

IN THE CIRCUIT COURT OF THE STATE OF OREGON FOR UMATILLA COUNTY,

Little Walla Walla Irrigation Union,

a corporation, et al, Plaintiffs,

vs.

Finis Irrigation Company, a corporation, et al,

Defendants.

Now on this day this cause coming on for hearing on the entry of the mandate of the Supreme Court of the State of Oregon issued herein on the 5th day of October, 1905, and for the entry of decree in accordance therewith, and the court being now fully advised in the premises, it is hereby,

ORDERED, ADJUDGED AND DECREED that the said mandate be and the same is hereby entered herein.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the original findings of fact, conclusions of law and decree rendered and entered in this cause by the Circuit Court be and the same are hereby amended as in said mandate directed.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the said original findings of fact, conclusions of law and decree, as amended, and the said mandate of said Supreme Court shall constitute and are hereby declared to be the findings of fact, conclusions of law and decree of this court herein.

Done and dated at Pendleton, Oregon, this 18th day of Nov. 1912.

Gilbert W. Phelps

Circuit Judge.

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 4th day of March, 1912,

WHEREUPON on this Thursday the 15th day of August, 1912, the same being the fifty-eighth judicial day of said term, there were present:

Hon. Robert Eakin, Chief Justice,
Hon. Thomas A. McBride, Associate Justice,
Hon. Frank A. Moore, Associate Justice,
Hon. Henry J. Bean, Associate Justice,
Hon. George H. Burnett, Associate Justice
J. C. Moreland, Clerk.

when the following proceedings were had:

Little Walla Walla Irrigation Union, }
a corporation, and about 40 others, }
Plaintiffs, Appellants and Cross- }
Respondents, }
vs }
Finis Irrigation Company, a corpora- }
tion, and about 400 others, Defend- }
ants, of which about 50 are also }
Cross-Appellants. }

vs

Appeal from Umatilla.

This cause having, at Pendleton, on the 9th day of May, 1912, been duly 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 the court having duly considered all the said questions, as well as the suggestions made by counsel in their argument and briefs, on the 2d day of July, 1912, rendered an opinion holding that there was PARTIAL ERROR as alleged, and a motion for a rehearing having been filed and duly considered by the court, and some corrections and the former opinion adhered to:

It is, therefore, CONSIDERED, 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 hereby modified as herein indicated; and the court having duly considered all the allegations of the parties, makes the following

ADDITIONAL FINDINGS AND MODIFICATIONS OF THE FINDINGS

hitherto made by the circuit court in this cause.

The court finds:--

1.

Finding No. 16 of the said circuit court, which finding reads as follows:

"That from the time of the appropriation of the waters of the said stream the parties hereto and their predecessors in interest have had the actual, exclusive, notorious and undisputed possession of the waters of the said stream as herein stated under a claim of right and color of title, and have continuously, openly, notoriously, and adversely used the same to the exclusion of all persons, either natural or artificial, and have had the actual, exclusive and undisputed possession of the said waters, water rights, ditches and dams and other appliances for diverting the same and have held the same against all persons whomsoever without interruption for more than ten years immediately prior to the commencement of this suit, except where otherwise stated in these findings".

not being sustained by the evidence is reversed and stricken out.

11.

That the defendants known as the Up River defendants, who are 50 in number, use water from the Walla Walla River above Station No. 1, which is above the head of the Milton Ditch. They irrigate 697 acres, of which 95 acres are in garden; four hundred and seventy-two (472) acres have been irrigated since prior to January, 1888, for the irrigation of which there has been appropriated 732 inches, and 216 acres have been irrigated since prior to 1898, for which there has been appropriated 324 inches.

111.

Finding No. 19 (page 231 of the record), so far as it refers to three inches per acre having been diverted, appropriated and used by the Cockburn defendants, is hereby stricken out, and forty-five (45) inches of water is hereby found sufficient to supply the needs of said Cockburn defendants; that said amount of water was appropriated and diverted by the Cockburn defendants prior to the year 1888. That said Cockburn defendants irrigate 30 acres and get their water above the town of Milton and below Station No. 1.

IV.

The court finds that about the year 1872, the predecessors in interest of the defendants above named and designated collectively as the Milton Ditch owners, entered upon the west bank of Nichols Branch of the Walla Walla River at a point near where the said Nichols west branch crosses Union street in the town of Milton as now laid out and platted, and therefrom dug and constructed a ditch in a Northwesterly direction through and across Sections 12, 1, 2, and 3, all in township 5 North of range 35 E. W. M.; for the irrigation of the lands adjacent to said ditch which ditch is described and referred to as the Milton Ditch, and diverted therefor said purposes from the channel of said stream 445 inches of water prior to January 1, 1888, when the Peacock Mill Company made an appropriation of 2,250 inches and appropriated and diverted an additional 215.25 inches into said ditch subsequent to 1888 and subsequent to the appropriation of the Peacock Mill Company of 2,250 inches, but prior to the time when the said Peacock Mill Company made its appropriation of five hundred inches of water in 1898. That there are ninety one (91) owners in the Milton Ditch, representing 407.79 acres, served with water from the said ditch. That there was appropriated through said Milton Ditch for the irrigation of 268.33 acres 445 inches, miners' measurement under six-inch pressure, prior in time to the appropriation by the Peacock Mill Company in 1888 of its 2,250 inches; and for 141.48 acres an additional appropriation of 215.25 inches was made subsequent to 1888 but prior to the second appropriation by the Peacock Mill Company of its five hundred inches of water in 1898, and the water so appropriated by the said Milton Ditch company has been used on the lands under said ditch ever since the date of its appropriation and said quantity is necessary for the proper irrigation of the lands under said ditch.

The foregoing finding is hereby substituted for the finding of the circuit court which is as follows:--

"That about the year 1872 the predecessors in interest of the defendants, above named and designated collectively as the Milton Ditch owners, entered upon the west bank of the said Nichols west branch at a point near where the said

Nichols west branch crosses Union street in the town of Milton, as now laid out and platted, and therefrom dug and constructed a ditch in a northwesterly direction to and across sections 12, 1, 2, and 3, in said township and range, for the irrigation of the lands adjacent to said ditch, which ditch is described and referred to as the Milton Ditch, and diverted for said purposes from the channel of said stream 725 inches of water therein and ever since have caused said quantity to flow therein, and the same has been used on the lands under said ditch ever since said date beneficially and said quantity is necessary for the proper irrigation thereof."

V.

That through the Stillman Ditch there are irrigated 108.33 acres. The appropriation of 57 inches with which to irrigate 30 acres of this land under the Stillman Ditch was made prior to the first appropriation by the Peacock Mill Company in 1888. The appropriation of 37.78 inches for 25.19 acres was made subsequent to the Mill Company's appropriation of 1888, and prior to the Company's appropriation in 1898. That the appropriation for the remainder of the 108.37 acres under the Stillman Ditch was made subsequent in time to the Mill Company's appropriation of 1898. There are 24 acres in garden under the Stillman Ditch.

VI.

That at all times since the year 1871 the Peacock Mill Company, its grantors and predecessors in interest have been and it now is the owner in fee simple of the following described lands, with appurtenances, to wit: Commencing at a point 28 rods south of the northwest corner of the northwest quarter of the southwest quarter of section 1 township 5 north range 35 EWM; running thence south 40 rods; thence east 24 rods; thence north 40 rods; thence west 24 rods to the place of beginning, in Milton City, Oregon, upon which is situated what is known as the Peacock Mill; also all of Block 44, 45, and 46 in Freewater, Oregon, upon which is situated what is known as the Eagle Mill, all of the real property described being upon the channels of the said Walla Walla River, in Umatilla County, Oregon. That the predecessors in interest of the Peacock Mill Company for the purpose of conducting a general milling business, commenced constructing the Peacock Mill on their premises as herein described in the year 1887, and on January 1, 1888,

appropriated for the purpose of furnishing power for said mill from the water flowing in the Walla Walla River 2,250 inches of water, miners' measurement under six-inch pressure, and began operating the said mill about the 8th day of August, 1888, and said mill has been operated ever since date, the motive power for running the said mill being water from said Walla Walla River which was diverted when the said mill began operations, that on the first day of January, 1898, the predecessors in interest of the said Peacock Mill Company commenced the erection of the Eagle Mill upon said premises for the purpose of conducting a general flour milling business and on said first day of January, 1898, appropriated from said Walla Walla River an additional five hundred inches, of water, miners' measurement under six inch pressure, for the purpose of furnishing power with which to run said mill, and at said date also appropriated for the purpose of furnishing motive power for said Eagle Mill the aforesaid 2,250 inches of water theretofore appropriated as aforesaid; that the said water so appropriated by the Peacock Mill Company was taken from a point on the west bank of the said Walla Walla River at a point about one-half a mile above the said Peacock Mill; that the said water appropriated for the Eagle Mill was, however, conveyed through the mill race and flume of the Peacock Mill for the greater part of the time, but part of the time said water for the Eagle Mill was permitted to flow down the regular channel of the Little Walla Walla River until it reached the mill race of the Eagle Mill; that the said water so appropriated by the said Mill Company and its predecessors in interest was conveyed into the mill races of the said mills and applied to the running of the said Peacock and Eagle mills and has ever since the date of their construction been so used; that the said appropriations by the said Peacock Mill Company were made at the point known as Station no. 68 on plat sand maps shown in this suit, and at a point about one half a mile above the said Peacock mill, except when there was not sufficient water flowing in the Little Walla Walla River at said Station No. 68 to supply said Mill Company with the water so appropriat-

ed, in which event the appropriation was made at Station No. 26, the point of division between the Tumalum branch and the little Walla Walla branch at a point just below the Red Bridge.

Vll.

That for and in lieu of the findings made by the circuit court concerning the water appropriated for the use of the irrigators taking water from the Tumalum branch of the Walla Walla River, and various ditches supplying from said Tumalum, the following finding is made:--

There are fifty defendants known as the Tumalum branch defendants, taking water from that branch by means of the East Side Ditch Company, the Loundagin Ditch Company, and those taking water directly from the channel by means of which they irrigate 416.52 acres of land. The appropriation for the following acreage was made prior in time to the appropriation of the Peacock Mill Company in 1888, viz: 22.31 acres, directly from the channel; 49 acres by the Loundagin Ditch; and 98.14 acres by the East Side Ditch. For the following acreage the appropriation was made subsequent to the 1888 appropriation but prior to the appropriation of the Mill Company in 1898, viz: for 29.81 acres, diverted from the channel; 60 acres by the Loundagin Ditch and 157 acres by the East Side Ditch. of this 106.21 acres are cultivated to vegetables and small fruits. In addition to the above amount, A. Miller, is entitled to 22.33 inches, the amount diverted by him by means of his pumping plant, and prior in time to the appropriation by the Mill Company in 1898 but subsequent to its appropriation of 1888; and the McCoy's, Johnson and Heimvick, intervening defendants, are entitled to 50 inches for domestic use, that is to say that the defendants above referred to as the Tumalum defendants appropriated for the irrigation of said lands and the use of McCoy, et al., 307.27 inches, miners' measurement under six inch pressure, prior in time to the appropriation by the Peacock Mill Company in 1888 and made an additional appropriation of 444 like inches prior in time to the Mill Company's

appropriation in 1898. That said water so appropriated by the users thereof from the Tumalum branch and its various ditches has been continuously used for the irrigation of lands under said ditches and for domestic purposes ever since the date of its appropriation.

VIII.

That for and in place of the finding made by the circuit court concerning the amount of water appropriated by the Stillman Ditch the following finding is made:--

That the Stillman Ditch has a capacity of ten second feet and diverts water from the Little Walla Walla River branch above the head of the Peacock Mill Company's race at Station No. 35 by means of which 106.33 acres are irrigated. An appropriation of 57 inches of water with which to irrigate 30 acres thereof was made prior in time to the appropriation made by the Mill Company in 1888 and an additional appropriation of 37.78 inches with which to irrigate 25.19 acres was made subsequent thereto and prior to the Mill Company's appropriation of 1898. The appropriation for the remainder of the 108.30 acres was made subsequent in time to the Mill Company's appropriation of 1898.

IX.

Defendants Martha Hudson, E. D. Walker, Jennie Walker, Lucetta Romine and Agnes R. Salt divert water from the Little Walla Walla branch above the mill race and below Station No. 1, on the river, for the irrigation of their land, which consists of 27.53 acres; for the irrigation of 21.33 acres of which land an appropriation of 32 inches of water was made prior to 1888 and for 6 acres an additional 9 inches was appropriated after 1888 but prior to 1898.

X.

That for and in place of the finding made by the circuit court in relation to the Perkins Ditch, the following finding is made:--

The Perkins Ditch takes water from the Little Walla Walla branch above the Peacock Mill but below the head of the Mill race, and

flows through and across the mill race immediately below the Peacock Mill. By stipulation with the Mill Company the water adjudged to this ditch shall hereafter be conveyed through the mill races to a point where it now crosses the tail race of the Peacock Mill Company. There are 29 users of water in this ditch, irrigating 66.37 acres therefrom, of which 16.45 acres are in Garden and small fruits. There was made an appropriation of 77.20 inches with which to irrigate 42.50 acres of said land prior to the appropriation by the Mill Company in 1888, and an additional appropriation of 28 inches was made with which to irrigate 18.75 acres subsequent to 1888 but prior to the Mill Company's appropriation in 1898.

XI.

That there are fifty defendants known as the Up River defendants, who use water from the Walla Walla River. Their lands are situated on the river above station 1, which is above the head of the Milton and Cockburn ditches. They irrigate 697 acres, of which 95 acres are in Garden. Prior to January 1, 1888, there was appropriated 732 inches for the purpose of irrigating 472 acres of said land irrigated by the Up River defendants, and subsequent to 1888 they appropriated an additional 324 inches with which to irrigate 216 acres of said land.

XII.

There are 35 defendants who irrigate about 271 acres directly from the streams below the head of the mill race, 77 acres of which are in Gardens. The appropriation of water for 113 acres thereof is prior to the year 1888, and for 110¹¹⁰ acres it was prior to 1898, namely 209.42 inches prior to 1888, and 165 inches prior to 1898. These defendants have no conflict with the Mill Company, as their needs are supplied from the water passing through the mill race. Thirty-one individual plaintiffs claim water from the Walla Walla River but divert the same below the point of diversion by the Mill Company. They irrigate about 481 acres. For 192 acres the appropriation was, prior to 1888 viz., 288 inches and for 95 acres, the appropriation

was, prior to 1898, viz., 142.50 inches. The amount of water passing through the mill Company's race must pass to them after serving the mills, which is more than sufficient for all of plaintiffs and the defendants last above mentioned, diverting water below the mill race.

XIII.

Finding No. 22, page 295 of the record, described a tract in section 20, township 5 north of range 36 EWM as containing 1.22 acres, is hereby amended to read as follows:--

James Harris who owns a parcel of land described as beginning at a point 2 rods south and 67 $\frac{3}{4}$ rods east of the northwest corner of section 20 in township five north of range 36 EWM; thence running east parallel with the north line of said section 20, 15 $\frac{1}{2}$ rods; thence south 91 $\frac{1}{3}$ rods; thence west 15 $\frac{1}{2}$ rods; thence north 91 $\frac{1}{3}$ rods to the place of beginning, the said tract containing 10 acres, of which 6.48 acres have been irrigated for more than 20 years from the Walla Walla River.

XIV.

The second finding by the circuit court (p.354 records) is hereby amended to read as follows:--

J. E. Rogers is the owner of a parcel of land described as beginning at the northwest corner of the southwest quarter of the southwest quarter of Section 35, township 6 north of range 35 EWM, running thence north to the north line of the northeast quarter of the southwest quarter 50 rods; thence at right angles easterly 80 rods; thence at right angles southerly 50 rods; thence at right angles 80 rods to the place of beginning; that 10 acres of said land has been irrigated for 30 years, 9 acres for 14 years, and 1 acre for 4 years; that 12.57 acres thereof are cultivated to orchard, garden and small fruit.

XV.

That the land described in the finding No. 32 of the circuit court, page 372 of the record, as being 10 acres of land in section 25 township 6 north of range 35 EWM, owned by Elvira Saunders and Charlotte Tanke, has been sold to George B. Dexter.

XVI.

Jay Holman is the owner of 51/100 acres of land all in Garden in the northwest quarter of the southeast quarter of section 25 township 6 north of range 35 EMM, which has been irrigated from Powell Ditch for 15 years.

XVII.

R. B. Lawler is the owner of 1.39 acres of land in section two, township five north of range thirty-five EMM, which has been irrigated for six years from Powell ditch.

XVIII.

The finding concerning the land of Orpha Johnson (Finding No. 11, p. 279 of the record) is hereby amended to read as follows:--

Orpha Johnson owns a parcel of land described as lots 7 and 8 in block 61, in Freewater, Oregon; that said tract contains 3.11 acres, of which 2.44 acres is in orchard and has been irrigated for 25 years from the Perkins Ditch. She also owns a tract of 7½ acres situated in the southwest quarter of the southeast quarter of section 35 township 6 north of range 35 EMM, and said 7½ acres have for 20 years been irrigated from the Little Walla Walla River from the Powell Ditch; 6.29 acres thereof being in garden and small fruit.

XIX.

The findings of the circuit court not inconsistent with the foregoing are hereby approved and ratified, and all findings of the circuit court inconsistent with the foregoing findings are reversed and set aside.

WHEREFORE,

1.

It is hereby ORDERED, ADJUDGED AND DECREED that each of the parties to this suit, whose names appear in the findings of fact herein, or the findings of the circuit court as herein modified, and their successors in interest, whose lands have been and are entitled to be irrigated from the waters of the Walla Walla River, or any of its branches, except as hereinafter or otherwise provided, shall have and

take from the respective streams, channel or ditches, described in the findings of fact, from which each of said land owners and irrigators have in the past taken water for irrigation, stock and domestic purposes, 1.5 miners' inches of water, measured under a six inch pressure, each fraction of an acre, miners' measurement, for each acre and for₄ with an additional one-half inch for each acre and for each fraction of an acre cultivated to garden or small fruits, except the defendant, A. Miller, who shall be entitled to have and take for the purpose of irrigating his nursery on the hill, which has been irrigated by a pumping plant an amount of water equal to that which can be raised on said land by means of a pump having a capacity of 250 gallons per minute, and operating 24 hours each day, all subject to the priorities herein-after decreed.

2.

It is further ORDERED, ADJUDGED and DECREED that the water which is taken through the Peacock Mill flume and race shall be divided between the numerous small streams and canals of the Little Walla Walla River as nearly as possible in proportion to the amount of land which is irrigated from each of said several small streams and channels.

3.

It is further ORDERED, ADJUDGED and DECREED that in case there is not, at any time, sufficient water with which to irrigate the several tracts of land mentioned and described in the findings herein, and to furnish water for power for said Peacock Mill Company and water for stock and domestic purposes, allowing each irrigated acre the amount of water herein found to be necessary for such irrigation, then the tract of land which have been irrigated for the longest time and the eldest appropriation for power purposes shall be deemed to have prior right to such water, and the amount and right decreed to the Peacock Mill Company shall be deemed to date and take priority from and according to the dates of appropriation, to wit: 2,250 inches appropriated January 1, 1868, and 500 additional inches

appropriated January 1, 1898.

4.

It is hereby further ORDERED, ADJUDGED and DECREED that the parties to this suit who reside upon, or own land on the numerous small streams and branches of the Little Walla Walla River below the Peacock Mill property, in case the Peacock Mill Company fails, neglects or refuses to convey through its said mill race and flume the amount of water to which said Peacock Mill Company is entitled to divert under this decree that then and in that event, said parties entitled to take and use water from said stream and branches below the said Peacock Mill shall have the right to enter upon the Walla Walla River at a point where, under this decree, the said Peacock Mill company diverts the water and to there take and divert into the channel of the Little Walla Walla River the amount of water which the said Peacock Mill Company is entitled to divert at said point, or so much thereof, as may be necessary to furnish the amount of water provided by this decree, but no rights shall be secured or acquired therein adverse to said Mill Company.

5.

It is further ORDERED, ADJUDGED and DECREED that Flossa Bartlett, Blake Bartlett, Halla Bartlett, Ina Bartlett and Evaline Bartlett are entitled to four (4) inches, miner's measurement, of water with which to irrigate in the manner herein provided, two acres of the following lands, to wit:

Beginning at the southwest corner of the northwest quarter of the northwest quarter of Section 35, Twp. 6 N.R. 35 East in Umatilla County, Oregon, running thence North 32 rods, thence East 25 rods, thence South 32 rods, thence West 25 rods, to the place of beginning.

6.

It is further ORDERED, ADJUDGED and DECREED that the Peacock Mill Company has the right to take and convey through its channels, canals, flume, mill race, and penstock, 2,250 inches, miners' measurement under a six inch pressure appropriated January 1, 1888, and five hundred (500) additional inches, like measurement, appropriated on

January 1, 1898, making a total of 2,750 inches of water, miners' measurement, under a six inch pressure for the purpose of furnishing power with which to run and operate its said mills, and to secure such water, said peacock Mill Company, its successors and assigns, shall be and are entitled to divert into its millrace and flume all the water flowing in the Brown and Miller mill races where they empty into the Little Walla Walla River, and sufficient of the water flowing in the Walla Walla River at the Red Bridge located at the east end of Fair Street in the City of Milton, to satisfy said appropriations if there be not sufficient in the Little Walla Walla River, provided, however, that the right or priority to the use of such water shall date from the date of the appropriation made by said Peacock Mill Company as above stated in the same manner as the amounts awarded to the different irrigators of land by the provisions of this decree; said appropriations to be measured at station 68, and if not in the Little Walla Walla River at that point, then to be measured at the point of division between the Little Walla Walla and the Tumalum branches

7.

It is further ORDERED, ADJUDGED AND DECREED that there is hereby awarded to the defendant, the Milton Irrigation Company, and the users under the Milton Irrigation Ditch, 445 inches of water measured under a six inch pressure, miners' measurement, prior in time and superior in right to the Peacock Mill Company's 1888 appropriation, and the further amount of 215.25 inches, miners' measurement under a six inch pressure, subsequent in time and inferior in right to said Mill Company's appropriation of 1888 but prior in time and superior in right to said Mill Company's appropriation of 1898, to be measured at the head of the said Milton Ditch as described in the findings of fact herein, that the said amount of water when so measured shall be entitled to flow continuously in and through the said ditch to the several users under the same; that a proper head gate and measuring device shall be maintained by said Milton Ditch Company at the intake of its ditch.

It is further ORDERED, ADJUDGED and DECREED that the Tualum defendants, the East Side Irrigation Company and the Roundagin Irrigation Company, J. D. McCoy, B. M. Johnson, L. Heidenrich, and Mary A. McCoy, are entitled to have flow down the Tualum branch of the Walla Walla River, at the point where the same is separated from the Little Walla Walla River, known as the Red Bridge, the amount of water necessary to irrigate all lands now owned and irrigated by them or any of them as shown by the data on file herein and a sufficient quantity for domestic purposes and stock watering purposes, being a total of 307.27 inches, miners' measurement under a six inch pressure, prior in time and superior in right to the 1888 appropriation of the said Peacock Mill Company and the further amount of 444 inches, miners' measurement, under a six inch pressure, subsequent in time and inferior in right to said mill Company's 1888 appropriation but prior in time and superior in right to said Mill Company's appropriation of 1898, which said appropriation of 444 inches includes the appropriation of A. Miller of 22.83 inches, which said appropriation of 307.27 inches is superior in right to the rights of any other parties to this suit, except the rights of the Milton Irrigation Company and the Cocke burn and Nichols defendants as provided herein; said appropriations shall be measured at the point of diversion from the stream.

It is hereby further ORDERED, ADJUDGED and DECREED that there is hereby awarded to the Perkins Ditch and those persons using by, through and under the same, 77.20 inches, miners' measurement, under six inch pressure, prior in time and superior in right to the Peacock Mill Company's appropriation of 1888, and the further amount of 28 inches, miners' measurement under six inch pressure, subsequent in time and inferior in right to said Mill Company's appropriation of 1888, but prior in time and superior in right to said Mill Company's appropriation of 1898, from the stream at the head of the Peacock mill race where the said Peacock Mill Company divides the water at the Red Bridge, and that the

same shall be conveyed through the said Peacock Mill flume and race pursuant to the stipulation on file herein, and delivered by the said Peacock Mill Company to the said Perkins Ditch and the users thereunder in the Perkins Ditch as the same now exists where the said Perkins Ditch crosses the waste ditch of the Peacock Mill Company at the corner of the Peacock Mill, as it stood prior to the commencement of this suit; that the amount of water awarded by this decree shall be delivered by the said Peacock Mill Company into the said ditch at said point without cost to the said Perkins Ditch or the users thereunder.

10.

It is further DECREED that the City of Milton is entitled and shall receive at all times through its present 14 inch intake water pipe, located on the west bank of the Little Walla Walla River, and having its intake about 1½ miles above the Bank Building on Main street in the said City, a continuous flow of water measured under a pressure of 3 feet of water above the upper surface of its pipe for domestic, irrigation, street sprinkling, fire protection, and other purposes in pursuance of the stipulation heretofore filed herein.

11.

It is hereby further ORDERED, ADJUDGED and DECREED that the defendants known in the findings herein as the Cockburn defendants, are entitled to and shall receive through the Nichols Ditch, the Cockburn Ditch, the Milton Ditch, or such other ditches, flumes or canals as they are now using water through or have heretofore used water through, for the irrigation of their several tracts and for stock and domestic purposes, 45 inches of water, miner's measurement, under a six inch pressure, prior in time and superior in right to the 1888 appropriation of the Peacock Mill Company.

12.

It is further ORDERED, ADJUDGED and DECREED that defendants, Martha Hudson, E. D. Walker, Jennie Walker, Lucetta Romine and Agnes R.

Salt are awarded 32 inches of water, prior in time and superior in right to the 1888 appropriation of the Peacock Mill Company, and the further amount of 9 inches, subsequent in time and inferior in right to the 1888 appropriation of said Mill Company, but prior in time and superior in right to the 1898 appropriation of said Mill Company, said water to be measured by miners' measurement under a six inch pressure at the head of the ditches of said defendants and to be taken from the Little Walla Walla River.

13.

It is further ORDERED, ADJUDGED and DECREED that the defendants known as the "Up River" defendants, are hereby awarded 732 inches of water miners' measurement, under a six inch pressure, of the waters of Walla Walla River, prior in time and superior in right to the 1888 appropriation of the Peacock Mill Company, and the further amount of 324 inches, measured as aforesaid, subsequent in time and inferior in right to said 1888 appropriation of the said Peacock Mill Company, but prior in time and superior in right to said 1898 appropriation of said Mill Company.

14.

It is further ORDERED, ADJUDGED and DECREED that the 33 defendants who irrigate 271 acres directly from the streams below the head of the Peacock Mill Company's mill race are hereby awarded 209.42 inches, miners' measurement, under a six inch pressure, prior to 1888 and 165 inches, measured as aforesaid, subsequent to January 1, 1888, but prior to January 1, 1898; that these defendants have no conflict with said Peacock Mill Company as their needs are supplied from the water passing through the mill race after serving the said Mill Company's mills.

15.

It is further ORDERED, ADJUDGED and DECREED that the 31 plaintiffs claiming the water of the Walla Walla River after the same has served the mills of the Peacock Mill Company are hereby awarded 288 inches, miners' measurement under six inch pressure, of the date of prior to 1888 and the further amount of 142.50 inches subsequent to January 1, 1888, but prior to January 1, 1898; that these

appropriations do not conflict with the appropriations of the said Peacock Mill Company.

16.

It is FURTHER ORDERED, ADJUDGED and DECREED that Fannie Holman is the owner of 10 acres of land which was adjudicated in the findings of the circuit court of the State of Oregon, for Umatilla County, as irrigated from the Little Walla Walla River, and the same is included with the lands of the 33 defendants mentioned on page 13 of the opinion of this court.

17.

It is FURTHER ORDERED, ADJUDGED and DECREED that the findings of fact, conclusions of law and decree of the circuit court of the state of Oregon, for Umatilla County, except as hereinbefore modified, be and the same are hereby CONFIRMED in all respects.

18.

It is FURTHER ORDERED, ADJUDGED and DECREED that the measurements provided for here, of water for lands irrigated thereby shall be measured at the head of the Milton Ditch, the East Side Ditch, the Roundagin Ditch, the Perkins Ditch, the Powell Ditch and the Stillman Ditch, respectively, and that water used by persons directly from the stream shall be measured at the line of the land where the same is diverted for irrigation purposes; that the water awarded the Cockburn defendants shall be measured at the place where the same has heretofore been diverted from the Milton Ditch, from the Nichols branch and from the channel of the stream.

That the water awarded to the Up River defendants shall be measured at the head of the ditches through which it is diverted, and if water is applied to the land directly from the stream it shall be measured at the place of diversion.

That the 50 inches of water awarded the McCoy defendants shall be measured at the head of the East Side Ditch and permitted to flow down to the said defendants from said point.

19.

It is FURTHER ORDERED, ADJUDGED and DECREED that the 307.27

inches of water awarded the Tumalum defendants herein is superior in right to the rights of any other parties to this suit, except the rights of the Milton Irrigation Company and the Cockburn defendants.

As to the appropriation of 444 inches by the said Tumalum defendants prior to the Peacock Mill Company's appropriation in 1898, the said appropriation of 444 inches in 1898 is prior in time and superior in right to all other appropriations by the plaintiffs or the defendants, except the Milton Ditch, which were made subsequent to 1898 and prior to 1898.

20.

It is further ORDERED, ADJUDGED and DECREED that the evidence is insufficient to establish adverse user on the part of any of the defendants herein.

21.

It is further ORDERED, ADJUDGED and DECREED that where the word inch is used herein as a unit of measurement of water, it means a miner's inch measured under a six inch pressure and is equivalent to one-fortieth of a cubic foot of water per second of time.

22.

It is further ORDERED, ADJUDGED and DECREED that the cost of dividing the water at the Red Bridge between the Tumalum defendants and the parties of this suit, who receive water through the Little Walla Walla River shall be borne jointly, the Peacock Mill Company and the irrigators upon the Little Walla Wally River should bear seventy per cent of the costs of such division and that the Tumalum defendants should bear thirty per cent of the cost of said division.

23.

It is further DECREED that before the irrigation season of 1913 commences there shall be established, if not already established, and thereafter, at the place where the waters first enter the several tracts of land to be irrigated, maintain a measuring box, or appropriate measuring device for the purpose of measuring the quantity of water awarded each of said tracts to be irrigated as shown by the findings herein, so that the same can be conveniently measured by a civil engineer, except that ^{the} Milton Ditch and the users of water

through the said Milton Ditch shall divide the water equitably among the users thereof under the said ditch upon the basis of 660.25 inches of water measured under a six inch pressure hereinbefore awarded to the said ditch, measuring devices to be established at the line of the several tracts of land to be irrigated from the said ditch to measure the quantity of water distributed to each of the several tracts by and through the said ditch.

24.

That the cost and expense of establishing measuring boxes and appropriate devices for the purpose of measuring the water awarded the several tracts, described in the findings of fact herein, shall be paid by the owner of each tract to be irrigated; that if any party of this suit, or his successors, or assigns, shall fail to establish said measuring box and measuring devices within the time hereinbefore provided, that then and in that event the said party so neglecting to establish the said measuring box or measuring device shall not be entitled to take or receive any water nor to irrigate his said land with any water so taken until he shall have complied with the said requirement and shall have at his own expense established his said measuring box or device.

25.

It is further ORDERED, ADJUDGED and DECREED that the Finis Irrigation Company, under and pursuant to its stipulation made a part of the findings of fact herein, is entitled to take all of the surplus water flowing in the Milton Ditch, after all of the parties claiming by, through and under said ditch shall have been supplied with all necessary water for their lands as hereinbefore provided.

26.

It is further ORDERED and DECREED THAT said Finis Irrigation Company, its successors or assigns, shall have no right, title or interest in or to any of the water flowing in the said Milton Ditch, and no right, power or authority to enter upon the line of the said ditch or to take water therefrom or to turn water into the said Milton Ditch or

to demand that a greater quantity of water or any water shall flow therein, and the said Finis Irrigation Company shall in no manner interfere with the management, control or operation of the said Milton Ditch or the waters flowing therein at any season of the year. That the water hereby awarded to the Finis Irrigation Company is such water as may be permitted by the said Milton Ditch and the defendants interested therein to flow past their premises and the end of the said Milton Ditch.

27.

It is further ORDERED and DECREED that Milton, Freewater & Hudson Bay Irrigation Company is the owner of and entitled to divert since the 16th day of February, 1903, two-fifths of all the water flowing naturally in the Little Walla Walla River between the 15th day of October of each year and the first day of the following April and no more. And between the first day of April and the 15th day of October of each year and any surplus water flowing in the said Little Walla Walla River in excess of 4000 inches, measured under a six inch pressure miners' measurement, and that the point of diversion is the headgate of the Milton, Freewater & Hudson Bay Irrigation Company, near the Southeast corner of the Northeast quarter of the Northeast quarter, Section 2, Township 5 North, Range 35, E.W.M. provided, however, that as against the plaintiffs to this suit, the said Milton, Freewater & Hudson Bay Irrigation Company shall acquire no right to have flow past the point where the waters of the Walla Walla River are divided between the Tumalum and the Little Walla Walla and down the Tumalum any water which may be required in the Little Walla Walla for the proper irrigation of the lands thereunder to be irrigated under the provisions of this decree; that the said Milton, Freewater & Hudson Bay Company, its assigns, successors in interest shall bear their pro rata expense on the maintenance of the necessary canals, dams, flumes and headgates in the Little Walla Walla River above the said defendants' said point of intake, said sum to be in proportion to the quantity of the water in the Little Walla Walla River diverted or caused to flow therein by the said defendants, and that the said Milton, Freewater & Hudson Bay Irrigation Company shall maintain at their point of diversion, the necessary flumes,

gates, dams and wiers necessary to properly measure and control the water of the said Little Walla Walla River; and that said stipulation on file in the findings of fact herein be enforced according to its terms and conditions against the parties and in favor of the parties thereto.

28.

It is further ADJUDGED and DECREED that the said Milton, Freewater & Hudson Bay Irrigation Company shall have the right to divert into the ditch of the said company where the same taps the Tumulum River, flood waters which may be flowing in said Tumulum, after the said Tumulum River defendants have been supplied with not to exceed 751.27 inches of water measured under a six inch pressure, miners' measurement, the said Peacock Mill Company has been supplied with water to the extent of 2,750 inches measured under said pressure, plus the amount in the said Peacock Mill race and flume that is awarded to the Perkins Ditch defendants under this decree, and after all irrigators and water users who receive water from the Little Walla Walla above the Peacock Mill have been supplied with water in accordance with this decree.

29.

It is further ORDERED, ADJUDGED and DECREED that there shall flow down to and upon the premises of the intervenors, J. D. McCoy, B. M. Johnston, I. Heidenrich and Mary A. McCoy at all times from the East Side Irrigation Company Ditch through the channel of what is known as Little Stream, or through a ditch of sufficient capacity to be constructed by, or at the expense of the said East Side Irrigation Company sufficient quantity of water for stock and domestic purposes on the premises of each of the said intervenors, not to exceed fifty inches, miners' measurement under a six inch pressure, which amount is included in the award of 307.27 inches hereinbefore made to the Tumulum defendants.

30.

It is further ORDERED, ADJUDGED and DECREED that any further expense arising in connection with the carrying into effect of this decree so far as the establishment of other measuring boxes or devices,

than those hereinbefore provided for, shall be paid for by the parties using water through the ditch or ditches, channels or streams where said additional measuring boxes are established.

31.

It is further ORDERED, ADJUDGED and DECREED that no costs shall be allowed or taxed for or against any of the parties upon this appeal. And the decree of the circuit court as to costs in that court is hereby affirmed.

STATE OF OREGON, :
 : ss.
County of Marion:

I, J. C. Moreland, Clerk of the Supreme Court of the State of Oregon, do hereby certify that the foregoing copy of decree has been by me compared with the original journal entry and that it is a correct transcript therefrom, and of the whole of such original, as the same appears of record, and in my office and custody.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of said Court, at Salem, Oregon, this October 5, 1912.

J. C. Moreland,

(Seal)

Clerk of Supreme Court.

TO THE CIRCUIT COURT OF THE STATE OF OREGON,

For the County of Umatilla.

You are hereby commanded that of the above judgment order of our Supreme Court, you cause proper entry to be made upon the records of your court, as of a judgment therein, and proceed to final determination and execution thereof, as to the said order of our Supreme Court, and to law and justice shall appertain.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of the Supreme Court of the State of Oregon at Salem, Oregon, this October 5, 1912.

J. C. Moreland,

Clerk of Supreme Court,
State of Oregon.

(Seal)

Filed October 7, 1912
Frank Saling, Clerk.
by R. T. Brown Deputy.