

the lands in contest from 1866 to 1874, and observed them during every month of this period; that said lands were too wet for cultivation and were covered with water during the planting, growing and harvesting seasons, but that no part thereof formed the bed of a permanent lake; that Colvig would testify that in 1864 he was a member of the Oregon Volunteers; that in such service he, in August, 1864, entered Warner valley, Oregon, at the south end of the valley and remained eight days; that said lands formed a part of a large marsh tending from the south end of Warner valley northward to where the Oregon Central Military Wagon Road crossed Warner valley; that said lands were covered by a heavy growth of tule, flag and other swamp grasses, but formed no part of the bed of the lake. Counsel for the settler claimants admitted that each and every one of the witnesses named in the application for continuance would, if present, testify as indicated, whereupon the motion for continuance was overruled. Counsel for the State and its grantees then introduced documentary evidence showing interests of Warner Valley Stock Company and closed.

Counsel for the settler claimants moved for continuance until July 31, and counsel for the State and its alleged grantee, the Warner Valley Stock Company, filed cross motion asking for continuance until August 4. The case was continued until July 31, 1899. The case was called July 31, and on motion of the State of Oregon and the Warner Valley Stock Company, their case in chief was reopened over the objections and exceptions of the settler claimants, and, owing to the illness of the Receiver of your office, said case was continued until August 4, 1899. Before, however, the case was continued, John Mullin filed his appearance as a "friend of the United States" by virtue of a telegram from the Acting Commissioner of this office, of July 29, 1899, authorizing the same without compensation or power to bias the United States. The case was called on August 7, at which time the hearing proceeded. The case was closed as to the taking of testimony on August 28, 1899, and after oral and written arguments by the adverse parties had been submitted, on February 3, 1900, rendered joint decision in favor of the settler claimants, wherein you found that: The testimony shows that in 1864 the lands in controversy were covered with an apparently permanent body of water, and the weight of testimony tends to show that this body of water continued to cover this land until about the year 1881; that the waters had gradually receded with the exceptions of a few years at intervals, when they would rise again, until the year 1889, after which they continued to gradually recede until the fall of 1889, when the land in contest became practically dry.

You discussed briefly the testimony of the principal witnesses and adverted to the fact that a number of levels were made on the tracts in dispute and that one at least of said levels showed a sufficient fall to refute the theory that any considerable portion of said land was covered by an apparently permanent body of water. In this connection you observed: In our judgment, the evidence that showed the actual conditions of the lands, should have greater weight than the surveys and statement of surveyors tending to rebut the testimony of actual conditions as shown by numerous witnesses. February 4, 1899, the attorneys in fact for the respective parties accepted personal service of notice of said decision, and on February 28, and March 8, respectively, the State of Oregon and the Warner Valley Stock Company filed appeal and specifications of error, and supplemental assignment of errors on appeal.

The substance of the testimony given by each of the material witnesses called by the State of Oregon and its alleged grantee the Warner Valley Stock Company, at the hearing, follows:

R. F. McConaughy, I am one of the stock holders of the Warner Valley Stock Company. I first saw the lands in controversy on July 1, 1866. I was up on the mountain and could see all over the valley. It presented the appearance of a tule marsh. In April, 1874, it was in the immediate vicinity of the lands, it was then a large tule marsh covered with tules, canes and swamp grasses. There was considerable water among the tules. In the fall of 1876, I took my cattle there for winter. It was a swamp, but the water had subsided a great deal. The cattle could go into the edge of the marsh quite a distance.

David H. Jones, I resided in Warner Valley, Oregon from September 15, 1867, to April 8, 1869. I have examined the plat of the original survey of townships 39 S., R. 24 and 25 E., and T. 40 S., R. 24 E., on file in this office. I have seen the tracks marked on said plat. The first time I observed the same was in October, 1866. The lands looked like a big tule marsh. I was not close to the lake at that time, but from where I stood, I supposed the water was under water. In the spring of 1867, I took my cattle there for winter. It was a swamp, but the water had subsided a great deal. The cattle could go into the edge of the marsh quite a distance.

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Peter Peterson, I first observed these lands from a point on the mountains about June 1, 1864. About the middle of July, 1867, I passed around the north end of the lake, south, clear around it north to Greaser Lake. It was a tule marsh interspersed with open streaks of water, extending north and south. There was not within the said three townships, so far as my observations went, any permanent lake. In 1864, the waters of the marsh came to what was afterwards established as the meander line, and in some places went beyond the same. I don't think I ever saw the waters as high again as they were in 1864. The water did not remain at the same height during the year. They receded with the approach of the dry season. During the high water season the waters flowed off the north end of the water passed off, it gradually percolated through the tules. The percolation drainage was slow. From my knowledge of his report, I think Fremont's camp on Christmas eve 1846, was on what is called Christ's lake, north of the Stone Bridge, and his camp on the evening of December 25, 1846, was what is called Long Point, Warner Valley, while that of December 26 was in the State of Nevada near the Oregon line. While Fremont's camp was at a place at the south-west of Warner Valley which he presumed to be an outlet, there is an inlet there that might have been mistaken for an outlet.

Cross Examination—I have seen the waters of Greaser Lake united with those of Warner. I saw that in 1864. I do not think that all of Warner Lake as returned by the original survey was covered with water at all seasons of the year. Nor was all the land between said meander line a lake in 1860. I signed the affidavit presented. In explanation I wish to say that there is a discrepancy in the water table as it is written. It should have been "at the high water seasons of the year" and not at "all seasons of the year." I intended to convey the impression that at high water seasons, the height of the water was much the same, and that during dry seasons, the water receded very much. The affidavit was executed in reference to a matter pending between McConaughy and Charles Tomnington affecting the lands in controversy in a civil suit, and is in part as follows: "That I have resided and have been in the vicinity of the said Warner Lake and have observed the same (i. e., the waters thereof) every year since the said 1864 inclusive; that to my certain personal knowledge, in the year 1864, the waters of the said Warner Lake were as high as they have ever been since the date." That at the time of my first visit to the said valley, in the year 1864, the waters of the said Warner Lake were up to the meander line, as first established by public survey, and which I am very well acquainted with by my having been upon the ground and seen the water table as returned to me by my personal observation, and that the said waters remained up to the meander line which was established prior to 1875, until about the year 1876. That I verify before me the personal knowledge of the said personal observation, that the said Warner Lake was naturally covered by waters which extended up to the originally established meander line thereof established by the public survey, and I certify before me that my personal observation, that the said waters, ever since 1864, all of Warner Lake as originally surveyed and measured by the United States Survey, was up to the bed of the lake as returned by the original survey, and was covered during all seasons of the year by water, and was a lake of marsh in fact, during the year 1860, and prior thereto, at all seasons of the year.

W. C. Hagle—I resided in Coleman Valley and Warner Valley from October 1872 to April 1878. Coleman Valley is situated some eight or ten miles distant from Warner. I have to some extent examined the original plat of survey and am familiar with the tract located as Warner Lake. I first saw said tract in October 1872. Its condition was that of an immense marsh—tule marsh, with the exception of two open lakes, one on the north and one on the south of Deep Creek, and the other about seven miles north of Deep Creek. The first lake north of Deep Creek covered an area of between a half section and section, the second one was a mile wide and about a mile long. During the year 1872, I crossed the marsh a number of times on the Stone Bridge. (Note: This bridge is situated in sec. 21, T. 37 S., R. 24 E., and sec. 19, T. 37 S., R. 25 E.) During the spring of 1873, the water was very high, and the marsh was inundated with water, and was covered with a heavy mass of vegetation. The overflow was caused by the melting of snow on the mountain ranges. The overflow would continue until, probably, the first of July, and would gradually subside until the late fall of the year. The water would recede to the extent that in the fall considerable hay could be cut on land covered with water on the first of July. I crossed the marsh in October 1873, from the east side, to what is called the Big Lake, between the two branches of Deep Creek. That part of the marsh was an almost impenetrable jungle. The tules and other vegetation which had grown for years formed a mass that extended above the water, where it was found. This vegetation retarded the flow of the water to the north. It created a continuous dam that very perceptibly retarded the flow of water. The water was about three to five thousand feet of cattle wintered in the south Warner marsh when it was there. At that time the term Warner Lake was applied to that part of the valley situated west of the Stone Bridge, and Warner marsh to that south.

Andrew Morris—I assisted Deputy Surveyor, John H. Neal, in making survey of townships 39 S., R. 24 E., 39 S., R. 25 E., and 40 S., R. 24 E. I had to team and sled, and I made a trail down the tules. The team belonged to McConaughy and the sled was made for the purpose on McConaughy's ranch. I was paid by McConaughy. I think Neal talked of throwing up the job and going home, and McConaughy wanted him to go ahead and survey it, and I think he agreed to furnish a man. I worked for McConaughy from until they organized the corporation, and afterwards with the Warner Valley Stock Company, in all eleven years.

Geor. S. Nickerson—I reside at Klamath Falls, Oregon. I ran a line of levels in accordance with instructions from southeast corner of section 18, T. 40 S., R. 24 E. to the Stone Bridge. I used a surveying engineer level. I have had experience in running levels. I worked at that business and surveying for eight years. I found the difference in the elevation from the point taken to be thirty-five hundred feet. The distance run was about twenty-nine miles, and thirteen hundred feet. It was impossible for the marsh to have been a prominent lake within the memory of man, because of the difference in level. The water was a continuous decline to the north. It was not uniform. The fall was greater the first five miles, fifteen and sixteen feet. At Greaser Lake the fall was 19.5 from point of beginning, and from Greaser Lake to the Stone Bridge, the fall was thirty-five hundred feet. I received by instructions from Col. Cogswell, Counsel for the State of Oregon, and the Warner Valley Stock Company, was assisted in the survey by Mr. J. E. Bowman, Mr. Tomnington and two others furnished by the latter, whose names I do not remember.

Daniel P. Browne—I am the Secretary and Treasurer of the Warner Valley Stock Company. Warner is one of the directors and stock holders therein. I have traced out the camps of Captain John C. Fremont in his exploring expedition through Warner Valley in December 1846. The camp of December 25, was what is called Horse Camp in North Warner about some twelve or fifteen miles north of the Stone Bridge. I easily recognized the camp of Dec. 24, which is Wilson's or Christmas Lake. This lake is about five miles north of the Stone Bridge. I located his camp on December 25 at Long Point in sec. 11, T. 38 S., R. 25 E. His next camp that of December 26, was in Coleman Valley.

Assisted Mr. Nickerson in running the levels. I carried the rod. I noticed a slight movement in the waters of the marsh, a sluggish current to the north.

F. M. Miller—I have resided in Goose Lake Valley about thirty years. I was acquainted with the lake when I first became acquainted with it. I couldn't say how much, at a guess, two or three feet. I was in Warner Valley ten or twelve years ago.

Cross Examination—I was in Warner Valley in the capacity of Deputy Sheriff, in a case regarding those lands. My purpose was to eject a settler named Tule from the land. I found the lake at home. It was apparently same. I took a team and wagon, and moved what effects he had over to the Deep Creek ranch—McConaughy's—I drove into a corral, and left his things in the wagon. He then accompanied me to Bidwell, California, paid the cost of the suit, and I did not see him or more of him until some time afterwards, at which time he was insane.

A. C. Kessler—I was stationed at Camp Warner as Captain of the Tenth Third Infantry, from the fall 1868 to 1870. I became acquainted with that part of Warner Valley lying south of the Stone Bridge in the winter of 1868 and 1869. During the years 1869 and 1870, and again in 1872, and after the spring of 1874, for two and a half years I traveled through that part of the valley. From my observation, the greater part of that county was a tule marsh, with the exception of the lakes. In the fall of the year, the water would dry up in some places more than others, and you could ride out horseshoe quite a ways, and the cattle would work out a great deal farther among the tules, than in the spring.

The State of Oregon and the Warner Valley Stock Company introduced in evidence, under the terms of the stipulation hereinbefore noted, transcripts of testimony given by witnesses in the various hearings, that had theretofore taken place. The material parts of such testimony together with the case in which it was given, follow:

Peter Peterson—F. B. Wakefield case—I accompanied a detachment of Oregon Volunteers under the command of Col. Drey, in 1846, from Ft. Bidwell, California, to what was then known as Warner Lake. I was with a detachment that attempted to pass along the west side of Warner Lake, and finding the route impracticable, went to the east side of the lake, which was at that time an arm of Warner Lake. We went between the arm and the water of the lake, and passed close by the

digout house.

Q. What was the condition of the land in the south end of what is known as Warner Valley in July 1867? A. It was a lake interspersed with open ground. The water came to the rim, on the east side of the lake, and to the foot of the mountains on the west side, south of east and west line from Greaser Lake. The water extended south of an east and west line from the digout.

Peter Peterson—Josef Morrow case—I am a cousin of R. F. McConaughy, the claimant under State of Oregon.

F. M. Jones—A. C. Wiley case—I settled in Warner Valley in 1867 and resided there until 1889. I first saw the land in the spring of 1869. It had the appearance of a marsh or lake. I observed these lands during the spring, summer and fall of 1869. From that time until twenty or thirty years ago, I probably passed the lands fifteen or twenty times in the spring, summer and fall of 1869, and the same was true of 1870. The character of these lands during the spring, summer and fall of each and every year from 1869 to 1882, was that of a marsh or lake. So far as I observed, the vegetation growing on said lands was tule and swamp grasses. The water that overflowed those lands was clear to the east most of the time. I mean to the foot hills close to the road. I observed indications that the water had been higher than it was in 1869. It appeared to have been higher than it was in 1869. It was clear from the motion of the water where it had washed the sands around the margin of the lake and also the tules on the rocks.

There was a rock about one-half mile from the lake, and it was about a mile or two hundred yards in the water. This rock was west and probably north of the land in dispute. In passing through the vicinity I went to the east end of the lake. The ground on which the rock stood appeared to have been dry soil. It appeared to have been filled from the mountain and was known as the Lone Rock. I think it would be possible to cross at the Lone Rock bridge, with a trail and wagon, when the water was not over the water.

N. P. Tomnington case—Perpendicularly, I think the water is ten feet lower than it was in 1868. As to the surface, the north in the same direction, now it has gone down into a chain of lakes, gone down for miles.

Joseph Brown—A. C. Wiley case—I first observed the land in controversy in May 1867. I was with 200 or 250 yards from the lake, next in the vicinity of the lands in 1869, in May and June, and again in May 1871. In 1867, the lake was pretty full, had a deal of water in it. In 1869, it had gone down a little. In 1871, it was about the same as any time during the three years I had seen it.

Q. Could you observe any of these lands at those visits? A. It was covered with water. Q. What vegetation did you find growing upon the lands in controversy at those three visits. A. Tule, water and tule. It looked like a lake. It was a lake too.

J. M. Wiley case—I first personally observed the land in controversy about a year ago. I was with 200 or 250 yards from the lake, next in the vicinity of the lands in 1869, in May and June, and again in May 1871. In 1867, the lake was pretty full, had a deal of water in it. In 1869, it had gone down a little. In 1871, it was about the same as any time during the three years I had seen it.

Q. Would you observe any of these lands at those visits? A. It was covered with water. Q. What vegetation did you find growing upon the lands in controversy at those three visits. A. Tule, water and tule. It looked like a lake. It was a lake too.

J. M. Wiley case—I first personally observed the land in controversy about a year ago. I was with 200 or 250 yards from the lake, next in the vicinity of the lands in 1869, in May and June, and again in May 1871. In 1867, the lake was pretty full, had a deal of water in it. In 1869, it had gone down a little. In 1871, it was about the same as any time during the three years I had seen it.

F. A. Hendrickson—A. C. Wiley case—I am acquainted with the land in controversy. Now reside and have resided since 1867, about five miles therefrom. I first observed the land in 1876. It had the appearance of a tule marsh. The tract was overflowed at said time. It was a part of Warner Lake or Marsh. The land had the appearance of tules growing up through water.

Q. Was any portion of the land in controversy included in Warner Lake or Marsh at that time? A. It was included in the lake at that time. Q. Was any portion of it covered with water at that time? A. It was covered with water except the sage brush knoll referred to, with tule and flag growing up through it.

I saw over all of said lands on horseback during the month of December, 1875. Tule water was frozen and I passed over them on the ice, with the exception of the sage brush knoll, etc. I was over the land during January and December 1876. The water was frozen over and I passed over them on the ice and did not observe the condition of the land, with the exception of the sage brush knoll referred to. There was a growth of tule and swamp grass that showed above the surface of the ice. The land in 1876, except that in 1881, the water began to recede and the land became drier.

R. Day case—It has been overgrown with water and covered with a growth of tule and swamp grass during the spring and summer months of the entire time and from 1876 to 1884, it has been covered with water during the entire months of every year during that time.

Sylvester Dixon case—I am acquainted with the land. First saw it in October 1876. It was all covered with water, with the exception of a small grassy knoll containing about four or five acres.

A. N. Bennett case—Q. Upon what legal authority is the digout situated? A. It is known as the digout house, now is situated on lot 3, sec. 18. But the original built in the creek, from which this house obtains its name, is on the line between lots 3 and 6.

J. H. Morrow and J. W. Morrow case—Q. What has been the condition of the shaded legal subdivision of this land from April 1878 to June 1887? A. From April 1878 to 1887, inclusive, they were covered with water during the entire spring and summer months, and were covered with ice during the winter months of those years.

Josef Morrow case—I have seen the land in controversy a majority of the months from April 1878 to June 1887. The land has been covered with water during the entire years, with the exception of 1877, 1888 and 1889.

W. A. Moore case—LANGRISH SAME AS JOSEF B. MORROW CASE.

A. D. Frakes case—I first became acquainted with the land in controversy in 1876. I was not on it, but it appeared to be a tule marsh. Was next in the vicinity of the land in December 1877. It was covered with water, and I could not get upon it at that time. When I first saw this land in October 1876, the entire tract was under water. From 1876 to 1885, the tract which is situate near the center of Warner marsh was under water the entire time.

N. P. Tomnington case—I have known the land since 1876. The land in controversy was a marsh when I first saw it in 1876. In December 1877, the tract was covered with ice. In 1879, the land was overgrown with water during the summer months.

C. E. Dodge—S. Dixon case—I was first in Warner Valley in July 1867. I entered from near the south end and passed on the east side of the lake.

Q. What was the condition of Warner Lake at that time? A. It was a perfect lake from the east foot hills to west foot hills. Judging from the depth of the water, it was a permanent lake.

John M. Sanders—A. C. Wiley case—I reside at Ft. Bidwell, Cal., and have since 1867. I am acquainted with the land in controversy. First saw it in 1867. It is about 25 miles from my place of residence. I have examined some of the corner posts or stones of this land. I first saw it in April 1868. I made those trips up and back, once in July, once in September and once in November. I passed within a quarter of a mile of the land. My observation was such that I am enabled to testify as to the character of the land, during said time. Its condition was that of a lake or swamp. It could not have been cultivated because of being too wet. The water that spread over this land in 1868, was a part of a large body of water known and called Warner Lake. The overflow seemed permanent and not temporary. The most of the way around Warner Lake or what was then called Warner Lake, there was a well defined beach to which the water came.

If I had been surveying this land in 1868, I would have called it a lake. My observation during the spring, summer and fall of 1869, was such as to enable me to testify as to the character of said land. It was the same as in 1868. So far as I could see the waters of Warner Lake or marsh covered the same in the spring, summer and fall of the year '69. I turned my cattle out to graze in the vicinity of these lands in '68, '69 and '70. They grazed on the hills and highlands around the margin of the lake, but did not graze on the land in controversy because it was too wet.

I observed the land again in September, 1884, and noticed a decided change in the character thereof. The vegetation growing on the land was finer; the lands were drier. In my opinion the change was caused by a succession of dry years, which caused the lake to recede, and another great thing has been the filling up of the valley by sediment washed in from the hills in time of flood. Some of the waters that flowed into Warner Lake have been diverted by ditches to Surprise Valley, Modoc county, Cal. The succession of dry seasons began in 1875 and ended in 1889. A great many of the lakes in that section of the country went dry and the others were very low. I would not have attempted to travel over any part of this land in 1868, '69 or '70 without a boat.

Cross Examination—Q. Was the beach a substantial water line and a permanent one, or was it composed of woods and floating debris that was washed up by extreme high water. A. It appeared to be a permanent one composed of matter washed up by the lake and rotted and formed a permanent water line.

Q. At your visit to the place in 1880, what was the appearance of this beach compared with what it was when you first saw it? A. The beach is very much the same with the exception that there is no new material washed upon it.

John M. Sanders—N. P. Tomnington case—Was first in the vicinity of the land in contest in 1868 in May. I should judge I was about a mile and a half from the land in controversy on the sand hills. I saw the water where the land is now, the whole country was covered with water.

Q. Where does the present travel road run? A. It runs along the edge of the valley which was under water at that time. Q. What was the condition of the country right east of where you camped? A. A lake. Q. How deep was it? A. Well it was deep enough to swim. I went in after some ducks and got in over my head.

Q. From your observations of the land in 1868, 1869 and 1870, and also from the appearance of the water line along the margin of Warner Lake, what in your opinion, was the condition of all the land in contest in 1860. A. Well my opinion would be that it was a lake in 1860. A. N. Bennett case—Q. What was the condition of this land during the year 1868, when you saw it? A. A swamp. Q. State whether or not it was covered with water these times? A. It was during the spring months. In the fall when I was there the vegetation covered the ground so that a person could not see.

Pardon Brown—Sylvester Dixon case—I have resided at Ft. Bidwell, Cal., for the last 21 years. I am acquainted with the land in controversy. I first saw the land or what was to be seen of it, in May 1870. With the exception of possibly four or five acres, it was covered with water. Q. State whether the waters of Warner marsh surrounded this lone rock at that time? A. At that time it was known as Warner Lake and the waters of Warner Lake surrounded the rock at that time. Q. What was the condition of these lands in contest from 1872 to 1877, inclusive? A. They were principally covered with water. There might possibly have been some seasons late in the fall, towards the latter part of that time, that a man could have got on there.

Cross Examination—Q. Did you ever see this lone rock in May 1870? A. I did, a portion of it. Q. About what was the depth of the water immediately surrounding it? A. I should judge at least three feet. W. C. Light—Amos Lloyd case—I reside at Ft. Bidwell, Cal., and am acquainted with the land in controversy. I passed within one-fourth of a mile from the land in August, 1871, and again in November, 1872; it was under water and

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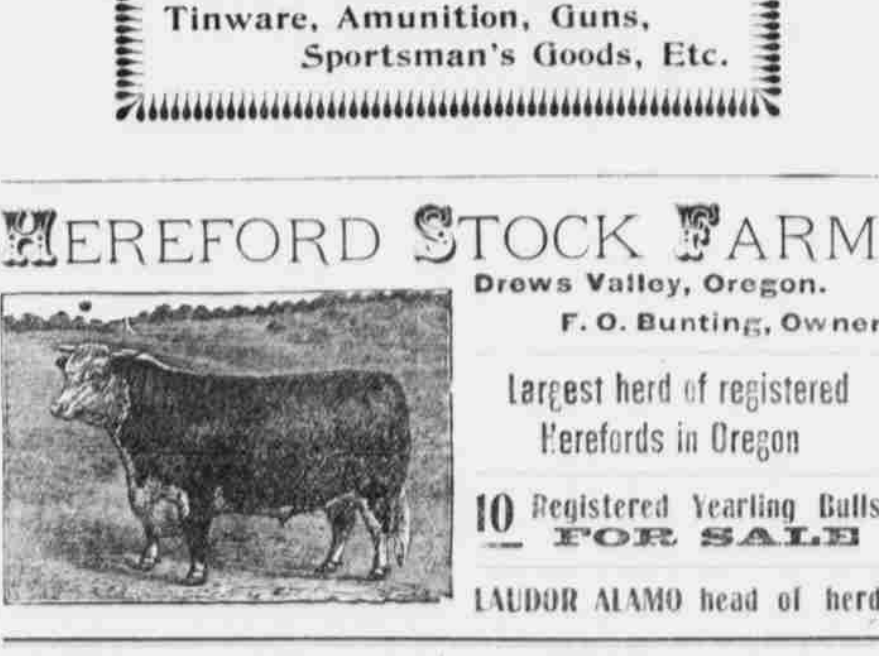
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