 25A, 25B, 25C and 25D). The appropriation made by J. M. Jones was afterward transferred to the Columbia Valley Land & Irrigation Company (see Exhibit 25E). That under the appropriation of J. M. Jones water was diverted, and in the year 1892 a couple of hundred acres were irrigated (Vol. 32, Book C, p. 670). In 1893 there was no water diverted through the ditch (Vol. 32, p. 670A). The ditch then fell into disuse and no further use was made of it until the rights were purchased by the Hinkle Ditch Company, which was succeeded by the Western Land & Irrigation Company. The Hinkle Ditch Company made a new appropriation on March 14, 1903. The priority date, therefore, of the Western Land & Irrigation Company begins with the appropriation of the Hinkle Ditch Company, and the same is hereby established as March 14, 1903, for 4109.68 acres, and July, 1907, for 12,747 acres.

Contest No. 93. United States of America, contestant, vs. Western Land & Irrigation Company, contestee. The rights of the contestee are established the same as in Contest No. 12 hereinbefore set forth in this finding.

(The Court's findings in Contests Nos. 34, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47 and 48 are omitted because they are identical with the findings and order of determination of the State Water Board.)

(The Court's findings Numbers 20, 21, 22, 23, 24, 26, 27, 28, 29, 30 and 31 are omitted because they are identical with the findings and order of determination of the State Water Board.)

Finding No. 25—That in all cases where any person, firm or corporation has a right under this decree to supply and deliver water to others and charge for the same, or may hereafter acquire such right, it is the duty of such person, firm or corporation to supply water to any and all persons, firm or corporation, or who can be reasonably supplied with water from said works under reasonable and uniform contracts and for reasonable and uniform charges up to the limit of the capacity of said works, so long as said person so taking such water complies or is ready to and able to comply with the terms of such contract. Such contract may provide for any reasonable and uniform method of pro rata distribution of water, and such person, firm or corporation may make such reasonable and uniform rules and regulations as may be necessary to facilitate such distribution. In case such contract does not provide for such distribution of water then such water shall be supplied to the water users in the order of, and according to the date of priority of use upon the land, or at the place upon which such water is to be used, and subject to

rotation as in this decree generally provided; provided, that no contract shall be made to deliver water to lands or places not theretofore supplied, to such an extent as to deprive any land or place of water which has been previously supplied, and provided further, that on contract shall be made to deliver water for irrigation or power unless the land or place where said water is to be used be entitled to such use under a right granted by this decree, or a permit of the State Engineer, or by a water right certificate.

All contracts for the use of water giving any preference other than as herein stated, are against the public policy and laws of the State of Oregon, and void.

Finding No. 32—That to get a sufficient head of water, the water master of the district in which such water is situated shall arrange such a system or systems of rotation as may be best applicable to either; first, by giving a greater amount of water for an appropriator for a proportionately less time, provided that the giving of such greater amount does not infringe upon any of the rights confirmed by this decree, and provided further, that the amount of water taken by an appropriator does not exceed the number of acre feet as found in these findings to be necessary for the irrigation of the land during the irrigation season; second, or in the absence of an agreement between such appropriators arranging for such rotation, and the manner in which such water shall be used in such rotation, the water master of the district in which such stream and its trib-

utaries is situated shall arrange such appropriators in groups or systems of rotation, first giving to the appropriator in such group a quantity of water equal to the combined appropriations, as the appropriators in said group or system for a length of time bearing the same ratio to the whole time required to make the complete rotation through the whole group of appropriators, bears to the combined appropriation of said group, and shall next serve another appropriator with a like quantity of water for his proportionate time, and so on, until all the appropriators in said group or system are served, then the distribution of water shall be repeated in the same manner throughout the irrigation season.

The determination as to who shall be first served in said group or system of appropriators shall be left to the judgment of the water master.

Third, or where two or more appropriators agree as between themselves as to the manner of said rotation in the use of water, said water master shall distribute the water in accordance with such agreement, provided always, that such arrangements into groups or systems of rotation shall not interfere with the prior rights of any appropriator, not a member of such group or system, and provided further, that such agreement shall be in writing, and filed by said appropriators with the water master.

That in all instances where water is stored, the water is run into the reservoirs during the high water time of the season, and stored until needed for use during the dry part of the sum-

mer season; that where storage is available, irrigators ordinarily use water during the growing season for their crops, provided their storage is sufficient to supply them with water for this growing season. The irrigation season ordinarily is between the first day of March and the first day of November of each year. In all cases where storage is not used and the water right of the irrigator is of a sufficient early date, and the flow of water in the stream sufficient to supply such irrigator with water during the growing season, the irrigation season for such irrigator is from the first day of March to the first day of November of each year; in all other cases the irrigation season for each irrigator is, any time of the year that there is or may be a supply of water sufficient for such irrigator to carry on his irrigation. That upon all the tributaries of the Umatilla River there shall be no limit as to the irrigation season, and the irrigators shall have the right to use the water at any time of the year it can be secured.

That along the tributaries of the Upper River the irrigation of the land is generally carried on upon the bottom lands adjoining the streams, and very little irrigation is carried on upon the hills and uplands. That the lands along and adjoining such tributaries are gravelly, and require more water per acre to irrigate than the uplands would require. That the irrigation along the main stream of the Upper River is generally confined to the bottom lands adjoining the stream, and not to the uplands. That the bottom lands of the Upper River, west and below the City of Pendleton,

require about the same amount of water for irrigation as do the tributaries of said Upper River. That four and one-half acre feet of water per acre per year is sufficient water for the irrigation of the bottom lands along the tributaries of said Umatilla River, and also along the bottom lands of said Upper River, west of and below the City of Pendleton. That three acre feet of water per acre per year is sufficient water for the irrigation of the bottom lands of said Upper River, east of and above the city of Pendleton, and for the irrigation of the uplands of said Upper River. That the lands of the Lower River shall be divided into the following classes: First, the lands along the tributaries; second, the bottom or meadow lands of the Umatilla River; third, the raw sage-brush lands of the upland, and, fourth, such uplands as have been reduced to cultivation and irrigation and subdued from its wild state.

That along the tributaries of the Lower River the same duty of water shall prevail as along the tributaries of the Upper River. That the meadow and bottom land of said Lower River is easily watered, and in a great many cases, needs drainage, but that such need of drainage does not obviate the necessity of irrigation. That the rainfall of the Lower River is such that all the land needs irrigation to a large extent. That along said Lower River there are a number of large irrigation projects partially developed. That it is the experience of the irrigators upon said projects, that in order to reduce the raw lands upon said projects to a state of cultivation and irrigation, it

is necessary to use a larger amount of water upon said lands during the process of such reduction.

That after irrigation of a tract of land for a number of years the amount of water necessary for the irrigation of such land materially decreases. That during the reduction of said lands from a raw state into a state of cultivation, six acre feet of water per acre, per year is a sufficient amount of water for the irrigation thereof. That after said land has been reduced to a state of cultivation and irrigation, three acre feet of water per acre per year is a sufficient amount of water for the irrigation thereof, except when the soil is composed mostly of loose ground which requires six acre feet.

That the specifications of a definite amount of water per acre, in these findings, shall not be taken as granting that specific amount of water to any water user, but shall only be taken as a rule and guide for the water master in the distribution of a maximum amount of water to any water user, and it shall be in the discretion of such water master to cut down the amount of water given for any particular acreage of land and turn the water to other land, at any time that such land becomes fully irrigated upon a less amount of water, or such water be not economically and beneficially used, and the water master shall have the right in his discretion to cut off the supply of water to any land at any time in the distribution of water, when the date of priority of such land is such that as the water becomes short and

scarce, there would not be sufficient water to deliver any to such land.

That in diverting water for the irrigation of lands, different heads or quantities of water are required for different conditions. The testimony shows there are the following different conditions: First, raw sage brush land not reclaimed, or in process of reclamation; second, reclaimed lands of loam or fine sand or fine soil texture; third, reclaimed land of coarse sand or loose gravel subsoil, or loose coarse soil texture. That for the reclamation of the first class of land, being raw land, a diversion of a head of 1-40th of a second foot per acre is required. That for the irrigation of the second class, or fine texture soil, after reclamation, a diversion of a head of 1-80th of a second foot per acre is required. That for the irrigation of the third class, or loose coarse texture soil, after reclamation, a head of 1-40th of a second foot per acre is required.

In all cases, however, where a specific quantity of water has been appropriated, the diversion shall not exceed such amount except as the result of rotation, nor in any case shall the amount of water diverted exceed the number of acre feet required for the irrigation of such land as found herein, to-wit: not more than six acre feet in all cases where 1-40th of a second foot per acre is diverted, and not more than three acre feet per acre in all cases where 1-80th of a second foot per acre is diverted. In all cases where the diversion is at the rate of 1-40th of a second foot per acre, such diversion shall include all waste by seepage and

evaporation, and in all cases where the diversion is at the rate of 1-80th of a second foot per acre, the water master may allow an increased diversion for such seepage and evaporation, which increased diversion shall be determined by the water master according to the actual seepage and evaporation in the diversion works, but in no case shall such increased diversion exceed twenty per centum of the amount allowed by this finding.

Finding No. 33—That the name and address of each appropriator of water from said Umatilla River and its tributaries, arranged in alphabetical form, together with the date of relative priority of such appropriation, the amount of such appropriation, per cubic foot per second of time (computed for convenience at a flow of 1-80th of a second foot per acre), the number of acres to which such appropriation is applied and to which such water is appurtenant, the use or uses for which such water was appropriated and is now applied, and to which such is limited, the name of the ditch or ditches through which such appropriation is diverted, the name of the stream or streams from which such appropriation is diverted, and the description of the land in the smallest legal subdivision in which such water right is appurtenant, arranged in alphabetical order, and set opposite, the name and postoffice address of each such appropriator, are as follows, to-wit:

(Notwithstanding the fact that the computation in the following schedules is made on the basis of 1-80th of a cubic foot per second per acre, it is intended that all lands falling

within classes first and third, as declared in next to last paragraph in Finding No. 32 hereof, shall be entitled to receive, and shall receive, 1-40th of a cubic foot of water per second, per acre (to the extent that the same may be economically and beneficially used); and the schedules shall be deemed and construed to accord to all lands in said classes first and third, 1-40th of a cubic foot of water per second, per acre (to the extent that the same may be economically and beneficially used.)

Finding No. 34—The following appropriators have, in their statements and proofs of claim, applied to the State Water Board to prescribe the time within which the full amount of water appropriated shall be applied to a beneficial use, and it appears to the said State Water Board that the appropriation of said appropriators, and each of them, were made prior to February 24, 1909, and that actual construction work had been commenced in good faith prior to said date, and

It further appears from the statements and proofs of claims filed, and the evidence adduced at the hearing, that the United States has appropriations of November 14, 1894, February 25, 1904, and an appropriation and reservation of September 6, 1905. That the appropriation of November 14, 1894, is completely vested as to one second foot; that the appropriation of February 25, 1904, at the time of filing the statement and proof of claim was completely vested for 25 second feet of water, for 2000 acres of land, and that the appropriation of September 6, 1905, is a complete reser-

vation under and by virtue of Chapter 228, Gen. Laws of Oregon for 1905, and that the appropriation and reservation of September 6, 1905, includes the lands covered by the appropriations of November 14, 1894, and February 25, 1904.

That the lands covered by said appropriations and reservation are hereinafter tabulated in this finding for the purpose of having the water rights of the United States fully set out and described in this finding, and to the further end that a compliance with this finding by the United States so far as the application of water to a beneficial use is concerned within the time limited herein, may have the effect of establishing its date of relative priority as of the date of February 25, 1904, so far as the lands covered by that appropriation are concerned.

The State Engineer is hereby directed to issue a certificate to each of said appropriators showing the time fixed by this finding within which the water appropriated by such appropriators shall be applied to a beneficial use. The extent of such appropriation shall be limited to such an amount or volume of water as shall have been put to a beneficial use by the expiration of the time fixed in this finding. In the column headed "Time Limit for Complete Application" in the following tabulation the word "vested" means that water has been completely applied to a beneficial use to the extent described therein, and in all cases where water has not been completely applied to a beneficial use, a limiting date is set for such

application to a beneficial use, and such incomplete rights are known and called "inchoate rights."

That the name and address of each appropriator of water from said Umatilla River and its tributaries, who has not completed such appropriation, and who has so applied to the State Water Board to prescribe the time within which the full amount of water shall be applied to a beneficial use, are hereinafter in this finding arranged in alphabetical form, together with the date of relative priority of each of such appropriations, the limiting date for the complete application of the full amount of water appropriated to a beneficial use, the use or uses for which such water was appropriated and is to be applied, the number of acres for which the appropriation was made and the number of acres now irrigated, or for which rights are reserved by statute in case such appropriation is for irrigation or storage, the name of the ditch or ditches, or reservoirs through which such appropriation is to be diverted, the name of the stream from which the water was appropriated, and the description of the land in each legal subdivision for which the appropriation was made, the description of the land upon which such water has been or is to be applied to a beneficial use, and to which such use is limited, arranged in alphabetical order and set opposite the name and postoffice address of each such appropriator, are as follows, to-wit:

	Date of Rel. priority	Time for complete App.	No. acres	Use	Ditch	Stream
Dillon Irri. Co.	1907	Jan. 1, 1920	1213.9	Irr.	Dillon	Main
Finding 9.....	Nov. 17, 1897	Vested 4.75 sec. ft.	380	Irr. Dom. and stock	"	"
Contest 12, 13, 17, 92.....	1907	Vested 5.00	309			
Reeves, W. T..	1907	Vested 1.41 sec. ft.	113			
Denzler, F. H..	1907	Vested .19 sec. ft.	15			
Myrick, B. F...	1907	Vested .13 sec. ft.	10			
Rector, B. F...	1907	Vested .18 sec. ft.	14			
Dixon, B. F....	1907	Vested .22 sec. ft.	22			
Umatilla Ranch Co.....	1907	Vested 4.3 sec. ft.	322			

All in townships 3, R. 28; 4, R. 28; 4, R. 29; 3, R. 29.

Furnish Ditch Co.....	Mar. 8, 1905	Vested 40.91 sec. ft.	3240.7	Irr.	Furnish	Main
Finding 9.....	Feb. 25, 1919	Storage of 5,500 A. ft. The water stored under the application of Feb. 25, 1909, is to be carried from the reservoir in the channel of the river to the main canal of the distribution system, and used upon the lands as in the decree listed, covering the appropriation of Mar. 8, 1905, and Feb. 25, 1909, both vested and inchoate.				
	Mar. 8, 1905	Jan. 1, 1920	4678.92	Irr.	Furnish	Main

All in townships 4, R. 28; 3, R. 29; 4, R. 29.

United States of America...	Nov. 14, 1894	Vested 1. sec. ft.	80	Irr.	Max- well	Main
	Feb. 25, 1904	Jan. 1, 1920 115 sec. ft.	10405	.....	
	Excepting 25 cu. ft. per sec. vested for 2,000 acres as shown hereafter in schedule.					
	Lands described under appropriation of Feb. 25, 1904, include the land described under appropriation of Nov. 14, 1894.					
	Sep. 6, 1905	Vested 350 sec. ft.	.....	.....	Feed Canal	Main
	In pursuance of C. 228, Gen. Laws of Ore., 1905.		25072	Irr., storage in Cold Springs Res., capacity 50,000 ac. ft. and Irr. from said Res.		

All in townships 5, R. 29; 4, R. 28; 4, R. 29; 5, R. 28.

The lands described under the appropriation and reservation of Sept. 6, 1905, include the land described under the appropriation of Nov. 14, 1894, and of Feb. 25, 1904. Thus the waters appropriated and reserved as of Sept. 6, 1905, are to be used jointly or interchangeably, as the case may be, with the waters appropriated as of Nov. 14, 1894, and Feb. 25, 1904, upon the lands described thereunder. The distribution system has been constructed to provide for this.

Of the 25,072 acres under the appropriation and reservation of Sept. 6, 1905, 4,031 acres have been irrigated prior to the filing of statement and proof by the United States in Sept., 1910. Of this area, 2,000 acres were also irrigated by way of the appropriation of Feb. 25, 1904, and rights have become vested thereunder, as follows:

	Feb. 25, 1904	Vested 25. sec. ft.	2000	Irr.	Max- well	Main
W. L. & I. Co.	Mar. 14, 1903	Vested 17.2 sec. ft.	1375	Irr.	Hinkle	Main
Finding 9.....						
Contest 8, 12, 34 to 48, inc., 93.....	Mar. 14, 1903	Jan. 1, 1920 34.4 sec. ft.	2759.68	"	"	"
	July, 1907	Vested 20.9 sec. ft.	1071	"	"	"
	July, 1907	Jan. 1, 1920	11257.97	"	"	"

All in townships 3, R. 28; 3, R. 27; 5, R. 28; 4, R. 28; 4, R. 27; 3, R. 29.

Finding No. 35—Each of the appropriators tabulated herein shall complete their appropriation, including the construction work and application of the water to a beneficial use, on or before the date set in such tabulation as being the limiting date for the complete application of such water to a beneficial use, or within such time as the State Water Board for a good cause shown, may extend as provided by law, upon the expiration of said time for the complete application of the water to a beneficial use as in this decree provided or any extension thereof, the State Water Board shall cause due proof to be taken of such application of the water to a beneficial use and grant such water right certificates as said State Water Board may ascertain that such appropriator is entitled to receive by virtue of such proof, and

It is further considered, ordered and decreed that the water rights of the various claimants in said proceedings be, and the same are hereby established in accordance with the foregoing decree.

XIII.

To the foregoing findings and decree of the Circuit Court, appellant filed the following exceptions:

(1) Said claimant excepts to so much of Finding No. 9, Contest No. 11, Courtney Irrigation Company, contestant, vs. United States of America, contestee, as finds with reference to the so-called Maxwell right of the United States, that due diligence has been shown in

bringing the lands thereunder into cultivation and irrigation, and that the United States Government should have under date of February 25, 1904, the lands tabulated under said right in Finding No. 34; also to so much of said Finding No. 9, Contest No. 11, as finds with reference to the third claim of the United States that under said third claim the United States of America is entitled to a right under its appropriation of September 6, 1905, for the lands tabulated under said right in Finding No. 34, on the ground that the same are contrary to the evidence and unsupported by the evidence.

(2) Said claimant excepts to so much of Finding No. 9, Contest No. 12, Dillon Irrigation Company, contestant, vs. Western Land & Irrigation Company, contestee, as finds that there was no water diverted through the ditch in 1893 under the J. M. Jones appropriation; that the ditch then fell into disuse and no further use was made of it until the rights were purchased by the Hinkle Ditch Company, which was succeeded by the Western Land & Irrigation Company; and that the priority date of the Western Land & Irrigation Company begins with the appropriation of the Hinkle Ditch Company; and also to so much of said finding in said Contest No. 12 as establishes the priority date of the Western Land & Irrigation Company as March 14, 1903, for 4109.68 acres, and July, 1907, for 12,747.48 acres, on the ground that the same is contrary to the evidence and is unsupported by the evidence.

(3) Said claimant excepts to the failure of the court to find that it is entitled to a priority

as of March 14, 1903, under the appropriation made on said date by the Hinkle Ditch Company for 17,213.21 acres.

(4) Said claimant also excepts to much of said Finding No. 9, Contest No. 12, as awards claimant a priority of July, 1907, instead of March 14, 1903, for 12,747.48 acres, on the ground that the same is contrary to the evidence, unsupported by the evidence and deprives claimant of a vested right.

(5) Claimant excepts to Finding No. 25 upon the ground that the matters and things in said finding set forth are not within the issues in this proceeding and are unsupported by any evidence.

(6) Claimant excepts to so much of Finding No. 32 as finds that in all cases where the diversion is at the rate of 1-40th of a second foot per acre, such diversion shall include all waste by seepage and evaporation, and that in all cases where the diversion is at the rate of 1-80th of a second foot per acre the water master may allow an increased diversion for such seepage and evaporation not to exceed twenty per centum of the amount allowed by said finding, on the ground that the same is contrary to the evidence, and on the further ground that the same is not within the issues herein relative to land requiring but 1-80th of a second foot for its irrigation.

(7) Said claimant excepts to the failure of the Court to find upon the issue of loss by seepage and evaporation under its proofs herein, and to the failure of the Court to allow

claimant an amount of water at its point of diversion sufficient to offset or cover such losses, and to the failure of the Court to allow claimant any water for such losses.

(8) Claimant excepts to so much of Finding No. 34 as finds that the appropriation of the United States of America of September 6, 1905, is a complete reservation under and by virtue of Chapter 228, Gen. Laws of Oregon for 1905, of the waters claimed under said appropriation of September 6, 1905, as set forth more particularly in the tabulation referred to in said finding, on the ground that the same is contrary to the evidence, contrary to law, and discriminates unjustly against all other appropriators.

(9) Claimant excepts to the tabulation of the rights of the United States of America in Finding No. 34 insofar as the same gives the United States a vested right as of September 6, 1905, for 25,072 acres, and to the failure of the Court to fix an inchoate right for the United States the same as other appropriators and to fix a time limit for the complete application to a beneficial use of the amount of such inchoate right, on the ground that the same is contrary to the evidence, contrary to law and interferes with the vested rights of other appropriators.

(10) Claimant excepts to the tabulation of its rights and of the rights of the Furnish Ditch Company in Finding No. 34 insofar as the same allows the Furnish Ditch Company any priority over this claimant on the ground that the same is contrary to the evidence, un-

supported by any evidence and not within any of the issues herein.

(11) Claimant excepts to the tabulation of its rights as set forth in Finding No. 34 insofar as said tabulation fails to allow claimant 15 acres additional in Sec. 30, Tp. 4 N., R. 28; 10 acres additional in Sec. 14, and 15 acres additional in Sec. 15, Tp. 3 N., R. 28; and 39.90 acres additional in Sec. 4, and 52 acres additional in Sec. 9, and 50 acres additional in Sec. 10, Tp. 3 N., R. 27, on the ground that the evidence shows claimant entitled to water for such additional acreage.

(12) Claimant excepts to the tabulation of its rights in said Finding No. 34 insofar as the same fails to allow claimant a priority as of March 14, 1903, for all of the lands described in said tabulation, on the ground that the same is contrary to the evidence, and that so much of said tabulation as awards claimant a priority as of July, 1907, for part of its lands, is unsupported by any evidence.

(13) Plaintiff excepts to the failure of the Court to allow it 1-40th of a second foot of water per acre for all of its lands set forth in said tabulation in Finding No. 34, on the ground that the same is contrary to the evidence, and that there is no evidence in this proceeding which will support a finding that 1-80th of a second foot of water is sufficient for any of claimant's land.

(14) Claimant objects and excepts to the Court's conclusion of law that a decree should be entered here in modifying the findings of the State Water Board and establishing the water rights of claimants accordingly.

ASSIGNMENTS OF ERROR

And appellant herein says there is manifest error on the face of the record in this:

(1) The Court erred in awarding the United States of America, under its third claim based on the provisions of Chapter 228, General Laws of 1905, a vested right of 350 cubic feet per second for both irrigation and storage.

(2) The Court erred in failing to limit the right for irrigation claimed by the United States of America, under the provisions of Chapter 228, General Laws of 1905, as an inchoate right, and to prescribe a time within which the full amount of water appropriated shall be applied to a beneficial use.

(3) The Court erred in not finding that the priority date of appellant begins with the appropriation of the Hinkle Ditch Company.

(4) The Court erred in failing to find that appellant was entitled to a water right under the appropriation made by its predecessors in interest in 1891, and to fix a date of priority therefor and the amount and extent thereof.

(5) The Court erred in awarding appellant a water right with priority date of March 14, 1903, for only 5805.68 acres of land.

(6) The Court erred in failing to award appellant a priority right of date March 14, 1903, for all its lands, viz., for 17,063.65 acres.

(7) The Court erred in awarding appellant a priority date of July, 1907, for 11,257.97 acres of land, instead of awarding appellant a priority date of March 14, 1903, for said lands.

(8) The Court erred in holding that where the contracts of any person, firm or corporation having the right to deliver water to others and charge for the same do not provide for the distribution of water, as set forth in Finding No. 25, then such water shall be applied to the water users in the order of and according to the date of priority of use upon the land; and in attempting to prescribe the terms and conditions of the contracts such person, firm or corporation may make with water users.

(9) The Court erred in determining that in all cases where the diversion is at the rate of 1-40th of a second per acre, such diversion shall include all losses by seepage and evaporation, but when the diversion is at the rate of 1-80th of an acre foot per acre, the water master may allow an increase of not to exceed twenty per cent for loss by seepage and evaporation.

(10) The Court erred in failing to find upon the issue of loss by seepage and evaporation under appellant's statement and proof of claim, and in failing to allow appellant an additional amount of water at its point of diversion to cover such losses.

(11) The Court erred in awarding appellant a priority date of July, 1907, for 11,257.97 acres of its lands, thereby placing such right subsequent to the rights awarded respondent Furnish Ditch Company, between whom and appellant there was no contest or controversy.

(12) The Court erred in failing to so limit the rights awarded respondent Furnish Ditch Company that they would be subsequent to all rights awarded the appellant.

W. G. DROWLEY,
Attorney for Appellant.

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IN
THE SUPREME COURT
OF THE
STATE OF OREGON

PENDLETON, MAY TERM, 1917.

In the matter of the determination of the relative rights of the various claimants to the waters of the Umatilla River and its tributaries, a tributary of the Columbia River, in Umatilla County, Oregon.

WESTERN LAND & IRRIGATION COMPANY,
Appellant,

vs.

DILLON IRRIGATION COMPANY, COURTNEY IRRIGATION COMPANY, BROWNELL DITCH COMPANY, OREGON LAND & WATER COMPANY, PIONEER IRRIGATION COMPANY, MAXWELL IRRIGATION COMPANY, THE UNITED STATES OF AMERICA, W. T. WALTON, SIDNEY WALTON, HARRY R. NEWPORT, F. H. GRITMAN, H. G. HURLBURT, FRANK E. FOWLER, JULIA C. FOWLER, JOHN J. PETERS, THOMAS W. PETERS, and FURNISH DITCH COMPANY,

Respondents.

BRIEF OF APPELLANT
WESTERN LAND AND IRRIGATION COMPANY

STATEMENT OF FACTS

This is a proceeding under Chapter 216, General Laws of 1909, known as the Water

Code, which was begun by filing with the State Water Board, Water Division No. 2, on May 7, 1909, a petition for and on behalf of the United States of America, requesting a determination of the relative rights of the various claimants to the waters of the Umatilla River and its tributaries, a tributary of the Columbia River in Umatilla County, Oregon.

Thereafter at the time and place fixed for the taking of testimony in said proceeding by the Superintendent of Water Division No. 2, the various claimants to the waters of said stream filed their several verified statements and proofs of claim, and within five days after the close of inspection of the statements and proofs of claim of the various claimants to the waters of said stream, the following contests were filed to which appellant herein is a party:

Contest No. 8, Courtney Irrigation Co. vs Western Land & Irrigation Company;

Contest No. 12, Dillon Irrigation Co. vs. Western Land & Irrigation Company;

Contest No. 34, Oregon Land & Water Company vs. Western Land & Irrigation Company;

Contest No. 36, W. T. Walton vs. Western Land & Irrigation Company;

Contest No. 37, Sidney Walton vs. Western Land & Irrigation Company;

Contest No. 39, Western Land & Irrigation Company vs. Pioneer Irrigation Company;

Contest No. 40, Western Land & Irrigation Company vs. Courtney Irrigation Company;

Contest No. 41, Western Land & Irrigation Co. vs. Harry R. Newport;

Contest No. 42, Western Land & Irrigation Co. vs. Brownell Ditch Company;

Contest No. 43, Western Land & Irrigation Co. vs. John J. and Thomas W. Peters;

Contest No. 44, Western Land & Irrigation Co. vs. Oregon Land & Water Company;

Contest No. 45, Western Land & Irrigation Co. vs. F. H. Gritman;

Contest No. 46, Western Land & Irrigation Co. vs. H. G. Hurlburt;

Contest No. 47, Western Land & Irrigation Co. vs. Frank E. Fowler and Julia C. Fowler;

Contest No. 48, Western Land & Irrigation Co. vs. Maxwell Irrigation Company;

Contest No. 93, United States of America vs. Western Land & Irrigation Company.

The adverse parties to said contests, whether filed by or against the appellant herein, are named as respondents in this appeal by virtue of the provisions of Section 6650, L. O. L., as amended by Chapter 97, Laws of 1913, which apparently requires that all adverse parties to any contest or contests wherein appellant was a party should be named as respondents.

The issues in Contest No. 34, Oregon Land & Water Company vs. Western Land & Irrigation Co.;

Contest No. 36, W. T. Walton vs. Western Land & Irrigation Co.;

Contest No. 37, Sidney Walton vs. Western Land & Irrigation Co.;

Contest No. 39, Western Land & Irrigation Co. vs. Pioneer Irrigation Company;

Contest No. 40, Western Land & Irrigation Co. vs. Courtney Irrigation Company;

Contest No. 41, Western Land & Irrigation Co. vs. Harry R. Newport;

Contest No. 42, Western Land & Irrigation Co. vs. Brownell Ditch Company;

Contest No. 43, Western Land & Irrigation Co. vs. John J. and Thomas W. Peters;

Contest No. 44, Western Land & Irrigation Company vs. Oregon Land & Water Company;

Contest No. 45, Western Land & Irrigation Company vs. F. H. Gritman;

Contest No. 46, Western Land & Irrigation Co. vs. H. G. Hurlburt;

Contest No. 47, Western Land & Irrigation Co. vs. Frank E. Fowler, and

Contest No. 48, Western Land & Irrigation Co. vs. Maxwell Land & Irrigation Company were settled by stipulation or otherwise disposed of in the order of determination of the State Water Board and Decree of the Circuit Court in such manner that the rights of the parties in said contests are not affected by this appeal.

The parties whose interests may be affected by this appeal are the appellant, Western Land & Irrigation Company, and the respondents, United States of America, Furnish Ditch

Company and possibly to some extent the Dillon Irrigation Company.

After all contests had been heard and determined, the State Water Board on March 29, 1915, filed in the Circuit Court of Umatilla County, Oregon, its findings of fact and order of determination wherein it fixed the priority date of appellant under the appropriation made by the Hinkle Ditch Company as March 14, 1903, and denied the appellant any rights under the appropriation made by its predecessors in 1891 (Abstract, pp. 65-70, Finding No. 9, Contests 12-93), and whereby the Dillon Irrigation Company was awarded a vested right of 4.75 cubic feet of water with a priority date of November, 1897, for 380 acres, and a priority date of 1907, vested and inchoate, for the remainder of the lands under its system. The Furnish Ditch Company was awarded a vested right of 4.91 cubic feet of water with a priority date of March 8, 1905, for 3272.81 acres, and an inchoate right with priority date of March 8, 1905, contingent upon completion by January 1, 1920, for the remainder of the lands under its project. And the United States of America was awarded a vested right of one second foot of water with a priority date of November 14, 1894, for 80 acres of land; a vested right of 54.4 second feet, with a priority date of February 25, 1904, for 4,031 acres; a vested right with priority date of September 6,

1905, of 350 cubic feet for storage; an inchoate right with priority date of February 25, 1904, contingent upon completion by January 1, 1920, for 11,011 acres, and an inchoate right with priority date of September 6, 1905, contingent on completion by January 1, 1920, for 9,947.5 acres. And the appellant Western Land & Irrigation Company was awarded a vested right of 38.33 second feet with a priority date of March 14, 1903, for 3,086 acres, and an inchoate right with priority date of March 14, 1903, contingent on completion by January 1, 1920, for the remainder of its lands, namely for 14,127.09 acres. (Abstract, pp. 90-91.)

In its Findings and Order of Determination, the State Water Board in Finding No. 25 attempted to prescribe the terms of contracts which might be made by any person, firm or corporation having a right to supply and deliver water to others and charge for the same (Abstract, pp. 75-76), and in Finding No. 32 limited the amount of water to be used for the irrigation of land to not exceed one-fortieth of a second foot for each acre during the months of April and May, and not to exceed one-eightieth of a second foot for each acre of land during any other months of the year (Abstract, pp. 82-83). And also allowed those having storage rights priority over irrigation rights in the months of November, December, January and February of each year (Abstract, p. 85); and

fixed the duty of water at $4\frac{1}{2}$ acre feet per acre per year during the period of reduction from a raw state to a state of cultivation, and at 3 acre feet of water per acre per year after land has been reduced to a state of cultivation (Abstract, p. 87).

Appellant excepted to the Findings and Order of Determination of the State Water Board to the effect that it was entitled to no rights under the appropriations made by its predecessors in 1891, and to so much of the findings as gave appellant priority date of March 14, 1903, and no other date. (See Finding No. 1, Abs., pp. 93-94.)

Appellant also excepted to Finding No. 25, in which the State Water Board attempted to prescribe the terms of contracts which might be made by persons, firms or corporations having a right to furnish water to others and charge therefor (Abs., p. 95, Exception 2); also to the finding of the Board limiting the amount of water to be used for irrigation to not to exceed one-eightieth of a second foot for each month of the year except the months of April and May (Abs., p. 96, Exception 4), and to so much of Finding 22 as allowed storage rights to have priority over other rights during the months of November, December, January and February of each year (Abs., p. 96, Exception 4); and appellant also excepted to the failure of the Board to find upon the issue

of loss by seepage and evaporation in its ditches and canals between the point of diversion and point of delivery to the land; and to the failure of the Board to allow appellant an amount of water at its point of diversion sufficient to cover such loss by seepage and evaporation as set forth and claimed in its proof of claim, and as shown by the proofs (Abs., pp. 97-98).

The United States of America excepted to Findings Numbers 9 and 34 establishing the priority date of appellant as March 14, 1903 (Abs., pp. 104-106, Exceptions 3 and 4).

The exceptions to the Findings and Order of Determination of the State Water Board by the Dillon Irrigation Company relate to the acreage under its project and to the date fixed for the completion of its inchoate rights; and further reference thereto is omitted.

There was no contest between the appellant and Furnish Ditch Company, and no exceptions by either the appellant or the Furnish Ditch Company to the rights of either as fixed and established by the Findings and Order of Determination of the State Water Board.

Thereafter on September 9, 1916, the Circuit Court of Umatilla County, Oregon, entered its findings and decree in the above entitled proceeding, and in Finding No. 9, Contest No. 11, the Courtney Irrigation Company, contestant, vs. United States of America, contestee,

found with reference to the claims of the United States of America as follows:

"The claim of the United States of America is divided into three parts; that part of the claim represented by Engineer's permits under Application No. 13 and Application No. 237, initiated March 28, 1909, not being completed rights are not in anywise determined by this decree of adjudication, but shall be determined and approved in accordance with Sections Nos. 6624, 6626, 6627, 6628, 6630, 6631, 6632 and 6633 of Lord's Oregon Laws.

"That the second basis of claim of the United States of America is based upon what is called the Minnehaha and Maxwell rights. * * * That about eighty acres is what the water was put over under the Minnehaha rights, and a water right for eighty acres of the priority date of 1894 has been established under the Minnehaha right. That on the 25th day of February, 1904, the Maxwell Land & Irrigation Company posted a notice of appropriation, and map filed therewith shows that the water was appropriated for the acreage as stated forthwith under the claim of the United States. That due diligence has been shown in the bringing of the lands thereunder into cultivation and irrigation, and that the United States Government should have, under date of February 25, 1904, the lands as hereinafter tabulated; that this tabulation shall include the claim of the Maxwell Land & Irrigation Company and claimants

thereunder, which will make the claim of the United States of America as tabulated include the claims of the United States of America, Maxwell Land & Irrigation Company, J. F. McNaught, S. R. Oldaker and Chas. E. Baker.

"The third basis of claim of the United States of America as based upon the appropriation of September 6, 1905, wherein the water rights are reserved to the United States under a statute of the State of Oregon appearing as Chapter 228, Gen. Laws of Oregon for 1905. This right is tabulated and described with the other rights of the United States in Finding No. 34.

And found with regard to the claims of Appellant in Contest No. 12, Dillon Irrigation Company, contestant, vs. Western Land & Irrigation Company, contestee, as follows:

"The contestee bases its rights upon three appropriations made in 1891, and upon a second appropriation made in 1903 (see Exhibits 25A, 25B, 25C and 25D). The appropriation made by J. M. Jones was afterward transferred to the Columbia Valley Land & Irrigation Company (see Exhibit 25E). That under the appropriation of J. M. Jones water was diverted, and in the year 1892 a couple of hundred acres were irrigated (Vol. 32, Book C, p. 670). In 1893 there was no water diverted through the ditch (Vol. 32, p. 670A). The ditch then fell into disuse and no further use was made of it until the rights were

purchased by the Hinkle Ditch Company, which was succeeded by the Western Land & Irrigation Company. The Hinkle Ditch Company made a new appropriation on March 14, 1903. The priority date, therefore, of the Western Land & Irrigation Company begins with the appropriation of the Hinkle Ditch Company, and the same is hereby established as March 14, 1903, for 4,109.68 acres, and July, 1907, for 12,747 acres."

And found in Contest No. 93, United States of America, contestant, vs. Western Land & Irrigation Company, contestee, that the rights of the contestee are established the same as in Contest No. 12 hereinbefore set forth in this finding.

The Court by its decree awarded the Dillon Irrigation Company a vested right with priority date of November 17, 1897, for 4.75 second feet of water for 380 acres, and a priority date of 1907 for all the remaining lands under its system; and awarded the Furnish Ditch Co. a vested right of 40.91 second feet of water with priority date of March 8, 1905, for 3,240.7 acres, and an inchoate right with a priority date of March 8, 1905, contingent upon completion by January 1, 1920, for the remaining lands under its project. And awarded to the Western Land & Irrigation Company a vested right for 17.2 second feet of water with priority date of March 14, 1903, for 1,375 acres; and an inchoate right

with priority date of March 14, 1903, contingent upon completion by January 1, 1920, for 2,759.68 acres; and a vested right for 20.9 second feet with priority date of July 1907, for 1,671 acres; and an inchoate right with priority date of July, 1907, contingent upon completion by January 1, 1920, for the remainder of its lands. (Ab., pp. 26-27.)

The Court found with reference to the several claims of the United States as follows:

"It further appears from the statements and proofs of claims filed, and the evidence adduced at the hearing, that the United States has appropriations of November 14, 1894, February 25, 1904, and an appropriation and reservation of September 6, 1905. That the appropriation of November 14, 1894, is completely vested as to one second foot; that the appropriation of February 25, 1904, at the time of filing the statement and proof of claim was completely vested for 25 second feet of water, for 2,000 acres of land, and that the appropriation of September 6, 1905, is a complete reservation under and by virtue of Chapter 228, Gen. Laws of Oregon for 1905, and that the appropriation and reservation of September 6, 1905, includes the lands covered by the appropriations of November 14, 1894, and February 25, 1904." (Ab., pp. 123-124.)

And tabulated the rights of the United States accordingly.

In Finding No. 25, the Court attempted to prescribe the terms of contracts which might be made by persons, firms or corporations having a right to supply and deliver water to others and to charge for the same; and in Finding No. 32 the Court determined that in all cases where diversion is at the rate of 1-40th of a second foot per acre such diversion shall include all waste by seepage and evaporation, and that in all cases where the diversion is at the rate of 1-80th of a second foot per acre, the Water Master might allow an increased diversion for seepage and evaporation not to exceed twenty per cent of the amount allowed by the Findings.

To the Findings and Decree of the said Circuit Court, the Appellant filed the following exceptions:

"(1) Said claimant excepts to so much of Finding No. 9, Contest No. 11, Courtney Irrigation Company, contestant, vs. United States of America, contestee, as finds with reference to the so-called Maxwell right of the United States, that due diligence has been shown in bringing the lands thereunder into cultivation and irrigation, and that the United States Government should have under date of February 25, 1904, the lands tabulated under said right in Finding No. 34; also to so much of said Finding No. 9, Contest No. 11, as finds with reference to the third claim of the United States that under said third claim of the United States of America is entitled to a

right under its appropriation of September 6, 1905, for the lands tabulated under said right in Finding No. 32, on the ground that the same are contrary to the evidence and unsupported by the evidence.

"(2) Said claimant excepts to so much of Finding No. 9, Contest No. 12, Dillion Irrigation Company, contestant, vs. Western Land & Irrigation Company, contestee, as finds that there was no water diverted through the ditch in 1893 under the J. M. Jones appropriation; that the ditch then fell into disuse and no further use was made of it until the rights were purchased by the Hinkle Ditch Company, which was succeeded by the Western Land & Irrigation Company; and that the priority date of the Western Land & Irrigation Company begins with the appropriation of the Hinkle Ditch Company; and also to so much of said finding in said Contest No. 12 as establishes the priority date of the Western Land & Irrigation Company as March 14, 1903, for 4109.68 acres, and July, 1907, for 12,747.48 acres on the ground that the same is contrary to the evidence and is unsupported by the evidence.

"(3) Said claimant excepts to the failure of the Court to find that it is entitled to a priority as of March 14, 1903, under the appropriation made on said date by the Hinkle Ditch Company for 17,213.21 acres.

"(4) Said claimant also excepts to so much of said Finding No. 9, Contest No. 12, as awards claimant a priority of July, 1907,

instead of March 14, 1903, for 12,747.48 acres on the ground that the same is contrary to the evidence, unsupported by the evidence and deprives claimant of a vested right.

"(5) Claimant excepts to Finding No. 25 upon the ground that the matters and things in said finding set forth are not within the issues of this proceeding and are unsupported by any evidence.

"(6) Claimant excepts to so much of Finding No. 32 as finds that in all cases where the diversion is at the rate of 1-40th of a second foot per acre, such diversion shall include all waste by seepage and evaporation, and that in all cases where the diversion is at the rate of 1-80th of a second foot per acre the Water Master may allow an increased diversion for such seepage and evaporation not to exceed twenty per centum of the amount allowed by said finding, on the ground that the same is contrary to the evidence, and on the further ground that the same is not within the issues herein relative to lands requiring but 1-80th of a second foot for its irrigation.

"(7) Said claimant excepts to the failure of the Court to find upon the issue of loss by seepage and evaporation under its proofs herein, and to the failure of the Court to allow claimant an amount of water at its point of diversion sufficient to offset or cover such losses, and to the failure of the Court to allow claimant any water for such losses.

"(8) Claimant excepts to so much of Finding No. 34 as finds that the appropriation of the United States of America of September 6, 1905, is a complete reservation under and by virtue of Chapter 228, Gen. Laws of Oregon for 1905, of the waters claimed under said appropriation of September 6, 1905, as set forth more particularly in the tabulation referred to in said finding, on the ground that the same is contrary to the evidence, contrary to law, and discriminates unjustly against all other appropriators.

"(9) Claimant excepts to the tabulation of the rights of the United States of America in Finding No. 34 insofar as the same gives the United States a vested right as of September 6, 1905, for 25,072 acres, and to the failure of the Court to fix an inchoate right for the United States the same as other appropriators and to fix a time limit for the complete application to a beneficial use of the amount of such inchoate right, on the ground that the same is contrary to the evidence, contrary to law and interferes with the vested rights of other appropriators.

"(10) Claimant excepts to the tabulation of its rights and of the rights of the Furnish Ditch Company in Finding No. 34 insofar as the same allows the Furnish Ditch Company any priority over this claimant on the ground that the same is contrary to the evidence, unsupported by any evidence and not within any of the issues herein.

"(11) Claimant excepts to the tabulation of its rights as set forth in Finding No. 34 insofar as said tabulation fails to allow claimant 15 acres additional in Sec. 30, Tp. 4, N. R. 28; 10 acres additional in Sec. 14, and 15 acres additional in Sec. 15, Tp. 3, N. R. 28; and 39.90 acres additional in Sec. 4, and 52 acres additional in Sec. 9, and 50 acres additional in Sec 10, Tp. 3, N. R. 27, on the ground that the evidence shows claimant entitled to water for such additional acreage.

"(12) Claimant excepts to the tabulation of its rights in said Finding No. 34 insofar as the same fails to allow claimant a priority as of March 14, 1903, for all of the lands described in said tabulation, on the ground that the same is contrary to the evidence, and that so much of said tabulation as awards claimant a priority as of July, 1907, for part of its lands, is unsupported by any evidence.

"(13) Plaintiff excepts to the failure of the Court to allow it 1-40th of a second foot of water per acre for all of its lands set forth in said tabulation in Finding No. 34, on the ground that the same is contrary to the evidence, and that there is no evidence in this proceeding which will support a finding that 1-80th of a second foot of water is sufficient for any of claimant's lands.

"(14) Claimant objects and excepts to the Court's conclusion of law that a decree should be entered herein modifying the

findings of the State Water Board and establishing the water rights of claimants accordingly."

The contention of appellant as set forth in its assignments of error herein, and upon the facts as hereinbefore set forth are in substance as follows:

That the Court erred in awarding to the United States of America under its third claim based on the provisions of Chapter 228, Gen. Laws of 1905, a vested right for 350 cubic feet of water for both irrigation and storage; and in failing to limit the right claimed by the United States, under the provisions of said Chapter 228, as an inchoate right, and to prescribe a time within which the full amount of water appropriated should be applied to a beneficial use.

And in failing to find that appellant was entitled to a water right under the appropriation made by its predecessors in 1891, and to fix a date of priority therefor, and the amount and extent thereof; and in dividing appellant's water right and awarding appellant a priority date of March 14, 1903, for only 5,805.60 acres and in failing to award appellant a priority date of March 14, 1903, for all of its lands.

And in attempting to prescribe the terms of contracts which might be made by persons, firms or corporations having the right to de-

liver water to others and to charge for the same; and in failing to find upon the issue of losses by seepage and evaporation under appellant's statement and proof of claim; and in failing to allow appellant an additional amount of water at its point of diversion to cover such losses.

And in awarding appellant a priority date of July, 1907, for 11,257.97 acres of its lands, thereby placing such right subsequent to the rights awarded the respondent Furnish Ditch Company, between whom and appellant there was no contest or controversy; and in failing to limit the rights awarded the Furnish Ditch Company, so that they would be subsequent to all rights awarded the appellant.

POINTS AND AUTHORITIES

The appellant, Western Land & Irrigation Company, contends:

1. That it is entitled to a water right with a priority date of 1891, for the amount of water then applied to a beneficial use by its predecessors.

Hough vs. Porter, 98 Pac. 1102, and that said right was never abandoned.

Abandonment as applied to an appropriation of water is an intentional relinquishment

of a known-right and the intention of the party who made the appropriation must govern, such intention to be ascertained from his conduct and declarations in respect thereto.

Farnum on Waters, Sec. 691,
Turner vs. Cole, 31 Ore. 154,
Oviatt vs. Big Four Mining Co., 39 Ore.
118,
Watts vs. Spencer, 51 Ore. 262,
Hough vs. Porter, 98 Pac. 1107,
Borman vs. Blackman, 18 Pac. 848.

To constitute abandonment non-user must be continuous for more than ten years.

Dodge vs. Morden, 7 Ore. 456,
Watts vs. Spencer, 51 Ore. 262,
Hedge vs. Riddle, 127 Pac. 549,
Well Water Rights, Sec. 567,
Hough vs. Porter, 98 Pac. 1107.

To constitute an abandonment of water, there must be a concurrence of the intention to abandon and an actual failure in its use.

Hough vs. Porter, 51 Ore. 318.

The party claiming there has been an abandonment has the burden of proof which must be clear and definite to a preponderance of the evidence.

Well Water Rights, Sec. 567.
1 Cyc. 7,
16 Cyc. 296,

Miller vs. Wheeler, 23 L. R. A. (NS.)
1065,
Hall vs. Lincoln, 50 Pac. 1047,
Beaver, etc., Co., vs. St. Vrain, etc., Co.,
Pac. 1066,
Putnam vs. Curtis 43 Pac. 1056.

Abandonment is not complete until another relocates so that a resumption of use may be made at any time before others intervene.

Beaver etc., Co., vs. St. Vrain, etc., Co.,
40 Pac. 1060.
Tucker vs. Jones, 10 Pac. 571.

Rights of United States Limited by State Laws.

Under the terms of the Reclamation Act, whence the powers of the United States in this proceeding are derived, the rights of the United States in the matter of the appropriation, distribution and use of water are subject to the laws of the state.

Act of June 17, 1902, Chap. 1093,
32 U. S. Statutes,
U. S. vs. Burley, 172, Fed. 615,
U. S. vs. Burley, 179, Fed. 1.

Chapter 228, Laws of 1905, under which the appropriation of the United States of September 6, 1905, is made, authorized the United States to appropriate only such waters as were unappropriated at the date of filing the notice in said chapter provided; and the State Water

Code expressly provides that nothing therein contained shall be so construed as to take away or impair the vested right of any person, firm, corporation or association to any water.

Laws of 1909, Chap. 216, Sec. 1,
L. O. L. Secs. 6594-6595.

The appropriator cannot allow the water to run to waste, nor prevent others from using it when not necessary for the purpose of his appropriation.

Mann vs. Parker, 48 Ore. 321,
Mattis vs. Hosmer, 37 Ore. 523,
Hough vs. Porter, 51 Ore. 318,
Ison vs. Sturgill, 57 Ore. 109,
Little Walla Walla Irr. Co. vs. Finis Co.,
62 Ore. 34,
Claypool vs. O'Neil, 133 Pac. 349.

Right of Appellant Based on Laws of 1891.

The rights of appellant are based on the provisions of the Laws of 1891.

L. O. L. 6525-6550.

"It is well settled that an intention to devote waters to beneficial use may comprehend use by other persons and on other lands than those of the appropriator.

Nev. Ditch Co. vs. Bennett, 30 Ore. 59,
Hough vs. Porter, 98 Pac. 1106,
Nevada Ditch Co. vs. Canyon & Sand
Hollow Co., 114, Pac. 86.

"Reasonable diligence only is required in the application of the waters to a beneficial use."

Moss vs. Rose, 27 Ore. 595,
Welmer vs. Simmons, 27 Ore. 1,
Hindman vs. Riser, 21 Ore. 112,
Cole vs. Logan, 24 Ore. 304,
Lowe vs. Riser, 25 Ore. 551,
Nev. Ditch Co. vs. Bennett, 30 Ore. 59.

"What constitutes reasonable diligence must be determined from the facts of each case.

Weil on Waters, 3rd Ed. Sec. 383,
Oviatt vs. Big Four Min. Co., 39 Ore. 118,
Pringle Falls Electric Co. vs. Patters, 132
Pac. 527.

"What constitutes such diligence will necessarily depend upon the nature and magnitude of the enterprise and to some extent upon the organized effort put forth in accomplishing the desired object.

Oviatt vs. Big Four Min. Co., 65 Pac. 811.

"And upon the natural obstacles to be encountered in executing the design.

Seawear vs. Pac. Live Stock Co., 88 Pac. 963.

"Where an appropriation is made and the area of arable land, to the irrigation of which water was appropriated, increases from year to year as additional land is brought under cultivation, the ad-

ditional application of water annually to meet the augmented demand causes the appropriation to relate back to its inception, thereby cutting off all intervening rights.

Seaweed vs. Pac. Live Stock Co., 88 Pac. 963,
Ison vs. Sturgill, 109 Pac. 579.

"And the rights reverts back to commencement of work where construction is prosecuted with reasonable diligence.

Hough vs. Porter, 98 Pac. 1102, 51 Ore. 318,
Whited vs. Cavin, 105 Pac. 396,
Ison vs. Sturgill, 57 Ore. 109.
Seepage Losses.

Appellant's claim to an allowance for loss from seepage and evaporation in its canals should have been allowed.

Middlecamp vs. Bessemer, etc., Co., 46 Colo. 102,
Weil, Vol. 1 p. 526,
Roeder vs. Stearn, 42 Pac. 867,
Hough vs. Porter, 93 Pac. 1105.
The Furnish Rights.

After the order of determination of the State Water Board is filed in the Circuit Court, the proceedings are as nearly as may be like those in a suit in equity. If exceptions are filed the Court fixes the time when a hearing

will be had on such exceptions; if no exceptions are filed, the Court enters a decree affirming the determination of the Board.

L. O. L. 6550, as amended by Chap. 97, Laws of 1913.

When the Furnish Ditch Company made its appropriation, appellant's rights as a prior appropriator had attached and the appropriation of said company is subject thereto.

Cole vs. Logan, 24 Ore. 304, 33 Pac. 568.
Kaylor vs. Campbell, 13 Ore. 596, 11 Pac. 301.

ARGUMENT

I.

Rights of the United States Under its Appropriation of September 6, 1905.

In the order of determination herein, the State Water Board awarded the United States under its appropriation of September 6, 1905, a head of 350 second feet for both storage and irrigation, but limited the right for irrigation as an inchoate right dependent on the complete application of water to a beneficial use by January 1, 1920, the same as was done with all other incomplete appropriations, (Abs. p. 91). When the matter came on to be heard in the

Circuit Court, the Court found (Find. 34, Abs. p. 123) that the appropriation of September 6, 1905, was a complete reservation of the water appropriated under and by virtue of Chap. 228, Gen. Laws of Oregon, 1905, and awarded the United States a vested right of 350 second feet with a priority date of September 6, 1905, for irrigation, storage in Cold Springs Reservoir, capacity 50,000 acre feet, and irrigation from said reservoir, and failed to limit the irrigation right of the Government under said appropriation in any manner.

The appellant contends that the irrigation rights of the United States under the appropriation of September 6, 1905, should have been limited as inchoate rights the same as are the rights of other appropriators. The effect of the Court's decree is to give to the United States, not only for storage but for direct irrigation as well, a present vested right of 350 second feet of water, with a priority date of September 6, 1905, which they can use or not use at their pleasure; but which, being a vested right, would entitle them to a diversion of that amount to be used if they saw fit on a very small area of land, to the detriment of all subsequent appropriators whose rights are limited not only by the area for which they are awarded a water right, but also by the maximum duty of water fixed by the Court's Decree at six acre feet for lands in process of reclamation and at three

acre feet for reclaimed lands. The effect of the decree is to relieve all of the lands listed in the schedule of lands to be irrigated by the United States from the duty of water as fixed by the decree.

The contention of appellant is that the United States takes its rights under the state laws and should be governed thereby the same as other appropriators.

U. S. vs. Burley, 172 Fed. 615,
U. S. vs. Burley, 179 Fed. 1,

and that it was not the intention of the Legislature in enacting Chapter 228, Gen. Laws of Oregon for 1905, to give to the United States a vested right to any amount of water it might appropriate regardless of whether or not it was applied to a beneficial use. In any event, the appropriation made by the United States under said Chapter 228, Gen. Laws of 1905, was made subject to existing appropriations and cannot be so construed as to deprive prior appropriators of their vested rights, as to do so would be to impair the obligation of existing contracts within the inhibition of Sec. 21 of Art. I of the State Constitution. Therefore, the irrigation right of the United States should be limited as a vested right and when the Cold Springs Reservoir is filled they should be required to allow the water, except so far as it is used beneficially by them, to pass to other appropriators.

Early Rights of Appellant

Appellant bases its claim to water upon diversion and use under three appropriations made by its predecessors in interest in 1891, and upon the appropriation made by the Hinkle Ditch Company on March 14, 1903. (Abs. p. 3.) The State Water Board found with reference to appellant's rights in the contest between appellant and Dillon Irrigation Company as follows:

"The contestee bases its rights upon three appropriations made in 1891, and upon a second appropriation made in 1903 (see Exhibits 25A, 25B, 25C and 25D). The appropriation made by J. M. Jones was afterward transferred to the Columbia Valley Land & Irrigation Company (see Exhibit 25E). That under the appropriation of J. M. Jones water was diverted, and in the year 1892 a couple of hundred acres were irrigated (Vol. 32, Book c, p. 670). In 1893 there was no water diverted through the ditch (Vol. 32, p. 670A). The ditch then fell into disuse and no further use was made of it until the rights were purchased by the Hinkle Ditch Company, which was succeeded by the Western Land & Irrigation Company. The Hinkle Ditch Company made a new appropriation on March 14, 1903. The priority date, therefore, of the Western Land & Irrigation Company begins with the appropriation of the Hinkle Ditch Company, and the same is hereby established as March 14, 1903." (Abs. pp. 66-67.)

Thus establishing its date of priority of March 14, 1903, under the Hinkle appropriation, but denying it any rights under its early appropriation. In its findings herein, the Circuit Court made a finding identical with that of the State Water Board with reference to appellant's early rights and the date of appropriation by the Hinkle Ditch Company, but establishing appellant's priorities as follows:

"The priority date, therefore, of the Western Land & Irrigation Company begins with the appropriation of the Hinkle Ditch Company, and the same is hereby established as March 14, 1903, for 4,109.68 acres and July, 1907, for 12,747 acres." (Abs. p. 114.)

The State Water Board and Court were mistaken in their statement that no water was diverted through appellant's ditch in 1893. The appropriation made by Jones and others on March 25, 1891, was conveyed to the Columbia Valley Land & Irrigation Company, (one of the so-called Hunt Companies) (Exhibit 25E), which constructed the first five miles of appellant's ditch in 1891 and 1892, and delivered water through the ditch during the years 1892 and 1893, according to the testimony of Mr. Teel, who was on the ground and in a position to know the facts. The head-gate was washed out in the winter of 1894 and no further use was made of the ditch until the advent of the

Hinkle Company, which succeeded to the Hunt rights. (Testimony Vol. 32, pp. 229-232.)

"The extent of these early rights should be determined not by the amount of appropriation, but by the amount of water applied to a beneficial use."

Hough vs. Porter, 98 Pac. 1102.

The State Water Board and Court found and Mr. Teel testified that water was used on about 200 acres of land. (Vol. 32 p. 669 to 670A.) Being asked when they first turned water into the ditch, he said "I think that it was in the spring of 1892, as near as I can remember."

Q. How long did they run water that year?

A. They ran it there about all season. (Vol. 32 p. 669.)

Q. And about how many acres did you say was irrigated along about 1902 and 1903 by the Hunt people?

A. It would be in 1892; I think perhaps a couple hundred acres would cover all that was irrigated; the Columbia Valley Land succeeded what is called the Umatilla and Butter Creek Company.

Q. That was the Jones and others as I understand.

A. Yes, sir. They were under contract to furnish some of the farmers on the meadows

there with water; that water was turned out somewhere near Echo. (Vol. 32 p. 670.)

Q. How many years did the Hunt people divert water through the ditch.

A. I do not know whether there was any water diverted through the head-gate after 1893 or not; I am not positive.

Q. Did any of those farmers in there who were to have gotten water from the old Butter Creek get water in succeeding years through that ditch?

A. Yes sir; some water was gotten through it.

Q. For how long?

A. Well, I would not like to say positively, but I think a year or two. (Vol. 32, p. 670A.)

The contention of appellant is that diversion and application to beneficial use of water under these early rights, having been made in 1892, and 1893, could only be lost by abandonment, which was continuous for more than ten years.

Dodge vs. Marden, 7 Ore. 456,
Watts vs. Spencer, 51 Pac. 262,
Hedge vs. Riddle, 127 Pac. 549,
Hough vs. Porter, 98 Pac. 1107.

The Hinkle Ditch Company went into possession in recognition of the Hunt rights in March, 1903. Mr. Hinkle testifies that upon the organization of the Hinkle Ditch Com-

pany, he entered into and carried on negotiations with Hunt which resulted in a contract being made for the purchase of his land, ditch and water rights. (Vol. 32, pp. 563-565.) It is not contended that any material use was made of the ditch subsequent to 1893 until the advent of the Hinkle Company, which succeeded to the Hunt rights, but the Hinkle Company having resumed the use of the ditch in the spring of 1903, less than ten years from the use made of it by the Hunt people in 1893, there was a resumption of use before the intervention of the United States in 1905.

See *Beaver, etc., Co. vs. St. Vrain Co.*, 40 Pac. 1066,
Tucker vs. Jones, 19 Pac. 571.

The United States claims that these old rights were abandoned. On this point they have the burden of proof which must be clear and definite to a preponderance of the evidence.

See *Miller vs. Wheeler*, 23 L. R. A. (NS) 1065,
Hall vs. Lincoln, 50 Pac. 1047,
Putnam vs. Curtis, 43 Pac. 1056,
and other cases cited under points and authorities.

In view of the testimony of Mr. Hamilton that he was up at the head-gate with Hunt in 1895 to forbid people using the ditch, (Vol. 32, p. 232), and of Mr. Teel that he looked after

the head-gate for several years at Hunt's request, (Vol. 32, p. 742-750), it cannot be said that an intent to abandon the ditch by the Hunt interests is shown by a preponderance of the evidence, or by proof which is clear and definite. Water having been used under these early rights and an abandonment thereof not having been shown by the parties upon whom rested the burden of proof, a finding as to the amount thereto and the quantity of water to which appellant is entitled thereunder should have been made by the Court. And in view of the finding that water under these early rights was used on about 200 acres, we believe that appellant should have been awarded a right of ten second feet with a priority date of March 25, 1891.

Company Contracts

In Finding No. 25, the Court in effect determines that contracts for the delivery of water made by any person, firm or corporation having a right to supply and deliver water to others and to charge for the same, which do not provide for a uniform method of pro rata distribution of water, must supply water to the water users in the order of and according to the date of priority of use upon the land, or at the place at which water is to be used and subject to rotation as in the decree provided.

Appellant is a company organized for the

purpose of delivering water to others and charging therefor. It has numerous contracts outstanding, the obligation thereof would be impaired if it were compelled to deliver water to water users in the order of priority of use, rather than in the order of contract.

There was no issue in any contest in these proceedings and no evidence received which called for a finding of the character indicated. While the finding in question may be sound as an abstract proposition of law, it is not responsive to any issue in these proceedings, and may be a source of trouble to appellant and others similarly situated insofar as its provisions conflict with or seem to vary the terms of their outstanding contracts with water users. It will not impair the validity of the decree and may save appellant and others trouble if the finding in question should be eliminated.

Seepage and Evaporation

In its proof of claim herein, the appellant made an express claim for 25% loss by seepage and evaporation over and above the one inch per acre which is claimed as the amount necessary for the proper irrigation of the lands under its system, (Abs. p. 12). It submitted as a part of its proof herein evidence of its losses by seepage and evaporation, (Testimony Vol. 32, pp. 921-923), which was received without objection and shows the losses in its canals to be

greater than the 25% claimed in its statement and proof.

A direct claim having been made by appellant for an allowance sufficient to cover losses by seepage and evaporation in its canals, which was supported by evidence, the State Water Board and Court should have made a finding and an award to appellant to cover such loss. Seepage losses were recognized by this Court in *Hough vs. Porter*, 98 Pac. 1105-1106, where the Court by its decree provided for water delivered at the intake of the head-gate sufficient to cover the loss by seepage and evaporation in the canal, and to furnish an effective delivery at the land of the quantity found by the Court to be sufficient for its proper irrigation.

As was said by the Court in *Middlecamp vs. Bessemer, etc., Co.*, 103 Pac. 280:

"All irrigation canals must of necessity seep more or less and will so continue until prevented by other means than ordinary diligence in their construction, and we do not think the time has yet been reached when the owners of such enterprises can be held to such a high degree of diligence in their construction as to be compelled to prevent them from seeping at all."

See also *Weil Water Rights*, Vol. 1, p. 526,

Roeder vs. Stearn, 42 Pac. 867.

No contention is made that the system of irrigation used by appellant is unnecessarily wasteful, or that the company has failed to exercise ordinary diligence and reasonable care to prevent losses of this character. There system of irrigation is the customary and usual one applied in the irrigated districts and its vested rights should be recognized, protected and upheld, including a right to divert a sufficient quantity of water to supply the needs of the land under its system, with a reasonable allowance for necessary seepage losses.

Appellant's Priorities

The principal water right which appellant claims is based upon the appropriation made by the Hinkle Ditch Company on March 14, 1903. The State Water Board found that the priority date of appellant begins with said appropriation and established the same as March 14, 1903. (Abs. p. 67.) The Court in its finding divided appellant's priority date and established the same as March 14, 1903, for 4,134.68 acres and July, 1907, for 12,928.97 acres. There is no finding by the Court that the Hinkle Ditch Company and appellant, as its successor in interest, did not proceed with reasonable diligence in the development of its irrigation system and the application to beneficial use of the water covered by said appropriation of March 14, 1903. Why, therefore, the Court

should have divided appellant's date of priority, awarding a priority of March 14, 1903, for a part of its lands, and of July, 1907, for the remainder thereof, we are unable to understand. Unless it be on the theory that the rights of prior appropriators are to be determined and limited by the extent of the development on their projects at the time the Government entered upon the scene in 1905.

Regardless of the so-called early rights claimed by appellant, the appropriation of its predecessor, the Hinkle Ditch Company, made on March 14, 1903, is sufficient in quantity to furnish an adequate supply of water for all the lands for which appellant now claims a water right. This right was initiated by posting and recording notice as by law required, and its extent must be determined by the intent of the appropriator, the nature and purposes of the use and the diligence with which the water has been applied to a beneficial use.

We must not lose sight of the fact that the Hinkle Ditch Company and the appellant, as its successor, are corporations organized for the purpose, among other things, of supplying water to others under the provisions of Secs. 6525-6550, I. O. L. Where, as in this case, corporations are organized to furnish water for general rental, sale and distribution for purposes of irrigation and in supplying water for household and domestic use, the intent to de-

vote the water to a beneficial use necessarily includes its use by other persons and on other lands than those of the appropriator.

Nevada Ditch Co. vs. Bennett, 30 Ore. 59,
Hough vs. Porter, 98 Pac. 1106,
Nev. Ditch Co. vs. Canyon & Sandhollow Co., 114 Pac. 86.

And reasonable diligence only is required in the application of the water to such beneficial use.

See *Moss vs. Rose*, 27 Ore. 595, and other cases cited on this point.

As was said by the Supreme Court in *Wimer vs. Simmons*, 27 Ore. 1, 39 Pac. 6:

"It is the policy of the law that the water of a stream shall be appropriated to the extent only that it is put to or designed for some useful or beneficial purpose. This is the measure of the appropriation. The entire appropriation may not be utilized at once for the purposes designed; in such case, a reasonable time is allowable within which to make the application to such purposes and the surroundings and circumstances of each particular case are elements for consideration in determining what is a reasonable time within which to complete and fix the extent of the appropriation."

Hindman vs. Riser, 21 Ore. 112,
Simmons vs. Winters, 21 Ore. 35,
Lowe vs. Riser, 25 Ore. 556,

Cole vs. Logan, 24 Ore. 304,
Sieber vs. Frink, 7 Colo. 154.

"Where an appropriation is made, and the area of arable land for the irrigation of which the water was appropriated increases from year to year as additional land is brought under cultivation, the additional application of water annually to meet the augmented demand causes the appropriation to relate back to its inception, thereby cutting off all intervening rights."

Seaward vs. Pac. Live Stock Co., 88 Pac. 965,
Ison vs. Sturgill, 109 Pac. 579.

The intention of the Hinkle Ditch Company is clearly shown by its notice of appropriation and by the testimony of Mr. Hinkle, its President and one of the incorporators of the Company. In response to the question: what was the purpose of that appropriation? Mr. Hinkle says: "The purpose was to take the waters of the Umatilla River there and reconstruct the old Hunt canal and build an extension of the ditch line on the surveys previously made by the Columbia Valley Land & Irrigation Company and others in a westerly direction to Butter Creek, and from thence upon such land as might be covered in a practical manner by laying the extension and also the development of power for pumping upon land adjacent through the distributing canal," (Vol. 32—535); and by

the following testimony of Mr. Teel, the Secretary of the Company, who testifies that the Company was organized in March, 1903, and that he posted the notice of appropriation of water by the Hinkle Ditch Company (Vol. 32--666), as follows:

Q. What was the purpose of the Hinkle Ditch Company, and what lands in a general way did it intend to irrigate when its appropriation was made?

A. We expected to irrigate all lands lying under the ditch that were not provided for by prior appropriations or other ditches.

Q. Had you at the time you made the appropriation determined definitely what lands would ultimately fall under the system when built?

A. They were largely on Butter Creek bottom and beyond Butter Creek—principally beyond Butter Creek.

Q. How did they correspond with the lands at present coming under the system?

A. They were about the same if not practically the same proposition.

(Vol. 32, p. 689.)

He then testified that the engineering work for the Company was done by Mr. Kimbrell and others and his attention was called to a map made by Mr. Kimbrell for the Company in November, 1906, the same being Exhibit No. 33,

and which the testimony shows was the first map prepared for the Company. He says with reference to it that it indicates the project so far as its extent had been determined at that time, and that the lands falling under the project as delineated upon this Kimbrell map are about the same as the lands falling under the project of appellant. A comparison of the Kimbrell map with Exhibit 75, appellant's first map of the project, will show that appellant's map covers a somewhat lesser area than does the Kimbrell map. Accompanying the appropriation by the Hinkle Ditch Company is a preliminary sketch and map showing the main canal extending in a general northwesterly direction to Butter Creek. There was also introduced in evidence, as Exhibits 34 and 35, the appropriation and map of the Columbia Valley Land & Irrigation Company, referred to in the testimony of Mr. Hinkle, which shows that the lands which the Hinkle Company contemplated irrigating, as testified to by Mr. Hinkle, embraces all the lands under the present project and others which are not included therein. If there was any imperfections in the notice of appropriation of the Hinkle Ditch Company, it would not invalidate or limit its right in any way by reason of the express provision of the Water Code, being sub-division 7 of Sec. 6595 of L. O. L., which reads as follows:

"And where appropriations of water heretofore attempted have been undertaken in good faith and the work of construction or improvement thereunder has been in good faith commenced and diligently prosecuted, such appropriations shall not be set aside or avoided, in proceedings under this act because of any irregularity or insufficiency of notice by law, or in the manner of posting, recording or publication thereof."

If the construction of the irrigating system of appellant and its predecessor, the Hinkle Ditch Company, to provide water for the irrigation of lands coming under the scope of its project, as shown by the testimony herein, was prosecuted with reasonable diligence within the rule long recognized and established by the Courts of this state, as shown by the authorities heretofore cited and referred to, then appellant's rights would necessarily relate back to the initiation of the appropriation by the Hinkle Ditch Company on March 14, 1903, and the division of priorities of the appellant in the decree of the Circuit Court cannot be justified from the evidence or sustained as a matter of law. The methods used by appellant's predecessor to secure the construction of ditches or the manner of supplying water to others must not be confused with the question of intent.

In the early history of the project, it ap-

pears that a part of the work of constructing ditches was done by the Butter Creek Company, and a part of the Cold Springs Company, so-called. The contracts between the Hinkle Ditch Company and the Butter Creek Company, (Ex. 28) and the contract between the Hinkle Ditch Company and Hurlburt, (Cold Springs Co.) (Ex. 25M), gave the Hinkle Ditch Company a joint interest in the ditches to be constructed, enlarged and extended by those companies and provided for a joint use thereof. The only purpose and object of which was to enable the Hinkle Ditch Company to furnish water to others than the above Companies and to lands along and beyond the portion of the ditch which those Companies helped to construct. In other words, the contracts with the Butter Creek Company and Cold Springs Company were means by which the Hinkle Ditch Company secured the construction of part of the present ditch and have nothing to do with the lands intended to be irrigated under the Hinkle appropriation other than being a part of the means of getting water to such lands. We are unable to see how the rights of other appropriators are affected or how they are concerned in the fact that part of the ditch was constructed under the aforesaid contracts, or how the rights of appellant can be limited because of said method of construction any more than if the construction had been by contract

or by day labor employed by the Hinkle Ditch Company, or by farmers who desired to pay for their water rights by helping construct the ditch.

Furthermore, the evidence shows that the ditch had been constructed beyond Butter Creek in 1906. Mr. Strohm, who was connected with the engineering work on the project says in the spring of 1906 the low line had been extended beyond Butter Creek; they had been working with a grader and used a bunch of horses—sixteen or twenty horses—on the work that was going on that spring. (Vol. 32, p. 295.)

It also appears that the Hinkle Ditch Company had contracts outstanding to deliver water beyond Butter Creek as early as 1906. On this point Mr. Strohm testifies as follows:

Q. Do you remember the year it was in which you made your first contract for water with the Hinkle Company?

A. It was in the fall of 1906.

Q. What month?

A. Along in October or November; or it might have been the first of December.

Q. Your first contract, as I understand you, was afterward surrendered to make a new one.

A. Yes sir; I changed the contract in January, 1908.

(Vol. 32, p. 296.)

And again:

Q. What was the nature of this contract made in 1906; with whom did you make it?

A. With the Hinkle Ditch Company.

Q. Have you that contract?

A. I surrendered the contract, delivered it over to them and tore up the notes. In 1906 I paid them \$200 cash and my payments coming in four or five hundred dollars a year I couldn't meet then, so I went to them in January, 1908, and made a new contract and paid them a hundred dollars.

Q. When was that?

A. In January, 1908, my second contract. I didn't record the first contract; I did the second.

(Vol. 32, p. 298.)

And in this connection Mr. Hinkle says the intention of the Hinkle Ditch Company was to maintain the canal to a point where it agreed to deliver to the Butter Creek Company and Cold Springs Company and defend the appropriation of water from the river, and as soon as it was able, to enlarge the canal so as to be able to deliver water through the same and through the canal beyond that point; and it made contracts with several people,—O. D. Teel, Henry J. Bean and Herbert Strohm and some of his associates.

(Vol. 32—552.) These were not the Butter Creek Company contracts but were original contracts with the Hinkle Ditch Company for lands lying beyond Butter Creek.

Some light is thrown on the causes which retarded the development of the project beyond Butter Creek by the facts disclosed in the testimony of Mr. Hinkle and Mr. Strohm, from which it appears that the lands beyond Butter Creek, or what is known as the lower part of the project were largely held under homestead entries in 1905; that they were withdrawn from that form of entry in the summer or fall of 1905, when the Government entered upon the scene, and remained withdrawn until about 1908, when they were restored to desert land entry, very largely through the efforts of Mr. Hinkle of the Hinkle Ditch Company. (See Vol. 32, 553-554, and Exhibits 79, 81, 82 and 83.)

It has been held that a delay of three years caused by the Forest Service is not a lack of diligence.

Wilshon vs. Globe, etc., Co., 110, Pac. 290.

The effect of the withdrawal of these lands was to retard the development of the Hinkle Ditch Company in that it made it impossible for the homestead entrymen to pay or secure the payment of water rights for their land. Notwithstanding the difficulty under which the

Hinkle Ditch Company labored as a pioneer in irrigation on the Umatilla River, we feel that the development of appellant's project proceeded with reasonable diligence, in view of the situation that existed at its inception and the natural obstacles to be over-come, and that its rights should not be limited because forsooth, its predecessor was unable to extend its project as rapidly as some of the respondents did with unlimited funds at their command.

There was no controversy or contest between appellant and the Furnish Ditch Company. The appropriation of the Furnish Ditch Company was made on Mar. 8, 1905, and it claimed no priorities whatever against appellant. By its decree the Court awarded appellant a priority date of July, 1907, for 12,928.97 acres of its lands, thereby placing the water right to said land subsequent to the right of the Furnish Ditch Company of March 8, 1905, between whom and appellant there was no contest.

When the Furnish Ditch Company made its appropriation, appellant's rights as a prior appropriator had attached and the appropriation of said Company is subject thereto.

Cole vs. Logan, 24 Ore. 304,
Kaylor vs. Campbell, 13 Ore. 596.

The proceedings in the Circuit Court being as nearly as may be like those in a suit of

equity under the Provisions of Sec. 6550, L. O. L., it was error for the Court to find on an issue not raised by the pleadings, a question which was not litigated, and about which there was no controversy; and the effect of the decree is to give to the Furnish Ditch Company rights superior to appellant which they neither assert nor claim.

In conclusion, we submit that, water having been diverted under the early rights claimed by appellant, the Court should have found and determined the extent of such rights unless they have been lost by abandonment; that as to abandonment, the burden of proof was upon respondents and they have not shown a loss of such early rights by a preponderance of the evidence or by clear and definite proofs. The irrigation rights of the United States of America for irrigation purposes under its appropriation of September 6, 1905, should have been limited as an inchoate right, the same as the right of other appropriators. Finding No. 25, with reference to the form of contract, should be eliminated from the decree because there is nothing in the Water Code which authorizes the State Water Board to pass on questions of that kind, and the matters and things set forth in said Finding were not within the issues in this proceeding and are not supported by evidence. The Court should have made a finding on the issue raised by appel-

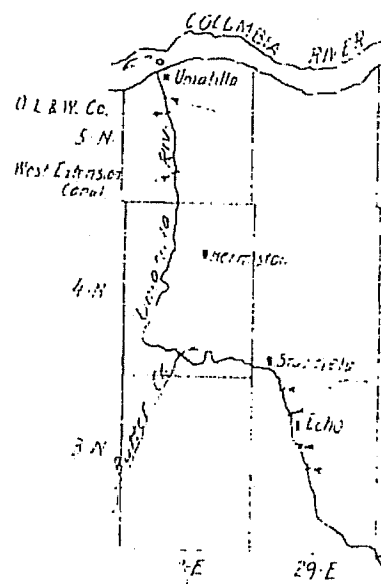
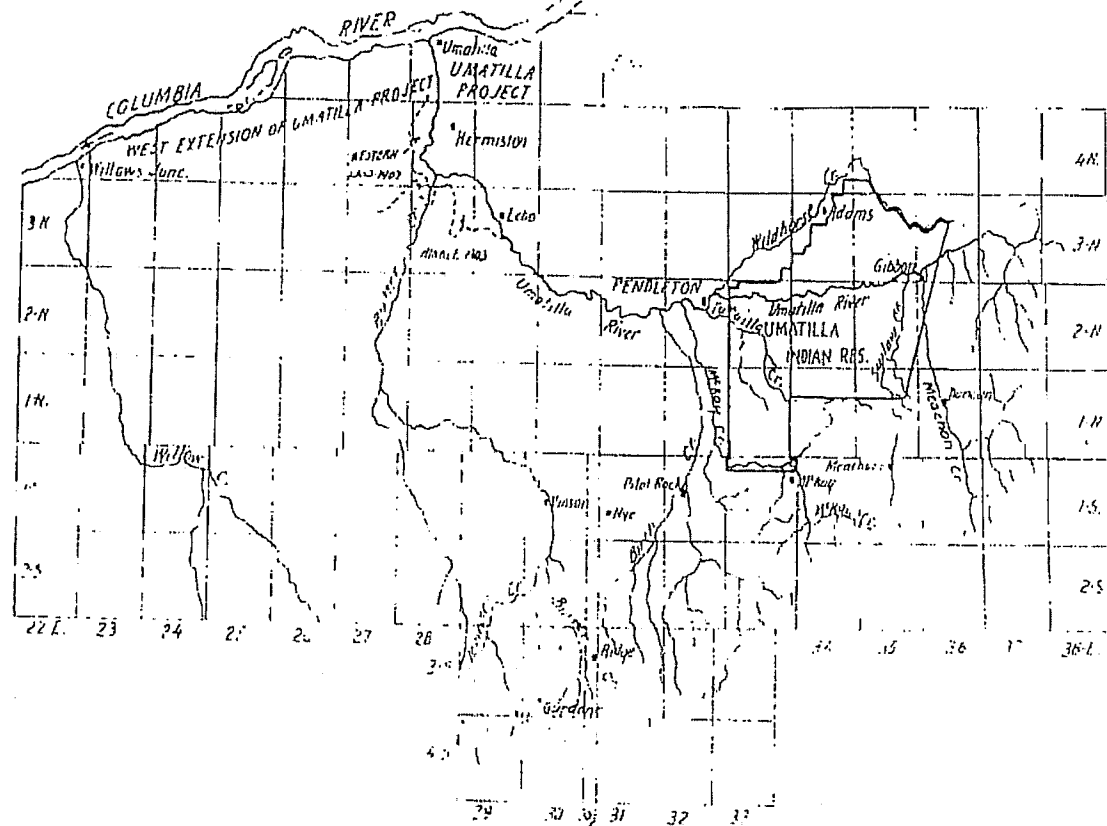
lant's statement and proofs of claim as to its seepage losses and in view of the conditions that existed at the inception of appellant's right and the continued and consistent development thereof, we feel that appellant and its predecessors have developed their rights with due diligence and that the date of priority of the principal right which they claim, based on the appropriation of the Hinkle Ditch Company, should be March 14, 1903, the date of appropriation by the Hinkle Ditch Company.

Respectfully submitted,

W. G. DROWLEY,
Attorney for Appellant.

gated and irrigable lands, ditch locations, capacities and the like, which were conducted by the Government and made available to all parties in the proceeding. have worked economies of very considerable virtue. The hearing of the 220 odd contests and the adduction of evidence and testimony in that regard, together with the careful trial of many important issues before the Circuit Court upon exceptions to the findings of the Water Board, have necessarily extended over a considerable period. The record in the case as it now comes to Your Honors upon appeal comprises, besides the findings of the Water Board and the proceedings in the Circuit Court with its decree, some thirty-four volumes composed of contests, answers and replies, many exhibits and several thousand pages of testimony and evidence. In a case of such magnitude we believe it to be of peculiar interest that neither the Government nor any others of the hundreds of parties involved (saving of course the appellant herein) have prosecuted an appeal; all being evidently convinced that the lower court's most painstaking and able analysis of the facts and conditions in the watershed, as crystallized in the Circuit decree, has achieved an adequate and satisfactory settlement of a vexing and complicated problem.

A graphic representation of the Umatilla River stream system with the principal towns, etc., will be found on Plate I, which also contains an insert showing the important points of diversion on the lower river. Plate II, drawn on an enlarged scale, depicts the main structures of and areas covered



MAP OF
UMATILLA STREAM SYSTEM
WITH INSET SHOWING MAIN DIVERSION POINTS
ON LOWER RIVER

Approved by U.S. Army, Nov. 14, 1894 - Feb. 25, 1904
Approved by
Department of War
Western Land Irrigation Co. (Minale) March 14, 1902 - July, 1907
(Allen Ditch diverted at same point)
U.S. Reclamation Service Sept. 6, 1902

IN THE SUPREME COURT

OF THE
STATE OF OREGON.

PENDLETON, MAY TERM, 1917.
(Set over to October Term, 1917.)

In the matter of the determination of the relative rights of the various claimants to the waters of the Umatilla River and its tributaries, a tributary of the Columbia River, in Umatilla County, Oregon.

WESTERN LAND & IRRIGATION COMPANY,
Appellant,

vs.

DILLON IRRIGATION COMPANY, COURTNEY IRRIGATION COMPANY, BROWNELL DITCH COMPANY, OREGON LAND & WATER COMPANY, PIONEER IRRIGATION COMPANY, MAXWELL IRRIGATION COMPANY, THE UNITED STATES OF AMERICA, W. T. WALTON, SIDNEY WALTON, HARRY R. NEWPORT, F. H. GRITMAN, H. G. HURLBURT, FRANK E. FOWLER, JULIA C. FOWLER, JOHN J. PETERS, THOMAS W. PETERS, and FURNISH DITCH COMPANY,
Respondents.

BRIEF OF RESPONDENT United States of America.

STATEMENT OF THE CASE.

Introductory.

As counsel for appellant states in the opening sentence of his brief, this is a proceeding under

Chapter 216, General Laws of 1909, known as the Water Code, whereby and wherein the United States has sought to secure a determination of the relative rights to the waters of the Umatilla River and its tributaries. It may not be out of place at the outset to briefly review the conditions which prompted the filing of the petition in the premises.

About twelve years ago the Federal Government, through its Department of the Interior and in pursuance of the Act of Congress approved June 17, 1902 (32 Stat. L. 388), known as the Reclamation Act, began the construction of a system of irrigation works leading from the Umatilla River and having in view the reclamation of over 25,000 acres of land lying east of that stream and south of the Columbia River in this county. This enterprise has involved the expenditure of about one and one-half millions of dollars and is now in operation; being known as "The Umatilla Project." On the westerly side of the Umatilla River, and again bordering the Columbia River on the south, there has been begun and is now in course of construction an additional system of irrigation works, taking out of the Umatilla River lower down on that stream and having in contemplation the reclamation of about 60,000 acres of land, the present development being confined to a first unit of over 11,000 acres. This undertaking is known as the West Extension of the Umatilla Project and has already involved the expenditure of some six or eight hundred thousand dollars.

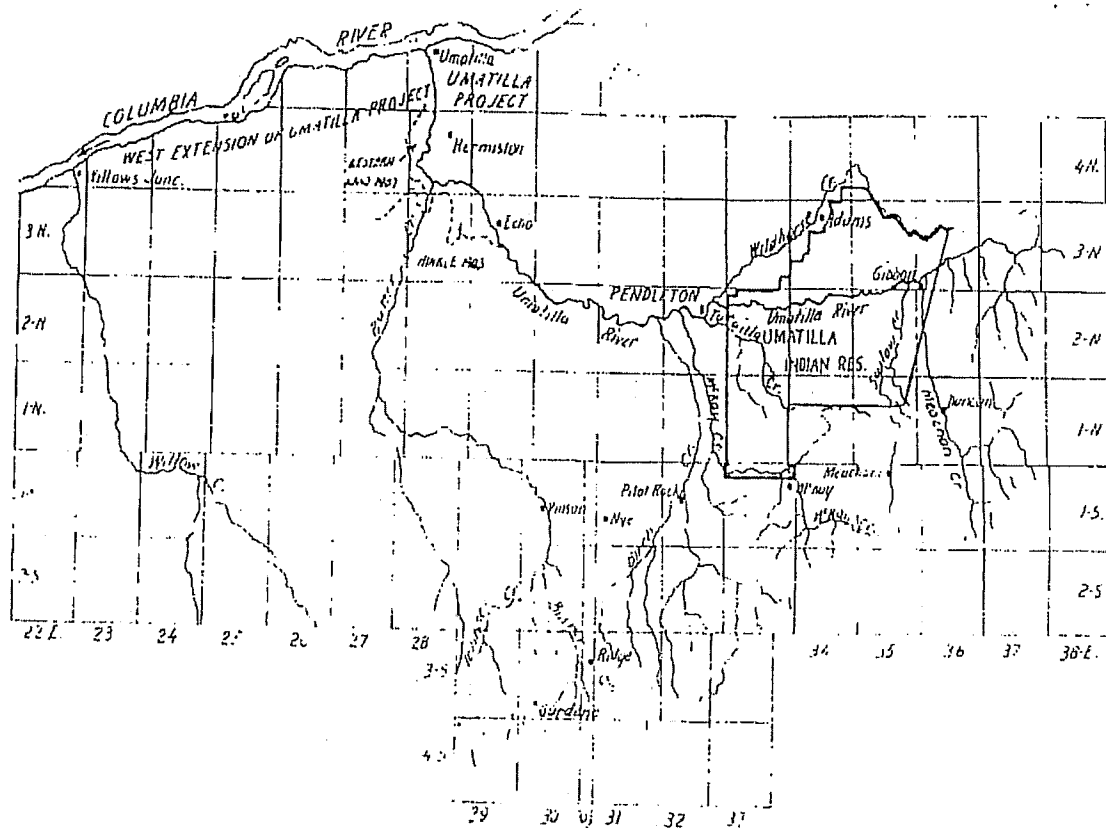
Studies by the United States of conditions in the Umatilla watershed, made just prior to and in

years succeeding the commencement of construction upon the parent project aforesaid, revealed a very evident necessity for the determination and settlement of the existing claims and rights to the use of water therein. While this necessity first arose on account of the Government's very logical interest in the water supply source, it was also very apparent that such a determination was called for as a public welfare measure. It was important of course in the first instance to ascertain in definite fashion the extent of those rights that were prior in time to the United States in order that they might be properly taken account of and respected, but it was also just as important, we think, to see to it that all the water users along the Umatilla River and its tributaries should have the advantage of an early definition of their rights under the simple, modern and economic legislation then just enacted, the so-called Water Code above referred to; the result of which would be that titles to the water for each holding, as between all claimants, would be commensurate in exactness and dependability with titles to land. Another desideratum (which would be readily accomplished in such a proceeding) was that there should also be an ascertainment of the amount of flood flow that would be available for future storage and further development of the country.

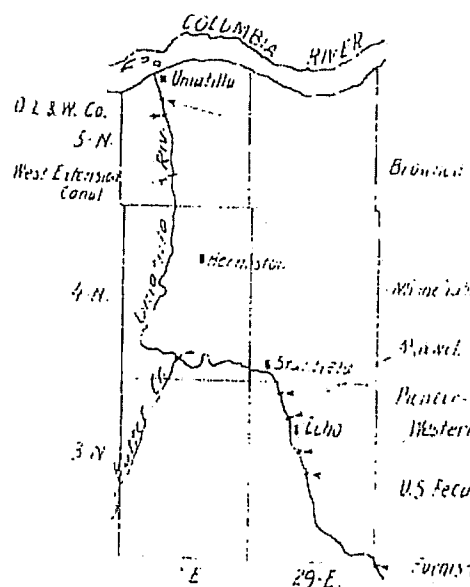
It can be said with entire accuracy that these were the things, each of them being of practically equal importance, that prompted the filing of a petition by the United States in the premises, and further that the elaborate investigations of irri-

gated and irrigable lands, ditch locations, capacities and the like, which were conducted by the Government and made available to all parties in the proceeding. have worked economies of very considerable virtue. The hearing of the 220 odd contests and the adduction of evidence and testimony in that regard, together with the careful trial of many important issues before the Circuit Court upon exceptions to the findings of the Water Board, have necessarily extended over a considerable period. The record in the case as it now comes to Your Honors upon appeal comprises, besides the findings of the Water Board and the proceedings in the Circuit Court with its decree, some thirty-four volumes composed of contests, answers and replies, many exhibits and several thousand pages of testimony and evidence. In a case of such magnitude we believe it to be of peculiar interest that neither the Government nor any others of the hundreds of parties involved (saving of course the appellant herein) have prosecuted an appeal; all being evidently convinced that the lower court's most painstaking and able analysis of the facts and conditions in the watershed, as crystallized in the Circuit decree, has achieved an adequate and satisfactory settlement of a vexing and complicated problem.

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MAP OF
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"Mine is a 'Lucky' U.S. - Nov. 14, 1894 - Feb. 25, 1914

Th. A. J. J. J. J. J.

Решение: $\frac{1}{2} \cdot 100\%$

Western Land & Irrigation Co. (Hinkle) March 14, 1903 - July, 1907
(Allen Ditch diverted at same point)

U.S. Fed. Inv. - Sept. 6, 1965

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by the Umatilla Project, together with a similar showing for the easterly portion of the West Extension. The latter is mentioned but incidentally in the decree and is not involved in this appeal. It is covered by applications for permit approved by the State Engineer and under present plans will be dependent as to its future development upon a proposed purely flood water reservoir situate in the main channel of the Umatilla River. On these accounts, and for the reason that its priority is in any event subsequent to those decreed to appellant, it may be disregarded as far as the purposes of this brief are concerned. On the other hand, it will be important to have it in mind throughout that the Umatilla Project proper, located east of the Umatilla River, depends for its water supply upon the Maxwell Canal, diverting under some old purchased rights, and in even greater degree upon the so-called U. S. R. S. Feed Canal, which takes out of the Umatilla River about a mile and a half above Echo and carries water for direct irrigation and storage to a by-pass into the distribution system and to the Cold Springs Reservoir. Plate II will also have an important place in illustration of the rights decreed to appellant and of the argument in support of the decree.

Withdrawn Demurrer and Motion to Strike; Errata.

Respondent ventures to preface its statement and discussion of the more important questions with the following observations upon the record