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# Harney Valley Items.

VOL. 17.

H. D. McIntyre, Proprietor  
Chas. S. Cochran, Editor and Manager.

BURNS, OREGON, SATURDAY, SEPTEMBER 28, 1901.

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### SWAMP LAND DECISION

Mrs. Sarah E. Marshall Wins  
Her Case With the French-  
Glenn Live Stock Company.

The Land Office of this place is  
in receipt of the decision in the  
contest case of the French-Glenn  
Live Stock Co. vs. Mrs. Sarah E.  
Marshall. It affirms the decision  
of the local office as printed in these  
columns some months ago, and al-  
though quite lengthy we give it in  
full. The decision is addressed to  
the local land officers and says:

The land involved herein is de-  
scribed as the N $\frac{1}{2}$  of the NE $\frac{1}{4}$  of  
Sec. 34, and the SE $\frac{1}{4}$  of the SE $\frac{1}{4}$   
and Lot 2 of Sec. 27, T. 26 S., R. 31 E.

The land lies north of the mean-  
der line of the south shore of Lake  
Malheur in T. 26 S., R. 31 E., as  
that line was established by the  
official survey of John W. Meldrum,  
commenced April 14, and completed  
April 16, 1877.

On April 11, 1892, a number of  
persons executed a petition for the  
survey of the lands between the  
water line of Lake Malheur and the  
established meander line thereof,  
alleging that they settled on the  
said lands in good faith. The pe-  
tition was filed in this office on  
May 2, 1892, and was denied by the  
office letter "E" of May 13, 1892.  
On an appeal by the petitioners,  
dated May 26, and filed in this  
office on June 8, 1892, the Depart-  
ment held, on March 3, 1893, in  
the Lake Malheur, 19 L. D. 256,  
following the decisions of the su-  
preme court in Hardin, Jordan,  
and Mitchell vs. Smale, 140 U. S.,  
371 and 406, that the riparian pro-  
prietors take to the center of the  
lake, which is non-navigable, but  
it appeared that the north shore of  
the lake in township twenty-six,  
range thirty-one, had not been  
meandered and that, at that time,  
the government still retained the  
title to nearly all of the land bor-  
dering on the lake. The Depart-  
ment therefore gave the following  
directions:

"\* \* \* You will, therefore, order  
surveys of those lands where no  
meander line has been run, and in  
townships where the government  
owns the lands adjoining the lake,  
in cases where the frontage is of  
sufficient extent, and the receding  
water has uncovered a space suf-  
ficiently large to warrant the ex-  
tension of the lines. A sound dis-  
cretion should be exercised in such  
cases, under the above ruling.

On the request of the Surveyor  
General of Oregon for further in-  
structions the Department, in Lake  
Malheur, 19 L. D. 439, reiterated  
the holding that owners of lands  
upon Lake Malheur, having ripar-  
ian rights, take to the lake. But,  
abandoning the plan of the survey  
ordered on March 3, 1893, 16 L. D.  
256, supra, the Department direct-  
ed that all the dry land between  
the meander line and the shore line  
of the lake be surveyed by complet-  
ing the survey of the townships  
involved, thus leaving the determi-  
nation of the lateral boundaries  
of the land of the private owners,  
under Hardin vs. Jordan, supra,  
for subsequent determination.

The land was surveyed under  
these instructions in 1895, the  
tracts in controversy being a part  
of the land so surveyed, and on  
August 16, 1897, the plat of sur-  
vey of the township within which  
the tracts in controversy lie was  
filed in your office. On the same  
day Sarah E. Marshall made home-  
stead entry No. 786, for the said  
tracts, containing 150.96 acres,  
and gave notice of her intention to  
submit final proof on October 27,  
1897. On the last named date she  
appeared with her witnesses and  
submitted final proof, and the

French-Glenn Live Stock company,  
the protestant herein, also appear-  
ed and protested against the accep-  
tance of such proof. The grounds  
of the protest are here summarized.  
Prior to the survey of 1895, and  
prior to the settlement of Sarah E.  
Marshall, the protestant, relying  
upon the meander line established  
by the survey of 1877, became the  
owner, for value and in good faith,  
of all the lands in sections 22, 23,  
and 31 and of lots 1 and 2 in sec-  
tion 35, bordering on the said  
meander line. Thereafter the water  
of the lake receded and left the  
land dry in controversy together  
with other lands, whereby the said  
lands, became a part of the lands  
south of the meander line, so pur-  
chased by the protestant.

It is shown by the plat of the  
survey of 1895, that the south  
boundary of the land in controversy  
is half a mile north of the mean-  
der line established by the survey of  
1877, in the east half of section  
thirty-four. It appears from the  
records of this office that the lands  
of the protestant south of the said  
meander line were returned as  
swamp-land by the government  
surveyor, and passed to the state  
of Oregon as such under the act of  
March 12, 1860 (12 Stat., 3).

The local officers dismissed the  
protest of the French-Glenn Live  
Stock Company, whereupon the  
protestant appealed to this office  
which, by letter "H" of July 14,  
1898, transmitted the record to  
the Department for instructions.  
In the said letter the fact was  
pointed out that the Department  
in its decision of December 3, 1894,  
19 L. D. 439, supra, distinctly re-  
cognized the right of riparian pro-  
prietorship in the state of Oregon  
and its assigns, but at the same  
time directed the extension of the  
survey over the land by complet-  
ing the survey of the townships  
involved; and it was suggested  
that, under the said decision, it  
would seem to be proper to cancel  
all entries made for lands claimed  
by private owners by virtue of ri-  
parian proprietorship.

On May 31, 1899, the Depart-  
ment held in this case, 28 L. D.,  
444, that

If the waters of the lake covered  
this land as indicated by the first  
survey, a conveyance of the lots  
shown by that survey to border  
upon the lake carried with it all ri-  
parian rights of the United States  
and consequently all land added to  
such lots by reliction.

It was contended in behalf of the  
defendant that the meander line  
established by the survey of 1877,  
did not approximately represent  
the water line of the lake as it then  
existed, and was run a consid-  
erable distance outside of the said  
line, but this contention was not  
supported by any affidavits of per-  
sons who had knowledge of the  
condition of the country in 1877.  
The Department held that the re-  
presentations made by the defend-  
ant's attorney did not justify an  
order for a hearing and that, in  
view of the defendant's failure, by  
a proper showing to present the  
hypothesis that the survey of 1877  
was incorrect, it was not necessary  
to discuss the proposition whether  
the government is estopped from  
questioning the correctness of the  
said survey. The holding is here  
quoted:

"I do not deem these statements  
as presented sufficient to justify an  
order for a hearing to determine  
the correctness of a survey made  
more than twenty years ago. It is  
not necessary to discuss or consid-  
er any proposition as hypothesis  
that the survey of 1877 was incor-  
rect either through mistake or  
fraud.

The record was accordingly re-  
turned to this office with the direc-  
tion that action be taken in accord-  
ance with the facts and the views  
expressed in the departmental de-

cision.

By letter "H" of September 21,  
1899, this office, discussing the said  
decision, and assuming that under  
the circumstances of the case the  
Department had jurisdiction to in-  
quire into the correctness of the  
survey of 1877, concluded that it  
was essential under the decision to  
determine first, whether or not the  
said survey correctly or approxi-  
mately represented the water line of  
Lake Malheur at the time of the  
survey, and second, whether the  
recession of the waters of the lake  
was gradual or sudden. You were  
therefore directed as follows:

As there has been no hearing  
this office is unable to determine  
from the record now before it, the  
questions of facts deemed material  
by the Department, and as Mrs.  
Marshall has heretofore failed to  
make a sufficient showing to war-  
rant an order of hearing, it is now  
without authority to direct a hear-  
ing for the ascertainment of such  
facts, but as she has a prima facie  
valid entry of record, an opportu-  
nity must be accorded her to be heard  
in its defense before any action ad-  
versely affecting the same may be  
taken, and as no such opportunity  
has been given, you are directed to  
notify her that she will be allowed  
sixty days within which to file a  
duly corroborated affidavit setting  
forth the facts that the Depart-  
ment has indicated are necessary  
for her to allege and prove in order  
to sustain her entry.

In case such affidavit is filed  
within the time prescribed, you  
will order a hearing if, in your  
judgment, the allegations therein  
contained meet the requirements  
herein made. If a hearing is order-  
ed, notice thereof must be duly  
served on the French-Glenn Live  
Stock Company.

On November 24, 1899, Sarah E.  
Marshall filed her affidavit alleging,  
in part, that she has known and  
resided upon the land in contro-  
versy for nine years, that it has  
not the appearance of ever having  
been the bed of a lake, and that  
she is informed that the survey of  
1877, did not represent the water  
line of Lake Malheur at that time  
and that if it had represented the  
water line the land in controversy  
would not have been included in  
the meander line. On November  
28 and 29, 1899, respectively, she  
filed corroborating affidavits of D.  
H. Smyth and James B. Jentre,  
both Smyth and Jentre alleged  
that they have known the land  
since prior to 1877, that the survey  
made in 1877 did not represent the  
water line of Lake Malheur, that if  
it had represented the water line  
the land in controversy would not  
have been included in the meander  
line, and that the land had not  
since they have known it, been  
covered by the waters of Lake  
Malheur.

On December 6, 1899, you issued  
a notice setting the hearing for  
January 19, 1900. On December  
7, 1899, and Jan. 2, 1900, the  
French-Glenn Live Stock Company  
filed protests against such hearing,  
alleging, in part, that it bought its  
land shown by the plat of the sur-  
vey of 1877 to border on Lake Mal-  
heur in good faith and in the be-  
lief that the land actually extended  
to the water line, and that it would  
not have bought the land if it had  
not been represented by the plat  
as extending to the lake. On Jan-  
uary 9, 1900, the parties stipulated  
for a continuance to April 23, 1900.  
On March 10, 1900, the protestant  
filed an appeal from your action  
setting the case for a hearing, and  
on March 13, 1900, you rejected  
the appeal.

The hearing was concluded on  
October 27, 1900, and on December  
13, 1900, you rendered decision  
recommending the dismissal of the  
protest. The protestant appealed  
on January 21, 1901, within due  
time after notice of your decision.

Only eleven witnesses testified  
at the hearing, five in behalf of the  
protestant and six in behalf of the

defendant, but the record of the  
testimony taken in the case of the  
French-Glenn Live Stock Company  
vs. Alva Springer, tried in the Cir-  
cuit Court for Harney County in  
May 1897, was introduced in evi-  
dence by the stipulation of the  
parties. That was an action for  
trespass involving lands adjoining  
the meander line on the north  
in sections thirty-four and thirty-  
five, the lands in section thirty-  
four lying between the lands of the  
protestant on the south and the  
lands entered by the defendant  
herein. The said lands are of the  
same character as the land in con-  
troversy, and the main issue in  
that case was whether the meander  
line approximately represented the  
water line at the time of the survey  
of 1877.

Lake Malheur as it existed in  
1877, was a shallow body of water  
running nearly east and west, ly-  
ing 3000 feet above the sea level.  
It was about twenty-two miles long  
and averaged about five miles wide.  
West of it and entirely separated  
from it by a narrow isthmus lay  
Lake Harney. The waters of Lake  
Malheur were from six to twelve  
feet higher than those of Lake Har-  
ney. In 1881, the water cut a  
channel through the isthmus, which  
kept on widening until, at the time  
of the hearing herein, it was a  
channel of considerable size through  
which the water from Lake Mal-  
heur emptied into Lake Harney.  
Lake Malheur received its main  
supply of water from the Silvies  
River on the north, and the Blitzen  
River on the south. A consid-  
erable quantity of water emptied  
into the lake from the Blitzen River  
up to 1891, but after that year the  
flow was greatly decreased by rea-  
son of the fact that a considerable  
portion of the water was drawn off  
in ditches and consumed in the ir-  
rigation of lands south of the lake.  
That the water in Lake Malheur  
was higher in 1877 than it was in  
1900, furthermore clearly appears  
from the testimony of witnesses  
who had for many years observed  
the relative stages of the water in  
the two lakes from the isthmus  
separating them. It appears from  
measurements and levels run in  
behalf of the protestant in 1900,  
that the water was from four to five  
feet lower than the meander line  
of survey of 1877.

The banks of the lake were so  
shallow in 1877, and the lake so  
gradually merged from openwater  
into a tule swamp, that it was in  
many places impossible to deter-  
mine where the lake ended and the  
swamp began. Township twenty-  
six, range thirty-one, north of the  
lake, was not meandered, as has  
been above stated, and the follow-  
ing notation is found on the plat  
of the same, the township having  
been surveyed in 1879:

"The surface of this township is  
but a trifle above the level of Mal-  
heur Lake. Salt or Alkali grass is  
found in abundance, with occasion-  
ally a patch of bunch grass. Mal-  
heur lies at an elevation of 3300  
feet above sea level. Malheur and  
Harney Lakes are separated by a  
narrow ridge or isthmus varying  
in width from five to ten chains.  
The ridge or divide is covered in  
places with a thick growth of grass-  
wood. The shore of Malheur Lake  
is not well defined in this town-  
ship, except in sections 29 and 36.

On the plat of township twenty-  
five, range thirty-two, north of the  
lake, which was also surveyed in  
1879, the following notation is  
found, in harmony with the descrip-  
tion of the land given in the field  
notes:

"With the exception of a project-  
ing point of table land in the north-  
west corner the surface of this town-  
ship is level and low. Nearly the  
entire township is overflowed in the  
spring. The eastern part is a tule  
swamp, water standing thereon the  
entire year.

Continued on Third page.