

*Silver Creek, Lake County - Houghton v. Porter - Appeal from  
 Supreme Court  
 (Copied from opinion prepared from Clerk of Supreme Court)  
 (Differs somewhat from printed opinion, in 1909 report)*

BE IT REMEMBERED, that at a regular term of the Supreme Court of the State of Oregon, begun and held at the court room in the City of Salem, on the first Monday the 1st day of March, 1909,

WHEREUPON on this Tuesday, the 10th day of August, 1909, the same being the Forty-seventh judicial day of said term, there were present:

Hon. Frank A. Moore, Chief Justice,  
 Hon. Robert Eakin, Associate Justice,  
 Hon. Thomas A. McBride, Associate Justice,  
 Hon. Woodson T. Slater, Associate Justice,  
 Hon. William R. King, Associate Justice, and  
 J. C. Moreland, Clerk.

when the following proceedings were had:

Annie C. Hough, Mary J. Kittredge, Marion Conley,  
 W. H. Hayes, J. M. Hayes, John Hayes, A. C. Geyer  
 and W. H. McCall, Plaintiffs and Respondents

v.

S. A. D. Porter, C. D. Porter, Administrator, Daisy  
 Porter, Widow, and W. F. Porter, E. A. Porter and  
 Carl D. Porter, Minor Heirs, of S. A. D. Porter by  
 Daisy Porter, Guardian; P. G. Chrisman, John C.  
 Porter, and James C. Porter, his Guardian; F. M.  
 Chrisman, B. F. Lane, Jennie Lane, C. C. Jackson,  
 Occidental Land & Improvement Company, a Corpora-  
 tion, and Chewaucan Land & Cattle Company, a Corpo-  
 ration, its Grantee; P. W. Jones, C. E. McKune,  
 Mary C. Brown, and E. D. Lutz,  
 Defendants and Appellants

Appeal from  
 Lake County.

and

George Durand, L. Huesman, Morris Ranner, Lucinda  
 Egli, John Partin, Jr., George H. Small, L. P.  
 Klipple, Emil Egli, Henry Egli, Martie Ward, Ang-  
 eline West, Mary Small, James M. Martin, J. M.  
 Sherer, Lulu Corum LaBrie, Isa M. Corum, Jewell  
 D. Corum, Maude Small, Walter C. Buick, J. Hall,  
 Corinna Buick, C. D. Buick, E. K. Henderson, R.  
 E. Smith, J. A. Smith, J. C. Harrow, J. M. Small  
 and F. F. McCarty,  
 Defendants and Respondents.

This cause having been heretofore tried, argued, and submitted to the court upon and concerning all the questions arising upon the transcript, record, and evidence, and then reserved for further consideration. And after an opinion by the court had been filed, a petition for rehearing by respondent Geo. H. Small, having been duly considered by the court, and the court having now duly considered all the said questions as well as the suggestions made by counsel <sup>in</sup> to their argument and briefs, and the said petitions for rehearing, finds that there is PARTIAL ERROR as alleged. It is, therefore, ordered, adjudged, and decreed by the court that the decree of the court below in this cause rendered and entered be, and the same is, in all things, except as is hereinafter affirmed, REVERSED AND SET ASIDE.

And the court having duly considered all the evidence herein, makes the following:

FINDINGS OF FACT:

1= Silver Creek rises in Township 31 South, Range 14 East, on the slope immediately north of Sycan Marsh, in Lake County, and flows northerly for a distance of about 25 miles into a marsh formerly called Paulina Marsh, entering at a point near the corner of Section 2 in said township and range. The west branch of Silver Creek rises in Township 30 Range 14 East, and flows into the main channel near the northwest corner of Section 29 of the same range. Bridge Creek is a tributary to Silver Creek, and rises in the Yamsay Mountains, near the dividing line between Lake and Klamath Counties, and runs northeasterly, emptying into Island Branch near the center of Section 15, Township 28 South, Range 14 East; thence into Silver Creek. At a point near the southeast corner of the Southeast quarter of Section 15, in said tract named, township and range, the channels diverge, one from each side of the creek; the easterly divergence is known as Bunyard Branch, and the westerly divergence, as Island Branch, and flows northeasterly through Section 15, running to the main stream near the southwest corner of Section 11. At a point near the southeast corner of the Southwest quarter of the Southwest quarter of Section 11 there diverges what is known as the Conley Branch, being a channel similar to the other branches named. Each extends through the S. A. D. Porter lands on to the Conley lands.

2. The irrigation season in the vicinity of Silver Creek begins each year in April and usually ends in July. Prior to May 10th yearly there has been no shortage in the water supply, a large surplus remaining after all wants are supplied. In the use of the water prior to that date and in respect to any surplus thereafter, all are interested, and entitled to use the same in the order of their priorities and to the extent needed, in the ratio fixed as to such use after May 10th of each year, which dates, priorities, etc., after May 10th are as follows:-

3. The plaintiff, Annie C. Hough, is the owner in fee simple of the South half of the South half of Section Two (2), North half of the Northeast quarter and the Northeast quarter of the Northwest quarter of Section Eleven (11), and the Southwest quarter of the Southwest quarter of Section One (1), Township twenty-eight South, Range fourteen (14) East, containing 240 acres; and she and her grantors, on June 1, 1878, appropriated and diverted 100 inches, or two and one-half second feet of water from the main channel of Silver Creek upon 200 acres of said land for the irrigation thereof, and have ever since so diverted and used said quantity of water for the necessary and proper irrigation thereof, which appropriation was prior in time and superior in right to any appropriation by any of the parties of this suit, except that of the defendant John C. Porter, with which it was contemporaneous, and is equal in right.

4. That the defendant, John C. Porter, is the owner in fee simple of the North half of Section fourteen (14) township twenty-eight (28) South, Range fourteen (14) East,

containing 320 acres, and he and his grantors on June first, 1878, by means of dams and ditches, appropriated and diverted 100 inches, or two and one-half second-feet of water from Bunyard Branch of Silver Creek, and the Main Channel of Silver Creek, upon 240 acres of said land, for the irrigation thereof, and have ever since diverted and used said quantity of water for the necessary and proper irrigation thereof, which appropriation was prior in time and is superior in right to any appropriation by any of the parties to this suit except that of the plaintiff, Annie C. Hough, with which it was contemporaneous and is equal in right.

5. That the defendant, Lucinda Egli, is the owner in fee simple of the Southwest quarter of section twenty-eight (28), East half of Southeast quarter of section twenty-nine (29), South half of Northwest quarter, Northwest quarter of Southwest quarter, ~~(and Northwest quarter of Southwest quarter)~~ and Northwest quarter of Northwest quarter of Section thirty-three (33) township twenty-eight (28) South, Range fourteen (14) East, containing 400 acres, and she and her grantors on April thirtieth, 1880, appropriated and diverted 120 inches, or three second-feet of water from the main channel of Silver Creek upon 240 acres of said land for the irrigation thereof, and have ever since diverted and used said quantity of water for the necessary and proper irrigation thereof, which appropriation was prior in time and is superior in right to any appropriation by any of the parties to this suit except those of the plaintiff, Annie C. Hough and John C. Porter, above set forth, to each of which it was subsequent in time and is inferior in right.

6. That the plaintiff, Marion Conley, is the owner in fee simple of the West half of section twelve (12) township twenty-eight (28) South, Range fourteen (14) East, containing 320 acres, and he and his grantors on May 1, 1880, appropriated and diverted 100 inches, or two and one-half second feet of water from the Conley Branch of Silver Creek upon 240 acres of said land for the irrigation thereof, and have ever since diverted and used said quantity of water for the necessary and proper irrigation thereof, which appropriation was subsequent in time and inferior in right to the appropriations of the plaintiff, Annie C. Hough, and the defendants, John C. Porter, and Lucinda Egli, above set forth, but prior in time and superior in right to the appropriations of all other parties to this suit.

7. That the defendant, George H. Small, is the owner in fee simple of the East half of section nine (9), South half and Northwest quarter of section ten (10), west half of Northwest quarter and west half of Southwest quarter, Northeast quarter of Southwest quarter, of Section eleven (11), west half of Northwest quarter, and South half of Section fifteen (15), North half of Northeast quarter and East half of Northwest quarter of Section twenty-two (22) township twenty-eight (28) South, Range fourteen (14) East, containing 1720 acres, and he on June thirtieth, 1882, appropriated and diverted forty (40) inches, or one second foot of water from the Island Branch of Silver Creek, upon 60 acres of said land, between said Island Branch and the main channel of Silver Creek, known as "The Island", for the irrigation thereof, and has ever since diverted and used said quan-

tity of water for the necessary and proper irrigation thereof, which appropriation was subsequent in time and inferior in right to each of the appropriations of the plaintiffs, Annie C. Hough, and Marion Conley, and of the defendants John C. Porter, and Lucinda Egli, above set forth, but prior in time and superior in right to any appropriations by any of the other parties to this suit. That the defendant, George H. Small on June first, 1884, appropriated and diverted 100 inches or two and one-half second feet of water from Island Branch of Silver Creek, and 50 inches or one and one-fourth second feet of water from Bridge Creek, a tributary of Silver Creek, through his two ditches leading out of said Island Branch, upon 300 acres of said land in said section fifteen (15) outside of said 60 acres in The Island above mentioned for the irrigation thereof, and has ever since diverted and used said quantity of water for the necessary and proper irrigation thereof, which appropriation was subsequent in time and inferior in right to each and all of the appropriations of the plaintiffs, Annie C. Hough, and Marion Conley, and the defendants, Lucinda Egli, John C. Porter, and George H. Small, above found and set forth, and the appropriation of the defendant S. A. D. Porter, hereinafter set forth, but prior in time and superior in right to any appropriation by any of the other parties to this suit.

8. That the defendants, W. F. Porter, E. A. Porter, and Carl D. Porter, minor heirs of the defendant S. A. D. Porter, deceased, pending this suit, and together with Daisy Porter, widow of said deceased and guardian of said minor heirs, and C. D. Porter, administrator of the estate of said deceased, substituted, are the owners of the Southeast quarter, south half of Northeast quarter, and South half of Southwest quarter of Section Eleven (11), township twenty-eight (28), South, Range fourteen (14) East, containing 320 acres, and said defendant S. A. D. Porter on May first, 1883, appropriated and diverted by means of dams and ditches one hundred inches or two and one-half second feet of water from the main channel of Silver Creek upon 240 acres of said land for the irrigation thereof, and he and his said heirs and their said guardian, and said administrator of his estate have ever since diverted and used said quantity of water for the necessary and proper irrigation thereof, which appropriation was subsequent in time and inferior in right to each of the appropriations of the plaintiffs, Annie C. Hough, and Marion Conley, and the defendants, John C. Porter, and Lucinda Egli, and the first appropriation of the defendant George H. Small on June thirtieth, 1882, of 40 inches or one second foot of water for the irrigation of the 60 acres contained in The Island, above set forth, but prior in time and superior in right to the second appropriation of the defendant, George H. Small on June first, 1884, of 100 inches or two and one-half second feet of water from Island Branch of Silver Creek, and 50 inches or one and one-fourth second feet of water from Bridge Creek for irrigation of 300 acres in Section fifteen (15) township twenty-eight (28) South, Range fourteen (14) East, above set forth, and to any other appropriation by any of the other parties to this suit. Neither the defendant, S. A. D. Porter, nor any one acting for him in the year 1895, or at any other time

wrongfully constructed any dam or headgate in the channel of Silver Creek, above the lands of the plaintiffs or elsewhere, nor at any time wrongfully maintained any dam or headgate in the channel of Silver Creek, nor at any time, by means of said dam or headgate, or otherwise, illegally or wrongfully diverted all or any of the waters of Silver Creek away from the lands of the plaintiffs, or any of them, nor threatened so to do, but lawfully and rightfully constructed the dam and headgate alleged in the amended complaint, and diverted by means thereof no more than 100 inches or two and one-half second feet of water from Silver Creek for the necessary and proper irrigation of his said land above described, to which he was legally and justly entitled; and the proximate cause of the damage, if any therefrom suffered by any of the plaintiffs was the result of diversions made by others on that stream and not by S. A. D. Porter; and the preliminary injunction issued in this suit at the instance of Annie C. Hough, the original plaintiff herein, was wrongful and without sufficient cause.

10. That the defendant, Walter C. Buick, is the owner in fee simple of the Southwest quarter of Section fourteen (14) township twenty-eight (28) South, Range fourteen (14) East, containing 160 acres; the defendant Corinna Buick, the owner in fee simple of the Southeast quarter of section fourteen (14) township twenty-eight (28) South, Range fourteen East, containing 160 acres; the defendants, Lulu Corum LaBrie, Isa M. Corum, and Jewell D. Corum, the owners in fee simple of the west half and north half of Northeast quarter of section thirteen (13) and North half of Northeast quarter of section twenty-four (24) Township twenty-eight (28) South, Range fourteen (14) East, containing 480 acres, and the defendant J. M. Small, the owner in fee simple of the south half of Northeast quarter and Southeast quarter of section thirteen (13), Southeast quarter of Northeast quarter of section twenty-four (24), township twenty-eight (28) South, Range fourteen (14) east, and Southwest quarter of section eighteen (18) and Northwest quarter of section nineteen (19), Township twenty-eight (28) South, Range fifteen (15) East, containing 680 acres, and they and their grantors on March first, 1885, appropriated and diverted by means of a certain ditch or canal, known as the Buick, Corum and Small ditch, 300 inches, or seven and one-half second-feet of water (measured at the intake of ditch last mentioned) from the main channel of Silver Creek at a point in section twenty-one (21) in said township and range, to and upon 420 acres of said lands about four miles distant, for the irrigation thereof, and have ever since diverted and used the same, which at the points of application amounts to about 270 inches, or six and three-fourths second feet of said water, a portion of which is sometimes used and applied through what is known as Bunyard Branches, in the necessary and proper irrigation of said land as follows: the defendants, Walter C. Buick and Corinna Buick, 90 inches or two and one-fourth second feet of said water on 140 acres of their said land; the defendants, Lulu Corum LaBrie, Isa M. Corum and Jewell D. Corum, 90 inches or two and one-fourth second feet of said water on 140 acres of their said land; and the defendant, J. M. Small, 90 inches, or two and one-fourth second feet of said water on 140 acres of his said land, which appropriation was

subsequent in time and inferior in right to each and all of the appropriations found and set forth above, but was prior in time and is superior in right to any appropriation by any of the other parties to this suit. The water when used through any other conduits than that of the Buick, Corum and Small ditch, incurs a greater loss before reaching its place of use, by reason of which, if the same or any part thereof shall at any time be diverted by other methods than through the said ditch and laterals leading therefrom, one "inch" of water shall be deducted from the supply awarded for each acre irrigated in such other manner so that in the aggregate the water passing the intake of the original ditch, including what may be used through it, shall not at any one time exceed 300 inches, when needed by others whose rights are involved herein.

T-3187  
A POW, POD

11. That the defendant, P. G. Chrisman, is the owner in fee simple of the west half of Southeast quarter and East half of Southwest quarter of section twenty-two (22) township twenty-eight (28) South, Range fourteen (14) East, containing 160 acres less about twenty (20) acres occupied by the townsite of Silver Lake, and the defendant John C. Porter is the owner in fee simple of the Northeast quarter of section twenty-three (23) and South half of Northwest quarter of Section twenty-four (24), township twenty-eight (28) South, Range fourteen (14) East, containing 240 acres, and they and their grantors on September first, 1885, appropriated and diverted by means of a certain ditch, known as the West, Porter and Martin ditch, 200 inches, or five second-feet of water from the main channel of Silver Creek, at a point near the center of section twenty-one (21) in said township and range, to and upon 300 acres of said lands for the irrigation thereof, and have ever since diverted and used said quantity of water for the necessary and proper irrigation thereof, which appropriation was subsequent in time and inferior in right to each and all of the appropriations found and set forth above, but was prior in time and is superior in right to any appropriation by any of the other parties to this suit.

12. That the defendant, C. C. Jackson, is the owner in fee simple of the Northeast quarter of section twelve (12), township twenty-eight (28) South, Range fourteen (14) East, containing 160 acres, and he on June first, 1886, appropriated and diverted by means of dams and ditches 80 inches, or two second feet of water from Conley Branch of Silver Creek upon said 160 acres of land for the irrigation thereof, and has ever since diverted and used said quantity of water for the necessary and proper irrigation of said land, which appropriation was subsequent in time and inferior in right to each and all of the appropriations above found and set forth, but was prior in time and is superior in right to any appropriation by any of the other parties to this suit.

13. That the plaintiff, W. H. McCall, is the owner in fee simple of the east half of the east half of section three (3) township twenty-eight (28) south, Range fourteen (14) east, containing 160.04 acres of land, and he on April first, 1887, appropriated and diverted by means of dams and ditches, 80 inches, or two second feet of water from a high or overflow channel leading from Silver Creek to and upon his said land for the ir-

rigation thereof, and has ever since diverted and used said quantity of water, when flowing in said channel for the necessary and proper irrigation of said land, which appropriation was subsequent in time and inferior in right to each and all the appropriations above found and set forth; and as to 80 inches for the irrigation of not to exceed 120 acres, he is prior in time, after May 10th of each year to all the other parties which may be hereinafter named; and prior to May 10th of each year he is entitled to use the waters of any of the streams above his premises, in common with all others interested therein.

14. That the defendant, B. F. Lane, is the owner in fee simple of the Northeast quarter, East half, and Lots one (1) and two (2) of the northwest quarter of section eighteen (18), township twenty-eight (28) South, Range fifteen (15) east, containing 319.96 acres, and he on May thirtieth, 1888, appropriated and diverted by means of dams and ditches 90 inches, or two and one-fourth second feet of water from Bunyard Branch of Silver Creek upon 160 acres of said land for the irrigation thereof, and has ever since diverted and used said quantity of water for the necessary and proper irrigation of said land, which appropriation was subsequent in time and inferior in right to each and all the appropriations above found and set forth, but was prior in time and is superior in right to any appropriation by any of the other parties to this suit.

15. That the defendant, The Occidental Land & Improvement Company, is the owner in fee simple of the South half of the North half, and south half of section sixteen (16), North half of south half, and south half of southwest quarter of section twenty-one (21), west half of northwest quarter of section twenty-one (21), south half of northeast quarter, northwest quarter of southeast quarter and northeast quarter of southwest quarter of section twenty (20) township twenty-eight (28) south, Range fourteen (14) east, containing 1320 acres, and designated in the pleadings of this suit ("Tract No. 1") and the North half and North half of South half of section two (2), township twenty-eight (28) South range fourteen (14) east, and the south half of south half, northeast quarter of southeast quarter, and east half of northeast quarter of section thirty-five (35) southeast quarter of southeast quarter of section thirty-four (34) and south half of southeast quarter of section twenty-six (26) township twenty-seven (27) south, Range fourteen (14) east, containing 880 acres of land and likewise designated as "Tract No. 2", and it and its grantors on May first, 1889, appropriated and diverted by means of dams and ditches 80 inches, or two second feet of water from the main channel of Silver Creek and from Bridge Creek, one of its tributaries, upon 120 acres of said land in said section sixteen (16) for the irrigation thereof, and it and its grantors have ever since diverted and used said quantity of water for the necessary and proper irrigation thereof, which appropriation was subsequent in time and inferior in right to each and all of the ap-

appropriations above found and set forth, but was prior in time and superior in right to any appropriation by way of the other parties to this suit.

16. That the defendant, George Durand, is the owner in fee simple of the south-of southwest quarter east quarter of section eighteen (18) north half of northwest quarter, southwest quarter of northwest quarter, southwest quarter and southeast quarter of section nineteen (19), northeast quarter, and east half of northwest quarter of section thirty (30), township thirty (30) South, Range fourteen (14) east, containing 640 acres, and he on April first, 1890, appropriated and diverted by means of dams and ditches 160 inches, or four second feet of water from the main channel of Silver Creek upon 480 acres of said land for the irrigation thereof, and has ever since diverted and used said quantity of water for the necessary and proper irrigation thereof, which appropriation was subsequent in time and inferior in right to each and all the appropriations above found and set forth, and was prior in time and is superior in right to any appropriations by any of the other parties to this suit.

17. That the defendant, E. D. Lutz, is the owner in fee simple of the northeast quarter and east half of northwest quarter of section fifteen (15), and northwest quarter of section ten (10) township twenty-eight (28) south, Range fifteen (15) east, containing 400 acres, and he on May thirty-first, 1890, appropriated and diverted by means of dams and ditches 100 inches or two and one-half second feet of water from Island Branch of Silver Creek upon 200 acres of said land in said section fifteen (15) for the irrigation thereof, and has ever since diverted and used said quantity of water for the necessary and proper irrigation of said 200 acres of land, which appropriation was subsequent in time and inferior in right to each and all of the appropriations above found and set forth but was prior in time and is superior in right to any other appropriation by any of the parties to this suit.

18. That the defendant, F. M. Chrisman, is the owner in fee simple of the southeast quarter of section twelve (12), township twenty-eight (28) south, Range fourteen (14) east, containing 160 acres, and he on May first, 1891, appropriated and diverted by means of dams and ditches 60 inches, or one and one-half second feet of water from Bunyard Branch of Silver Creek upon 100 acres of said land for the irrigation thereof, and has ever since diverted and used said quantity of water for the necessary and proper irrigation of said 100 acres of land, which appropriation was subsequent in time and inferior in right to each and all of the appropriations above found and set forth, but was prior in time and is superior in right to any other appropriation by any of the parties to this suit.

19. That the defendant, Mary C. Brown, is the owner in fee simple of the southeast quarter of section thirty-one (31) township twenty-seven (27) south, range fifteen (15) east, containing 160 acres, and she on May first, 1893, appropriated and diverted by means of dams and ditches, 50 inches, or one and one fourth second feet of water from the main channel of Silver Creek upon said land, for the irrigation thereof, and has ever



since diverted and used said quantity of water for the necessary and proper irrigation of said land, which appropriation was subsequent in time and inferior in right to each and all of the appropriations above found and set forth, but was prior in time and is superior in right to any other appropriation by any of the parties to this suit.

20. That the plaintiff, Mary J. Kittredge, is the owner in fee simple of section thirty-six (36), township twenty-seven (27) south, range fourteen (14) east, containing 640 acres, and she on May first, 1894, appropriated and diverted by means of dams and ditches, 160 inches, or four second feet of water from the main channel of Silver Creek upon 480 acres of said land for the irrigation thereof, and has ever since diverted and used said quantity of water for the necessary and proper irrigation of said 480 acres of land, which appropriation was subsequent in time and inferior in right to each and all of the appropriations above found and set forth, but was prior in time and is superior in right to any other appropriation by any of the parties to this suit.

21. That the defendant, P. W. Jones, is the owner in fee simple of the east half of northwest quarter, southeast quarter of southwest quarter and lots 3 and 4 of section thirty-one (31) township twenty-seven (27) south, Range fifteen (15) east, containing 324.57 acres, and he on June thirtieth, 1894, appropriated and diverted, by means of dams and ditches, 80 inches, or two second feet of water from the main channel of Silver Creek upon 160 acres of said land for the irrigation thereof, and has ever since diverted and used said quantity of water for the necessary and proper irrigation of said 160 acres of land, which appropriation was subsequent in time and inferior in right to each and all of the appropriations above found and set forth, but was prior in time and is superior in right to any other appropriation by any of the parties to this suit.

22. That the defendant, C. E. McCune, is the owner in fee simple of the Northeast quarter of section thirty-one (31), township twenty-seven (27), South, Range fifteen (15) east, containing 160 acres, and he on May thirty-first, 1896, appropriated and diverted, by means of dams and ditches, 50 inches, or one and one-fourth second feet of water from the main channel of Silver Creek upon 100 acres of said land for the irrigation thereof, and has ever since diverted and used said quantity of water for the necessary and proper irrigation of said 100 acres of land, which appropriation was subsequent in time and inferior in right to each and all of the appropriations above found and set forth, but was prior in time and is superior in right to any other appropriation by any of the parties to this suit.

23. E. K. Henderson is the owner of certain lands in the vicinity of those whose rights are involved, the character of which is not established, nor does it appear that his interests are in any manner involved; and owing to insufficiency of proof respecting his interests, no findings can be made in reference thereto.

As CONCLUSIONS OF LAW the court finds:

1. No decree affecting the rights of W. H. Hayes, J. M. Hayes, John Hayes, and A. C. Geyer, should be entered, they having been dismissed in the court below.
2. The defendants in the court below, J. Heusman, Morris Ranner, John Partin, Jr., J. P. Klippel, Emil Egli, Henry Egli, Martie Ward, Angeline West, J. A. Smith, Mary Small, James M. Martin, James M. Sherer, Maud Small, J. Hall, C. D. Buick, R. E. Smith, J. C. Harrow, and F. F. McCarty, having been adjudged of being in default, a decree should be entered that they have no rights to any of the waters of said creek until after the needs of the other parties herein to the extent herein determined are supplied.
3. The parties hereto have no riparian rights in any of the streams mentioned in the findings of fact, except for domestic purposes and including the watering of a reasonable number of stock, the ascertainment of the quantity required, and manner of using of which will be left for determination by the trial court in manner indicated in the opinion of this court.
4. The parties named in the findings of fact are entitled to a decree establishing their respective rights to the use of water from the streams involved, in harmony with the findings of fact.
5. Neither party should recover costs in the court below, but the heirs of S. A. D. Porter, deceased, and J. C. Porter should have judgment against Geo. H. Small for their costs and disbursements in this court.

DECREE.

Based upon the said findings of fact and conclusions of law, and upon the whole record in this cause, it is, therefore, ordered, adjudged, and decreed by the court that the defendants in the court below, J. Huesman, Morris Ranner, John Partin, Jr., J. P. Klippel, Emil Egli, Henry Egli, Martie Ward, Angeline West, J. A. Smith, Mary Small, James M. Martin, J. M. Sherer, Maude Small, J. Hall, C. D. Buick, R. E. Smith, J. C. Harrow, and F. F. McCarty, have no rights whatever to any of the waters of said stream described in the findings of fact until after the needs of the other parties hereinafter named are supplied, to the extent hereinafter designated.

That Anna C. Hough is the owner of the land described in finding of fact 3 and is entitled to 100 inches, or  $2\frac{1}{2}$  second feet of water from the main channel of Silver Creek, to be used upon her 200 acres of land for the irrigation thereof, equal in right and time to those of John C. Porter, and prior to any of the other parties to this suit.

That John C. Porter is the owner of the land described in finding of fact #4, and is entitled to 100 inches, or  $2\frac{1}{2}$  second-feet of water from the Bunyard Branch of Silver Creek for the irrigation of his said <sup>240 ac.</sup> lands, equal in right and time to those of Anna C. Hough, and prior to that of any of the other parties to this suit.

That Lucinda Egli is the owner of the land described in finding of fact #5, and is entitled to 120 inches, or 3 second feet of water from the main channel of Silver Creek for irrigation upon her said lands of 240 acres, and that her appropriation and right to the use thereof is superior in right to the appropriation of any of the other parties to this suit except those of Anna C. Hough and John C. Porter.

That Marion Conley is the owner of the land described in finding of fact #6, and is entitled to 100 inches, or  $2\frac{1}{2}$  second feet of water from the Conley Branch of Silver Creek for the irrigation of 240 acres of his said land, and his right thereto is superior to that of any of the other parties hereto save and except those of Anna C. Hough, John C. Porter, and Lucinda Egli.

That Geo. H. Small is the owner of the lands described in finding of fact #7, and is entitled to use 40 inches, or 1 second foot of water from the Island Branch of Silver Creek, upon 60 acres of said land lying between said Island Branch and the main channel, known as "The Island", for the irrigation thereof, which appropriation is superior to that of any of the other parties to this suit, save and except those of Anna C. Hough, Marion Conley, John C. Porter, and Lucinda Egli, and that he is also entitled to 100 inches, or  $2\frac{1}{2}$  second feet of water from Island Branch from Silver Creek, and 50 inches, or  $1\frac{1}{4}$  second feet of water from Bridge Creek, through his two ditches, leading out of Island Branch upon his 300 acres in Section 15, over and above the said 60 acres of the Island above mentioned, for the irrigation thereof; and that his right thereto is superior to that of any of the other parties hereto, save and except that of Anna C. Hough, Marion Conley, Lucinda Egli, and John C. Porter, and the rights of the heirs of S. A. D. Porter, deceased as hereinafter set forth.

That W. F. Porter, E. A. Porter, and Carl D. Porter, minor heirs of the said S. A. D. Porter, who is deceased pending this suit, together with Daisy Porter, his widow. and C. D. Porter, administrator of the said decedent, substituted, are the owners of the land described in finding of fact No. 8, and are entitled to 100 inches, or  $2\frac{1}{2}$  second feet of water from the main channel of Silver Creek, for the irrigation of 240 acres of said land; and that the same is superior in right to that of any of the other parties to this suit, save and except Anna C. Hough, Marion Conley, John C. Porter, Lucinda Egli, and the appropriation of the defendant, Geo. H. Small, of 40 inches, or 1 second foot of water, for the irrigation of 60 acres, contained on the Island, as above set forth.

That Walter C. Buick, Lulu Corum LaBrie, Isa M. Corum, and Jewel D. Corum, and J. M. Small, are the owners of the lands described in find<sup>ing</sup> of fact No. 10 herein, and are entitled to 300 inches, or  $7\frac{1}{2}$  second feet of water, measured at the intake of the ditch or canal known as the Buick-Corum-Small Ditch, at a point in section 21, township 28 south, range 15 east, for the irrigation of their said lands, as follows: to wit- 270 inches, or  $6\frac{3}{4}$  second feet of said water, a portion of which is sometimes used and applied through what is known as Bunyard Branches in the necessary and proper irrigation of said lands as follows: Walter C. Buick and Corinna Buick, 90 inches or  $2\frac{1}{4}$  second feet, on 140 acres of their lands; Lulu Corum LaBrie, Isa M. Corum, and Jewel D. Corum, 90 inches or  $2\frac{1}{4}$  second feet on 140 acres of their said lands; J. M. Small, 90 inches or  $2\frac{1}{4}$  second feet on his said lands, The water when used through any other conduits than that of the Buick-Corum-Small Ditch incurs a greater loss before reaching its place of use, by reason of which if the same or any part thereof shall be used by other methods than through the said ditches and laterals leading therefrom, no greater quantity of water shall be used than in the aggregate shall amount to 300 inches, measured under six-inch pressure at the intake of said ditch.

That F. G. Chrisman and John C. Porter are the owners of the lands described in finding of fact No. 11 and are entitled to 200 inches , or 5 second feet of water from the main channel of Silver Creek at a point near the center of section 21, township 28 south, range 14 east, taken through a certain ditch known as the West-Porter-Martin Ditch, for the irrigation of <sup>300 inches</sup> their said lands, and that their rights are superior to all those except Anna C. Hough and John C. Porter, as set forth in the first part of this decree, upon his said lands described in finding of fact No. 4. also Lucinda Egli, Marion Conley, Geo. H. Small, the heirs of S. A. D. Porter, Walter C. Buick, Lulu Corum LaBrie, Isa M. Corum, Jewel D. Corum, and J. M. Small.

That C. C. Jackson is the owner of the lands described in finding of fact No. 12 and is entitled to 80 inches, or 2 second feet of water from the Conley Branch of Silver Creek, upon 160 acres of his said land, for the irrigation thereof, which rights are inferior to those of all the parties hereinbefore in this decree mentioned, and superior to those of all the other parties hereinafter in this decree mentioned.

That W. H. McCall is the owner of the land described in finding of fact No. 13, and is entitled to 80 inches or 2 second feet of water from the high or overflow channel leading from Silver Creek to or upon <sup>120 acres</sup> his said lands for the irrigation thereof, and that his rights are inferior to those of all the parties hereto in this decree heretofore mentioned, and superior to those of all the parties hereinafter mentioned.

That B. F. Lane is the owner of the land described in finding of fact No. 14, and is entitled to 90 inches, or  $2\frac{1}{2}$  second feet of water from the Bunyard Branch of Silver Creek, for the irrigation of the 160 acres of his said lands, and that his rights are inferior to those of all the parties hereto in this decree heretofore mentioned, and superior to those of all the parties hereinafter mentioned.

That the Occidental Land & Improvement Co. is the owner of the lands described in findings of fact No. 15, and is entitled not to exceed in all 80 inches, or 2 second feet of water from the main channel of Silver Creek or from Bridge Creek, one of its tributaries, for the irrigation of 120 acres of its said land in section 16, and that said right is inferior to those of all the parties hereto in this decree heretofore mentioned, and superior to the rights of all the parties hereinafter mentioned.

That Geo. Durand is the owner of the land described in finding of fact No. 16, and is entitled to 160 inches, or 4 second feet of water from the main channel of Silver Creek for the irrigation of 480 acres of his said lands, and that said rights are inferior to those of all the parties heretofore in this decree mentioned, and superior to those of all the parties in this decree hereinafter mentioned.

That E. D. Lutz is the owner of the land described in finding of fact No. 17, and that he is entitled to 100 inches, or  $2\frac{1}{2}$  second feet of water from the Island Branch of Silver Creek for the irrigation of his 200 acres of said land in section 15, and that said right is inferior to each and all of the parties heretofore in this decree mentioned, and superior to the rights of all the parties in this decree hereinafter mentioned.

That F. M. Chrisman is the owner of the lands described in finding of fact No. 18, and is entitled to 60 inches, or  $1\frac{1}{2}$  second feet of water from Bunyard Branch of Silver Creek, upon 100 acres of his said land for the irrigation thereof, and that said rights are inferior to the rights of all the parties herein in this decree heretofore mentioned, and superior to the rights of all the parties hereinafter mentioned.

That Mary C. Brown is the owner of the land described in finding of fact No. 19, and is entitled to 50 acres of land, or  $1\frac{1}{4}$  second foot of water from the main channel of Silver Creek for the irrigation of her said land, and that her rights are inferior to those

of all the parties herein in this decree heretofore mentioned, and superior to those of all the parties hereinafter in this decree mentioned.

That Mary J. Kittredge is the owner of the land described in finding of fact No. 20, and is entitled to 160 inches, or 4 second feet of water from the main channel of Silver Creek upon 480 acres of said land for the irrigation thereof, and that said rights are inferior to those of all the parties herein in this decree heretofore mentioned, and superior to those of all the parties hereinafter in this decree mentioned.

That P. W. Jones is the owner of the land described in finding of fact No. 21, and is entitled to 80 inches, or 2 second feet of water from the main channel of Silver Creek upon 160 acres of his said land for the irrigation thereof, and that his rights are inferior to those of all the parties herein in this decree heretofore mentioned, and superior to those of all the parties hereinafter in this decree mentioned.

That C. E. McKune is the owner of the lands described in finding of fact No. 22, and is entitled to 50 inches, or  $1\frac{1}{2}$  second feet of water from the main channel of Silver Creek upon 100 acres of his said land for the irrigation thereof, but that his said rights thereto are inferior to those of all the other parties in this decree.

And it is further ordered, adjudged, and decreed that each of the parties to this suit is hereby forever enjoined from interfering with the rights of any of the other parties as in this decree set forth; and all those whose rights are herein adjudicated are forever enjoined from using more of the water of Silver Creek than as hereinbefore provided, at all times when such use will interfere with any of the rights of any of the parties to this suit, as herein decreed and set forth.

And it is further ordered that in case it shall appear to the court below that these findings and decree are incomplete and do not set forth the rights of the parties hereto as announced in the opinion of the court in this decree, said court shall have the right to enter such supplemental decree or decrees as shall correctly set forth the rights of such parties, not inconsistent with the said opinion.

And it is further ordered that the heirs of S. A. D. Porter, with John C. Porter, recover off and from Geo. H. Small their costs and disbursements in this court, taxed at \$450.00.

And it is further ordered that this cause be remanded to the court below from which this appeal was taken, with directions to enter a decree in accordance herewith.