WATER-RIGHT DOCKET

Grand Teton National Park

Docket No: 9

TWO OCEAN AND EMMA MATILDA LAKES (CANCELLED)

Preliminary Docket Information

07-03-2012: Notice of Cancellation

NOTICE OF CANCELLATION

This docket has been cancelled and may not contain all documents that pertain to the cancelled water right. If you wish to view this docket in its entirety, please contact the National Park Service Water Rights Branch, 1201 Oakridge Drive, Suite 250, Fort Collins, CO, 80525.

WATER DOCKET INFORMATION

AREA GRAND TETON NATIONAL PARK

DOCKET NO. 9 (PART I)

APPLICATION NOS. 3770, 3771, 16190, & 4232 Cancelled Cancelled Cancelled Cancelled

PERMIT NO. _____

CERTIFICATE NO. _____

TITLE OF DOCKET TWO OCEAN AND EMMA MATILDA LAKES (PART I)

PRIORITY _____

REMARKS: _____

_____

IN THE SUPREME COURT, STATE OF WYOMING

October Term, A. D. 1941

January 5, 1942

In the matter of the Appeal of the Utah-Idaho Sugar Company from the action of the State Engineer in the Endorsements placed upon Applications for Amendment of Permits Nos. 3770 Res. and 3771 Res. and Applications for Secondary Permits from Two Ocean and Emma Matilda Reservoirs (Applications Nos. 13 1-2-3-4/357 and 14 3/136.)

SNAKE RIVER LAND COMPANY,

Protestant and Respondent,

and

STATE BOARD OF CONTROL,

Respondent,

vs.

UTAH-IDAHO SUGAR COMPANY,

Applicant and Appellant.

No. 2208.

Appeal from the District Court, Teton County: Hon. H. R. Christmas, Judge.

For the appellent there was a brief by John U. Loomis of Cheyenne, Wyoming, Ashby D. Boyle of Salt Lake City, Utah, and Otto E. McCutcheon of Idaho Falls, Idaho, and oral argument by Mr. Loomis.

For the respondent there was a brief by Ewing T. Kerr, Attorney General, Harold I. Bacheller, Deputy Attorney General, and Arthur Kline, Assistant Attorney General, of Cheyenne, Wyoming, and oral argument by Mr. Kerr.

For the protestant and respondent there was a brief by Fabian, Clendenin, Moffat & Mabey of Salt Lake City, Utah, and Arthur Kline of Cheyenne, Wyoming, and oral argument by Mr. Moffat.

Riner, Chief Justice.

This cause is before the court by direct appeal from a judgment of the district court of Teton County, which "confirmed" a decision of the State Board of Control, which theretofore, on appeal from certain orders, made by him, sustained the action of the State Engineer of this state regarding the proposed amendment of several reservoir permits, and as to other matters pending before him. The Utah-Idaho Sugar Company was the applicant for the amendment of these permits and the appealing party throughout this litigation. The Snake River Land Company filed a protest before the State Engineer against the applications of the Utah-Idaho

Sugar Company and is designated as the "protestant and respondent". The State Board of Control is also named herein as a respondent.

For convenience and brevity the Utah-Idaho Sugar Company, which is a Utah corporation authorized to transact business in Idaho and Wyoming and certain other states, will subequently be mentioned as the "appellant" or the "Utah Company"; the respondent, the State Board of control, will usually be herein referred to as the "Board"; and the Snake River Land Company, also a Utah corporation with aurhority to do business in the State of Wyoming, will be designated as the "Land Company".

Subject to the condition of the record on the instant appeal, which will hereinafter be discussed, the facts which we deem material to be borne in mind so far as the merits of this proceeding are concerned, would appear to be these:

There are, or rather, were, for one of them has ceased to exist, two corporations, each bearing the name "Osgood Land & Livestock Company". One of these corporations exists through and under authority granted by the State of Idaho, while the other was created under Wyoming law. The relation existing between these two corporate entities is not very clearly defined in the record aforesaid. Unless otherwise indicated in the subsequent discussion, the Wyoming corporation of this name will be intended, and for brevity it will be referred to as the "Osgood Company".

This litigation undertakes to draw in question the use of two reservoirs constructed upon Two Ocean and Emma Matilda Lakes, which are bodies of water located in Teton County, Wyoming, and upon lands owned and controlled by the United States government. It also involves the use of certain water channels, viz., Two Ocean Creek, which carried the run-off from Two Ocean Lake into Pacific Creek, and Emma Matilda Creek, which performs a like service for Emma Matilda Lake. Pacific Creek is a tributary of the Snake River in said County, and these water channels are for the most part on land owned and controlled by the United States of America.

In the year 1919 Joseph Markham and Roy Lozier filed in the office of the State Engineer of the State of Wyoming an application for Permit No. 3861-Res., proposing to build a dam three feet high near the outlet of Emma Matilda Lake and to store 2579.7 acre feet of water. This permit was granted and final proof made. A secondary permit No. 15569 was also given to these parties, together with another person, for the beneficial application of this stored water to 386.5 acres of land in Teton County, Wyoming. The reservoir permit was adjudicated for 1710 acre feet capacity and the secondary permit aforesaid for the irrigation of the land mentioned therein.

The same year H. C. McKinstry and William C. Thompson filed in said office an application for Permit No. 3487-Res., proposing to construct a dam two feet high near the outlet of Two Ocean Lake and to store 1024 acre feet of water. This permit was also granted and final proof made. Secondary Permits Nos. 15185 and 15186 issued for the beneficial use of this stored water on 246.6 acres in Teton County, Wyoming. The Reservoir Permit was adjudicated for 512 acre feet capacity and said secondary Permits for the irrigation of the lands therein described.

The forestry service of the United States government, apparently in direct charge of these lands, seems to have assented to the construction of these small dams designed to furnish water for the use of certain ranches in Teton County, Wyoming. These dams were subsequently raised somewhat in height by successors to the original applicants, the Two Ocean Reservoir Dam to six feet and the Emma Matilda Dam to four feet. The Utah Company claims some interest in these reservoirs through certain deeds and assignments, as does the land company as purchaser of much of the ranch lands to which water was adjudicated under the secondary permits aforesaid. None of these rights appear to be directly involved in the case at bar and they are briefly described now merely to show the condition of affairs existing at the time of the applications for the permits here in question and to throw some light on the interests of the respective parties hereto at that time.

Subsequently and on October 8, 1919, one C. C. Carlisle filed applications in the office of the State Engineer of this State to construct

water impounding works, which would very greatly enlarge the capacity of the reservoirs aforesaid by undertaking to enlarge the Two Ocean Reservoir to an available capacity of 65,605 and the Emma Matilda Reservoir to 60,900 acre feet. Application was also made for a water supply canal to these reservoirs from Pacific Creek by the construction of the Twin Reservoir Supply Canal. These applications were thereafter granted by the State Engineer of Wyoming on September 14, 1921, as Permits Nos. 3770-Res. and 3771-Res. for the enlargement of the Two Ocean and Emma Matilda Reservoirs respectively, Permit No. 16190 for the Twin Reservoir Supply Canal and Permit No. 4232 Enl. for the enlargement of this canal.

In this connection it may be observed that the aforesaid application No. 3770 Res. stated that the "reservoir is located in the channel of Two Ocean Creek", and the application No. 3771-Res. sets forth that this reservoir "is located in the channel of Emma Matilda Creek". By original application or by assignment these permits were eventually held by the Osgood Company. All four of these permits referred to in the preceding paragraph were conditionally granted, as the endorsements made thereon by the State Engineer in his official capacity disclose:

> "This permit is conditioned upon the strict performance by the permittees, or their successors or assigns, of the certain agreement dated May 2, 1921, between Frank C. Emerson, State Engineer, and The Osgood Land and Livestock Company, and is subject to cancellation at any time the terms of said agreement are not complied with.
> "This permit grants only the right to use surplus water of the stream when all prior rights are satisfied.
> "Construction of proposed work shall begin within one year from the date of approval.
> "The time for completing the work shall terminate on December 31, 1924.
> "The time for completing the application of water to beneficial use shall terminate on December 31, 1924, and final proof of appropriation shall be made withine five years thereafter."

We have italicized the particular portion of these endorsements which is especially pertinent in the case now before us.

The lands which were proposed to be affected by the enlargement of these reservoirs, and also the land through which the supply canal was to be built, are, as hereinabove generally indicated, Federal domain

property, under the ownership, control and supervision of the United States government. They were temporarily withdrawn from settlement, location, sale or entry by Executive Order of the President, No. 2908, dated July 8, 1918. This order was supplemented and extended by a second withdrawal of these lands under date of January 28, 1921, Executive Order No. 3394, dated January 28, 1921.

Due to these several withdrawal orders and the prospective difficulty of obtaining rights-of-way for the proposed constructions and their consequences, a written agreement was entered into under date of May 2, 1921, by and between the then State Engineer of this State, Frank C. Emerson, as such Engineer, and also as a "trustee for and in behalf of the State of Wyoming", as party of the first part, and the Osgood Company aforesaid, as party of the second part, wherein, after setting forth certain recitals, it was agreed by and between the respective parties as follows:

"I.

"The party of the first part, does hereby agree that upon the execution of this Agreement, and the delivery of the necessary Surety bond or bonds, that he will duly approve the applications now pending in his office covering the granting of permits for the construction of the said reservoirs and supply ditches, together with the necessary water appropriation required for said reservoirs, and that he will issue the necessary permits in connection with the said applications, authorizing and permitting the said second party to construct the aforesaid reservoirs and divert the waters from the streams available, and particularly from Pacific Creek, to be stored in said reservoirs.

II.

"The said party of the second part agrees that upon the issuance of the aforesaid permits, it will make due and proper application to the General Land Office of the United States for the purpose of securing the necessary rights-of-way for the construction of the reservoirs and supply ditches contemplated in the aforesaid applications, and that it will use all due diligence in securing the said rights-of-way.

III.

"The said party of the second part agrees that upon the said United States General Land Office granting to the second party the necessary rights-of-way, permitting the said second party to construct the aforesaid reservoirs and supply ditches, that the said second party, its successors and assigns, will pay the party of the first part, as Trustee for said purpose, the sum of thirty thousand dollars ($30,000.00), the same to be used, -- one-half in connection with the building of a bridge across Snake River at or near Wilson, in Jackson Hole, Wyoming, and one-half to be used in connection with construction of bridges across Snake River at or near Menor's Ferry, Jackson Hole, Wyoming, which said sum the said second party agrees to pay as follows, to-wit:

$15,000.00 at the time the said rights-of-way are granted to the second party by the said United States General Land Office, and $7,500.00 within twelve (12) months thereafter, and the remaining $7,500.00 within eighteen (18) months thereafter.

IV.

"The said party of the second part agrees to furnish Surety bond or bonds, guaranteeing to the party of the first part, the performance of the acts herein provided to be performed by the said second party, which said bond or bonds, it is hereby mutually agreed, shall be correspondingly reduced as the respective payments are from time to time made.

V.

"It is finally agreed and understood between the parties hereto, that in the event of the United States General Land Office refusing to grant the necessary rights-of-way, required in the construction of the said reservoirs and supply ditches, that then this agreement shall become null and void upon the said party of the first part for concellation, the said permits to be issued by him, and which are covered by this agreement."

Attached to this agreement appears to be a written "stipulation" stating:

"The understanding of parties signed hereto is that, if certain bonds are executed by the Osgood Land and Livestock Company of Wyoming and delivered to the State Engineer of Wyoming, and other terms and conditions of this agreement are complied with, the certain reservoir applications for the storage of water at Emma Matilda and Two Ocean Lakes and Pacific Creek will be approved by the State Engineer of Wyoming.

"The aforesaid bonds shall be in favor of Frank C. Emerson, State Engineer, as trustee for the State of Wyoming, and are designed for the purpose of providing funds to assist in constructing two certain bridges across the Snake River, the necessity for which in part arises from the release of water stored in reservoirs on the Upper Snake River. One of the aforesaid bonds shall provide for the payment of Fifteen Thousand Dollars ($15,000.00), in cash, to the Trustee, upon the approval of the necessary rights-of-way by the Federal Government for the proposed Emma Matilda Lake and Two Ocean Lake Reservoirs, the said amount to be used by the State toward the construction of the new bridge near Wilson. A second bond shall provide for the payment of Seventy-five Hundred Dollars ($7,500), in cash, to the Trustee, within twelve (12) months after the said rights-of-way are granted by the Federal Government, and in additional Seventy-five Hundred Dollars ($7,500), within eighteen (18) months after the granting of the said rights-of-way. The bonds shall be surety company bonds, and shall be approved as to form by the Attorney General of Wyoming.

"The granting of the said reservoir applications is further conditioned upon the assignment by C. C. Carlisle to the Osgood Land and Livestock Company of Wyoming of any permits that may be issued in his name. The proposed action of approval upon the said applications by the State Engineer shall be taken as soon as the aforesaid bonds and assignments are received in his office."

This stipulation, undated, was signed by Frank C. Emerson, State Engineer, C. C. Carlisle, and one O. A. Johannesen, the attorney for the Osgood Company and designated as such in one of the recitals preceding said agreement of May 2, 1921. The original agreement of that date was signed by Frank C. Emerson, "State Engineer of Wyoming and

Trustee as hereinabove stated", and the "Osgood Land and Livestock Company" by its president and secretary.

Pursuant to this agreement and stipulation the Osgood Company seems to have tendered only a personal bond signed by individual sureties resident in Idaho, conditioned for the payment of the $30,000, as provided in the above quoted agreement of May 2, 1921. (In that connection, as to what is usually required of sureties in this State, see Section 69-107.) No surety company bond appears to have been furnished, nor was this bond apparently approved as to form by the Attorney General of Wyoming, as provided by the "stipulation" of the parties as aforesaid.

The Osgood Company also made application to the United States General Land Office for the necessary rights-of-way for the construction of the several reservoirs and supply ditches contemplated by the Carlisle permits aforesaid, but failed to secure such rights-of-way, its application in that behalf being rejected by the Department of the Interior, the decision of the Commissioner to that effect being dated May 14, 1923. The sum of money mentioned in said agreement to be paid by the Osgood Company for bridge construction work, accordingly, in whole or in part was never forthcoming and nothing more seems to have been done in the matter of securing these rights-of-way.

Under date of April 15, 1920, the Idaho corporation, also named the Osgood Land and Livestock Company, entered into a contract with the Utah Company agreeing to sell to the latter corporation, together with certain lands located in the State of Idaho, as well as certain Idaho water rights, "Five thousand (5,000) acre feet of stored water, the same being a storage right which the said party of the first part is securing for use upon the premises described in 'Group A'". "Group A" includes these Idaho lands. No lands in Wyoming are mentioned in said "Group A". In this connection it may be observed that while the reservoir permits Nos. 3770 Res. and 3771 Res. issued to Carlisle, as above described, do not describe the lands to be irrigated by the proposed stored water, the aforesaid permit No. 16190 for the Twin Reservoir Supply Canal and No. 4232 Enlargement, for the "first Enlargement" of the

Twin Reservoir Supply Canal, in response to the statement in the official form used, "the land to be irrigated is described in the following tabulation" and the direction thereunder, "(Give Irrigable Acreage in Each 40-Acre Subdivision. Designate Ownership of Land, Government, State of Private. If private, Give names of Owners.)", do not supply any data of this kind whatsoever, the spaces left for township, range and section being left vacant. The permit No. 16190, above mentioned, was applied for by the Osgood Company through one O. A. Johannesen, who signed the application. Under date of September 14, 1921, permits Nos. 3770 Res. and 3771 Res. and 4232 Enlargement were assigned by C. C. Carlisle to the Osgood Company. Permit No. 16190, as well as permits Nos. 3770 Res., 3871 Res. and 4232 Enlargement, aforesaid, were on May 23, 1938, undertaken to be transferred by "Assignment and quit Claim Deed" to the Utah Company and O. A. Johannesen by the Osgood Company and its Board of Directors last elected, the Osgood Company being recited as then "defunct".

The claim is now advanced and there appears to be oral testimony that apparently was given before the State Engineer to that effect, that the five thousand acre feet mentioned in the contract between the Idaho Osgood Land and Livestock Company and the Utah Company, as described above, referred to the Osgood Company's rights obtained as heretofore stated, in the Two Ocean and Emma Matilda Reservoirs.

On July 23, 1936, the Utah Company made applications to the State Engineer of Wyoming to amend Permits Nos. 3770 Res. and 3771 Res. to conform to the works originally constructed and existing. These applications set forth that the Two Ocean Reservoir was constructed to a total capacity of 3046 acre feet and the Emma Matilda Reservoir to 1340 acre feet. Applications were also made for secondary permits to apply this stored water to specific lands in Bonneville County, Idaho. Accompanying these applications were (1) a request on behalf of the Utah Company for a special permit to be issued by the State Engineer in favor of the Utah-Idaho Sugar Company, which would grant that corporation

> "permission to take a certain quantity of water from the State of Wyoming into the State of Idaho for the application of beneficial use to lands in Bonneville County, Idaho, which water is appropriated to the Utah-Idaho Sugar Company under the following Permits issued by you to them.

"No. 3770-R, No. 3771-R, and Secondary Permits No. 3770-R. and No. 3771-R, and

(2) a request on behalf of said Utah Company for

"cancellation of the following Permits now held in the name of the Osgood Land and Livestock Company on your records, and according to a complete report filed herewith, assigned from the Osgood Land and Livestock Company to the Utah-Idaho Sugar Company, of Salt Lake City, Utah, a Utah corporation, and whom I represent as Agent:

"Permits No. 3770-R, No. 3771-R, No. P-16190 and No. 4232 Enl.

"I also request, as agent for the Utah-Idaho Sugar Company, that the date of priority in each case be preserved and applied to amended application for secondary Permits filed herewith."

These requests were signed by "Earl S. Albert, agent for the Utah-Idaho Sugar Company."

Just here it may be noted that the Twin Reservoir Supply Canal, and, of course, the enlargement thereof were never constructed. Request numbered "(1)" supra was evidently made to obtain action on the part of the State Engineer under Section 122-1601 Revised Statutes, 1931, which reads in part:

"and provided, further, that the water stored in any reservoir cannot be used outside the boundaries of the state of Wyoming without special permit from the state engineer; and provided, further, that the state engineer may deny any use of water from any reservoir that would be detrimental to the public interest."

This statute was enacted originally by the sixteenth state legislature and received executive approval February 23, 1921.

The Land Company made its protest to the State Engineer of Wyoming against these applications for amendment upon several grounds; first, as owner of certain lands in this state included under the secondary permits and adjudications of the original construction of the two reservoirs; and, second, as a corporation formed for the purpose of preserving through subsequent government ownership and control "certain of the scenic features and beauty spots in Jackson Hole."

June 1, 1938, a hearing was had before the State Engineer of Wyoming. Testimony was taken and evidence submitted regarding these matters which are outlined above. This hearing resulted in orders being made by the official last mentioned under date of December 5, 1938, that permits Nos. 3770-Res., 3771-Res., 16190 and 4232 Enlargement be cancelled; that applications for amendment of Permits Nos. 3770-Res. and 3771-Res. be rejected and that

"It is further ordered that applications for secondary permits for use of water stored under Permits Nos. 3770 Res. and 3771 Res., under filing numbers 13 3& 4/357, and application for special permit to use water stored in Two Ocean and Emma Matilda Reservoirs outside the State of Wyoming be and the same hereby are rejected."

This action of the State Engineer was affirmed on appeal by the Utah Company to the Board aforesaid, by order of that Board dated July 24, 1939, giving as its reason for its action in the premises that "the State Engineer in rejecting said applications is hereby sustained for the reason that the State Engineer and the State Board of Control are now prohibited under Chapter 125, Session Laws of Wyoming, 1939, from granting permits for any appropriation or development of the State's waters while within the State's boundaries in whole or in part for use outside the State". The Utah Company then removed the matter by appeal to the district court of Teton County, which, by its judgment dated December 19, 1940, affirmed the action of the Board, "excepting, however, the reason" stated in the Board's order, as aforesaid. From this judgment the present appeal was carried to this court.

On these facts our views are, briefly stated: We are inclined to think that permits Nos. 3770 Res., 3771 Res., 16190 and 4232 Enlargement were granted subject to the express condition that in the event the United States General Land Office refused to grant the necessary rights-of-way required for the construction of the contemplated reservoirs and the required supply canals, as described in said permits, the agreement and the permits aforesaid should cease to be operative. When the endorsements upon all of these permits made by the State Engineer and quoted above, the provisions of the agreement of May 2, 1921, and the attached stipulation, are considered together, as they should be, we believe no other construction is reasonably possible. It is plain that the General Land Office of the United States refused to grant the necessary rights-of-way. No bond was given as directed by the agreement of the parties and no money was paid as required by said agreement. The time for commencing and completing construction under said permits has long ago expired. This situation prevailed for many years after the refusal of the rights-of-way, as mentioned above, evidently with the

acquiescence of all concerned. Under such circumstances to grant the secondary permits now sought, when the applicant does not have and has not been able to obtain the rights-of-way to construct or maintain the necessary storage works, would be productive of nothing but trouble between the State and Federal sovereignties, and undoubtedly would be "detrimental to the public interest."

A familiar principle in the law of contracts pertinent just here has been thus stated by this court in Rhorbaugh v. Mokler, 26 Wyo. 514, 188 P. 448:

> "It is well settled that if the meaning of a contract or instrument is doubtful on its face, the practical construction put upon it by the parties should have great weight in determining its proper construction. * * * * This is especially true where the parties have for a long time acquiesced in and acted, in good faith, upon such practical construction."

In the case at bar the parties affected by these agreements described above have for a long period of time acquiesced in the construction given them as above set forth.

The applications in the case at bar, as appears from the "request" numbered "(2)", supra, also desire priorities which could exist only if the conditional permits became effective, otherwise non-operative grants of such a character could prevent other parties from obtaining water rights which they were fairly entitled to have.

Again, Section 122-1601, W. R. S., 1931, as we have noted above, invests the State Engineer with discretion to "deny any use of water from any reservoir that would be detrimental to the public interest." Under this power we are unable to perceive that that officer abused the discretion vested in him in taking the action he did.

It is urged that because the permits covered by the agreement of May 2, 1921, were not surrendered for cancellation they remain in full force. We cannot agree to this view. That contention would reform subdivision "V" of the agreement of May 2, 1921, to read in effect:

> "It is finally agreed and understood between the parties hereto that this agreement shall become null and void upon the party of the second part surrendering and delivering to the party of the first part, for cancellation, the said permits to be issued by him and which are covered by this agreement."

This cannot fairly be done in disregard of the other provisions of that

paragraph as written by the parties themselves and all the other instruments, which, as we have said, must be construed with it. A construction such as urged would put it in the power of the Osgood Company, by merely withholding the permits, to retain all rights thereunder. That the parties never intended such a construction to be assigned to the paragraph aforesaid is, we think, perfectly apparent. Undoubtedly a construction of this kind would produce a result unreasonable and unfair to the State of Wyoming and its citizens.

On the merits of this case then we are convinced that the district court was right and its decision should be affirmed.

On account of its importance we have seen fit to consider rather in extense the facts involved in the cause. We need not have done so. As previously presaged, the record brought here on this direct appeal is in such a condition that a similar result must be reached thereunder, and as already intimated what was said above was set forth subject to the condition of that record.

In Simpson V. Occidental Building & Loan Assn., 45 Wyo. 425, 19P. 2d 958, this court said, speaking of the certification of a record under the direct appeal method of appellate procedure:

> "The form for certification of the record required by the statute is of the simplest: i. e., that it be 'true and correct'. Yet, again and again, we are confronted with long and elaborate certificates placed in the record where they should not be, which frequently serve only to cause trouble. Where, as in the certificate now being discussed, only separate papers are undertaken to be certified and the statutory form of certification not used, the danger is great that an important paper will be overlooked and not included therein. Indeed, that is true here, thus rendering the clerk's certificate fatally defective in another particular. While the copy of the notice of appeal, itself, is properly certified, nothing whatsoever appears in the certificate concerning the due proof of service thereof, something which is a vital prerequisite to the power of this court to consider a case on appeal and which must appear from the record. See Culbertson v. Ainsworth, 26 Wyo. 214, 181 Pac. 418; Koch v. Koch, 41 Wyo. 450, 287 Pac. 85; Lindback v. Lackey, 41 Wyo. 493, 287 Pac. 480."

In the record before us the clerk's certificate, appearing as the first four pages of the record, recites a certification "that the attached and foregoing are all of the original pleadings, motions and stipulations and is a full, true and complete transcript and copies of all Journal Entries made and entered in the Matter of the Appeal

of Utah-Idaho Sugar Company from the State Board of Control in a proceeding wherein Utah-Idaho Sugar Company was applicant and Snake River Land Company was protestant upon the following applications:" After listing these applications, six in all, the certificate proceeds: "and that accompanying this transcript is a Transcript of the Testimony taken before the State Engineer and of all Exhibits offered and received in the proceeding, which Exhibits are more particularly described as follows:" This is followed by a list of 47 purported Exhibits, and also lists Exhibits A to J, inclusive. Thereupon the certificate concluded: "and said Exhibits are identified by the date December 28, 1939, and by the initials 'E. L.' which are the initials of Earl Lloyd, Deputy State Engineer and Ex-officio Secretary of the State Board of Control." It will be observed that the notice of appeal and due proof of service thereof are not even mentioned in the certificate aforesaid and, of course, are not certified at all as they should be. Neither is the specification of errors "authenticated" by the clerk, as required by Section 89-4906, W. R. S. 1931.

In the record thus undertaken to be certified we find a stipulation signed by counsel for all the parties herein, which reads, omitting title and signatures:

> "Subject to the pleasure of the Court, it is stipulated by the parties that the appeal in the above entitled matter may be submitted upon the record filed, either party to have the privilege of filing written brief and to make oral argument at such time as the court may set the matter for hearing, and to file such reply brief as may be desired within such time as may be fixed by the court at the time of the hearing."

We take this stipulation to mean that the entire filed record, presumably the record on appeal from the State Board of Control, is intended - shall be regarded as admissible or admitted competant evidence - "subject to the pleasure of the court", whatever that phrase may mean.

If the language of the phrase aforesaid means that the court may act upon only those certain portions of the record which the court regarded as relevant to the issues of the appeal, then, of course, it is evident that it is impossible for this court to determine upon what portions of the record the action of the court below was taken. Under the well known principle of appellate court practise, it being the duty of the appealing party to demonstrate prejudicial error on the part of the trial court,

the judgment could not be reversed. If the remaining portion of the stipulation means that the parties may present by brief and oral argument such portions of the "record filed" as each of them regarded as supporting their views of the case, then the same condition of affairs would prevail so far as this court is concerned as if the matter were left to the trial court to select the portions of the record upon which to render judgment. If, however, the stipulation means, as seems to us likely, that allthe record filed on appeal from the Board shall be taken as all the admitted evidence in the case for both the district court and the parties, then we have a situation where the cause was tried below on an agreed statement of facts, and what is said hereinafter is definitely applicable.

Section 89-4905, W. R. S. 1931, pertaining to the transcript of the evidence on direct appeals brought to this court, reads:

> "Whenever the party appealing desires to review the ruling of the district court on the admission or exclusion of evidence, or questions the sufficiency of the evidence to sustain the verdict, finding, judgment, or decision, or alleges the verdict, finding, judgment or decision is contrary to law, the party appealing shall cause to be prepared by the official court reporter a complete transcript of all the testimony offered at the trial, with each question consecutively numbered, and showing all rulings of the court in admitting or excluding evidence, or in directing or refusing to direct a verdict for either party, which transcript of the testimony and rulings of the court shall be certified to by the official court reporter as being true and correct, and as containing all of the testimony offered at the trial, with the rulings of the court in admitting or excluding evidence, or in directing or refusing to direct a verdict for either party. When the record of the testimony offered atthe trial, and the rulings of the court to be included therein, are prepared and certified as provided in this section, the same shall be filed with the clerk of the district court within seventy days from the date of the entry of the order or judgment appealed from, or within the time as extended by the court or judge."

A study of the brief of appellant indicates that the grounds upon which the judgment below is questioned are that such judgment is not sustained by sufficient evidence and is contrary to law. Nevertheless there is no certificate at all appearing in the record before us by the official court reporter that the transcript of the evidence is true and correct and as containing all the evidence offered at the trial, as contemplated and required by the positive mandate of the law set forth in the Section 89-4905, supra. It is hardly necessary to state that parties by their mere stipulation may not overthrow definite statutory requirements governing appeal proceedure to this court.

In Diamond Block Coal Company v. Edmonson, 14 Ind. App. 594, the court speaking of an agreed statement of facts said:

"When the parties agree upon the facts, as in this case, they do nothing more than to simplify the trial by obviating the necessity for making proof, and such facts when agreed to, do not constitute a special finding of facts, and an exception to a conclusion of law based upon such facts presents no question on appeal to this court. Henes, Admr. v. Henes, 5 Ind. App. 100.

"The statement of the facts agreed to, when the case is not an agreed one under the statute, is more evidence and nothing more. It is an agreement that the evidence would establish the facts embodied in the statement. Robbins v. Swain, Exr., 7 Ind. App. 486.

"In a trial upon an agreed statement of facts, as the evidence in the case, such statement does not become a part of the record unless made so by bill of exceptions or order of the court. Pennsylvania Co. v. Niblack, 99 Ind. 149."

It is true these observations were made concerning a bill of exceptions and it is well established in this jurisdiction that no bill of exceptions is required in direct appeal cases in this court, Barnett v. Bankers' Finance Ass'n., 38 Wyo. 511, 268 P. 1025. However, the certified transcript required by Section 89-4905, C. R. S., 1931, stands in its stead.

The same rule as prescribed by the Indiana court prevails in Ohio. In Goyert & Vogel v. Eicher, Adm'r., 70 Ohio State 30, 70 N. E. 503, it was held that an agreed statement of facts, although in writing, signed by counsel for all parties, and filed, did not become a part of the record unless brought upon the record by a bill of exceptions, or the facts as agreed upon were set forth in the journal entry as the court's finding of facts. To the same effect is the case of Bank of Virginia v. Bank of Chillicothe, 16 Ohio 170, and the cases of Gallagher v. Kangerle et al., 42 Ohio App. 249, 181 N. E. 913; Williamsburg Tp. et al. v. Maham, (Ohio App.) 23 N. E. 2d 451. See also Prokop v. Mlady et al., 136 Neb. 644, 287 N. W. 55; Standard Life Insurance Co. of the South v. Adams, 174 Tenn. 405, 126 S. W. 311.

In Lusk Lumber Company v. Independent Producers Consolidated et al., 46 Wyo. 341, 26 P. 2d 1075, there was a stipulation reading, so far as its material part was concerned:

"It is hereby stipulated by the parties hereto that this cause shall be tried to the Hon. C. D. Mumane, Judge of the District Court of Natrona County, without a jury, each party to use such portion of the former record as he may desire."

It was pointed out that:

"An inspection of the record now presented on this appeal from the judgment mentioned, discloses that, apparently, no record of the proceedings had upon the trial of the case was made by the official court reporter, and, in consequence, no certified transcript of the evidence presented to, and considered by, the district court, with the parties' objections and exceptions thereto, and the court's rulings thereon, as required by section 89-4905, Wyo, Rev. St. 1931, is here for our examination."

The judgment in that case also contained a recital:

"And it further appearing to the satisfaction of the Court that counsel for the respective parties had stipulated and agreed that the matter might be presented to the Court upon the record, including the testimony introduced at the former trial, and that counsel might read from the transcript, duly certified to by the official Court Reporter reporting said cause, and the Court having announced its willingness to hear said cause upon the record and said transcript, counsel thereupon read to the court the pleadings in said cause, with the exhibits, together with the transcript of the testimony, and both parties having announced that no further evidence would be offered, the Court proceeded to hear the arguments of counsel in support of their respective positions, and, after argument thereon, and the Court being now fully advised in the premises, finds, etc."

And the judgment below was affirmed.

Without further extending this opinion we find ourselves obliged to affirm the judgment of the district court of Teton County.

Affirmed.

Kimball and Blume, JJ., concur.

IN THE SUPREME COURT OF THE STATE OF WYOMING

FILED
AUG 6 1941

In the Matter of the Appeal of the Utah-Idaho Sugar Company from the action of the State Engineer in the Endorsements placed upon Application for Amendment of Permits Nos. 3770 Res. and 3771 Res. and Applications for Secondary Permits from Two Ocean and Emma Matilda Reservoirs (Applications Nos. 13 1-2-3-4/357 and 14 3/138.).

SNAKE RIVER LAND COMPANY,

Protestant and Respondent,

and

STATE BOARD OF CONTROL,

Respondent,

-vs-

UTAH-IDAHO SUGAR COMPANY,

Applicant and Appellant.

No. 2208

BRIEF OF SNAKE RIVER LAND COMPANY

PROTESTANT AND RESPONDENT

* * * *

Ewing T. Kerr
Fabian, Clendenin, Moffat & Mabey

Attorneys for Snake River Land Company, Protestant and Respondent

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IN THE SUPREME COURT OF THE STATE OF WYOMING

In the Matter of the Appeal of the Utah-Idaho Sugar Company from the action of the State Engineer in the Endorsements placed upon Application for Ammendment of Permits Nos. 3 770 Res. and 3771 Res. and Applications for Secondary Permits from Two Ocean and Emma Matilda Reservoirs (Applications Nos. 13 1-2-3-4/357 and 14 3/138).	
SNAKE RIVER LAND COMPANY, Protestant and Respondent, and STATE BOARD OF CONTROL, Respondent. -vs- UTAH-IDAHO SUGAR COMPANY, Applicant and Appellant.	No. 2208

BRIEF OF RESPONDENT AND PROTESTANT
SNAKE RIVER LAND COMPANY

Upon the initiation of the present proceedings before the State Engineer, Applicant's position, as then known by this Protestant, was that Applicant wanted 5,000 acre feet of water out of Emma Matilda and Two Ocean Lakes, and that this amount was desired whether or not the Snake River Land Company received any water whatsoever for its ranches. The proceedings to date have apparently changed Applicant's position so that now it desires such storage capacity as there may be in the lakes after granting to the Snake River Land Company ranches such water as may be necessary for the proper development of these ranches.

Before further expounding Protestant's position it might be well to say a word about the Snake River Land Company. The Company is organized and is operated for the purpose of preserving the natural beauties and resources of Jackson Hole. It has purchased ranches and water rights in the hope that some time they will be accepted by the United States Government as part of

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its recreational playground. In the meantime it endeavors to operate its ranches so as to minimize the cost of holding the land. It desires to preserve its water rights for the government agency which may ultimately accept these lands may wish to continue the ranching operations. On the other hand, if the government agency desires to relinquish its water rights that would be its option.

This brief statement of the position of the Snake River Land Company gives it somewhat the same political - economic approach to the problem of natural resources as some public corporations, and in this litigation the Snake River Land Company is not only interested in preserving its rights in the two lakes but it is interested in preserving the natural beauties of the area and in addition is interested in preserving for the people of the State of Wyoming any rights, developed or undeveloped, which may exist in Emma Matilda and Two Ocean Lakes. In other words, the mere fact that there may be an excess storage capacity in the two reservoirs over and above the needs of the Snake River ranches is not sufficient reason for granting such excess rights to the Applicant, and we join with the Attorney General in defending the position of the Board of Control and the District Court in maintaining the rights of the sovereign state of Wyoming.

Protestant believes that a historical statement of the facts in this matter is important and submits the following as such a statement.

May 1, 1919, Joseph Markham and Roy B. Lozier filed application for Permit No. 3561-R asking to build a dam three feet high at the outlet to Emma Matilda Lake, and to store 2579.7 acre feet of water. This permit was granted. (Ex. 28)

On May 9, 1919, H. C. McKinstry and William C. Thompson filed an application for Permit No. 3487-R to construct a dam two

feet above stream bed on Two Ocean Lake to store 1024 acre feet of water. This application was approved. (Ex. 20)

On October 6, 1919, C. C. Carlisle filed an application for Permit No. 3770-R, asking the right to enlarge Two Ocean Lake Reservoir so as to store 63,605 acre feet of water. (Ex. 36) On the same date C. C. Carlisle filed an application for Permit No. 3771-R, asking for the privilege of increasing the dam of Emma Matilda Lake so as to store 60,900 acre feet of water. (Ex. 38) These last two permits to Carlisle were conditioned upon the strict performance of a certain agreement dated May 2, 1921, between the State Engineer of the State of Wyoming and the Osgood Land and Livestock Company, a Wyoming corporation, which agreement is in evidence as Exhibit 40.

At some time, the exact date of which is not certain, a two-foot impounding dam was constructed at the outlet of Two Ocean Reservoir, as provided by Permit No. 3487-R, and a three-foot impounding dam was constructed as provided by Permit No. 3561.

In 1919, according to H. C. McKinstry, he, as an employee of the Osgood Company (which of the two Osgood companies is not specified), constructed a six-foot dam on Two Ocean Reservoir, (Tr. 46); and evidently, from McKinstry's testimony, the original dam in Emma Matilda was a four-foot dam. (T. 47)

Thereafter, on February 5, 1921, McKinstry assigned his interest in Permit 3487-R to Osgood Land and Livestock Company, a Wyoming corporation. (Ex 21) And on April 14, 1920, Thompson assigned his interest to Milner and Shane. (Ex. 22) And on March 21, 1921, Milner and Shane assigned the Thompson interest in Permit No. 3487-R to the Osgood Land and Livestock Company, a Wyoming corporation. (Ex. 23) On August 12, 1920, Markham and

Lozier assigned their interest in Permit No. 3561 to McInstry. (Ex. 29) And on February 5, 1921 McKinstry assigned his interest in the Markham and Lozier permit No. 3561 to the Osgood Land and Livestock Company, a Wyoming corporation, and on September 14, 1921, C. C. Carlisle assigned his interest in Permits Nos. 3770-R and 3771-R, together with other permits, to the Osgood Land and Livestock Company, a Wyoming corporation.

Now, the Applicant in the matter now before the Court, on the 5th day of April, 1920, and while the reservoir permits were still held by the original settlers in Jackson Hole, entered into an agreement with the Osgood Land and Livestock Company, an Idaho corporation, and therein they attempt to base their claim for storage rights in Two Ocean and Emma Matilda Lakes. In this agreement (Report 79), the Osgood Land and Livestock Company, an Idaho corporation, agrees to sell 5,000 acre feet of stored water, and they agree to do the construction work necessary to reservoir the 5,000 feet of water. There is nothing in that contract, or in any of the documents subsequent to that contract, to indicate that the 5,000 acre feet of water was to come from Two Ocean Lake, from Emma Matilda Lake, or from any other particular lake.

The Applicant now makes some point of the fact that 5,000 acre feet of water is of some value and particularly at Idaho Falls, Idaho. We can agree with this but we do not believe that the 5,000 acre feet of water provided for in the contract by the Osgood Land and Livestock Company and the Applicant was considered of a great deal of value. Otherwise it might well be asked why was the reference to the storage water so meager. Normally, in a contract dealing with an article of such value it would be specifically described, which is not the case in this

contract. And furthermore, if it was of such value and the Buyer considered it of such great importance, why was the matter allowed to rest for more than fifteen years before any steps were taken to perfect these inchoate rights?

Again referring to the fact that such storage rights as existed in the two lakes in question at that time belonged to the original settlers, there can be no presumption that this water was to come from these reservoirs rather than to come from Jackson Lake Reservoir, or any other reservoir on the Snake River system.

Simultaneously with the filing of Application for Permit No. 3487-R, McKinstry and Thompson filed application for a permit to divert and appropriate, under Permit No. 15185, wherein they specified that the water to be stored under Permit 3487-R was to be used on 211.4 acres of land in Teton County, Wyoming. The record fails to show that this permit was ever assigned or transferred to applicant, or that any other or additional permit to withdraw the same water has ever been made. (Ex. 25)

On August 15, 1919, Joseph Markham and Roy B. Lozier and C. W. Snell filed an application for permit to divert and appropriate water under Permit No. 15569 and specified 386.51 acres of land in Teton County to be irrigated with the water. This application, so far as the record discloses, was never assigned or transferred to Applicant. (Ex. 32)

Subsequently, and subsequent to the Agreement between the Osgood Land and Livestock Company, the Idaho corporation, and the Applicant, the following certificates to appropriate water were issued by the Board of Control under date of January 15, 1926; the certificate for 512 acre feet was issued to McKinstry and the Osgood Land and Livestock Company, specifying

that it was being appropriated from Two Ocean Reservoir. The certificate provides, "The use is restricted to the place where acquired and the purpose for which acquired." (Ex. 24) On the same date certificate to appropriate 1.06 cu. ft. of water was issued to the Osgood Land and Livestock Company to irrigate 74.4 acres of land in Teton County. It specified that this water was stored in Two Ocean Reservoir under Permit 3487-R. (Ex. 26) And on the same date a certificate to appropriate water is issued to H. C. McKinstry for 1.96 cu. ft. of water to irrigate 137 acres of land in Teton County, to be diverted from Two Ocean Reservoir under Permit 3487-R. (Ex. 27) And on January 15, 1926, a certificate to appropriate water is issued to Markham and Lozier under Permit No. 3561-R. (Ex. 31) And on the same date a certificate to appropriate water is issued to Joseph Markham for 1.88 cu. ft. of water to irrigate 131.61 acres in Teton County. (Ex. 31) And on the same date a certificate of appropriation is issued to Roy B. Lozier for 1.36 cu. ft. per second to irrigate 130 acres of land located in Teton County, (Ex. 34) And on the same date a certificate was issued to C. W. Snell to divert 1.75 cu. ft. of water to irrigate 134.9 acres of land in Teton County. The last three certificates were all made to divert water from Emma Matilda under Permit 3561-R. There is nothing in the record to show that any of these certificates were ever assigned or transferred, legally or equitably, to Applicant. The fact that these certificates were, in 1925, issued to the original settlers rather than to Applicant seems to indicate that at that time Applicant did not claim ownership of the rights in question.

Actually, Applicant's case consists of the following: That a corporation, the Osgood Land and Livestock Company, an

Idaho corporation, agreed to sell Applicant certain land and water in 1920. Applicant received from Osgood Land and Livestock Company, an Idaho Corporation, all of the land and most of the water, but failed to receive the promised 5,000 acre feet of storage water. The money that was paid by the Applicant to Osgood Land and Livestock Company, an Idaho corporation, is evidently gone with the wind. For otherwise the Osgood Land and Livestock Company, an Idaho corporation, could be called upon to perform according to the terms of its Agreement. Applicant, nevertheless, caused certain waters to be diverted from Emma Matilda Reservoir and Two Ocean Reservoir into Snake River, and to be withdrawn by it and used in Idaho. When its right to do so was questioned by Protestant, it threshed around for a legal basis on which to predicate a claim to the water it had been using. It found in its quest applications for Permits Nos. 3770-R (Ex. 36) and 3771-R (Ex. 38) and application for Permit No. 16190 (Ex. 34), and application for Permit No. 4232 (Ex. 45) and with these, together with the assignments from Markham, Lozier, McKinstry and Thompson, sought to establish a right for the raising, if there was any raising, of the original dams in Two Ocean and Emma Matilda Reservoirs.

It is respectfully submitted that Permits Nos. 3770-R and 3771-R and 16190 and 4232 were all conditioned upon obtaining the right from the General Land Office to store water upon the public domain and transport it over the public domain, and that although such right was applied for, it was denied, and an appeal was taken therefrom, and that the order of denial was upheld, and that upon its being upheld, all rights under and to those permits above specified ceased, and became as ineffectual as though they had never existed. Because these permits are still

on file and have not long ago been cancelled, as they should have been, it is now sought to distort them out of all resemblance to their original purpose, and by means of quitclaim deeds procured between the time of the filing of the protest herein and the hearing before the State Engineer, to resuscitate these dead permits and give a priority to claimant's claims. (Tr. 46-47) Applicant's position would today be just as strong if it had come in at this time and asked to appropriate water from TWO Ocean and Emma Matilda Lakes, and forgotten all about old permits and deeds from defunct corporations.

We thus come to the actual situation. Someone, ostensibly the Osgood Land and Livestock Company of Wyoming, through a trespass on the lands of the United States Government, raised the dams at the outlets of Two Ocean and Emma Matilda Lakes, and by a trespass on the lands of the United States Government, and without any right from the State of Wyoming, stored waters in those lakes, and by trespass diverted those waters, and by trespass conveyed them over the lands of the United States Government into the Snake River, and there unlawfully commingled them with other waters, and without any right transported the waters across the State line and out of the State of Wyoming, and there diverted the waters from said Snake River and converted and used those waters on their so-called Osgood Tract near Idaho Falls, without any right in law. And they now claim, by virtue of the series of trespasses and conversions which have gone on over a period of years, a right to continue to trespass and convert the waters of the State of Wyoming.

A portion of Applicant's Brief is devoted to the fact that the waters have been and can be beneficially used on the Osgood Tract. There is no law which justifies a trespass or a

conversion because the waters can be beneficially used. A portion of Applicant's Brief is devoted to the need for the water, but there is nothing said in the Brief as to why other waters cannot be purchased from other sources to supply this need.

Exhibits A to H, inclusive, constitute the documentary evidence on file in Teton County concerning the water rights in question, and demonstrate such notice as Protestant received at the time of the purchase of the Snell, Lozier, Thompson, Markham and McKinstry places of the existence of any conflicting or other water claims in and to the waters of Emma Matilda and Two Ocean Reservoirs.

What has been said so far relative to the facts is a matter of construing the testimony most favorably to Applicant. We respectfully submit that the evidence in this matter does not support the stated and assumed fact by Applicant that either of the dams was raised by either Applicant or the Osgood Land and Livestock Company. We submit that the dams, as originally constructed, were their present height and that this construction was donepursuant to the original Markham, Lozier and McKinstry applications and that there was never any raising of these dams pursuant to the Carlisle applications.

Carlisle's plan involved the appropriation of water from Pacific Creek, not water from Emma Matilda or Two Ocean Lakes. These lakes were only reservoir sites under Carlisle's plan. The source of water was to be from Pacific Creek. Applicant's present position involves converting these applications into appropriations from Emma Matilda and Two Ocean Lakes so that the actual source of supply is being changed. And it is respectfully submitted that the testimony does not support the proposition that any increase was ever made in the height of the impounding

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works at the two lakes pursuant to the Carlisle applications. And furthermore, if any such increase was made it was not pursuant to any rights granted by reservoir permits 3770-R and 3771-R because these were conditional and as pointed out, the conditions have never been met and the permits ceased to exist for all practical purposes when the Osgood Land and Livestock Company failed to obtain the necessary rights-of-way from the General Land Office.

As to Applicant's first point, the fact is that the permits in question have been cancelled by the State Engineer and it is submitted that Applicant is not entitled to any amendment as a matter of right. It was not until this matter was instituted that any application was ever filed with the State Engineer or anyone else to transport stored waters out of the State of Wyoming into the State of Idaho.

As to Applicant's second point, the non-existence of a special permit to allow Applicant or its predecessory to transport water over the public domain and to store waters thereon, is important because Permits Nos. 3770-R and 3771-R were both conditioned upon obtaining such permits.

Concerning the third point raised by Applicant, let us say that the fact that the storage waters are limited under existing certificates of appropriation to the lands now owned by the Snake River Land Company is important because we contend that such water rights as exist in the reservoirs under consideration are owned by the Snake River Land Company.

Answering Applicant's forth point, we take the position that whether or not there is any unadjudicated storage capacity in the two reservoirs is immaterial, because any unadjudicated

storage capacity in the reservoirs belongs to the State of Wyoming and not to Applicant.

As to the fifth point raised by Applicant, let us say that the State Engineer has, by order, terminated and voided Permits #3770-R and #3771-R. Both permits were conditioned and the conditions have not been met and furthermore, neither application called for the storage of the waters of either Emma Matilda or Two Ocean Lakes but rather called for the storage of water of Pacific Creek, which no one attempts to claim has been or is being stored in either of the reservoirs in question.

Answering Applicant's sixth point, we wish to say that the testimony fairly shows that Applicant looked to the Osgood Land and Livestock Company to supply it with storage waters. Then because that Company failed under its contract, it certainly gives Applicant no right to claim any water in either Two Ocean or Emma Matilda.

Concerning Applicant's seventh point, we say that the formal transfers obtained from the defunct Osgood Land and Livestock Company are of no avail, for that Company had no rights in the first instance and the quitclaim deeds that were obtained after these proceedings were instituted were only an afterthought.

As for Applicant's eighth point, it might be debated whether a fluctuating water line mars the scenic features of these two lakes. Applicant claims that a fluctuating water line in no way detracts from the beauties of the lake. We contend that it does.

Applicant's ninth point is merely a recapitulation of its previous points, as its tenth point is. Its eleventh point is fundamentally predicated upon the erroneous assumption that Applicant has acquired some rights by adverse use or prescription

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which is contrary to the law.

As to Applicant's twelfth point, we say that there are no storage right in either of these reservoirs which have been acquired by Applicant, so whether or not the waters have been used elsewhere or can be used elsewhere is entirely immaterial.

As to Applicant's thirteenth point, from the point of view taken by Applicant the case of

Scherck vs. Nichols

is not applicable in this matter.

There was a time when the social and political philosophy of this country might have sustained the attempted exploitation of these two lakes by Applicant, but under the nebulous claim advanced in this case it is respectfully submitted that with the passing of our frontier and the recognition of the ultimate value of these natural resources to the people of the several states, the burden is definitely upon the Applicant to prove compliance with the law as a prerequisite to the perfecting of rights to natural resources, which we submit Applicant has failed to do.

In conclusion, it is respectfully urged that the action of the State Engineer in cancelling permits Nos. 3770-R and 3771-R 16190 and 4232 Enl. should be sustained and the application for amendments to Permits Nos. 3770-R and 3771-R under filing No. 131 and 2/357 as rejected by the Engineer be sustained, because:

1. Rights acquired under Permits 3561-R and 3487 are not now in issue;

2. Permit 3771-R and Permit No. 3770-R should have been cancelled for failure of condition and that should be done now;

3. Notice of cancellation of Permit #3771-R was given as provided by law on September 30, 1934;

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4. More rights have been adjudicated in Emma Matilda under Permit No. 3561-R than the present storage capacity of the lake; hence no work could possibly have been done under Permit No. 3770-R and it is now in default;

5. The unlawful diverting and using of water cannot be the basis of a right to use.

6. It is beyond the power of the Board of Control to grant a permit to transport developed water of the state to a point outside of the state for use there under the circumstances in this case.

Respectfully submitted,

Arthur Aline

Fabian, Clendenin Moffat & Mabey

ATTORNEYS FOR SNAKE RIVER LAND COMPANY, PROTESTANT AND RESPONDENT

ACCEPTANCE OF SERVICE

Service of the copy of the fore-going brief is hereby acknowledged this 6th day of August, 1941.

JOHN U. LOOMIS

ATTORNEY FOR APPLICANT AND APPELLANT

IN THE SUPREME COURT OF THE STATE OF WYOMING

No. 2206

In the Matter of the Appeal of the Utah-Idaho Sugar Company from the action of the State Engineer in the Endorsements placed upon Application for Amendment of Permits Nos. 3770 Res. and 3771 Res. and Applications for Secondary Permits from Two Ocean and Emma Matilda Reservoirs (Applications Nos. 13 1-2-3-4/357 and 14 3/138).

SNAKE RIVER LAND COMPANY,

Protestant and Respondent,

and

STATE BOARD OF CONTROL,

Respondent,

vs.

UTAH-IDAHO SUGAR COMPANY,

Applicant and Appellant.

BRIEF OF RESPONDENT.

Ewing T. Kerr, Attorney General
Harold I. Bacheller, Deputy Attorney General
Arthur Kline, Assistant Attorney General
Attorneys for Respondent.

IN THE SUPREME COURT OF THE STATE OF WYOMING

No. 2200

In the Matter of the Appeal of the Utah-Idaho Sugar Company from the action of the State Engineer in the Endorsements placed upon Application for Amendment of Permits Nos. 3770 Res. and 3771 Res. and Applications for Secondary Permits from Two Ocean and Emma Matilda Reservoirs (Applications Nos. 13 1-2-3-4/357 and 14 3/138).

SNAKE RIVER LAND COMPANY,

Protestant and Respondent,

and

STATE BOARD OF CONTROL,

Respondent,

vs.

UTAH-IDAHO SUGAR COMPANY,

Applicant and Appellant.

BRIEF OF RESPONDENT.

Statement of Facts

To avoid repetition with the brief filed by protestant and respondent, Snake River Land Company, our brief will be confined to three questions, vis:

1. Was the opinion and order of the State Engineer, under date of December 5, 1938, supported by the evidence? (R. pp. 62-67)

2. Was the findings and order of the State Board of Control, under date of April 12, 1939, affirming the decision of the State Engineer supported by the evidence? (R. pp. 71-72)

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5. Was the judgment and decree of the district court, under date of December 19, 1940, in affirming the decision of the State Board of Control supported by the evidence? (R. p. 90)

The facts in the case are not in dispute. Under date of September 14, 1921, Permits Nos. 3770 Res. and 3771 Res. for the enlargement of Two Ocean and Emma Matilda Lakes were conditionally granted by the State Engineer; that under date of February 5, 1921 (Exhibit No. 21), by assignment, the Osgood Land and Livestock Company, a Wyoming corporation, became the holder of these permits; subsequently said permits were assigned to the applicant and appellant, Utah-Idaho Sugar Company.

Under date of May 2, 1921, a written agreement was entered into by Frank C. Emerson, State Engineer, and the Osgood Land and Livestock Company. Said written agreement may be found at page 105 of Exhibit No. 19, and was and is in words and figures as follows, to-wit:

"AGREEMENT

"THIS AGREEMENT, made and entered into this 2nd day of May, 1921, by and between Frank C. Emerson, State Engineer of the State of Wyoming, as such Engineer, and also as a Trustee for and in behalf of said State, of Cheyenne, State of Wyoming, the party of the first part, and THE OSGOOD LAND AND LIVESTOCK COMPANY, a corporation duly organized under the laws of the State of Wyoming, and maintaining its principal offices at Moran, in the State of Wyoming, and Idaho Falls, in the State of Idaho, the party of the second part, WITNESSETH:

"WHEREAS, on or about the 29th day of April, 1921, an oral agreement was entered into by and between the respective parties hereto, and also one C. C. Carlisle of Cheyenne, State of Wyoming, whereby it was agreed on the part of the party of the first part, that the said first party would grant and issue certain storage reservoir applications heretofore filed in the office of the said party of the first part, making application for the building of storage reservoirs on what are known as the Two Ocean Lake, and the Emma-Matilda Lake, together with the necessary supply ditches from what is known as Pacific Creek, in Jackson Hole, State of Wyoming, on consideration of the said party of the second

part paying into a special fund, of which the said first party should be constituted the Trustee, the sum of thirty thousand dollars ($30,000.00), the said fund to be used in connection with the construction of two bridges in the said Jackson Hole, across Snake River at a point near what is called Wilson, and also at a point near what is called Menor's Ferry, the said sum to be payable as follows, to-wit:

"$15,000.00 upon the granting, by the United States General Land Office, to the said party of the second part, the necessary rights-of-way for the said reservoir and the said supply ditches, and

"$7,500.00 within twelve (12) months after the granting of such rights-of-way by the said United States General Land Office, and

"$7,500.00 within eighteen (18) months after the granting of such rights-of-way by the said United States General Land Office, and

"WHEREAS, the said second party, through its attorney, O. A. Johannesen, agreed with the said party of the first part that the said payments were to be made, as aforesaid, upon the granting of the rights-of-way by the United States General Land Office, for the said reservoirs and supply ditches, and

"WHEREAS, the said party of the second part has agreed to furnish surety bond or bonds, guaranteeing to the said party of the first part the aforesaid payments, if the said permits and rights-of-way pertaining thereto are duly issued and granted,

"NOW, THEREFORE, IT IS HEREBY AGREED BY AND BETWEEN THE RESPECTIVE PARTIES, AS FOLLOWS, TO-WIT:

"I. The party of the first part, does hereby agree that upon the execution of this Agreement, and the delivery of the necessary surety bond or bonds, that he will duly approve the applications now pending in his office covering the granting of permits for the construction of the said reservoirs and supply ditches, together with the necessary water appropriation required for said reservoirs, and that he will issue the necessary permits in connection with the said applications, authorizing and permitting the said second party to construct the aforesaid reservoirs and divert the waters from the streams available, and particularly from Pacific Creek, to be stored in said reservoirs.

"II. The said party of the second part agrees that upon the issuance of the aforesaid permits, it will make due and proper application to the General Land Office of the United States for the purpose of securing the necessary rights-

of-way for the construction of the reservoirs and supply ditches contemplated in the aforesaid applications, and that it will use all due diligence in securing the said rights-of-way.

"III. The said party of the second part agrees that upon the said United States General Land office granting to the second party the necessary rights-of-way, permitting the said second party to construct the aforesaid reservoirs and supply ditches, that the said second party, its successors and assigns, will pay to the party of the first part, as Trustee for said purposes, the sum of thirty thousand dollars ($30,000.00), the same to be used, --one-half in connection with the building of a bridge across Snake River at or near Wilson, in Jackson Hole, Wyoming, and one-half to be used in connection with construction of bridges across Snake River at or near Menor's Ferry, Jackson Hole, Wyoming, which said sum the said second party agrees to pay as follows, to-wit:

"$15,000.00 at the time the said rights-of-way are granted to the second party by the said United States General Land Office, and $7,500.00 within twelve months (12) thereafter, and the remaining $7,500.00 within eighteen (18) months thereafter.

"IV. The said party of the second part agrees to furnish surety bond or bonds, guaranteeing to the party of the first part, the performance of the acts herein provided to be performed by the said second party, which said bond or bonds, it is hereby mutually agreed, shall be correspondingly reduced as the respective payments are from time to time made.

"V. It is finally agreed and understood between the parties hereto, that in the event of the United States General Land Office refusing to grant the necessary rights-of-way, required in the construction of the said reservoirs and supply ditches, that then this agreement shall become null and void upon the said party of the second part surrendering and delivering to the party of the first part, for cancellation, the said permits to be issued by him, and which are covered by this agreement.

"IN WITNESS WHEREOF, the said parties have hereunto caused their names to be written, in the manner contemplated by law, and pursuant to proper authorization, the day and year first above written.

FRANK C. EMERSON
State Engineer of Wyoming, and
Trustee as hereinabove stated.

OSGOOD LAND AND LIVESTOCK COMPANY,
By James L. Milner, President
SEAL. By V. K. Tuggle, Secretary."

ARGUMENT.

It will be observed that under the terms of paragraph V of said agreement, as aforesaid, the said Osgood Land and Livestock Company agreed that in the event the United States General Land Office refused to grant the necessary rights-of-way required in the construction of said reservoirs and supply ditches that the agreement should be null and void, and the said Osgood Land and Livestock Company agreed to surrender and deliver to the State Engineer for cancellation the said permits now in controversy.

Under date of May 14, 1923, the Department of the Interior rejected the application of the Osgood Land and Livestock Company for rights-of-way. A copy of said letter of rejection may be found at page 77 of Exhibit No. 19, and again on July 28, 1933, the Department of the Interior, in a letter to the State Engineer, advised that the application of the Osgood Land and Livestock Company had been finally rejected and cancelled; said letter from said department being in words and figures as follows, to-wit:

"UNITED STATES

DEPARTMENT OF THE INTERIOR
General Land Office
District Land Office

Evanston, Wyoming
July 28, 1933.

"Mr. R. W. Burritt, State Engineer
Cheyenne, Wyoming

"Dear Sir:

Replying to your telegram of this date you are advised the Right of Way Application, Serial number 08675, of Osgood Land and Livestock Company has been finally rejected and canceled and has no standing at this time.

Very respectfully,

/s/ J. T. Booth
Register."

Thus it will be seen that under the terms of the agreement entered into by the State Engineer and the Osgood Land and Livestock Company, it was incumbent upon the Osgood Land and Livestock Company to surrender said permits for the purpose of cancellation; this it refused to do.

Under the terms of the agreement, the Osgood Land and Livestock Company executed a surety bond in the sum of Thirty Thousand Dollars ($30,000.00), a copy of said bond may be found at page 111 of Exhibit No. 19. So far as the record discloses, the Osgood Land and Livestock Company complied with two provisions of the agreement, viz: They applied to the General Land Office of the United States for the purpose of securing the necessary rights-of-way and executed a bond in the sum of Thirty Thousand Dollars ($30,000.00).

It will be noted that the granting of permits Nos. 3770 Res. and 3771 Res. was first of all conditioned upon the Osgood Land and Livestock Company obtaining authority from the General Land Office for the necessary rights-of-way. In the event the necessary rights-of-way were granted by the United States General Land Office, then the Osgood Land and Livestock Company agreed to pay Fifteen Thousand Dollars ($15,000.00) to the State Engineer for the purpose of constructing bridges across Snake River at or near Menor's Ferry, Jackson Hole, Wyoming, and that twelve months thereafter they agreed to pay an additional sum of Seven Thousand Five Hundred Dollars ($7,500.00), and eighteen months thereafter they agreed to pay an additional sum of Seven Thousand Five Hundred Dollars ($7,500.00). The agreement also provided that the Osgood Land and Livestock Company would construct a ditch from Pacific Creek for the purpose of replenishing the supply of water taken from said reservoirs.

The case comes down to this - the government refused to authorize the rights-of-way; the Osgood Land and Livestock Company failed to pay the Thirty Thousand Dollars ($30,000.00)

for the purpose of constructing bridges on the Snake River and further failed to construct a ditch from Pacific Creek for the purpose of replenishing the supply of the reservoirs.

Under this set of facts, can it be said that the State Engineer was not justified in taking the action which he did under date of December 3, 1938? (R. pp. 62-67)

In the opinion and order of the State Engineer rendered herein and above referred to it will be observed that a complete recitation of the facts were reviewed by the State Engineer; his findings are explicit and based upon undisputed testimony in said matter. We quote briefly from the opinion of the State Engineer which may be found at page 65 of the record.

> "2. Permits Nos. 3770 Res., 3771 Res., 16190 and 4838 Enl.
>
> "After the permits referred to in the preceeding discussion were granted, plans were made to construct extensive impounding works and greatly enlarge the capacity of both reservoirs. On October 6, 1919, C. C. Carlisle filed applications in the office of the State Engineer to enlarge the Two Ocean Reservoir to an available capacity of 63,605 acre feet and the Emma Matilda Reservoir to an available capacity of 60,900 acre feet. To provide a water supply to fill the enlarged reservoirs, application was made for a permit to divert water from Pacific Creek into th reservoirs by the construction of the Twin Reservoir Supply Canal.
>
> "These applications were subsequently granted on September 14, 1921, as Permits Nos. 3770 Res. and 3771 Res. for the enlargement of the Two Ocean and Emma Matilda Reservoirs respectively, Permit No. 16190 for the Twin Reservoir Supply Canal and Permit No. 4838 Enl. for the enlargement of the canal, subject to certain conditions explained below. By original application or by assignment, the Osgood Land and Livestock Company, a Wyoming corporation became the holder of these permits.
>
> "The lands which were to be inundated by the enlargement of these reservoirs, and also the land across which the supply canal was to be constructed, are public domain of the United States, and were temporarily withdrawn from settlement, location, sale or entry by Executive Order of the President, No. 2905, dated July 8, 1918. The operation of this order was extended by the second withdrawal made by Executive Order, No. 3394, dated January 28, 1921. Evidently as a

result of this withdrawal and the difficulty of obtaining necessary rights-of-way suggested thereby, an agreement was entered into by and between the then State Engineer and the Osgood Land and Livestock Company, before these four applications for permits were approved.

"By the terms of this agreement, dated May 2, 1921, The State Engineer agreed to approve the applications and grant the permits, and the Osgood Company agreed to make application to the General Land Office of the United States for the necessary rights-of-way, and to pay to the State Engineer as trustee the sum of thirty thousand dollars ($30,000) for the construction of certain bridges, upon the said rights-of-way being granted by the General Land Office. The Osgood Company further agreed to furnish surety bonds guaranteeing this payment 'if said permits and rights-of-way pertaining thereto are duly issued and granted.' Paragraph V of the agreement is in the following words:

> 'It is finally agreed and understood between the parties hereto, that in the event of the United States General Land Office refusing to grant the necessary rights-of-way, required in the construction of the said reservoirs and supply ditches, that then this agreement shall become null and void upon the said party of the second part surrendering and delivering to the party of the first part, for cancellation, the said permits to be issued by him, and which are covered by this agreement.'

"Pursuant to this agreement the Osgood Company filed its surety bond, and on September 14, 1921, the State Engineer granted Permits Nos. 3770 Res., 3771 Res., 16190 and 4232 Rnl. Each of these four permits bears the following endorsement: 'This permit is conditioned upon the strict performance by the permitees, or their successors or assigns, of the certain agreement dated May 2, 1921, between Frank C. Emerson, State Engineer, and the Osgood Land and Livestock Company, and is subject to cancellation at any time the terms of said agreement are not complied with."

"The application of the Osgood Company for rights-of-way was denied by letter of May 14, 1923, from William Spry, Commissioner of the General Land Office, to the Register and Receiver at Evanston, Wyoming. (Evanston 08675 "P" MN). No money has ever been paid to the State Engineer under the agreement of May 2, 1921.

"In the meantime, under date of April 15, 1920, an Idaho corporation, the Osgood Land and Livestock Company, entered into a contract, under

date of April 15, 1920, agreeing to sell to the Utah-Idaho Sugar Company, the present applicant, certain lands in Idaho, and among other water rights, 5,000 acre feet of stored water, the rights for which were being acquired by the vendor. It is now asserted that this 5,000 acre feet applied to the Osgood Company's right in the Two Ocean and Emma Matilda Reservoirs. The applicant bases its claim to Permits Nos. 3770 Res. and 3771 Res. upon this contract and subsequent deed issued in compliance therewith.

"It appears that in 1919, several years before the expiration of time for completion of construction under Permits Nos. 3770 Res. and 3771 Res. (viz. Dec. 31, 1924), The Osgood Company of Wyoming did enlarge the impounding works at Two Ocean Reservoir, and did some work at the Emma Matilda, the nature and extent of which is not shown.

On July 23, 1935, the Utah-Idaho Sugar Company made application to the State Engineer to amend Permits Nos. 3770 Res. and 3771 Res. to conform to the extent of the works actually constructed, and to cancel the permits for the Twin Reservoir Supply Canal, which was never constructed. This application shows that the Two Ocean Reservoir was constructed to a total capacity of 3040 acre feet, and Emma Matilda Reservoir to 1340 acre feet. Application was also made for secondary permits to apply this water to lands in Idaho, and for a special permit to use this water stored within the state upon lands located outside the state, as required by Wyo. R. S. 1931, Sec. 122-1601, (S. L. 1921, C. 141, Sec. 1).

"The Snake River Land Company filed its protest to the application for amendment, upon two grounds, first, as owner of certain lands in Wyoming included under secondary permits and adjudications of the original construction of these reservoirs, and, second, as a company 'formed for the purpose of acquiring and retaining for present and future generations, through government ownership and control, certain of the scenic features and beauty spots in Jackson Hole.'

"On June 1, 1938, a hearing was held before the State Engineer in order that all facts might be before him when rendering decision, both parties being present.

"At this hearing, the applicant attempted to correct any difficulty arising from the fact that its claim is based upon conveyance from an Idaho corporation, whereas the permits in question were issued or assigned to a Wyoming corporation, by filing quit claim deeds from individuals as the statutory trustees of the now defunct Wyoming corporation.

"The National Park Service also filed a protest, and was represented at this hearing, upon the understanding that any evidence submitted by it could not be considered, as it is not in fact an interested party.

OPINION

"The relative titles and interests of the two parties in the original rights and works (Permits Nos. 3487 Res., 3561 Res., 15185, 15186, and 15569, and adjudications thereunder) is not made clear by the considerable amount of evidence thereon introduced at the hearing. The same is true of the various assignments and deeds by which the applicant claims title and interest from the two Osgood corporations. However, the decision of these questions is not properly one for the State Engineer, and is immaterial to the decision of the present controversy.

"Permits Nos. 3770 Res., 3771 Res., 16190, and 4232 Enl. were granted subject to cancellation for noncompliance of the terms of the agreement of May 2, 1921, with the State Engineer. By the express terms this agreement was made conditional upon the grant or refusal of the necessary rights-of-way by the General Land Office. The obvious intent of this agreement was that upon refusal of the necessary rights-of-way, not only the agreement itself became void, but also that the permits issued under its terms should likewise fail and become subject to cancellation. This is the only logical construction which can be placed upon the words of paragraph V of the agreement. It is apparent that Permits Nos. 3770 Res., 3771 Res., 16190, and 4232 Enl. should be cancelled. It follows that the applications for secondary permits and special permit to use stored water outside the state must fall with the storage rights which are their source of supply. To grant these secondary and special permits, when the applicant does not have, and cannot obtain the rights-of-way or easements to build or maintain the necessary storage works, would certainly be detrimental to the public interest as encouraging trespass and creating unnecessary difficulties in the administration of the water. (Wyo. R. S. 1931, Sec. 122-406)

"There exists a further reason for cancelling Permit No. 3771 Res. upon the Emma Matilda Reservoir. By the terms of this permit, final construction was to be completed by December 31, 1924. Failure to complete construction within the time required by the permit is a default in its specified requirements operating as a forfeiture of the water right. (Wyo. R. S. 1931, Sec. 122-409). No proceeding is required to effect the forfeiture, the only

requirement being that the State Engineer shall be registered mail, at least three months before default shall become operative, notify the permitee of the expiration date. There is no question but that such notice was given in this case on September 30, 1934.

"The rights under Permit No. 3561 Res., acquired before Permit No. 3771 Res. was granted, have been adjudicated in the capacity of 1710 acre feet. The plans submitted upon the application to amend Permit No. 3561 Res. show the present total capacity of Emma Matilda Reservoir to be 1340 acre feet, an amount less than that previously adjudicated. It is thus clear that no construction resulting in the enlargement of Emma Matilda Reservoir above the adjudicated capacity was ever done, and that there now exist a default in the terms of Permit No. 3771 Res.

"The applicant has requested that Permits Nos. 16190 and 4232 Enl. be cancelled upon the grounds that the supply canal therein described has never been constructed.

"IT IS THEREFORE ORDERED that Permits Nos. 3770 Res., 3771 Res., 16190 and 4232 Enl. be and the same hereby are CANCELLED, and that applications for amendments of Permits Nos. 3770 Res. and 3771 Res. under filing Nos. 13 1 & 2/357 be and the same are hereby REJECTED.

"IT IS FURTHER ORDERED that applications for secondary permits for use of water stored under Permits Nos. 3770 Res. and 3771 Res., under filing numbers 13 3 & 4/357, and application for special permit to use water stored in Two Ocean and Emma Matilda Reservoirs outside the State of Wyoming be and the same hereby are REJECTED."

An appeal was taken from the decision of the State Engineer by the applicant to the State Board of Control; a hearing was had before the State Board of Control, at the conclusion of which the Board affirmed the findings of the State Engineer, which may be found on pages 71 and 72 of the Record. The findings of the State Board of Control, among other things, held:

"That the action of the State Engineer in rejecting said applications is hereby sustained for the reason that the State Engineer and the State Board of Control are now prohibited under Chapter 125, Session Laws of Wyoming, 1939, from granting permits for any appropriation or development of the State's waters while within the State's boundaries in whole or in part for use outside the State."

We do not propose that the reasons given by the State Board of Control in affirming the decision of the State Engineer are entirely proper; we do contend, however, that the decision of the State Board of Control in affirming the decision of the State Engineer was correctly reached.

After the decision of the State Board of Control was made on the 24th day of April, 1939, an appeal was taken to the district court where the matter was tried before the Honorable J. A. Christmas. Said matter having been taken under advisement by said court and briefs having been submitted in said matter, the court did on the 19th day of December, 1940, affirm the decision of the State Board of Control 'excepting however the reasons therein stated' by the State Board of Control. (R. p. 90)

PRESCRIPTIVE RIGHT

We particularly direct the court's attention to page 10 of the transcript of testimony which is, in part:

> "Q. Now, would the action and investigations and knowledge that you got at that time indicate to you why the applicant had not taken any action to perfect those rights before that time.
>
> "A. My recollection of this may be based partly on assumption, but as I recall, from early in the '20's, on which date position of enjoyment of water was given by the then owners and that position and enjoyment had been entirely uninterrupted, it had not occured to anyone to go ahead and perfect those rights, the paper rights."

This answer clearly indicates that the applicant was of the opinion that he had acquired a prescriptive right since no action had been taken by the applicant during a period of almost twenty years. This identical question has been passed upon by our Supreme Court in the case of Campbell v. Wyoming Development Co., 100 Pac. (2d) 124. At pages 138 and 139 the Court said:

> "As stated, the plaintiffs claim a right by prescription. It would seem to follow as a corollary from what has already been stated, that no claim of a prescriptive right can be set up by plaintiffs, at least up to the time of the adjudication of the waters of Little Laramie River in 1892. That such prescriptive right can not be set up against other appropriators directly from the Little Laramie River has been held in German D. & R. Co. v. Irrigation Co., 67 Colo. 390, 178 P. 896; Bieser v. Stoddard, 73 Colo. 554, 216 P. 707; see Holbrook Irr. Dist. v. Arkansas, etc., Land Co., D. C. 42 F. 2d. 541, 546.* * *
>
> "We do not mean to intimate, or seem to concur in the view, that a prescriptive title to water may be acquired in this state, particularly since 1890, when the legislature enacted a law requiring the initiation of all water rights to be pursuant to a permit from the State Engineer. We do not need to enter into that question in this case. See the case of Wyoming Hereford Ranch v. Hammond Packing Co., 33 Wyo. 14, 236 Pac. 764."

After the rendition of this decision, the appellant was dissatisfied with the holding of the Court and petitioned for a rehearing. The court reviewed at length the question of a prescribed right in 102 Pac. (2d) 745. At page 748 the court said:

> "Counsel have again argued the question of prescription at length. That no prescriptive title was obtained up to the time of the adjudication of the Little Laramie in 1892 was so clearly pointed out in the original opinion that we need not say anything more on that point. The only possible question is as to prescription since that time, if a prescriptive title may be obtained at all in this state, which we refused to decide. The court's finding of fact No. 8, set out in the original opinion, substantially was to the effect that no such prescriptive title was acquired. What counsel now ask us to do included, in effect, that we should review that finding, and their contention includes the point that that finding was in fact erroneous and should have been broader. But they did not except to that finding, nor was an exception to the finding embraced within the motion for a new trial. It is generally held that in the absence of an exception, a finding of fact will not be reviewed by the appellate court. 3 C. J. 933; see also 3 C. J. 984, 1338, 1345. We may, however, say that the mere use of water, however long continued does not give rise to a title by prescription."

Thus it will be seen that under the laws of the State of Wyoming, particularly since 1890, a right by prescription cannot be obtained in the State of Wyoming.

Since the applicant has discussed in detail the facts and circumstances from the original issuance of these permits, we deem it unnecessary for the State to reiterate the details of this case. In most every instance, we believe, the parties agree that there is no dispute as to the facts.

The respondent takes the position that the applicant and appellant has never acquired a lawful permit. This court, in the case of Wyoming Hereford Ranch v. Hammond Packing Co., et al. 33 Wyo. 14, 236 Pac. 764, at page 33 of the Wyoming report, said:

> "While this court has never had occasion directly to pass on the question, we find in our reports several expressions which seem to indicate the opinion that since the Act of 1890 no lawful diversion of water could constitute an appropriation unless based upon a permit."

It is an elementary principle of law that courts are loathe and reticent to interfere with decisions of administrative boards unless the action of the same is clearly erroneous. State ex rel. Marsh, v. State Board of Land Commissioners, 7 Wyo. 478; State ex rel. Foote, v. Board of Livestock Commissioners, 4 Wyo. 126; Miller v. Hurley, 37 Wyo. 344.

CONCLUSION

It is respectfully submitted that the State Engineer could not have reached any other decision than that which he found in cancelling the permits of the applicant and appellant; the testimony, as well as the exhibits in the case, shows conclusively that the agreement was a conditional agreement; that is to say - the applicant must first obtain rights-of-way from the United States General Land Office before the permits became effective, and upon its failure to obtain the rights-of-way the State Engineer was acting within his authority in cancelling said permits.

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It is, therefore, submitted that the decision of the trial court affirming the decision of the State Board of Control should be affirmed.

Respectfully submitted,

Ewing T. Kerr
Attorney General

Harold I. Baeheller
Deputy Attorney General

Arthur Kline
Assistant Attorney General

Attorneys for Respondent, The State Board of Control.

ACCEPTANCE OF SERVICE.

Service of a copy of the above and foregoing brief is hereby acknowledged this 1st day of August, 1941.

John U. Loomis
Attorney for Applicant and Appellant.

IN THE SUPREME COURT,

STATE OF WYOMING.

No. 2208.

In the Matter of the Appeal of the Utah-Idaho Sugar Company from the action of the State Engineer in the Endorsements placed upon Application for Amendment of Permits Nos. 3770 Res. and 3771 Res. and Applications for Secondary Permits from Two Ocean and Emma Matilda Reservoirs (Applications Nos. 13 1-2-3-4/357 and 14 3/138).

SNAKE RIVER LAND COMPANY,

Protestant and Respondent,

and

STATE BOARD OF CONTROL,

Respondent,

vs.

UTAH-IDAHO SUGAR COMPANY,

Applicant and Appellant.

BRIEF OF APPELLANT

STATEMENT

Stripped of historical detail and the details of prior procedure, what the appellant seeks here involves a rather simple matter.

Generally speaking, the appellant seeks amendment of two existing reservoir permits which it has acquired by purchase, so that such permits will accord with the actual construction of impounding works completed within the time limited thereby, and further seeks permission to use the water involved outside of Wyoming, that is in Idaho. In connection with such applications

to amend the appellant offers also to relinquish its rights in certain other permits likewise acquired by purchase.

To state the matter more concretely, the appellant acquired from the Osgood Land and Live Stock Company the rights of the latter in permits 3770-R and 3771-R for the enlargement of Two Ocean and Emma Matilda Reservoirs respectively. These original applications sought to greatly enlarge the Two Ocean Reservoir to an available capacity of 63605 acre feet and the Emma Matilda Reservoir to an available capacity of 60900 acre feet. The permits under both enlargement applications were issued September 14, 1921, and provided that the construction of the proposed work should begin within one year from that date and that the time for completion should terminate December 31, 1924.

The very extensive impounding works contemplated by these original enlargement applications were never completed, but impounding works to store the amount of water contemplated by applications for amendments here involved were actually constructed by Osgood Land and Live Stock Company as assignee of the permittee and have been in existence since at least 1921. In other words, impounding works contemplated by the applications for amendments now being heard were constructed well within the time required by the enlargement permits.

The original enlargement permits were conditioned upon compliance by the permittee with the terms and provisions of an agreement between the State Engineer and the permittee which provided that the permittee should make application to the U. S. General Land Office for rights of way or easements to construct the tremendous reservoirs then contemplated and upon receiving such permission should pay a total amount of $30,000.00 for the construction of two bridges across the Snake River, giving surety bond for the faithful performance of such agreements. It was

also agreed that should the General Land Office refuse to grant the rights of way or easements, then the agreement between the State Engineer and the permittee should become null and void upon the permittee delivering the permits to the State Engineer for cancellation.

The permittee carried out its part of the agreement so far as it was able to do so by making application to the General Land Office and giving the bond required, but the General Land Office refused the rights of way or easements for such large reservoirs. The permits have never been canceled by the State Engineer and remain in existence at this time, although the State Engineer by his order of December 3, 1938 in this proceeding attempted to cancel them. They have been duly assigned to the appellant.

The appellant in this proceeding seeks amendments of the original permits to accord with the actual construction of impounding works which were constructed within the time limited therein. It also seeks permission to use the stored water in the State of Idaho. This permission is sought through applications for secondary permits and a request for the use of stored water outside Wyoming.

The appellant has actually maintained and reconditioned the impounding works, and has used the stored water involved in the State of Idaho for a great number of years in the belief that it had purchased the right to do so.

The impounding works involved do not result in the storage of water above the highwater lines of Two Ocean and Emma Matilda Lakes, and, as we believe and contend, the existence and use of the impounding works do not detract from the natural beauty of these lakes, but, on the contrary, are factors in preserving such natural beauty.

The appellant has some rights in previous appropriations covering stored water in these lakes under permits 3487-R and 3561-R, although the exact nature and extent of these rights need not be definitely determined and are immaterial to this controversy, all that is material here being that such claims exist and form an additional basis for the rights now sought to be protected by the appellant.

The appellant also offers to relinquish any rights it may have in the foregoing and other permits in excess of what it now seeks in this proceeding.

In order to state the issues or controversy involved it will be convenient to briefly analyze the various applications and the grounds of objection by Snake River Land Company and The National Park Service thereto.

Application for an amended permit to construct Two Ocean Reservoir (Permit No. 3770-R)

This is an application by Utah-Idaho Sugar Company to amend a previous permit, No. 3770-R, to construct a reservoir in the bed of Two Ocean Lake, having a high water line area of 620 acres and available capacity of 3040 acre feet. (R. 15-18).

Original Permit No. 3770-R was to construct a reservoir in the channel of Two Ocean Creek having a high water line area of 983 acres and available capacity of 63,605 acre feet.

Thus it appears the amendment seeks to reduce the high water line area from 983 acres to 620 acres and the available capacity from 63,605 acre feet to 3040 acre feet.

Application for secondary Permit to divert and appropriate from Two Ocean Reservoir.

This is an application by Utah-Idaho Sugar Company for

authority to divert and appropriate water from Two Ocean Reservoir to the Osgood tract in Township 3 North, Range 37 East, Boise B. & M. for the irrigation of 5680.35 acres, with a capacity at the headgate of 2.5 cubic feet per second. It is an application for a secondary permit made in connection with amended Permit No. 3770-R. (R. 19-22).

Application for an Amended Permit to construct Emma Matilda Reservoir (Permit No. 3771-R)

This is an application by Utah-Idaho Sugar Company to amend a previous permit, No. 3771-R, to construct a reservoir in the bed of Emma Matilda Lake having a high water line area of 904.2 acres and an available capacity of 1340 acre feet. (R. 23-26).

Original Permit No. 3771-R was to construct a reservoir in the channel of Emma Matilda Creek having a high water line area of 1130 acres and an available capacity of 60,900 acre feet.

Thus it appears the amendment seeks to reduce the high water line area from 1130 acres to 904.2 acres and the available capacity from 60,900 acre feet to 1340 acre feet.

Furthermore, the storage in acre feet sought is even less than that adjudicated under the original storage right. (3561-R).

Application for Secondary Permit to divert and appropriate from Emma Matilda Reservoir.

This is an application by Utah-Idaho Sugar Company for authority to divert and appropriate water from Emma Matilda Reservoir to the Osgood tract in Township 3 N., Range 37 E., Boise B. & M. for the irrigation of 5680.35 acres with a

capacity at the headgate of one cubic foot per second. It is an application for a secondary permit made in connection with amended Permit No. 3771-R. (R. 27-29½).

Request for special permits to use stored water outside the State of Wyoming.

This is an application for permission to take a certain quantity of water from the State of Wyoming into the State of Idaho for application to beneficial use upon lands in Bonneville County, Idaho, which water is appropriated to the Utah-Idaho Sugar Company under Permits Nos. 3770-R and 3771-R and Secondary Permits Nos. 3770-R and 3771-R. (R. 30).

Request for cancellation of Permits Nos. 3770-R, 3771-R, P-16190 and 4232 Enlargement.

This is an application by Utah-Idaho Sugar Company for cancellation of the above numbered permits. Its actual purpose is to relinquish the rights of appellant in excess of what appel-land seeks here. (R. 31).

Permit No. 16190 was to construct a ditch or canal known as Twin Reservoir Supply Canal 3.6 miles long, with a carrying capacity of 496.64 cubic feet per second from Pacific Creek.

Permit No. 4232 was for the enlargement of the Twin Reservoir Supply Canal to a carrying capacity of 500 cubic feet per second.

Thus it appears that Utah-Idaho Sugar Company offers to relinquish its right to construct the Twin Reservoir Supply Canal with an enlarged capacity of 500 cubic feet per second from Pacific Creek and offers to relinquish its right to storage in Two Ocean Reservoir in excess of 3040 acre feet and in Emma Matilda Reser-

veir in excess of 1340 acre feet.

Protest of Snake River Land Company.

To Application for use of water in Idaho under 8487-R.

The protest against this application is upon the following grounds: (a) the applicant has no special use permit from the Forest Service; (b) the storage right was limited to use on the lands for which application has been made; (c) the 512 acre feet appropriated is sufficient only for the Wyoming ranches.

To Application for Use of water in Idaho under No. 3561-R.

The protest against this application is upon the following grounds: (a) The appellant has no special use permit from the Forest Service; (b) the storage right was limited to use on the lands for which application has been made; (c) the appellant has no surplus over the 1710 acre feet of storage reserved for the Wyoming ranches.

To Applications for Amendment of permits 3770-R and 3771-R and Applications for use of water thereunder by secondary permit and special permit in Idaho; to Application to cancel Permit No. 16190 to construct Twin Reservoir Supply Canal and Permit 4238 for Enlargement thereof.

The protest against the foregoing applications is upon the following grounds: (a) the permits were conditioned upon the granting of easements for the reservoirs and supply ditches by the United States General Land Office, which condition has failed and the permits have no standing and are wholly void; (b) the appellant can have gained no right by prescription and was not misled; (1) the Wyoming law does not permit water rights

to be gained by prescription, (2) the Sugar Company has averaged in use from 1920 to 1954 less than 50% of the 5000 acre feet claimed, (3) the State Engineer's records show that the appellant's vender had no title.

General Protest. - The protestant states the following additional grounds of protest: (a) the appellant has no legal right or interest in any existing permit sought to be amended; (b) the appellant has no permit to use the water outside of Wyoming; (c) the lands sought to be used for diverting and impounding works have been withdrawn from entry; (d) the granting of the applications will tend to defeat the purpose of the Snake River Land Company to preserve the scenic features and beauty of Two Ocean and Emma Matilda Lakes. (R. 52-51).

Protest of The National Park Service.

The National Park Service in its protest states no grounds in addition to those stated in the protest of Snake River Land Company. (R. 52-61). This party was in effect ruled out of the proceeding at the hearing before the State Engineer and has made no subsequent appearance.

Decision of State Engineer.

A hearing was held before the State Engineer on June 1, 1938, and he made his decision in the form of a written "Opinion and Order" dated December 3, 1938, thereafter endorsed upon the applications, rejecting all of the applications and canceling Permits 3770 Res., 3771 Res., 16190 and 4232 Enl. and the secondary permits under 3770 Res. and 3771 Res. (R. 62-67). Further details appear under the argument with reference to this opinion and order.

Decision of the Board of Control.

An appeal was taken by the applicant from the decision of the State Engineer to the State Board of Control which heard the matter on April 20, 1939, and made its written "Findings and Order" dated April 24, 1939, sustaining the action of the State Engineer in rejecting the applications for the "reason that the State Engineer and the State Board of Control are now prohibited under Chapter 125, Session Laws of Wyoming, 1939, from granting permits for any appropriation or development of the State's waters while within the State's boundaries in whole or in part for use outside the state." (R. 71-72).

Judgment of the District Court.

An appeal was taken to the District Court of Teton County where the judgment of the court "confirmed" the decision of the State Board of Control, "excepting, however, the reason therein stated." (R. 90-91).

Specifications of Error.

Upon this appeal the appellant has specified as error that the judgment of the District Court is not sustained by sufficient evidence, and is contrary to law, and that each of the applications should have been granted. (R. 93-94).

ARGUMENT.

1. THE APPELLANT IS ENTITLED TO AN AMENDMENT OF PERMITS NOS. 3770-R and 3771-R REDUCING THE RESERVOIR CAPACITIES THEREOF, AND TO PERMISSION TO USE THE WATER THEREUNDER IN IDAHO UNDER THE APPLICATIONS FOR SECONDARY PERMITS AND THE REQUEST FOR SPECIAL PER-

MITS, RELINQUISHING ANY RIGHTS IT MAY HAVE IN ADDITION THERETO.

(a) Applications for amendments of 3770-R and 3771-R.

We believe that the appellants have produced evidence clearly sufficient to require the granting of all of the applications referred to in the above heading; that there is no contrary evidence in the record; and that the decision of the State Engineer denying the applications is arbitrary and unsupported in fact and in law.

The evidence is as follows:

The original enlargement applications (3770-R, for Two Ocean Reservoir; and 3771-R for Emma Matilda, or Markham, Reservoir) were filed October 6, 1919. (Exs. 36, 38). That same summer Mr. H. C. McKinstry built additional dams. (Tr. 44, 45). He built these dams for the Osgood Company, and that company paid for them. (Tr. 44, 45). The dam which he then built at Emma Matilda Lake is the same as is shown in the picture "Exhibit 10". (Tr. 45). This is the same dam which Mr. Albert observed at Emma Matilda in 1933. (Tr. 19). The dam which McKinstry built at Two Ocean Lake in 1919 was approximately 8 feet high and would impound 6 feet of water (Tr. 46), or about 5 feet in average years. This dam was washed out at the end of the first year and was replaced with a like dam by the Osgood Company, (Tr. 47), and it was rebuilt by the applicant in 1928. (Tr. 36, 37). McKinstry was there until 1925 (Tr. 42) and this dam was in place all the time he was there. In 1925 he thought the dam could have been made to hold 4 feet of water. (Tr. 47). The dam which McKinstry built at Emma Matilda Lake in 1919 would impound four feet above extreme low water and he thought the works would have been made to hold that amount. However the lake has changed due to washing in of silt. (Tr. 47).

At the time McKinstry built these impounding works the

State Engineer was on the ground and gave permission to proceed with the building of the reservoirs, saying he could see no reason why the preliminary work could not be started.

The original impounding works on these lakes, of which the above were enlargements, contemplated a dam 2 feet above the stream at Two Ocean Lake (Ex. 20), and a dam 3 feet high at Emma Matilda Lake (Ex. 28).

In 1920 the applicant bought 5000 acre feet of stored water from Osgood Land and Livestock Company (Ex. 2), which the latter agreed to have assigned by proper certificate of ownership. (Ex. 2). This was 5000 acre feet of stored water in Two Ocean and Emma Matilda Lakes. The applicant thereafter enjoyed possession of these reservoirs. (Ex. 1).

The applicant used the water from these reservoirs on its Osgood tract from 1920 to 1935. (Tr. 46; Tr. 23-25; Tr. 30; Tr. 36).

The applicant has paid for maintenance of the dams and reconstructed the Two Ocean dam in 1928. (Tr. 34, 35).

The original applicant under Permits 3770-R and 3771-R made formal assignment to Osgood Land and Livestock Company in 1921. (Ex. 37).

The Osgood Land and Livestock Company made formal assignment of Permits 3770-R and 3771-R to applicant in 1938. This was in addition to the agreement of April 15, 1920.

The Wyoming lands below these reservoirs are amply supplied with water from the direct flow of the creeks and the Snake River. (Tr. 20; Tr. 25; Tr. 48).

These stored waters are important to the applicant and needed by it. (Tr. 38).

There is no evidence in the record to contradict the foregoing.

With reference to applications to amend 3770-R and 3771-R

it will be noted that the effect of the application to amend 3770-R is to reduce the high water line area from 983 acres to 620 acres, and the available capacity from 63605 acre feet to 3040 acre feet, and that the effect of the amendment of 3771-R is to reduce the high water line area from 1130 acres to 904.2 acres and the available capacity from 60900 acre feet to 1340 acre feet. It will also be noted that the impounding works authorized by the original enlargement permits, to the extent that same are sought to be recognized by applications for amendments, have been in existence since long before the time to construct or make proof of construction formally expired under the conditions of the permits. That is, the applications for amendments seek permission to construct impounding works to impound 3040 acre feet under 3770-R and 1340 acre feet under 3771-R; and the evidence shows that impounding works sufficient to impound such an amount of water have been in existence since 1919, whereas original permits 3770-R and 3771-R provided that the time for completing the impounding works should terminate on December 31, 1924. Hence it also follows that the works had been completed prior to the time specified in the applications for amendments. (See Transcript, pp. 23, 34, 35, 44, 45, 46, 47). It is also clear that the stored waters involved are not needed and could not be used in the State of Wyoming.

(b) Rights and Title of Appellant under 3770-R and 3771-R.

The rights of the appellant under the rights mentioned in the heading and the appellant's title thereto as the same have a bearing upon the applications now under consideration appear from the evidence and may be briefly stated as follows:

Application 3770-R for the enlargement of Two Ocean Reservoir, was filed October 6, 1919, by C. C. Carlisle and is

recorded in Book 12 at page 270 of Applications. (Ex. 36). It was assigned by C. C. Carlisle to the Osgood Land and Live Stock Company September 14, 1921, by assignment recorded in Book 7 Misc. at Page 1. (Ex. 37).

Application 3771-R for the enlargement of Emma Matilda Reservoir was filed October 6, 1919, by C. C. Carlisle and is recorded in Book 12 at page 271 of Applications. (Ex. 38). The permit was assigned by C. C. Carlisle to the Osgood Land and Live Stock Company on the 14th day of September, 1921, the assignment being recorded in Book 7 Misc. at page 1. (Ex. 37).

Osgood Land and Live Stock Company by contract dated April 15, 1920, agreed to sell to the appellant certain lands and water rights, being the Osgood Tract in Idaho, including 5000 acre feet of stored water, the same being a storage right which the Osgood Land and Live Stock Company was securing for the use upon the Osgood Tract. (Exhibit 2). The evidence shows that the 5000 acre feet of stored water was stored water in Emma Matilda and Two Ocean Reservoirs (Tr. 12). Osgood Land and Live Stock Company with which the applicant contracted was an Idaho corporation and another corporation bearing the name The Osgood Land and Live Stock Company had been incorporated in the State of Wyoming. The latter corporation handled most of the transactions with reference to the stored water. Both corporations have transferred by assignment and quit claim deed to the appellant, all of their interests in the permits and other water rights herein involved. (Exs. 46 and 47).

(c) Status of 3770-R and 3771-R.

The applications for enlargements of Two Ocean and Emma Matilda Reservoirs known as Permits Nos. 3770-R and 3771-R, have the following status at the present time.

As has been previously pointed out, these original applications were for a very much greater storage capacity than the present applications for amendments thereof. The original permits each specified that they were conditioned upon the strict performance by the permittees, or their successors or assigns, of a certain agreement dated May 2nd, 1921, between the State Engineer and The Osgood Land and Live Stock Company and that they were subject to cancellation at any time if the terms of such agreement were not complied with. (Exs. 36, 38).

The agreement of April 29, 1921, referred to provided that upon execution thereof and the signing by The Osgood Land and Live Stock Company of surety bonds therein referred to, the State Engineer would issue the permits; that The Osgood Land and Live Stock Company should thereupon make application to the General Land Office of the United States for permits to construct the reservoirs in a United States Forest Reserve; that upon the granting of such permit by the General Land Office The Osgood Land and Live Stock Company would pay to the State Engineer the sum of $30,000.00 in installments as provided for the construction of two bridges over the Snake River. (Ex. 40). The surety bonds referred to were to guarantee performance by The Osgood Land and Live Stock Company of the acts to be performed by it. (Ex. 42). It was also agreed between the parties that if the General Land Office should refuse to grant the permits that then the agreement should become null and void upon The Osgood Land and Live Stock Company delivering to the State Engineer for cancellation the permits issued by him. (Ex. 40).

The surety bond was given as agreed (Ex. 42) and the application was made to the General Land Office and was denied by letter of May 14, 1923, from the Commissioner of the General Land Office to the Register and Receiver at Evanston, Wyoming. (Ex.

43).

The permits have never been cancelled by the State Engineer, except by the attempted cancellation in this proceeding contained in his Order of December 3, 1938.

While the construction of the reservoirs on the large scale contemplated by these permits was never undertaken or completed, it is a fact, shown by the evidence, that the impounding works, to the extent contemplated by the applications now pending for amendment of the permits, were actually undertaken and completed by Osgood Land and Live Stock Company, assignee of the permittee, prior to the time fixed for the completion of the work under permits numbers 3770-R and 3771-R (Tr. 23, 34, 35, 44, 45, 46, 47) and these reservoirs as so enlarged have been used by the appellant for each of the years 1920 to 1934 inclusive. (Tr. 10, 30, 32, 33, 37, 46, 48). Reconstruction work on Two Ocean Lake Reservoir in 1928 was done by appellant (Tr. 36, 37), assignee of the permits, and the dams were maintained after their original construction by assignees of the permittee. (Tr. 36, 44). The State Engineer was on the ground at the time the original construction was proceeding and assented to it. (Tr. 49). A representative of the Forest Service set the stakes for the dam as it was reconstructed in 1928. (Tr. 28, 37, Ex. 17), to correspond with previous impounding capacity (Ex. 16). The applications for amendments were filed in the year 1935.

At the present time therefore the appellant is in the position of claimant, as assignee, for a valuable consideration, of these uncancelled permits for the enlargement of the reservoirs, and the reservoirs were, within the time limited by the permits, actually enlarged to the extent that the appellant now seeks amendments of the original permits. The State Engineer has often recognized the right of a permittee to make proof of completion after the time limit where the actual work was completed within

the time prescribed by the permit. This appellant now seeks such action in its behalf in a situation where the work sought to be recognized was actually completed within the time limited and the appellant has not only used the water for many years last past, but has also paid substantially for the right it seeks to have recognized, and has maintained the reservoirs. (Ex. 2).

It is true that the original permits were to some extent conditioned upon the agreement to pay for two bridges, but it is obvious that this agreement was based upon the project in its original enlarged form and there is no basis for the State Engineer to press any such claim in connection with the permits as they are sought to be amended. Furthermore, the State Engineer did not cancel these permits prior to the filing of the applications for the amendments here sought. The applicant now has on file applications for amendments of existing permits and has made a showing entitling it to such amendments.

(d) Permits 3487-R and 3561-R.

Permit 3487-R for Two Ocean Reservoir and Permit 3561-R for Emma Matilda or Markham Reservoir have both ripened into adjudicated storage rights.

The rights under 3487-R were adjudicated November 24, 1925, in favor of "H.C. McKinstry; Osgood Land and Live Stock Company," for 512 acre feet with date of priority of May 9, 1918, and Certificate of appropriation was issued under date of January 15, 1926, and is recorded in Certificate Record No. 45 at page 198. (Ex. 24). The actual storage capacity of Two Ocean Reservoir, as Mr. Roger's survey conclusively proves, is 3040 acre feet.

The rights under 3561-R were adjudicated under date of November 24, 1925, in favor of Joseph Markham and Roy B. Losier, for 1710 acre feet, and Certificate of appropriation was issued

under date of January 15, 1926, and is recorded in Certificate Record No. 45, page 201. (Ex. 31). This adjudication is generous; Mr. Rogers found the actual storage capacity to be nearer 1340 acre feet.

All the right, title and interest of the original applicants, H. C. McKinstry and Wm. C. Thompson to permit 3487-R had been previously assigned as follows: H. C. McKinstry assigned to the Osgood Land and Live Stock Company by assignment filed March 12, 1921 and recorded in Book 6 Misc. at page 426. (Ex. 21). Wm. C. Thompson assigned to James L. Milner and A. T. Shane by assignment filed March 25, 1921, and recorded in Book 6 Misc. at page 430. (Ex. 22). James L. Milner and A. T. Shane assigned to the Osgood Land and Live Stock Company by assignment dated March 25, 1921, and recorded in Book 6 Misc. at page 431. (Ex. 23).

All the right, title and interest of the original applicants, Joseph Markham and Roy B. Lozier to permit No. 3561-R had been previously assigned to the Osgood Land and Live Stock Company by assignments as follows: Joseph Markham and Roy B. Lozier assigned to H. C. McKinstry by assignment filed March 12, 1921, and recorded in Book 6 Misc. at page 427. (Ex. 29). H. C. McKinstry assigned to the Osgood Land and Live Stock Company by assignment dated March 12, 1921, and recorded in Book 6 Misc. at page 428. (Ex. 30).

Thus it appears that all right, title and interest in Permits 3487-R and 3561-R had been assigned to the Osgood Land and Live Stock Company prior to adjudication, and that 3487-R was adjudicated in the name of H. C. McKinstry; Osgood Land and Live Stock Company. All right, title and interest of Osgood Land and Live Stock Company (both the Wyoming and the Idaho Companies)has been transferred by assignment and quit claim deed to Utah-Idaho Sugar Company. (Exs. 46, 47).

Two secondary rights have been adjudicated under No. 3487-R, the secondary permit being No. 15185.

Application for Permit 15185 was filed by Wm. C. Thompson and H. C. McKinstry May 9, 1918, and is recorded in Book 48 at page 282. The permit was issued under date of August 19, 1918. (Ex. 25). This secondary right was adjudicated to Osgood Land and Live Stock Company under date of November 24, 1925, recorded in Book 45, page 200, for 1.06 cubic feet per second of time, with priority of May 9, 1918, to irrigate 74.4 acres in Section 12-45-114. Certificate of appropriation was issued January 15, 1926. (Ex. 26). Secondary right under this permit was also adjudicated to H. C. McKinstry November 24, 1925, recorded in Book 45 at page 199, for 1.96 cubic feet per second of time to irrigate 137 acres in Section 7-45-113, with date of priority May 9, 1918. Certificate of appropriation was issued January 15, 1926. (Ex. 27).

Three secondary rights have been adjudicated in connection with Permit 3561-R. These secondary rights were adjudicated under Permit 15569 filed by Joseph Markham, Roy B. Lozier and O. W. Snell on August 19, 1919, and recorded in Book 50 at page 65. Permit was issued September 18, 1919. (Ex. 32). The following rights have been adjudicated under this permit.

There was adjudicated to Joseph Markham under date of May 4, 1925, recorded in Book 45 at Page 202, an appropriation for 1.88 cubic feet per second of time, with priority for stored water of May 1, 1919, and for unstored water of August 18, 1919, for the irrigation of 131.61 acres in Section 6-45-114. Certificate of appropriation was issued January 15, 1926, and recites that the rights thereunder for irrigation from the unstored flow of the stream shall not exceed one cubic foot for

seventy acres. (Ex. 33).

There was adjudicated to Roy B. Lozier under date of May 24, 1925, recorded in Book 45-203, 1.86 cubic feet per second, with date of priority of May 1, 1919, for stored water and August 18, 1919, for unstored water for irrigation of 130 acres in Section 4-45-114. The certificate of appropriation was issued January 15, 1926, and likewise recites that the rights for the unstored flow of the stream shall not exceed one cubic foot for seventy acres. (Ex. 34).

There was adjudicated to O. W. Snell by adjudication dated November 24, 1925, recorded in Book 45, page 204, 1.78 cubic feet per second, with date of priority of May 1, 1919, for stored water and August 18, 1919, for unstored water, for the irrigation of 124.9 acres in Section 22-45-114. This certificate also recites that the rights for the unstored flow of the stream shall not exceed one cubic foot for seventy acres. (Ex. 35).

Thus it appears that all right, title and interest in and to Permits 3487-R and 3561-R have been assigned to the Osgood Land and Live Stock Company and by it transferred to Utah-Idaho Sugar Company. (Exs. 46, 47).

These reservoir rights (3487-R and 3561-R) have but an indirect bearing upon the controversy here, and it is of little importance at this time whether the secondary permits were issued with the intent, and had the effect, of adjudicating all of the stored water under these permits to the secondary permittees or not. It is sufficient to point out at this time that the appellant has prima facie rights to stored water under these reservoir rights. In this connection it appears that the storage right under 3487-R was adjudicated to H. C. McKinstry and Osgood Land and Live Stock Company jointly; that one of the secondary permits was adjudicated to the Osgood Land and Live Stock Company, individually, and has been acquired and reserved by Douglas

Scalley for the benefit of, and conveyed to, the applicant; (Tr. 35, 40, 41); that there is nothing to indicate all of the water stored in either reservoir has been fully covered by secondary adjudications, the adjudications of water under the secondary permits being made on the basis of cubic feet per second of time, which has no bearing upon the amount of stored water to which each permittee may have been entitled; and that the adjudications in connection with the secondary permits under 3561-R included rights for both stored and direct flow water, and therefore cannot be depended upon as a basis for allocating the stored water. A further adjudication of some character may be necessary to determine the respective rights of applicant and others to these stored waters.

It follows that Utah-Idaho Sugar Company as successor in interest to Osgood Land and Live Stock Company has a clear right to stored water under 3487-R and 3561-R by reason of the following (1) adjudication of the storage rights under 3487-R jointly to H. C. McKinstry and Osgood Land and Live Stock Company; (2) adjudication under secondary permit 15185 for the irrigation of 74.4 acres in Section 12-45-114 to Osgood Land and Live Stock Company; (3) the residual right to stored water under both 3487-R and 3561-R by reason of assignments of the permits prior to adjudication to Osgood Land and Live Stock Company and their subsequent transfer by assignment and quit-claim deed to Utah-Idaho Sugar Company.

It should be remembered that stored water may be sold, leased, transferred and used in such manner and upon such lands as the owner may desire provided it is used for beneficial purposes. (122-1602, W.R.S. 1931). And the owner of a reservoir shall be held to be the owner of the right to impound the water and the right to sell or lease a portion or all of his

right to the impounded waters. (122-1601).

The appellant through the Osgood Land and Live Stock Company has a right to stored waters under 3487-R and 3561-R and it is unnecessary and immaterial to determine the extent of that right at this time. Whatever right the appellant has under those permits forms an additional basis for its claim that it is entitled to the amendments of permits 3770-R and 3771-R which it now seeks.

Other than as hereinabove stated permits 3487-R and 3561-R have no material bearing upon the matter now under consideration by the State Engineer.

The large amount of space devoted to this question by protestants serves only to emphasize, so far as the present controversy is concerned, that the appellant does have rights under permits 3487-R and 3561-R.

(e) Application for permission to use in Idaho.

The evidence shows that as a practical matter the water involved in the applications now before the Court could not be used in Wyoming (Tr. 20-21, 24-25, 48), and that it has for several years actually been applied to beneficial use in Idaho. (Tr. 30, 32, 33, 37, 46, 48, Exs. 16, 17, 18). This has not been done in bad faith but under the belief by the users that they were entitled to the water and that their record title would ultimately be completed and perfected. (Tr. 36, 37, 41, 48-49). Clearly the mutual requirements of friendship between the States of Wyoming and Idaho with reference to the division of waters requires that under the circumstances the State Engineer should permit the use of this water in Idaho. The water cannot be used in Wyoming; it was purchased by the appellant; its use (as is hereinafter pointed out) will not have the

effect of interfering with the beauty of the two lakes involved. The appellant does not question the reasonable requirements of other water users having storage and secondary rights. (Tr. 8-9). The protestant contends that the dams are a bad thing (Tr. 67) and yet proposes to continue to use them. (Tr. 68). This is an unreasonable position and should not be considered. The protestant makes no showing of any detriment to it which might result from the granting of the applications of Utah-Idaho Sugar Company. The evidence shows that there is enough water from the reservoirs for all appropriators, including the appellant. (Tr. 48).

(f) Applications to cancel or relinquish.

The appellant asked for nothing under this head which the State Engineer should not have been willing to grant upon request. The appellant wishes to make clear, however, that it does not seek cancellation but desires merely to relinquish any rights which it may have in the following permits without objection to cancellation to that extent.

The applications involved under this heading are as follows: P-16190, 4838 Enl. and the excess of 3770-R and 3771-R over that which is covered by the applications for amendment now pending.

(g) The contention of the protestant that it purchased lands and water rights without knowledge of the appellant's claims is without merit.

The position of the protestant under this contention is made clear by its witness Winger. Mr. Winger testified that the protestant bought the various lands under these reservoirs, "believing that we were buying all of the water rights appurte-

ant thereto, including storage rights," (Tr. p. 68); and again the same witness said with reference to the position of his principal that "they felt that they were buying all water appurtenant to that land." (Tr. 66).

It is clear that the Snake River Land Company did get all water rights, including storage rights, appurtenant to its lands and was not misled or damaged by any failure on its part to ascertain the existing water rights of the appellant. In other words, the protestant got all of the water rights it expected to get and has no cause for complaint on any ground at this time. The appellant does not question the right of the protestant to satisfy its reasonable requirements under its purchased rights. (Transcript pp. 8-9).

2. THE EXISTENCE OR NON-EXISTENCE OF AN EXECUTIVE ORDER OF WITHDRAWAL OR A SPECIAL PERMIT FROM THE FOREST SERVICE HAS NO BEARING UPON THE MATTERS INVOLVED HERE AT THIS TIME.

All that the protestants have to say with reference to an executive order of withdrawal or a special use permit from the Forest Service is immaterial in this proceeding. The State Engineer grants permits without reference to any rights or easements which must be obtained in connection with the building of irrigation or impounding works. Even if the practice of the State Engineer were, as we do not understand it to be, that the granting of water rights would be made conditional upon the obtaining of such rights of way or easements, the question would still not be material here. If the applications here pending are granted it will then be the concern of the appellant to make proper applications to the Forest Service for the needed rights of way or easements. There is no reason to believe at this

time that such rights of way or easements will not be granted in view of the fact, as we have pointed out, and will point out in more detail hereinafter, that the rights sought by the appellant here will not have the effect of interfering with the beauty of the lakes involved. We do not believe that protestants are justified in asserting that the Forest Service will not grant the necessary rights of way or easements and certainly the State Engineer at this time has no right to assume so. See, Denver Power & Irrigation Co. v. Denver & R. G. Co., 69 Pac. 568, 570, holding that condemnation proceedings will not be affected by fact that easement for a reservoir in a forest has not been obtained. We believe the Forest Service is responsive to the needs and requirements of all our citizens and that it will readily see that the desired rights of way and easements will not be detrimental to the beauty of the country or to any other citizens. The fact that the General Land Office refused the request for rights of way and easements on the very much enlarged scale contemplated by the original applications has no apparent bearing on what the needs of the appellant will be under the amended applications. One of the reasons of the appellant in asking the amendments is to make its demands consistent with the preservation of the beauty of the two lakes involved, and we cannot believe that this attitude of the appellant will not receive favorable consideration by the Forest Service. The applicant must pursue the rights in some order by succession. If it went first to the Interior Department that Department might with greater reason say the applicant had no water right and could therefore not be granted an easement in the forest.

3. THE QUESTION WHETHER STORAGE RIGHTS UNDER EXISTING CERTIFICATES OF APPROPRIATION HAVE BEEN LIMITED TO USE ON

ANY PARTICULAR LANDS IS NOT MATERIAL AT THIS TIME.

This issue was raised by the protestants with reference to Certificates 3487-R and 3561-R. There is nothing within the four corners of these documents which imports any such restriction. Moreover, as pointed out above, these certificates have only a very indirect bearing upon this controversy and it is not important at this time to determine whether the storage rights adjudicated under the permits referred to were limited to any particular lands or not. Certainly any rights of the appellant under the certificates referred to have not been adjudicated with reference to their places of use and if and when their rights are adjudicated those questions will arise, but such questions need not and should not be determined at this time.

4. THE QUESTION WHETHER THE NUMBER OF ACRE FEET ADJUDICATED IN CONNECTION WITH EXISTING CERTIFICATES OF APPROPRIATION HAS THE EFFECT OF EXCLUDING THE APPELLANT FROM PARTICIPATION UNDER SUCH APPROPRIATIONS IS LIKEWISE IMMATERIAL SO FAR AS THIS CONTROVERSY IS CONCERNED.

This issue was also raised by the protestants and refers to the rights under Permits 3487-R and 3561-R. The argument is that the number of acre feet adjudicated indicates an intention on the part of the Board to adjudicate all the water to secondary permittees under whom appellant claimed no rights. No evidence was offered in support of that contention. The great disparity between the allotments to the settlers, and the storage actually existing, at least in the case of Two Ocean, should in itself be sufficient to refute it. Besides, the assignments from the ranchers to Osgood contain reservations in favor of assignors which

definitely establish that their participation, while preferred, should not exhaust the total storage in normal seasons. The ranches other than Thompson, should not be denied their reasonable requirements. Appellant will not oppose such an arrangement, either under an interim working agreement or in any appropriate proceeding. The present proceeding would hardly seem to be a proper one in which to allot or re-allot storage waters previously adjudicated by the Board of Control.

5. PERMITS NUMBERS 3770-R AND 3771-R HAVE NOT BEEN TERMINATED OR VOIDED.

We have already pointed out that under the contract between the State Engineer and the Osgood Land and Live Stock Company these permits are subject to cancellation upon their surrender by the permittees. No such surrender has ever been made and the permits have never been terminated or voided. They are still in existence for proper disposition, and we respectfully submit that under the showing here made the applications for amendment of the original permits to accord with the actual construction of impounding works within the time limited should be granted at this time. This would have the double effect of disposing of the original permits on the very much enlarged basis and giving the appellant a record title to the storage rights as limited by the impounding works actually constructed.

6. THE APPELLANT IS ENTITLED TO THE AMENDMENTS BY REASON OF ITS PURCHASE OF THESE WATER RIGHTS, UNDER THE CIRCUMSTANCES INVOLVED, AND THE USE OF THE WATERS THEREUNDER.

We have already pointed out that the water involved in

this controversy constitutes the 5000 acre feet which the appellant purchased from the Osgood Land and Live Stock Company. The purchase price of all of the properties involved in the transaction was very large, that is seven hundred thousand dollars. (Ex. 2, Ex. 19, pp. 130-132). The actual portion of the consideration allocable to the 5000 acre feet of water referred to has not been fixed and cannot be stated, but stored water in the amount of 5000 acre feet for use on such a project as was purchased by the Utah-Idaho Sugar Company is obviously valuable, and the evidence showed its importance and necessity. (Tr. 26, 31, 38). The appellant paid for this right and assumed that it would be delivered. Eventually it found that its title was involved, and in attempting to straighten it out discovered that its applications made for that purpose were the subject of protest, not by other water users in the State of Wyoming but by representatives of the Snake River Land Company and by the National Park Service. With commendable frankness the protestants have indicated that their protests are based upon the assumed, and we believe erroneous ground, that the granting of the applications here will have the effect of detracting from the beauty of the lakes involved. We submit that the appellant is entitled to the amendments sought. At the risk of repetition we repeat the grounds for this assertion: The appellant paid for the rights; the impounding works were constructed within the time limit by the assignee of the permittee and his successor in interest; the water has, in all good faith, been applied to beneficial uses for many years; the appellant is honestly endeavoring to quiet its title; the appellant is anxious to cooperate in the desires of the protestants and not to interfere with the beauty of the lakes involved; and finally, as we submit, the granting of the applications here will not mar the beauty of the lakes, nor can the water involved be used in Wyoming. As to the good faith of the appel-

lant in using the water, see Transcript 36, 37, 41, 48-49, Ex. 16. In this connection it should be borne in mind that the State engineer was on the ground and assented to the enlargement construction (Tr. 49); that a representative of the Forest Service set the stakes for the reconstruction work done in 1928, (Tr. 28, 37) and (Ex. 17) that there is no evidence of objection to the use of the water by the state water officials until 1935.

7. THE APPELLANT HAS FORMAL TRANSFERS OF ALL OF THE RIGHTS OF OSGOOD LAND AND LIVE STOCK COMPANY HEREIN INVOLVED.

As has already been pointed out the appellant has formal transfers by assignment and quit-claim deeds of all of the rights of Osgood Land and Live Stock Company, both the Idaho and Wyoming corporations, herein involved. These transfers cover all of the rights of Osgood Land and Live Stock Company under Permits 3770-R, 3771-R, 3487-R and 3561-R and all other water rights herein involved, including all interest and estate of Osgood Land and Live Stock Company in and to Two Ocean Lake Reservoir and Emma Matilda Lake Reservoir.

8. THE GRANTING OF THE APPLICATIONS WILL NOT TEND TO DEFEAT THE PURPOSE OF THE SNAKE RIVER LAND COMPANY TO PRESERVE THE SCENIC FEATURES AND BEAUTY OF TWO OCEAN AND EMMA MATILDA LAKES.

The real ground for protest is that the effect of the granting of the applications will be to mar the beauty of the Two Ocean and Emma Matilda Lakes. The protest of the National Park Service states the fear that the granting of the applications may result in the building of very large reservoirs on the basis

of the original applications 3770-R and 3771-R. If appellant has failed to make its purpose clear up to this point, we now wish to state unequivocally that the appellant seeks only to quiet its title to rights under 3770-R and 3771-R to the extent that impounding works now exist, and have existed for many years, and to relinquish any rights in addition thereto, and we believe that its applications for amendments, cancellations and relinquishments so state. Clearly that is their effect and that is the purpose of the appellant.

The evidence shows that the height of the impounding works corresponds with the natural high water marks of the lakes (Tr. 20), and it seems impossible that there can be any contention under these circumstances that the existence of these rights and the impounding works thereunder can in any substantial way mar the beauty of the lakes involved. In fact we submit that on the contrary, advantages arise from the existence of these impounding works and the use of these lakes in the manner contemplated and in which they have actually been used. In other words, the effect of these impounding works and the use of the water under these rights is to hold the water in the lakes and let it out gradually in a manner which does not mar or disturb the beauty of the lakes by erosion or otherwise. (Ex. 19, p. 1). The diversion works are very benign in appearance and could be easily made almost, if not absolutely, unobservable. (Exs. 7, 8).

Furthermore, the appellant is entirely in accord with the views of the protestants in the matter and is as anxious as the protestants to preserve the beauty of these lakes and the rights of all others involved.

And in any event we believe that the complaint of the Snake River Land Company under this heading is immaterial and should not be considered.

Exhibits 13 and 14 clearly indicate that the beauty of

these lakes is not being marred. It should be remembered that the applications do not contemplate any changes in existing conditions.

9. THE DECISION OF THE STATE ENGINEER IS ERRONEOUS AND IS NOT JUSTIFIED BY THE EVIDENCE AND CANNOT BE FOLLOWED.

We respectfully disagree with the contention of the State Engineer that the agreement of May 2, 1921, between the then State Engineer and Osgood Land and Live Stock Company is subject to the interpretation he gives it under the circumstances here involved. The condition for cancellation upon refusal of United States General Land Office to grant necessary rights of way had reference to the very much enlarged reservoirs then contemplated. That it has no practical or actual application to the reservoirs contemplated by the amended applications involved in this proceeding is evident on the fact of the matter, and this interpretation has been fully recognized by the acquiescence of succeeding State Engineers. The cancellation provision provides for the surrender and delivery of the permits to the State Engineer for cancellation and this has never been done or sought by any State Engineer except by the order of the State Engineer in this proceeding. The State Engineer had not cancelled the existing permits prior to the filing of these applications and is not entitled to do so after the showing of the applicant in this proceeding.

The State Engineer makes an unjustified assumption to the effect that the appellant cannot obtain rights of way to build or maintain the necessary storage works, which is entirely outside of the record.

The State Engineer's assumption that Permit No. 3771 Res. upon the Emma Matilda Reservoir is canceled by the mailing of a

notice of forfeiture is contrary to law. The statute to which the State Engineer refers (Sec. 122-409) provides that default by the holder of the permit in completing the construction within the time specified shall work a forfeiture of the water right involved; provided, that the State Engineer shall give notice by registered mail at least three months before default. The statute does not provide that the giving of such notice shall constitute a cancellation of the certificate, but merely that such notice shall be a prerequisite to cancellation. That this is so was clearly recognized by the Legislature in 1937 by amending the section to provide by additional language that "The State Engineer may upon such default cancel the permit." Clearly the State Engineer's argument that the giving of the notice in itself canceled the permit is erroneous.

Furthermore, the statutory provision for limitation upon the time of making proof of application to beneficial use, and for forfeiture upon default, applies only to a ditch permit, and therefore does not apply to a reservoir storage permit. Such a limitation if voluntarily asserted by the State Engineer can not be effective as the basis of a forfeiture, particularly where the water user is actually asserting his rights.

This Court has frequently recognized the rule that doubts with respect to forfeitures of water rights should be resolved in favor of the water user.

Van Tassell v. Cheyenne, 49 Wyo. 333, 350.

Ramsay v. Gottsche, 51 Wyo. 516, 529.

Horse Creek District v. Lincoln Land Co., 54 Wyo. 320, 340.

Campbell v. Wyoming Development Co., 55 Wyo. 347, 404.

In the Horse Creek case the Court indicated the specific application of the principle to the forfeiture of water permits by its approval of a case in which a Federal Court so applied the

rule.

We quote from the Court's decision in Horse Creek District v. Lincoln Land Company at page 340, as follows:

"We are also inclined to the view that before the forfeiture of vested water rights provided for by Section 122-421 should be construed to be operative, there should be a formal declaration thereof procured by some one clothed by law with proper authority to invoke it.

"The decisions cited below relative to analogous statutes are in our judgment of persuasive weight.

"Where an Act of Congress (March 3, 1891) directed,

"'That if any section of said canal or ditch shall not be completed within five years after the location of said section the rights herein granted shall be forfeited as to any uncompleted section of said canal, ditch, or reservoir, to the extent that the same is not completed at the date of the forfeiture,'

it was ruled by the court in United States v. Whitney, 176 Fed. 593, that:

"'This requirement being in the nature of a condition subsequent, the rule undoubtedly is that failure to comply therewith does not operate ipso facto to divest the grantee of the title and reinvest the grantor therewith, but that to be effectual, the default must be followed with a declaration of forfeiture by some competent authority, and, the grant here being of a public nature, such declaration can be made only by an act of Congress, or in an appropriate judicial proceeding. United States v. De Repentigny, 5 Wall. 211, 267-268, 18 L. Ed. 627; Schulenberg v. Harriman, 21 Wall. 44, 62-64, 22 L. Ed. 551; Farnsworth v. Minnesota, etc. Ry., 92 U.S. 49, 56-68, 23 L. Ed. 530; McMicken v. United States, 97 U. S. 204, 218, 24 L. Ed. 947; Bybee v. Oregon, etc., Ry., 139 U. S. 663, 674-677, 11 Sup. Ct. 641, 35 L. Ed. 305; St. Louis, etc. Ry. v. McGee, 115 U. S. 469, 472-475, 6 Sup. Ct. 123, 29 L. Ed. 446; Railroad Co. v. Mingus, 165 U. S. 413, 430-434, 17 Sup. Ct. 348, 41 L. Ed. 770.'

"Of similar purport is the case of Spokane & British Columbia Railway Co. v. Washington & Great Northern Railway Co., 219 U. S. 166, 31 S. Ct. 182, 55 L. Ed. 159. In the course of its opinion filed therein the court said:

"'The leading case is Schulenberg v. Harriman, 21 Wall. 44, 22 L. Ed. 551. In that case there was an act of Congress making a grant of lands, conditioned that all lands remaining unsold after ten years should revert to the United States. It was there held that notwithstanding this condition, no one could take advantage of its nonperformance except the grantor or his heirs, or the successors of the grantor, if the grant proceeded from an artificial person, and that unless such persons asserted

the right to forfeiture, the title remained unimpaired in the grantee; and it was further held that if the grant be a public one, the right to forfeiture must be asserted by judicial proceedings authorized by law, the equivalent of an inquest of office at common law, or there must be some legislative assertion of ownership for the breach of the condition."

"See also Adams v. Terrell, 108 Tex. 331, 107 S. W. 537; Carns v. Idaho-Iowa Lateral & Reservoir Co., 34 Idaho 333, 202 P. 1071; Verde River Irrigation & Power District v. Salt River Valley Water Users' Ass'n., 94 Fed. (2d) 936.

"That our view of the matter coincides with the intention of the Legislature relative to the procedure necessary in litigation of this character is confirmed, we think, by the phrasing of the first sentence of Section 122-422, W.R.S. 1931:

"'When, pursuant to the provisions of § 122-421, any water user who might be affected by a declaration of abandonment of existing water rights, desires to bring about a legal declaration of such abandonment, he shall present his case in writing to the board of control.'

"We have italicised the significant words in the sentence as they bear on the point now under consideration. If, as urged by the plaintiff, Section 122-421 was to be regarded as self executing and automatic in its operation, we hardly believe the law-making department of the state would have used the language it did, indicating so emphatically that a 'declaration' of abandonment should be had and providing the method for obtaining it. It may be observed additionally that, unless some kind of formal determination of this character were had, no one dealing with real estate in the arid sections of our state, the value of which property would be very little without the water rights attached thereto, could at any time be sure as to his title to the most vital part of the property he held. Unsettlement of titles to real property is not a result to be reached lightly and without strong legal reasons to support it. It is quite obvious, too, that until a declaration of forfeiture has been made the owner of the water right still retains the title to it and is justified, of course, in his continued use thereof. When, as in the case at bar, for more than ten years that continuous use has prevailed and no declaration of forfeiture has been sought of the water right in question, neither the administrative officers of the state nor any other person is entitled to invoke the forfeiture immediately thereafter, as directed in Sections 122-422 to 122-427, inclusive.

"Finally, returning again to the opening words in the sentence last above quoted from the procedural statute, Section 122-422, supra, 'when, pursuant to the provisions of § 122-421, any water user who might be affected by a declaration of abandonment,' etc., it is manifest that the italicised word, 'affected,' is both significant and controlling. It indicates to our mind that it was not the

legislative purpose to open the door to any person whomsoever to undertake proceedings to procure a declaration of abandonment. Those who are authorized to use the procedure set forth in Sections 122-422 to 122-427, W.R.S. 1931, inclusive, are only those whose rights would be 'affected.'"

The evidence is clear that the impounding works were constructed long prior to the time limited, and there could be no forfeiture under any circumstances upon that ground. In finding to the contrary the State Engineer was clearly in error.

The argument of the State Engineer that Emma Matilda Reservoir had already been adjudicated for the storage of 1710 cubic feet, and that therefore the erection of a dam impounding 1340 acre feet could not constitute an enlargement, is based upon an erroneous impression of the facts. The evidence is that the original storage dam was authorized for a height of 3 feet, and that the enlargement dam was actually constructed to a height of 4 feet. The evidence also is that the lake filled in with silt. The works now impound 1340 acre feet, which is the amount the amended application calls for. It is thus clear that the actual construction did constitute an enlargement, and there is no reason why the amended application should not be made to correspond with the actual existing storage capacity, particularly when to do so tends to protect the scenic features of the lake. The applicant does not question the original storage rights and seeks only the surplus after those rights are satisfied.

10. THE DECISION OF THE BOARD OF CONTROL IS BASED EXCLUSIVELY UPON THE GROUND THAT THE STATE ENGINEER AND THE STATE BOARD OF CONTROL ARE PROHIBITED FROM GRANTING THE APPLICATIONS UNDER CHAPTER 125, SESSION LAWS OF WYOMING, 1939, AND THIS CONCLUSION IS ERRONEOUS.

The Constitution of Wyoming provides that "the Board of Control, to be composed of the State Engineer and Superintendents of Water Divisions * * * shall, under such regulations as may be prescribed by law, have the supervision of the waters of the State and of their appropriation, distribution and diversion. Its decisions to be subject to review by the Courts of the State." (Article 8, Section 2).

The legislature has now provided that "None of the waters of Wyoming shall ever be appropriated while within the state for use outside the State's boundaries except pursuant to a petition to the Legislature and an act by the legislature permitting any such diversion specifically described as such. The State Engineer, Board of Control, State Planning and Water Conservation Board, and any other officers agents, agencies, or employees of the state are prohibited from granting permits for any such appropriation or development of the state's waters while within the state's boundaries, in whole or in part, for use outside the state. Any such grants, except in pursuance of the provisions of this section shall be null and void." (Session Laws, 1939, Chapter 125, Section 1).

Thus it will be seen that the Constitution specifically delegates to the Board of Control, composed of the State Engineer and the Superintendents of the Water Divisions, the supervision of the waters of the state and their appropriation, distribution and diversion; and the Legislature has attempted in 1939 to take from the constitutional board the power to supervise the appropriation, distribution and diversion of certain waters of the state, that is those which are to be used outside of the state.

The waters involved in this litigation are clearly "waters of the state" contemplated by the above constitutional provision, and the Legislature recognizes this by referring to them as "waters of Wyoming".

The Legislature apparently seeks to avoid the clear effect of the constitutional mandate by impliedly distinguishing between waters of the state which are to be used within the state and waters which are to be used without the state. This is a distinction which the constitutional provision does not state, and which it clearly does not contemplate. There would be as much reason for the Legislature to attempt to take from the Board of Control similar power with reference to waters of the state which are to be used in a specified county of the state.

The 1939 legislation is a plain attempt on the part of the Legislature to seize powers which the Constitution has placed elsewhere, that is in the Board of Control.

There is nothing in this contention which is inconsistent with the holding of our Supreme Court in Simmons v. Ramsbottom. 51 Wyoming 419, to the effect that the constitutional provision has not vested the Board of Control with exclusive jurisdiction of actions to determine the priority of water rights, but that there is concurrent jurisdiction for that purpose in the courts. In fact the action of the 1939 Legislature is directly contrary to this holding, because such action attempts to place exclusive jurisdiction in the Legislature, and to the extent involved, to take such jurisdiction from the Board of Control.

It is true that the constitutional provision referred to provides that the supervision of the Board of Control shall be under such regulations as may be prescribed by law. This clearly refers to such regulations as may be consistent with the powers directly granted to the State Board of Control, and does not give the Legislature, under the guise of regulation, the power to usurp the very authority granted to the Board by the Constitution.

The Legislature seems to have recognized the futility of providing that none of the waters of the state can ever be

appropriated for use outside of the state; and has resorted to an equal futility, that is the attempt to take the power of supervision over appropriation, distribution and diversion from the constitutional authority and give it to itself.

Assuming for the sake of argument, but not admitting, that the Legislature might, consistently with the Constitution, have provided that the Board of Control should not approve the appropriation, distribution and diversion of water for use outside the State, until the Legislature had been given the opportunity to approve or disapprove a petition for such use outside the State, it is clear that this is not what the Legislature did or intended.

Furthermore, the legislation makes no attempt to provide for pending applications, or vested rights, and may not be interpreted to mean that such applications should be denied and the rights of the appellant terminated prior to an adequate opportunity by the appellant to make the required petition to the Legislature.

The application here involved for permission to use in the State of Idaho has been presented in due course, first to the State Engineer, as required by statute, and by appeal to the State Board of Control, which had the entire matter, including the question of use in the State of Idaho before it.

The very least that the court could order, under the circumstances, was that the application should not be denied upon the basis of the 1939 legislation until the appellant had had ample opportunity to present to the State Legislature a petition for use of the water outside of the State.

It is exceedingly doubtful whether the State of Wyoming can deny the right to store water in this state and use same on an interstate stream in Idaho, where no detriment to the State of

Wyoming is shown and the water could not be used in Wyoming in any event.

11. THE STORED WATER INVOLVED HAS BEEN APPROPRIATED AND APPLIED TO BENEFICIAL USE IN ACCORDANCE WITH ESTABLISHED PRINCIPLES AND PROCEDURE.

The right to the use of water by prior appropriation and application to beneficial use is too thoroughly rooted in the law of Wyoming to require discussion.

In this case the storage rights involved were appropriated by the construction of the necessary impounding works which have been maintained for many years by the applicant. Shortly after the construction of the impounding works the water was actually applied to beneficial use and has been applied ever since to the extent the applicant has been permitted to use it.

The rule that, since the adoption of the Constitution of Wyoming, water can be appropriated only in accordance with the procedure established by the Constitution is thoroughly recognized and not questioned by us.

It is our contention, however, that the rules of procedure thus established and amplified by legislation have been followed in this instance.

It is true that final proof of application to beneficial use has never been made, but there is nothing in the law which prevents this being done at this time, so far as it may be necessary to do so, under the peculiar facts of this case, and the appellant has the right to make such proof.

It is also true that the impounding works constructed by the applicant were not nearly as extensive as the permits provided. There is nothing in the law of this State, however, which prohibits

this, and under general principles of applicable water law the fact of appropriation and application to beneficial use must be recognized and approved. This is particularly so where there is no assertion of adverse water rights, as is the fact in this case at bar.

12. SINCE THESE STORAGE RIGHTS HAVE BEEN ACQUIRED BY APPROPRIATION AND APPLICATION TO BENEFICIAL USE CONSISTENTLY WITH THE LAWS OF WYOMING, AND THE WATER CANNOT BE USED IN WYOMING BUT IS BENEFICIALLY USED IN IDAHO, THE RIGHTS OF THE APPLICANT CANNOT BE DENIED WITHOUT VIOLATING THE CONSTITUTION OF WYOMING AND THE CONSTITUTION OF THE UNITED STATES.

The authorities on this subject are not extensive, but the general principles involved, and such expressions of the Supreme Court of the United States as exist, indicate that the rights of the applicant cannot be denied.

Mr. Justice Holmes, speaking for the Court in Bean v. Morris, 221 U. S. 485, 486, said, with reference to water arising in one state and flowing by stream into another, where the rights of users in the two states were involved, as follows:

> "We know no reason to doubt, and we assume, that, subject to such rights as the lower State might be decided by this court to have, and to vested private rights, if any, protected by the Constitution, the State of Montana has full legislative power over Sage Creek while it flows within that State. Kansas v. Colorado, 206 U. S. 46, 93-95. Therefore, subject to the same qualifications, we assume that the concurrence of the laws of Montana with those of Wyoming is necessary to create easements, or such private rights and obligations as are in dispute, across their common boundary line. Missouri v. Illinois, 200 U. S. 496, 521. Rickey Land & Cattle Co. v. Miller & Lum, 218 U. S. 258, 260. But with regard to such rights as came into question in the older States, we believe that it always was assumed, in the absence of legislation to the contrary, that the States were willing to ignore boundaries, and allowed the same rights to be acquired from outside the State that could be acquired from within. Mannville Co. v. Worcester, 138 Massachusetts, 89. Thayer v. Brooks, 17 Ohio, 489. Slack v. Walcott, 3 Mason, 508, 516. Stillman v. White Rock Manuf. Co., 3 Woodb. & M. 538. Rundle v. Delaware & Raritan Canal Co.,

1 Wall. Jr. 275, 14 How. 80. Peet v. Edwards, 3 Blatchf. 310. See Worcester v. Great Falls Manuf. Co., 39 Maine, 246, 253. Armendias v. Stillman, 54 Texas, 623; State v. Lord, 16 N. H. 357. Howard v. Ingersoll, 17 Alabama, 780, 795. There is even stronger reason for the same assumption here. Montana cannot be presumed to be intent on suicide, and there are as many if not more cases in which it would lose as there are in which it would gain, if it invoked a trial of strength with its neighbors. In this very instance, as has been said, the Big Horn, after it has received the waters of Sage Creek, flows back into that State. But this is the least consideration. The doctrine of appropriation has prevailed in these regions probably from the first moment that they knew of any law, and has continued since they became territory of the United States. It was recognized by the statutes of the United States, while Montana and Wyoming were such territory, Rev. Stat., § § 2339, 2340, p. 429, Act of March 3, 1877, c. 107, 19 Stat. 377, and is recognized by both States now. Before the state lines were drawn of course the principle prevailed between the lands that were destined to be thus artificially divided. Indeed, Morris had made his appropriation before either State was admitted to the Union. The only reasonable presumption is that the States upon their incorporation continued the system that had prevailed theretofore, and made no changes other than those necessarily implied or expressed. See Willey v. Decker, 11 Wyoming, 496; Smith v. Denniff, 24 Montana, 20.

"It follows from what we have said that it is unnecessary to consider what limits there may be to the powers of an upper State, if it should seek to do all that it could. The grounds upon which such limits would stand are referred to in Hickey Land & Cattle Co. v. Miller & Lux, 218 U. S. 258, 261. So it is unnecessary to consider whether Morris is not protected by the Constitution; for it seems superfluous to fall back upon the citadel until some attack drives him to that retreat. Other matters adverted to in argument, so far as not disposed of by what we have said, have been dealt with sufficiently in two courts. It is enough here to say that we are satisfied with their discussion and confine our own to the only matter that warranted a certiorari or suggested questions that might be grave."

In Weiland v. Pioneer Irrigation Co., 259 U. S. 498, 502, the Supreme Court of the United States, speaking through Justice Clarke, said:

"As to the merits of the case. In the discussion of the jurisdictional question it has been sufficiently developed that the essential controversy here involved is whether priority of appropriation of water, from the part of an interstate stream in Colorado, for beneficial use on lands in Nebraska, into which State the stream in a state of nature flows, gives superiority of right over later appropriation also made in Colorado from the same stream, but for use in that State.

"Both of the lower courts held that the presence of the state line did not affect the superiority of right and enjoined the Colorado state officials from treating the appellee in the distribution of water otherwise than it would be treated if the canal were wholly within the State of Colorado and all the lands irrigated therefrom were in that State."

It is sufficiently clear from these expressions that the Supreme Court of the United States will protect the rights of water users in one State in the use of water of an interstate stream as against claims arising in another State where the claimant has been denied due process of law.

In the case at bar the applicant has asserted an existing claim to water gained consistently with the laws of Wyoming. The applicant's evidence supports its claim and there is no substantial evidence to the contrary. The applicant's evidence shows that the water involved is not needed and therefore cannot be beneficially used in the State of Wyoming, but that the water is being beneficially used and is needed by the applicant in the State of Idaho. There is no evidence to the contrary on this point, and it has not been contended at any point of the proceedings that this water can be used in the State of Wyoming. Under these circumstances there can be no basis for the denial of appellant's applications, except arbitrary refusal, and such denial deprives the applicant of its property without due process of law, and denies to it the equal protection of the laws, contrary to the Constitution of the United States and the Constitution of the State of Wyoming.

Wyoming undoubtedly has no jurisdiction to adjudicate water rights in Idaho. It may, therefore, be doubtful whether the applications for secondary permits filed by the appellant serve any practical or useful purpose. The only point involved is permission by the State of Wyoming to use this water in Idaho, to the extent the State of Wyoming has power to grant

or withhold such permission, and perhaps permission to use the creeks and river involved within the State of Wyoming as a right of way for delivery. As just stated, it is our opinion that the State of Wyoming has no power to withhold such permission under the circumstances of this case. The statutes of this State permit very broad rights in the storing and disposition of stored water. This Court has recently recognized this fact. Scherck v. Nichols, et al, 55 Wyo. 4, 19.

13. THE RECENT CASE OF SCHERCK V. NICHOLS STATES IMPORTANT PRINCIPLES APPLICABLE TO THIS CASE.

This Court has recently decided the case of Scherck v. Nichols, 55 Wyo. 4. In that case the Court states, or restates, the following principles or propositions of law applicable to the acquisition of the right to use water by appropriation and beneficial use.

1. A water right may be initiated on land not owned by the appropriator.

2. Steps leading up to the appropriation of water may be taken by one who acts as a volunteer for the ultimate user.

3. Water may, in this state, be impounded by any one who is neither the owner or in possession of any land.

4. The owner of the reservoir may sell, lease, transfer and use such water in such manner and upon such lands as the owner may desire. Section 122-1602, W.R.S. 1931.

5. One may divert and impound water, under application to, and permit by, the State Engineer, for the ultimate use of another.

6. In the case of storage water it is not required to be attached to any land.

7. Appropriations by one for the use of another should

be recognized unless some special reasons of public policy to the contrary exist.

8. It is the public policy of this state that its waters should be put to the highest possible use.

9. No one should be able to get control of waters for mere future speculative profit or advantage.

10. The State Engineer fixes the time within which the appropriation must be completed for this purpose.

11. A claim to water need not be personal in the sense that no one else can reap the benefit of it.

12. Our statute seems to lay the main stress on the beneficial use, and in the case of irrigation by direct flow from the stream, on the place of use. Other elements seem to be of more or less secondary importance, except, of course, that the prior applicant and permittee who is diligent otherwise, has the prior right.

In the case at bar the appellant has acquired storage water and put it to beneficial use in a manner in every respect consistent with principles above stated and it is now entitled to make its record title, and then proceed to obtain its easements from the Interior Department.

SUMMARY

The appellant acquired storage rights by purchase for a valuable consideration. Such storage rights had been perfected up to the point of final proof by the construction of impounding works and the maintenance thereof, and the application and use of the water over a period of years to a beneficial purpose. Permits under which the impounding works were constructed remained in exist-

ence and no attempt to cancel them was ever made prior to the commencement of this proceeding.

The appellant in this proceeding has sought in effect permission to make final proof or formal record of its storage right and to obtain whatever permission may be necessary to use the water in Idaho.

There has been no assertion of any adverse water right which is not fully recognized by the appellant.

Without any showing that the rights of any water user in the State of Wyoming, or the interests of the State of Wyoming itself, will be adversely affected, the State Engineer has arbitrarily refused to grant the applications of the appellant.

The principal ground of refusal advanced by the State Engineer is that the permits were granted subject to conditions and the conditions have failed.

There is no reasonable basis for the conclusion that the conditions asserted have any application to the permits as they were actually availed of in the construction of smaller impounding works than were originally contemplated. If such conditions are considered applicable they are discriminatory and invalid. In any event, the conditions themselves required that the permits should be surrendered for cancellation and canceled. There is no claim that the permits were ever surrendered or canceled. They cannot now be canceled in the face of the claims actually asserted and the showing made by the appellant. To do so would involve a forfeiture, which will not be permitted under the circumstances of this case.

The denial of the appellant's application under the circumstances shown constitutes a denial of due process of law, and denies to the appellant the equal protection of the laws,

in violation of the Constitution of the United States and the Constitution of the State of Wyoming.

The appellant's application should be granted in reversal of the previous orders and judgments.

Respectfully submitted,

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Attorneys for Applicant and Appellant.

In the Supreme Court,

State of Wyoming.

No. 2208.

In the Matter of the Appeal of the Utah-Idaho Sugar Company from the action of the State Engineer in the Endorsements placed upon Applications for Amendment of Permits Nos. 3770 Res. and 3771 Res. and Applications for Secondary Permits from Two Ocean and Emma Matilda Reservoirs (Applications Nos. 13 1-2-3-4/357 and 14 5/138.)

SNAKE RIVER LAND COMPANY,

Protestant and Respondent,

and

STATE BOARD OF CONTROL,

Respondent,

vs.

UTAH-IDAHO SUGAR COMPANY,

Applicant and Appellant.

A B S T R A C T

Application for an Amended Permit to Construct the Two Ocean Reservoir.

This is an application by Utah-Idaho Sugar Company for an amended permit to construct the Two Ocean Reservoir in the bed of Two Ocean Lake, having a high water line area of 620 acres and an available capacity of 3040 acre feet. (R. 15-18). It is in fact an application to amend a previous permit, No. 3770-R.

Application for Secondary Permit to divert and appropriate from Two Ocean Reservoir.

This is an application by Utah-Idaho Sugar Company for authority to divert and appropriate water from Two Ocean Reservoir

to the Osgood tract in Township 3 North, Range 37 East, Boise B. & M. for the irrigation of 5680.35 acres, with a capacity at the headgate of 2.5 cubic feet per second. (R. 19-22). It is in fact an application for a secondary permit made in connection with the foregoing application for an amendment of permit No. 3770-M.

Application for an Amended Permit to Construct the Emma Matilda Reservoir.

This is an application by Utah-Idaho Sugar Company for an amended permit to construct a reservoir in the bed of Emma Matilda Lake having a high water line area of 904.2 acres and an available capacity of 1340 acre feet. (R. 23-26). It is in fact an application to amend a previous permit, No. 3771-M.

Application for Secondary Permit to divert and appropriate from Emma Matilda Reservoir.

This is an application by Utah-Idaho Sugar Company for authority to divert and appropriate water from Emma Matilda Reservoir to the Osgood tract in Township 3 North, Range 37 East, Boise B. & M. for the irrigation of 5680.35 acres, with a capacity at the headgate of one cubic foot per second. (R. 27-29½). It is in fact an application for a secondary permit made in connection with amended permit No. 3771-M.

Request for special permit under permits No. 3770-M and No. 3771-M.

This is an application for permit to take a certain quantity of water from the State of Wyoming into the State of Idaho for application to beneficial use upon lands in Bonneville County, Idaho, which water is appropriated under Permits Nos. 3770-M and 3771-M and Secondary Permits Nos. 3770-M and 3771-M. (R. 30).

Request for cancellation of Original Permits No. 3770-R, No. 3771-R, No. P16190 and No. 4232 Enl.

This is an application by Utah-Idaho Sugar Company for cancellation of the above numbered original permits. (R. 31). Its actual purpose is to relinquish the rights of appellant in excess of what appellant seeks here. (Tr. 4, 8, 9). Permit No. 16190 was to construct a ditch or canal known as Twin Reservoir Supply Canal 3.6 miles long, with a carrying capacity of 496.64 cubic feet per second from Pacific Creek. Permit No. 4232 was for the enlargement of the Twin Reservoir Supply Canal to a carrying capacity of 500 cubic feet per second.

Protest of Snake River Land Company.

While this protest is rather lengthy, it is believed that its substance can be adequately abstracted for the purposes of this appeal as follows:

1.Protest to application for use of water in Idaho under 3487-R.(Protestant assumes erroneously that the application is for use under this right.)

Protest against this application is upon the following grounds: (a) The applicant has no special use permit from the Forest Service: (b) the storage right was limited to use on the lands for which application was made; (c) the 512 acre feet appropriated is sufficient only for the Wyoming ranches.

2. To application for use of water in Idaho under No. 3561-R. (Protestant assumes erroneously that the application is for use under this right.)

Protest against this application is upon the following grounds:

(a) The applicant has no special use permit from the Forest Service; (b) The storage right was limited to use on the lands for which application has been made; (c) The applicant has no surplus over the 1710 acre feet of storage reserved for the Wyoming ranches.

3. To applications for amendment of Permits 3770-R and 3771-R. and applications for use of water thereunder by Secondary Permit and special permit in Idaho; to application to cancel Permit No. 16190 to construct Twin Reservoir Supply Canal, and Permit No. 4232 for enlargement thereof.

The protest against the foregoing applications is upon the following grounds: (a) The permits were conditioned upon the granting of easements for the reservoirs and supply ditches by the United States General Land Office, which condition has failed and the permits have no standing and are wholly void; (b) the applicant can have gained no right by prescription and was not misled; (1) the Wyoming law does not permit water rights to be gained by prescription, (2) the Sugar Company has averaged in use from 1920 to 1934 less than fifty per cent. of the 5000 acre feet claimed, (3) the State Engineer's record shows that the applicant's vendor had no title.

4. General Protest.

The protestant states the following additional grounds of protest: 9(a) The applicant has no legal right or interest in any existing permit sought to be amended; (b) the applicant has no permit to use the water outside of Wyoming; (c) the lands sought to be used for diverting and impounding works have been withdrawn from entry; (d) the granting of the application will tend to defeat the purpose of the Snake River Land Company to preserve the scenic features of Two Ocean and Emma Matilda Lakes. (R. 32-51).

Protest of the National Park Service

The National Park Service in its protest states no grounds in addition to those stated in the protest of Snake River Land Company. (R. 52-61). This party was in effect ruled out of the proceeding at the hearing before the State Engineer and has made no subsequent appearance.

Decision of the State Engineer.

A hearing was held before the State Engineer on June 1, 1938, and he made his decision in the form of a written "Opinion and Order" dated December 3, 1938, thereafter endorsed upon the applications rejecting all of the applications and cancelling Permits 3770 Res., 3771 Res., 16190 and 4232 Enl., and the Secondary Permits under 3770 Res. and 3771 Res.

After making a "statement" the State Engineer gives his opinion as follows: (a) Permits Nos. 3770 Res., 3771 Res., 16190 and 4232 Enl. were granted, subject to cancellation for non-compliance with the terms of the agreement of May 2, 1921 with the State Engineer, which made the granting of the permit conditional upon the granting or refusal of the necessary rights of way by the General Land Office. Upon refusal of the rights of way the agreement became void, and the permits issued under its terms, together with the secondary permits should be canceled. To grant the secondary and special permits, when the applicant does not have, and cannot obtain the rights of way for storage works, would be detrimental to the public interest as encouraging trespass and creating unnecessary difficulties in the administration of water. (b) By the terms of Permit 3771 Res. final construction was to be completed by December 31, 1924; failure to complete constituted a forfeiture upon giving the notice by registered mail required by the statute. (c) The rights under Permit 3561 Res. acquired before Permit 3771 Res. was granted, had been adjudicated in the capacity of 1710 acre feet. The present amendment contemplates a total capacity of only 1340

acre feet. Hence as no construction resulting in the enlargement of Emma Matilda Reservoir was ever done, there now exists a default. (R. 62-67).

Appeal.

This is a notice of appeal to the State Board of Control directed to John D. Quinn, State Engineer, appealing from his decision as to all of the matters covered by his opinion. (R. 68-69).

Stipulation.

This is a stipulation that the matter may be submitted to the Board of Control upon the record made and briefs filed before the State Engineer, and that either party shall have the right to argue the case orally before the Board, or if it prefers, to file an additional brief. (R. 70).

Findings and Order

This constitutes the findings and order of the State Board of Control.

The Board first makes findings with reference to the proceedings, including the hearing before the Board.

The Board then denies the applications, the only reason stated being as follows: "That the action of the State Engineer in rejecting said applications is hereby sustained for the reason that the State Engineer and the State Board of Control are now prohibited under Chapter 125, Session Laws of Wyoming, 1939, from granting permits for any appropriation or development of the State's waters while within the State's boundaries, in whole or in part for use outside the State." (R. 72).

Notice of Appeal

This is the statutory notice of appeal from the Board of

Control to the District Court. It is directed to the protestants. (R.6).

Precipe for Clerk's Notice of Appeal

This is the statutory precipe directed to the Clerk of the District Court of Teton County, (R.7).

Clerk's Notice of Appeal.

This is the statutory notice required by the Clerk of the District Court to which an appeal is taken from the Board of Control in such water matters. It notifies the Secretary of the State Board of Control that an appeal has been perfected in the District Court of Teton County, Wyoming, from the order of the Board of Control above referred to, and requests the preparation, certification and transmission to such Clerk of a transcript of the proceedings, including the evidence. (R. 73-74).

Acknowledgment of Service.

This is an acknowledgment of service of the Clerk's Notice of Appeal by attorneys for the Snake River Land Company. (R. 10).

Undertaking.

This is the statutory undertaking required of the appellant in an appeal to the District Court from the State Board of Control. (R.11 and 12).

Petition.

This is a petition on appeal filed by Utah-Idaho Sugar Company, appellant, in the District Court of Teton County, Wyoming,

stating that the order and determination of the Board of Control is not sustained by sufficient evidence and is contrary to the evidence, and that such order and determination is contrary to law. (R. 75-76).

Summons

This is summons directed to the Sheriff of Teton County, Wyoming, by the Clerk of the District Court of that County, commanding him to notify Snake River Land Company of the appeal. (R. 77)

Demurrer

This is a demurrer by Snake River Land Company to the petition on appeal of Utah-Idaho Sugar Company, on the ground that it does not state sufficient facts to constitute a cause of action. (R. 78).

Answer.

This is an answer by Snake River Land Company to the petition of Utah-Idaho Sugar Company on appeal and is in formand effect a general denial. (R. 79-80).

Answer of State Board of Control.

This is the answer of the State Board of Control to the petition on appeal of the Utah-Idaho Sugar Company and is in form and effect a general denial. (R. 81-82).

Stipulation.

This is a stipulation by the parties that the appeal in the District Court may be submitted on the record filed, each party to have the privilege of filing a written brief and to make oral argument at the hearing, and to file such reply brief as may be desired within a time fixed by the Court. (R. 83-85).

Certificate.

This is the Certificate of Earl Lloyd, Deputy State Engineer and Ex-Officio Secretary of the State Board of Control, to the record on appeal from such Board. (R. 86-89).

Judgment and Decree.

This is the judgment and decree of the District Court dated December 19,1940. The Court first recites the proceedings at the time of hearing and then recites its judgment in the following language: "That the decision of the State Board of Control be, and the same is, hereby confirmed, excepting however, the reason therein stated." (R. 90-91).

Notice of Appeal

This is a notice by Utah-Idaho Sugar Company to protestants and opposing parties of its intention to appeal to the Supreme Court of Wyoming from the whole of the judgment and decree of the District Court, and shows service on the Attorney General and attorneys for Snake River Land Company. (R. 92).

Specifications of Error.

These are the specifications of error filed by Utah-Idaho Sugar Company in connection with the appeal to the Supreme Court, stating as error the following: The judgment of the District Court is not sustained by sufficient evidence, and is contrary to law. Each of the applications involved should have been granted under the evidence and the applicable law and they were in effect denied. Service upon the Attorney General and Attorneys for Snake River Land Company, protestant, is shown. (R. 93-94).

Certificate.

This is a certificate of R. N. Moody, Clerk of the District Court of Teton County, as to the record and transcript of evidence from the District Court of Teton County. (R. 1-4).

Transcript of Testimony.

1. **Applicant's witnesses.**

Ashby D. Boyle.

The statements in my affidavit, Exhibit 1, are true except for one thing, that is the Utah-Idaho Sugar Company now has assignments of the permits referred to.

Exhibit 2 purports to be a contract of Osgood Land and Live Stock Company for certain water rights and is the same as appears on page 130 of the Report, Exhibit 19. (Tr. 7).

I have been familiar with the purchase of the Osgood tract since its inception and have been familiar with the matters at Jackson Hole since the summer of 1933.

The Utah-Idaho Sugar Company is willing to relinquish its entire interest in Permit No. 16190 and Permit No. 4232 Enl. These permits cover the supply ditch and its enlargement.

It is ready to relinquish its rights in Permits Nos. 3770-R and 3771-R to the extent of the excess applied for above the present impounding capacity of the dams, with the qualifications I have stated to Mr. Moffatt and Mr. Fabian, who represent the Snake River Land Company, that we would enter into a working agreement, in the event the State Engineer approved our applications, by which the McKinstry place might receive its reasonable requirements from Two Ocean Reservoir and the Lozier, Snell and Markham ranches might receive their (Tr. 8)reasonable requirements from Emma-Matilda, not exceeding in the case of Two Ocean, the first foot of storage water,

and in the case of Emma-Matilda the first two feet of storage, provided the irrigation requirements should run that high. That offer was not accepted and is still open.

It is my recollection that this matter was called to my attention in 1933 either by receiving a copy of a proposed compact between Idaho and Wyoming from Mr. Johannesen, or it may have been in connection with a conference with Mr. Dealley upon his return from Cheyenne where he had inspected certain records in the State Engineer's Office.

At that time I did three things. Over a course of a few weeks I was present at two or three interviews with forest officials at Ogden, with Mr. Dealley, and I visited Jackson Hole, viewing both lakes, and prepared a form of application which I hoped might meet our requirements. I also visited Cheyenne where I interviewed Mr. Burritt, then State Engineer. (Tr. 9).

I was in Ogden in August; In Jackson Hole on Labor Day - all within sixty days' time.

As to why the applicant had not taken action to perfect these rights before that time, we had had uninterrupted enjoyment of the water and it had not occurred to any one to perfect the paper rights.

In the course of one of my conferences with Mr. Burritt he indicated that some qualified person should investigate the facts and file a full report for the benefit of the Engineer's office. He asked, and I told him, that Mr. Albert would be acceptable. I had met Mr. Albert in the fall of 1934. The report was made one and a half or two years later. (Tr. 10).

When Mr. Albert was employed in 1933 it is correct to say that he was employed as a Wyoming qualified engineer, whom Mr. Burritt, the State Engineer, had indicated was satisfactory to him. Our own engineer did field work.

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When Mr. Albert was employed in 1933 it is correct to say that he was employed as a Wyoming qualified engineer, whom Mr. Burritt, the State Engineer, had indicated was satisfactory to him. Our own engineer did field work.

There were three employments of Mr. Albert, two by us and one by Mr. Burritt. The first in 1933 was in connection with the application mentioned and was very limited. The second was by Mr. Burritt. Mr. Albert was a representative of the State Engineer's office. I engaged him to prepare the applications which are before the Engineer for hearing today. (Tr. 11).

Cross-Examination.

The applicant based its rights upon the agreement at page 81 of Exhibit 2 until it got assignments - quit-claim deeds, from the Osgood Land and Livestock Company of Wyoming, and its last qualified directors and from Johannesen and from Osgood Land and Livestock Company, an Idaho corporation.

I would say the Utah-Idaho Sugar Company qualified in Wyoming late in 1933.

Re-Direct.

I would say that the 5000 acre feet of water referred to in the contract had reference to water in Emma-Matilda and Two Ocean Lakes. The dams were in place and that was an existing right, which was under contemplation of the applicant. (Tr. 12).

K. S. Albert.

I am a licensed engineer and land surveyor in Wyoming. I was a licensed surveyor in '33 and a licensed engineer in '35.

I made some investigation of the matter on hearing in 1933 and 1935.

I went to Jackson Hole in October 1933 and inspected the two lakes.

I did this upon call from Mr. Burritt and an official of Utah-Idaho Sugar Company, with the understanding with Mr. Burritt that the Sugar Company should be charged.

I met Mr. Hodgen at Moran and he had his survey notes which (Tr. 13) included a traverse of both the high and low water lines of each of the reservoirs, and we looked at the headgates and various construction features of the lakes at that time.

In 1936 I went over the Osgood tract in Idaho and I also went through the Sugar Company's files in Salt Lake City.

I went over the entire records in the State Engineer's office in Cheyenne, the records in the Salt Lake City office of the Utah-Idaho Sugar Company, and from the inspection on the ground and of the Osgood tract I prepared a report for the State Engineer of Wyoming, explaining the entire situation from my first inspection up to the date of the report.

That is the report on file here. The facts stated therein are correct so far as I was able to ascertain and the report was prepared by me.

In connection with the report (Tr. 14) I prepared an application for the cancellation of all the permits which had been assigned by the Osgood Land and Livestock Company of Wyoming, representing an excess of the water actually impounded in the two reservoirs, with the request that the date of priority be preserved for all of those permits which were not actually and wholly canceled. In addition I asked for amended permits for Nos. 3770-M and 3771-M, and in addition I asked for secondary permits to apply the water from these reservoirs upon the Osgood tract in Idaho. And in addition I asked for a special permit from the State Engineer to take the water across the state line from Wyoming into Idaho.

I prepared the applications herein involved. (Tr. 15).

The blue prints filed with them were actually prepared by Mr. Robert Hodgen, Utah-Idaho Sugar Company engineer, but I checked his notes roughly on the ground and supervised the preparation of the tracings in his office in Salt Lake City and dictated the certificate on the tracings of the reservoirs. The paper marked

"Map to accompany amended application for the construction of two Ocean and Emma-Matilda Reservoirs, Teton County, Wyoming," being my certificate, is one of the maps to which I have referred. It is a print from a tracing prepared by Mr. Rodgers from the survey of the lakes.

It shows the high and low water areas of both Two Ocean and Emma-Matilda Lakes and the outlet works, and cross section and profile of the impounding works. It is Exhibit 3.

Exhibit 4 is the so-called Osgood tract, approximately 80 miles from Idaho Falls, Idaho. (Tr. 16). That is one of the maps I have talked about to be used in connection with the secondary applications.

Exhibit 5 shows the drainage area in the vicinity of Two Ocean and Emma Matilda Lakes, the creek connecting that lake with Pacific Creek and Pacific Creek emptying into the Snake River. I copied that from a map which an engineer prepared in Idaho. I did not make the actual survey myself. I would say that it is substantially correct.

Exhibit 6 constitutes information from the Utah-Idaho Sugar Company offices as to the total area of acres irrigated, the number of acres dry, number of acres of waste land in the Osgood tract. It also gives the capacity of each pumping plant, the number of pumps, the horsepower of each pump, when installed, a list of water rights owned or to be used on the tract, together with the dates of priority, and various operating and maintenance expenses in connection with the tract. The chart was prepared by Mr. Rodgers and I got a copy of it from the Utah-Idaho Sugar Company file in connection with the secondary permits and filed it in the office of the State Engineer.

Exhibit 7 is a picture of the outlet and headgate on Emma-Matilda Lake. It was one of the pictures filed in connection with this report. It correctly shows the headgate as I observed it in

October, 1933.

Exhibit 8 is a picture showing the water coming over the spillway at Two Ocean Lake. The lake was not full at the time. The note on the back says it was taken in July. I was there in October. The outlet works and headgates are correct as observed, but the water was not spilling over at that time.

Exhibit 9 is the picture of Two Ocean Lake Looking north from the headgate. (Tr. 18).

Exhibit 10 is a close-up view of the outlet and headgate of Emma-Matilda Lake.

Exhibit 11 was taken from the top of the outlet works at Two Ocean Lake as constructed with a road across so that vehicles could have access to the north side of the lake.

Exhibit 12 is a picture of a beaver house on Emma Matilda Lake.

Exhibit 13 is a picture of Two Ocean Lake, with the Teton Range in the background, taken from the east side of the lake.

Exhibit 14 is a picture of Emma-Matilda Lake, with the Teton Range in the background, taken from the east side of the lake.

Exhibit 15 is a picture of Two Ocean Lake looking south toward the Teton Range.

These are all photographs filed by me in connection with the hearing, as I have described above.

They correctly show conditions with the exception of Two Ocean Lake showing water coming over the spillway. I never saw that. (Tr. 19);

As I stated in my report, the outlet works and headgates added to the scenic effect very materially. In my opinion they enhance and do not affect to disadvantage the scenic effect. In Emma-Matilda Lake the lines of high and low water are so close that they have not affected timber growth at all. In Two Ocean there

is approximately five feet, between the high and low elevation of the water which has not as yet affected the timber growth much, since the water is only there a short time in the spring and is drawn off early in the summer.

There was not any bare timber standing in 1933. There were no more dead trees than there are in any forest.

My personal opinion is that the dams enhance the beauty of both lakes. (Tr. 20.)

I am familiar only in a general way with what application can be made of this stored water in the State of Wyoming. My opinion is that all of the irrigable acres could be very satisfactorily supplied from water of the Pacific Creek, which I have never seen dry and which always has a good flow. The Snake River always has enough water in it for all irrigable lands in Wyoming.

Cross-Examination.

I made this report while in the employ of the State Engineer. Preliminary to making the report I went over all of the records in both Wyoming and Idaho relative to the claim of the Utah-Idaho Sugar Company to Emma-Matilda and Two Ocean Lakes, (Tr. 21).

I also made a study of the Osgood tract.

I would say that this report of conditions in Emma-Matilda and Two Ocean Lakes is pertinent to this hearing.

I made no examination of the records of Teton County relative to transfer of storage rights.

Robert Rodgers.

I am Robert Rodgers and reside at Bellingham, Washington. I am employed by the Utah-Idaho Sugar Company, and have been for nineteen years, going back to 1919. (Tr.22).

I have some familiarity with Two Ocean and Emma-Matilda Lakes. I first saw them in 1926 and had not been there before that time. In 1926 the extent of the impounding works at Emma-Matilda, as I recall, was the same as shown in that picture. That is the extent of the impounding works at Emma-Matilda were the same as they are at the present time.

The dam at Two Ocean was a dirt dam with a wooden headgate.

At that time five feet of water were stored at Two Ocean. In Emma-Matilda, as I recall, the dam was constructed so that flash boards could be inserted in the gate and five or six feet of water could be stored.

At that time I was a civil engineer and I am a surveyor and engineer licensed in the State of Utah and have been for twenty-three years, during which time I have been employed by the applicant (Tr. 23) except the last two years when I moved to Washington.

As to my educational qualifications, I had high school and two years of college.

I made the tracings about which Mr. Albert has been talking. (Mr. Moffatt stated at this point that he did not question the blue prints in any way).

I had been on the stream on which these reservoirs are located since 1926 until 1935. I have been in Jackson Hole probably on an average of three times a year during that time.

As to the extent to which I visited these reservoirs, in 1926 I set out the stakes and made the cross sections by which these reservoirs were constructed. I was also there in person once or twice in 1928 during construction. Before 1928 I was there only in 1926.

My trips along the river during these times were merely vacation trips. (Tr. 24).

As an engineer I made observations of the streams. As to the storage in these lakes, it is my opinion that there would be

enough direct flow for all areas in Wyoming.

The stored water was used on the Osgood tract in Idaho. The water was measured at the outlet of the reservoirs as it was requested, and record kept of it, and the Utah- Idaho Sugar Company was given credit for it.

I believe that Mr. Markham measured the water at the reservoirs at one time. The measurement at the reservoirs themselves was done by employees of the Sugar Company. (Tr. 25) I believe these employees reported to the Superintendent at the dam at Moran and he reported to the Water Master in Idaho Falls. I was familiar with the practice from 1930 to 1932.

This stored water is important to the Utah-Idaho Sugar Company for use on its Osgood tract. In explanation of this- as to the character of the direct flow on the Osgood tract - in seasons of shortage they have one right of 100 second feet, which we in Idaho considered at the time to be a flood right.

Cross-examination.

There is not sufficient direct flow of water to take care of all water due the Osgood tract. I do not know any appropriators of water there. (Tr. 26).

I believe Mr. McKinstry measured the water as it was drawn out of the reservoirs for a number of years-until 1925. After 1925 Roy Lozier made the observations, I think, - I believe until 1930. Then Mr. Hill made them for some time.

I believe the original settlers constructed the original works on the two lakes. I was not there until 1926.

The works I have testified to, I believe, were reconstructed the following year, or some other year. (Tr. 27). I understand that the works I saw in 1926 were not the original works.

I staked out the construction of the dam on Two Ocean Lake in 1928 and it was constructed thereafter. The grade stake

was set for that purpose by the Forest Supervisor.

I am familiar with Permit No. 3487 and came across it in this office. (Tr. 28).

I believe Mr. Crandall deducted a certain amount of water for water that was lost in transit from the reservoirs to the point where it was taken in Idaho. I did not say that a like amount of water was taken from the river in Idaho as was released from the reservoirs.

Lynn N. Crandall.

I am Lynn Crandall and am employed as Water Master on the Snake River in Idaho. (Tr. 29). I am also Deputy commissioner of Reclamation and District Engineer for the United States Geological Survey. I have been such since the spring of 1930. My employment has been continuous and I still hold those positions.

Referring to the protest of Snake River Land Company, particularly page 17, the tables there set out of water taken from the Emma-Matilda and the Two Ocean Lakes are correct. They correspond with the records which I have in my possession. These records were made under my supervision in 1930. I can describe the method used from 1930 to date. There are records in my office prior to that time. The Utah-Idaho Sugar Company has employed the Superintendent at Jackson Hole (Tr. 30) to take the figures of the reservoir waters when he is not occupied with his own work. He goes over once or twice a week and regulates the discharge from the reservoirs and 'phones them to me each week. The water is discharged as it is needed, and the figures are given to me by the Reservoir Superintendent as the water is discharged from these lakes. These figures as shown here are based on the quantities of water transmitted to me by the Jackson Hole Reservoir Superintendent by telephone. No more water is discharged from the reservoirs than the channels will carry.

This water has been used since 1930 on the Osgood tract near Idaho Falls, Idaho, where it is used for irrigation of alfalfa, grain, potatoes and sugar beets as the principal crops that are irrigated.

I am familiar with the Utah-Idaho Sugar Company direct flow rights on Snake River. The principal right has a 1900 priority and is for 100 second feet per second of time. That is what is known as a late right and is cut off as soon as the flood waters stop about the first of July, and in dry seasons it is cut off prior to that time.

They have about 80 second feet which is prior to the rights I have described. Some of that earlier water was to be delivered to certain individuals and not to the Sugar Company. The total capacity of the pumping plant is 120 second feet. There is 20 feet of rights prior to 1900 and 100 feet with priority of 1900. The 1900 priority is really a flood right as conditions actually exist on the river.

Water taken from these reservoirs and used on the Osgood tract subsequent to 1934 are as follows: 1935, 4200 acre feet; 1936, 3669 acre feet; 1937, 3653 acre feet.

Cross-Examination.

I have not got the figures segregated as between Two Ocean and the other reservoir. We have reported the discharge together but the Superintendent at Jackson Lake says there have been no waters discharged out of the ordinary in the last two years. The Superintendent's name is D. P. Hill, Moran, Wyoming. He has been there since 1932. Mr. Markham died in 1931. These figures were given by Mr. Hill since 1932.

Re-Direct.

These figures are gross figures. A loss of 7.28% was charged. This is a standard figure. The water users on the Snake

River have agreed to the figure and it has been used by common agreement for a number of years.

D. E. Scalley.

I am D. E. Scalley and live at Salt Lake City. I am employed as General Production Superintendent for the Utah-Idaho Sugar Company. I have been so employed since 1929. (Tr. 32). For three years prior to that I was Idaho Manager for Utah-Idaho Sugar Company with headquarters at Idaho Falls. Prior to that I was Assistant Factory Superintendent for ten years dating back to 1903, when I started to work there. I have been employed continuously by the applicant since 1903. I became Idaho Manager of the Company in 1927.

Since 1927 I have been very well acquainted with the Two Ocean and Emma-Matilda reservoirs and I have been somewhat familiar with them since 1921 when I first visited the reservoirs.

At that time the dam at Two Ocean Lake was a dirt fill with a gooden headgate. The capacity of that dam before we reconstructed it in 1928 was possibly eight to ten inches higher than the present dam. (Tr. 34).

As to Emma-Matilda, itis the same as when it was purchased by the Osgood Company, and is the same now as it was in 1921.

The title to the Thompson ranch on Pacific Creek close to the reservoirs passed through my name. There were secondary adjudicated reservoir rights. I have conveyed title to that property to the Snake River Land Company. In making that conveyance the water rights were reserved.

I was familiar with the reconstruction of the dam at Two Ocean Reservoir in 1928 as it was under my general supervision. The Utah-Idaho Sugar Company paid for that work. I do not have figures with me as to the expenditures on that dam and the maintenance of it and other matters prior to 1928. (Tr. 35). Prior to that time the Utah-Idaho Sugar Company paid for the maintenance of

the dam from the time they took it over. The same is true of Emma-Matilda.

In 1933 these water rights came to my attention first through Mr. Johannesen of Idaho Falls and shortly after I came to the State Engineer's office in Cheyenne and started to look into what I could find out about them. Mr. Burritt was the State Engineer at that time. I gathered what information I could and conveyed it to our Counsel. To my knowledge these rights had never been questioned prior to 1933. In 1928 when we decided it was advisable to reconstruct the wooden headgate and dirt dam it was necessary for me to secure an appropriation for this work from the company before we could commence, and we established the cost as nearly as we could estimate it and Mr. Wallace, our General Manager, gave his authority to go ahead (Tr. 36) with the concrete construction. We also got approval of the Forest Service Supervisor at that time. I do not think there was any one else to take the matter up with but the Forest Service. I had the Forest Service go ahead and set the grade stake and had them set the type of construction. So when this came up in 1933 it was a complete surprise to me.

When this matter came up in 1933 and we began to investigate I made two trips to the Regional office of the Forest Service in Ogden to discuss the matter. At that time I heard no objection by the Forest Service to the use that was being made of these rights.

Prior to 1933 the applicant actually used the water from these reservoirs without objection from any one.

I know that the water was being used on the Osgood tract at the time covered by Mr. Crandall's statement. (Tr. 37). I believe the direct flow rights are 120 cubic feet with a priority of 1900. I have been the water cut off in the early part of July, and I recall dry seasons, especially in 1934, when we were cut off from this water in the early part of June. This stored water in Emma Matilda is an important item to the applicant. It is extremely

important to the crops that are grown in the upper Snake valley. The two principal crops are potatoes and sugar beets. It is important that they should be supplied with water. This stored water is a necessary supply for the Utah-Idaho Sugar Company for the irrigation of the Osgood tract.

The facts stated in Exhibit 16 are true. (Tr. 38). Exhibit 16 is the same as my affidavit that appears on page 127 of the report (Exhibit 19).

Cross-examination.

I was told that the impounding works I saw in 1921 were constructed by the Osgood Company in 1920.

In a general way the reconstruction in 1928 was under my supervision. Two men, both working with me, handled the details. I had visited the State Engineer's office previously. I did not get any written permit from the Forest Service to allow for the construction of these dams. I have never seen any written permits from any one to allow this work or which gave consent for the construction. I do not remember ever seeing any such permits.

The Utah-Idaho Sugar Company owned the Thompson place and I was their agent. At the time title was transferred the water right was reserved. Subject to correction, that was in 1930 or 1931.

I don't know whether any request was made on the Water Commissioner of the State of Wyoming to release water from these two lakes.

Re-direct.

It was my understanding that we were proceeding in accordance with the law.

(Colloquy between Mr. Moffatt and Mr. Loomis.)

There is no question that the Thompson deed contains the water reservation.

Re-Direct.

Exhibit 17 is the affidavit of Mr. M. M. Chapman, which is the same as the affidavit appearing at page 123 of the report. (Exhibit 19).

Exhibit 18 is the affidavit of Wilford Y. Cannon. It appears at page 125 of the report. (Exhibit 19).

H. C. McKinstry.

I am H. C. McKinstry and I reside at Denver and have resided there since 1926. Prior to 1926 I resided one year in Casper and prior to that in Moran in Jackson Hole. I was a licensed surveyor at that time, that is 1916 or 1917 to 1928 or 1929.

I am familiar with this Two Ocean and Emma Matilda Lake controversy. (Tr. 42). I had a ranch which was located on the stream below Two Ocean Lake, and I owned two feet of storage on Two Ocean Lake which was adjudicated later. The application for this permit was filed in 1918 by me. I owned a one-half interest and William C. Thompson owned the other.

I constructed the impounding works under that permit personally in the fall of 1918. Such impounding works consisted merely of a plank and gravel dam two feet high, which would store two feet vertical on the lake.

The following year I disposed of my right in this reservoir to Osgood Land and Livestock Company. (Tr. 45).

I am familiar with the fact that the Osgood Company made application for the enlargement of the reservoir.

After that permit was granted to the Osgood Company I know that additional impounding works were constructed at Two Ocean

Reservoir in the summer of 1919. I did this work under the instructions of the Osgood Company and they paid for the work.

I am familiar with the fact that later on the Osgood Company disposed of its rights in the reservoir to the applicant. That was approximately in the spring of 1920.

After that time some repair work was doneon the impounding works. I did this work with men they sent in. I did work of that character for the applicant intermittently until 1925. The Utah-Idaho Sugar Company paid for that work.

I would not know whether I had any storage rights in Emma-Matilda Lake Reservoir. (Tr. 44). I am familiar with the impounding works constructed there at the time that the works were reconstructed at the Two Ocean Reservoir. Referring to picture print marked "Exhibit 10" bearing the notation "Dam at Emma-Matilda Lake" I have seen that dam. I built it. It was built in the same year by the Osgood people. That would be in 1919. It was all a part of the same job. I built that for the Osgood people and they paid for it. The rights of the Osgood Company on this reservoir were conveyed to the applicant prior to 1920. At the same time the rights on Two Ocean were conveyed. They were all conveyed in 1920. I did maintenance work on this impounding works the same year I put in the dam for Thompson and myself at Two Ocean Lake. Subsequent to 1920 I did no such repair work for the Utah-Idaho Sugar Company. (Tr. 45). I left the Jackson Hole country permanently in 1926. I was back just during the summer of 1925 .

From 1920 to 1925 I had to do with the measuring of water for the Osgood Land and Livestock Company first, and later, after 1920, for the Utah-Idaho Sugar Company. I made my reports directly to Mr. Markham, Superintendent at Moran. I would have a very rough idea of the amount of water measured during those years. Referring to the table at page 17 of the Snake River Land Company's protest,

I could not swear to the accuracy of the table but they are pretty close.

The impounding capacity in linear feet above the low water level in Two Ocean Reservoir of the impounding works I constructed in 1919 for the Osgood Company was six feet. The dam was eight feet high, approximately. To my knowledge, just within .2 of a foot of six feet of water has been stored in the lake. (Tr. 46) About five feet was impounded in average years. It would vary. When I spoke of impounding six feet I was referring to a special or unusual year.

As to whether impounding works were in place during all the time I was familiar with Two Ocean Reservoir after 1919, at the end of that first year the first dam was washed out. The water was measured as it went out. It was repaired at the end of that year, to the same capacity as the dam I constructed for the Osgood Company. That dam continued to be there during all the other years that I was there.

With reference to Emma-Matilda Reservoir, the impounding works there would impound four feet above extreme low water. The reservoir has changed in years past due to the washing in of silt in the outlet and the work of beaver. The work of beaver has put the water back as high as we have ever had it with an artificial dam. In 1925 these works could, I believe, have been made to hold four feet, the height (Tr. 47)of the dam.

My opinion, based upon my familiarity with the streams on which these reservoirs are located, and what I have heard as I have sat and listened to these proceedings here, is, in view of all the circumstances, that there was just no land left down the river that is not covered by water rights. As far as Jackson Hole is concerned I would say that the water could not be used in the State of Wyoming. I do not know of any place below Jackson Hole where it could be used.

During the years I was measuring water out of these reservoirs, the Utah-Idaho Sugar Company was getting the water and using it at Idaho Falls on the Osgood project. The secondary appropriators were getting water too at that time from these reservoirs - I, on two Ocean and Lozier, Snell and Markham on Emma-Matilda.

At the time I built these impounding works for the Osgood Land and Livestock Company the State Engineer was on the ground. (Tr. 48). At that time he went over the entire project and looked over the supply canal that was at that time contemplated and was covered by Permit No. 16190. He looked over the territory below the lakes and went on down the river with the idea of locating the lands that might possibly be irrigated with this water, and in conclusion, he gave no definite assurance as to what he could do except to express the opinion that it seemed to him to be in order and that the Engineer's office would issue permits. He gave permission to proceed with the building of the reservoirs. He said he could seeno reason why preliminary work could not be started. The Osgood dam had been started before he was there but not completed. It was not completed until after he left.

Cross-Examination.

I sold water rights to the Osgood Company in 1919 and sold the land in 1918. Subsequently I sold land to the Snake River Land Company. (Tr. 49).

Exhibit "A" is the abstract I gave to the Snake River Land Company preparatory to selling my property.

Referring to Sheet 2 of the abstract covering reservoir No. 15185 for 1.96 second feet of water stored in Two Ocean Reservoir, Reservoir Certificate No. 3487 with priority of May 9, 1918, would say it is "somewhat modified" to the time I made the deal

with the Osgood people. We reserved the water rights. I got only one certificate of appropriation from the waters of Two Ocean Lake, that is only one certificate of appropriation issued by the State Engineer. (Tr. 51). This is water I disposed of to the Osgood Land and Livestock Company in 1919.

Referring to the original deed from H. C. McKinstry in 1928 to the Snake River Land Company, Exhibit B, which bears the signature of myself and wife, I was aware that it conveyed all water rights appurtenant to the land when I signed it.

There was no intention to convey anything to the Snake River Land Company which had already been conveyed to the Osgood Land and Livestock Company.

At the time I sold the land to the Snake River Land Company I dealt with Mr. Milner. The certificate of appropriation referred to is a secondary appropriation on Two Ocean. (Tr. 53). It indicates the amount of the appropriation as 1.96 second feet. It does not indicate the direct flow from the stream. There is nothing there to indicate any appropriation in acre feet. The only appropriation is in cubic feet per second of time.

Re-Direct.

In connection with this secondary appropriation there was also a primary certificate of appropriation covering storage. I believe it was issued to the Osgood Company. I believe that Thompson was out of it by that time. Referring to the certificate of appropriation of stored water, the certificate was issued to me and the Osgood Company. The entry in the abstract with reference to certificate of stored water is Entry no. 2.

I was not using the water the year I sold the land, that is in 1924. (Tr. 55).

(Exhibits 19 to 47 are offered in evidence, pages 56 to 80 inclusive.)

Otto McCutcheon.

Exhibit 46 was prepared by me and I witnessed the signatures, which are those of J. L. Milner and O. J. Johannesen. I did not witness the signature of H. C. McKinstry.

These men are the last statutory trustees of the corporation.

Referring to Exhibit 47, I prepared that instrument and it was executed in my presence. The signatures are those of L. A. Hartert, A. T. Shane, J. L. Milner, George Brunt, W. L. Shattuck and O. J. Johannesen. They are the former directors of the Wyoming corporation of Osgood Land and Livestock Company. I witnessed the signatures and took the acknowledgments.

Mr. McKinstry recalled.

Referring to Exhibit 46, I signed that instrument.

PROTESTANT'S WITNESSES.

(The following Exhibits were then introduced by Mr. Moffatt in behalf of the Protestant, Snake River Land Company: Exhibits C, D, E, F, G and H.)

Richard Winger.

I reside in Jackson Hole, Wyoming, and have lived there for twenty-five years. I am acquainted with the two lakes here referred to and have been for twenty years, more or less. At the present time I am employed as Resident Agent of the Snake River Land Company, charged with supervision and general care of its property in Jackson Hole. (Tr. 62). I am also President of the State Game and Fish Commission of Wyoming.

I am familiar with the Lozier, Snell, McAinstry and Markham places. These were properties purchased by the Snake River Land Company.

With reference to my position as an individual resident of Jackson Hole and as agent of the Snake River Land Company in relation to the pending applications, I make the following statement (Tr. 64);

"Speaking principally as an individual resident of that country, I would like to impress upon the State Engineer what we feel is the best interests of the State of Wyoming, and I believe that under our statutes, should be brought into consideration in a case of this kind. I have been more or less interested in this question of the Emma-Matilda and Two Ocean Lakes for a great many years. I have appeared before various State Engineers in protest against the withdrawal of those waters. I have seen a great deal of correspondence from residents not only protesting this question to the State Engineer, but to the Forest Service and the Park Service. I have heard it stated here that this water has been used for many years without any protests of any kind. I know that there have been many and varied protests against using that water. I appeared with Mr. Johannesen before State Engineers as far back as 1920 or '21, and I have been more or less familiar with the situation since that time. I have tried to keep abreast of this thing, and my principal interest was the preservation of those two lakes. This is a matter of record that I ask that as a citizen that it be carefully considered by the State Engineer. That in 1918, by Presidential Proclamation, withdrawal order was made for the protection of certain country in Teton and Lincoln County for the purpose of adding those lands to the National Parks System. These lands were principally government lands but under the protection of another Bureau. The carrying out of this Presidential issue of withdrawal orders that no construction work be done on these lands, seemed to work a hardship on the McKinstry, Thompson, Markham and Lozier ranchers who were interested in obtaining waters from these two

lakes for the irrigation of their land, and through the Park Service and its officials, and largely through Mr. Albright, who was in charge of the Park Service, a modification of that withdrawal order was made in order that water might be obtained in a nedessary amount to take care of these ranches of Wyoming residents. I can readily see that if in violation of that withdrawal order, permission were given by another federal bureau exceeding the modification, then the National Park Service for whom the withdrawal order was made, the Park Service would become a party in interest. As I say, everything in the record points to the fact that only such water was to be stored as was necessary for the irrigation of four Wyoming ranches, and that was at various times defined as a low dam not to exceed two feet on Emma-Matilda Lake, to impound 1710 acre feet of water, and not to exceed one foot on Two Ocean Lake to impound 812 acre feet of water. These permits were granted, reservoir permits, and when the permits were granted, the land was tied in and a description of the land placed on the reservoir permits. We have always understood that reservoir water can be transferred only by deed in this state. Of course, in my capacity as Purchasing Agent at one time for the Snake River Land Company, it was necessary for me to search the records, which I carefully did and found no record of deed of assignment in Teton County. I can assure you that when the Snake River Land Company bought the lands, they were not informed that there was any reservation. They felt that they were buying all water appurtenant to that land. Now this is the intent not only of the Federal government, but of the State Engineer as stated in the letters from the State Engineer, this limited the impounding of water to a certain extent and as defined by the State Engineer was one foot on Two Ocean and two feet in Emma-Matilda, it made clear the kind of impounding works at

that time-- that necessarily had no legal basis, there was no right for that. Over a course of years such impounding works were built and it was determined by someone that five thousand feet could be impounded with the right impounding works. I fail to see by what process anyone can obtain a regular title to that amount of water. I am quite confused with this hearing, inasmuch as a great deal of evidence regarding lands in Idaho or the Osgood Land and Livestock Company and their applications which have been made here for the cancellation of two permits entitled 3770-R and 3771-R which purport to give them title or right to impounding water. These permits, so far as I have been able to learn were never granted to anyone. They were conditioned on the performance of a certain act which was incapable of performance and therefore those permits became null and void. I don't understand on just what the Utah-Idaho Sugar Company base their right to come in and request of the State Engineer cancellation of two already null and void reservoir permits, with the request that new permits be issued in their stead with the samepriority that the null and void ones would have had, had they been granted. This is confusing to me. We naturally are interested in our country and are naturally interested in its preservation, and we have felt all along that the dams at those two lakes were a bad thing, and not to the interest of the State of Wyoming, inasmuch as we can find no legal rights for the transfer of those waters, and inasmuch as we can find no record wherein a deed to those waters or deed to any legal waters was filed in Teton County, or we can find any place in the records where the State of Wyoming has been notified to deliver water, or where the Osgood Company requested permisaion to remove water across the State line.

MR. LOOMIS: You are aware of the petition here now.

THE WITNESS: Yes.

No request to the State Engineer has been made up to this date. As the representative of the Snake River Land Company, I made a

search of the records; I found these reservoir permits, and direct flow permits on record in Teton County and found them all tied in with the land, the land upon which the water is to be used, and when we made the purchase of these lands we did it believing that we were buying all of the water rights appurtenant thereto, including storage rights. We were not informed to the contrary. In fact, I believe at that time we looked up and found the Engineer has required, before he adjudicated these rights, the showing of sufficient evidence of the interest of these ranchmen in their lands at that time. I attempted again, I believe in 1935, to learn whether or not any records were to be found in the connection mentioned. As you know, we can permit non-use of water on lands in this state for a certain period of time without it being subject to contest, and the Snake River Land Company had never been given notice of abandonment or intention of abandonment of water rights, and before the expiration of five years, I did attempt to make irrigation of our properties for the purpose of protecting the water rights on those lands, and I expect to still do that on some of those lands. Speaking as the President of the State Game and Fish Commission, I was put on the fire the other night at a meeting at home. The construction of those dams has practically ruined the fishing in those lakes. It used to be wonderful fishing. There are no trout and at this time they are filled with suckers and chug almost above their carrying capacity, and they are dying every year. The trout used to come up the outlets to the lakes to spawn so think that the natives could throw them out with pitchforks, but now they cannot get up, especially in Two Ocean Lake. Our fish Commissioner, who is quite a student of fish culture, said that it would cost about $40,000 now ti rid those two lakes of suckers that are in there and then put them back in shape for trout. I offer that more as a protest than as a statement."

In most cases I searched the records of Teton County to ascertain whether these five appropriators had conveyed their water rights by deed. In the transfer of the original Thompson Company I understood at the time that the change was made by quit-claim deed. As to the other four no record of transfer was to be found. I even at that time, or some years ago, called upon the State Engineer to ascertain whether he had any files, any record of transfer, and found he did not. I called upon the Forest Service and examined the free use permits for the construction of these dams. I found where certain proofs had been made by the Osgood Land and Livestock Company, and where the Thompson ranch had been sold to Milner and Shane of Idaho Falls, filed on by free use permit, but there was no change made. The free use permit carried the clause that these free permits were not transferrable and upon the disposal and transfer of these lands the water rights or ditches would be terminated. (Tr. 69).

I do not know of any unappropriated water that can be used upon the Snake River Land Company ranches that have heretofore taken their water from these lakes. If it were feasible to irrigate these ranches from Pacific Creek, it appears that the ranchesm would have done so rather than from these lakes, but I cannot see how that is possible inasmuch as the filings were made years ago on these lakes.

Cross-examination.

I was in charge of purchasing for the Snake River Land Company in 1920.

The properties tought from these ranchers are now being leased. The intention of the Snake River Land Company, I believe, was to turn these ranches over to the National Park Service as an addition to the Teton National Park. This is in the game country and the lands are very favorable for the growth of game. (Tr. 70). I believe these lands are not within the Forest Preserve.

I am familiar with the fact that there are a great many reservoirs in Wyoming within the limits of Forest Preserves, but none of them are within lands withdrawn by order. All forests may be withdrawn from homesteading but not from commercialization.

I believe I am familiar with the fact that in obtaining storage rights it is necessary to get a storage appropriation and a secondary use appropriation.

What I meant in referring to the lands covered by the earlier permits was that the lands irrigated were described in the secondary permits. As I read them, the reservoir permits merely describe the lands upon which the water is stored. (Tr. 71).

John C. Simpson.

I am an engineer by trade, licensed in Wyoming. I am Water Commissioner in Jackson, Wyoming. I have lived in Jackson permanently since the fall of 1933, and before that I lived there intermittently in the summer months. I have practiced my profession since that time.

I visited Two Ocean and Emma-Matilda Lakes in 1933. I had no acquaintance with them as Water Commissioner until the summer of 1935. At that time Mr. Winger came to me early in the irrigating season and stated (Tr. 72) that the Snake River Land Company owned these various ranches that were previously irrigated and stated that they had not used the water the previous season but that they desired to use it that year, and ascertained that before withdrawing any water they were supposed to notify the Water Commissioner, and asked me to handle it for them.

I was aware of a certain amount of conflict, so followed the usual procedure and examined the State Board of Control records to see who appeared to be the lawful owners.

I found only two adjudicated rights. First the original

two rights to store water in the two lakes and the secondary rights to apply the water to the original ranches. I corresponded with the State Engineer either directly or through the Division Water Superintendent, and learned that there were no other applications applying to the lakes.

I searched the records of Teton County. I found the deed introduced here whereby the Snake River Land Company acquired the lands covered and where the appurtenant water rights were conveyed, (Tr. 73).

I did not find any record of the transfer of the original settlers to the Osgood Land and Livestock Company or to the Sugar Company. The name of Utah-Idaho Sugar Company did not appear. The name of the Osgood Company appeared in only one connection - in the submission of final proof of one application covering Two Ocean Lake. Along with it appeared the name of McKinstry.

After obtaining what information was available, I concluded that the Snake River Land Company was the rightful owner of the water, and at that time the water it wanted was mainly in Emma-Matilda Lake. During 1935 I made several trips to the lakes, particularly to Emma-Matilda, and when it appeared necessary locked the gates open to let the Snake River Land Company withdraw water.

I made no measurements that year so far as I recall.

During 1935 I had a conversation with Mr. Hill, head of the Reclamation Service, and it appeared (unintelligible from here to the end of the paragraph.)

So far as I know the condition during 1936 and 1937 was similar. I was at the lakes once in 1937 and two or three times in 1936. (The witness then made a voluntary statement which does not appear to be pertinent.)

Cross-Examination.

I examined the records of the County Recorder as Water Commissioner. I did not expect to find in the records any permit for enlargement of storage rights. (Tr. 77). I examined the County records for deeds and certificates of appropriation, for rights proved up on and for other information. But for pending applications I went to the State Engineer's office. It is a fact that only certified rights appear on the county records.

Examination by Mr. Quinn.

I don't know that I ever actually locked the headgates at Two Ocean Lake but it was posted. I did actually lock the headgates at Emma-Matilda, that being the lake the Snake River Land Company wished to withdraw water from and where the headgates were most often molested. As far as I know no one else regulated the headgates. When I first inspected Emma-Matilda lake there was a lock there marked "USRS", initials for the United States Reclamation Service.

Recross Examination.

I had a conversation with Mr. Hill in which I indicated to him that there was considerable doubt in my mind as to whether the Utah-Idaho Sugar Company was entitled to withdraw any water from the lake.

The posted notices at Two Ocean Lake were on State Board of Control forms, stating substantially that the headgate had been taken under control of the Water Commissioner.

I have not been to Two Ocean Lake since 1935 except for pleasure trips.

I have not had contact with Mr. Hill since 1935. He said that he would not act as agent on Emma-Matilda and would get more data before acting on Two Ocean. (Tr. 79). It is perhaps true that the matter was left in abeyance with Mr. Hill. There was a little different situation on the two lakes. We had a very definite and concrete problem on Emma-Matilda, but the Sugar Company had claims on the Two Ocean, but they were of a very "imperative nature." (The rest of the answer is unintelligible.)

My only doubt as to who had a right on Two Ocean Lake was with regard to the Thompson place which was sold to the Snake River Land Company by Mr. Scalley.

H. C. McKinstry, recalled.

I had knowledge of the flow out of Two Ocean Lake in the fall of the year prior to the time the dam was built. Before the dam was built there was no continuous flow out of the lake in mid-summer. After the dam was built the flow continued a longer time. In other words, there was more water flowing out of the lake after the dam was built than before the dam was built. (Tr. 80). After the dam was built the flow continued to be the same in the stream up to the time the gates were shut off.

EXHIBITS.

Exhibit 1.

(See Exhibit 19, pages 130-132)

This is the affidavit of Ashby B. Boyle to the effect that by Agreement, dated April 15, 1930, the applicant bought the Osgood tract of 6000 acres together with water rights, including, but not limited to, 5000 acre feet of stored water in Teton County, Wyoming, the same being a storage right which Osgood Land and Live Stock Company was acquiring in Two Ocean and Emma Matilda reservoirs; that the consideration for the purchase was $700,000; that the officers of the applicant Company in good faith believed the Osgood Land and Live Stock Company and The Osgood Land and Live Stock Company of Wyoming to be one and the same corporation; that ever since April 15, 1920, the applicant has enjoyed possession of Two Ocean and Emma Matilda Reservoirs without protest or interference for either Osgood Company or any one claiming under them.

Exhibit 2.

(See Exhibit 19, pages 79-90)

This is the Sales Contract dated April 15, 1920, between Osgood Land and Livestock Company, an Idaho Corporation, and the applicant.

The reference to the 5000 acre feet of stored water appears on page 3 of the Agreement as follows: "Five thousand (5000) acre feet of stored water, the same being a storage right which the said party of the first part is securing for use upon the premises described in 'Group A'". The consideration of $700,000 is recited on page 5 of the Agreement. On page 7 appears the Agreement of the Osgood Company that it would have executed and assigned to the applicant a proper certificate of ownership, showing the right to the use of the 5000 acre feet of storage water.

The contract is executed at page 12 for The Osgood Land and Livestock Company by James L. Milner, President, and A. T. Shane, Secretary. It is acknowledged before E. H. Hollister, Notary Public at Idaho Falls, Idaho.

Exhibit 3.

This is a blue print of a map to accompany the Amended Application for the construction of Two Ocean and Emma Matilda Reservoirs, certified to by Karl S. Albert, a Wyoming engineer, and showing the irrigation works as well as the high and low water levels. Two Ocean Lake has a high water level of 620 acres and a low water level of 596 acres, and a capacity of 3040 acre feet. Emma Matilda Lake has a low water level of 882.5 acres, a high water level of 904.2 acres, and a capacity of 1340 acre feet.

Exhibit 4.

This is a blue print of a map to accompany application for secondary permit of the Utah-Idaho Sugar Company covering the Osgood Project near Idaho Falls, Idaho, certified to by Karl Albert, a Wyoming Engineer.

Exhibit 5.

This is a blue print of a map of Two Ocean and Emma Matilda lakes and their outlets through Two Ocean Creek and Emma Matilda Creek through Pacific Creek to Snake River, prepared by H. Hodgers and copied and mapped in 1921 by Otho E. Williams, Water Commissioner at Jackson, Wyoming.

Exhibit 6.

This is a blue print of a tabulation covering the Osgood irrigation project, showing the total area, the irrigated area, the dry area, the waste area, the irrigated area covered by the main plant, No. 2 plant, No. 3 plant, No. 4 plant, and the percentage

of the total area irrigated; also the capacity of various pumping plants, the number of pumps, the motors, the character of the drive and the year installed; also the extent and priority of the various water rights; also the canal and plant costs in the year 1932; also the number of people on the project.

Exhibit 7.

This is a print of a photograph of the outlet and headgate of Emma Matilda Lake.

Exhibit 8.

This is a print of a photograph showing the water coming over the spillway at Two Ocean Lake.

Exhibit 9.

This is a print of a photograph of Two Ocean Lake looking north from the headgate.

Exhibit 10.

This is a print of a photograph consisting of a close-up view of the outlet and headgate of Emma Matilda Lake.

Exhibit 11.

This is a print of a photograph taken from the top of the outlet works at Two Ocean Lake, as constructed with a road across so that vehicles could have access to the north side of the Lake.

Exhibit 12.

This is a print of a photograph of a beaver house on Emma Matilda Lake.

Exhibit 13.

This is a print of a photograph of Two Ocean Lake with the

Teton Range in the background taken from the west side of the Lake.

Exhibit 14.

This is a print of a photograph of Emma Matilda Lake with the Teton Range in the background taken from the east side of the Lake.

Exhibit 15.

This is a print of a photograph of Two Ocean Lake looking south toward the Teton Range.

Exhibit 16.

(Exhibit 19, pages 127-129)

This is the affidavit of Douglas Scalley to the effect that during the irrigation seasons commencing with 1928 and ending with 1934, both inclusive, the applicant put to beneficial use on the Osgood tract all water impounded during such years in Two Ocean and Emma Matilda Reservoirs; that he visited the Reservoirs during the period described on a number of occasions and had supervision of the reconstruction of the dam at Two Ocean Reservoir during the fall of 1928; that to his knowledge the dam in place prior to such reconstruction had an impounding capacity of 5 feet above low water level which is the approximate equivalent of the natural runoff into the reservoir; that the previous dam was of unsatisfactory construction and allowed considerable loss during the impounding period and for that reason reconstruction was decided upon and put into effect; that during 1928 and each year until and including 1934, applicant arranged with a resident of Jackson Hole to have the headgates at the reservoirs lowered at the proper time to impound the natural runoff which was done each year except 1932, when Joseph Markham who was depended upon to lower the gates died; that the applicant has during each year depended upon a competent individual to measure accurately the flow from such reservoirs during each season, and reports of such

flow have been made and depended upon by the applicant in making demand in Idaho for delivery of storage water of the reservoirs; that in 1933, the applicant caused a careful check of the flow from the reservoirs to be made from the time the gates were raised until the irrigating season on the Osgood tract was virtually completed, and in accordance therewith the applicant demanded during 1933 and 1934 and in fact received the entire storage of the reservoirs, that is, in 1933, 3660 acre feet and in 1934, 1100 acre feet; that the season of 1934 was excessively dry causing a severe shortage of water; that prior to the construction work in 1928 the elevation of the proposed dam was determined and stake set by a representative of the United States Forest Service at five feet above low water level which corresponded to the impounding capacity of the previous dam; that at no time from 1928 to 1934 did anyone interfere with or question the right of the applicant to all of the storage water of the two reservoirs.

Exhibit 17.

(Exhibit 19, pages 123-124).

This is the affidavit of M. H. Chapman to the effect that from September 1, 1921, to March 30, 1930 he had complete charge of the Osgood project; that from 1921 to and including 1929, the stored water of Two Ocean and Emma Matilda Reservoirs were put to beneficial use in the irrigation of the Osgood tract; that the stakes fixing the irrigation with the proposed new dam were set by a representative of the United States Forest Service to conform with the impounding capacity of the previous dam.

Exhibit 18.

(Exhibit 19, pages 125-126)

This is the affidavit of Wilford Y. Cannon to the effect that during 1930, 1931 and 1932 the waters impounded in Two Ocean and Emma Matilda Reservoirs were used for irrigation of the Osgood

tract; that he visited the reservoirs on several occasions in 1930, 1931 and 1932 and at all such times there were in place at the outlets of such reservoirs dams of sufficient height to impound, if properly maintained, all of the natural runoff into the reservoirs; that at no time during 1930, 1931 and 1932 did any one interfere or question the right of the applicant to such water.

Exhibit 20.

(Exhibit 19, pages 37-40)

This is a copy of Reservoir Permit No. 3487, applicants Wm. C. Thompson and H. C. McKinstry, for construction of a reservoir in Two Ocean Lake by a dam two feet above the bed of the stream.

Exhibit 21.

This is a photostatic copy of an assignment by H. C. McKinstry to Osgood Land and Livestock Company, a Wyoming Corporation, of McKinstry's rights in permit No. 3487.

Exhibit 22.

This is a photostatic copy of an assignment by William C. Thompson and H. C. McKinstry to James L. Milner and A. T. Shane of their rights in permit No. 3487.

Exhibit 23.

This is a photostatic copy of an assignment by James L. Milner and A. T. Shane to The Osgood Land and Livestock Company, a Wyoming corporation, of their rights and permits in permit No. 3487.

Exhibit 24.

(Exhibit 19, pages 41-43)

This is a copy of Certificate of Appropriation, anem of appropriators, H. C. McKinstry and Osgood Land and Livestock Company;

Amount of appropriation, 512 acre feet, covering Two Ocean Reservoir under permit No. 3487.

Exhibit 25.

This is a photostatic copy of the application for permit No. 15185 to divert and appropriate water from Two Ocean Reservoir; the applicants are Wm. C. Thompson and H. C. McKinstry. This is a secondary permit in connection with Reservoir Permit No. 3487.

Exhibit 26.

This is a photostatic copy of a certificate of appropriation of water in favor of Osgood Land & Livestock Co., under secondary permit No. 15185 for 1.06 cubic feet per second for irrigating 74.4 acres in connection with storage reservoir permit No. 3487.

Exhibit 27.

This is a photostatic copy of Certificate of Appropriation of water in favor of H. C. McKinstry under secondary permit No. 15185 for 1.96 cubic feet per second for the irrigation of 137 acres in connection with Reservoir Permit No. 3487.

Exhibit 28.

(Exhibit 19, pages 48-51)

This is a copy of Permit No. 3561 Reservoir and application therefor, applicants Joseph Markham and Roy B. Lozier, for a reservoir in Emma Matilda Lake by construction of a dam three feet high to impound 2579.7 acre feet, having a High water line area of 865 acres.

Exhibit 29.

This is a photostatic copy of an assignment by Joseph Markham and Roy B. Lozier to H. C. McKinstry of their rights in Reservoir Permit No. 3561.

Exhibit 30.

This is a photostatic copy of an Assignment from H. C. McKinstry to Osgood Land and Livestock Company, a Wyoming corporation of his rights under Reservoir permit No. 3561.

Exhibit 31.

(Exhibit 19, pages 52-54)

This is a copy of Certificate of Appropriation to Joseph Markham and Roy B. Lozier under Reservoir Permit No. 3561; amount of appropriation, 1710 acre feet.

Exhibit 32.

This is a photostatic copy of a permit No. 15569 and application therefor, applicants, Joseph Markham, Roy B. Lozier and O. W. Snell. It is in fact a secondary application in connection with Reservoir Permit 3561.

Exhibit 33.

This is a photostatic copy of a certificate of appropriation of water under Secondary Permit 15569 in favor of Joseph Markham for 1.88 cubic feet per second for the irrigation of 131.61 acres in connection with Reservoir Permit No. 3561.

Exhibit 34.

This is a photostatic copy of a Certificate of Appropriation of water in favor of Roy B. Lozier under Secondary Permit No. 15569 for 1.86 cubic feet per second for the irrigation of 130 acres in connection with storage Permit No. 3561.

Exhibit 35.

This is a photostatic copy of a Certificate of Appropriation under Secondary Permit No. 15569 in favor of O. W. Snell for 1.78 cubic feet per second for the irrigation of 124.9 acres in connection

with reservoir permit No. 3561.

Exhibit 36.

(Exhibit 19, pages 67 to 71 inclusive)

This is a copy of Permit No. 3770 Reservoir and application therefor, applicant, C. C. Carlisle, for permission to construct an enlargement of Two Ocean Lake Reservoir with a high water area of 983 acres to impound 63,605 acre feet, at a cost of $640,000.

Exhibit 37.

This is a photostatic copy of an assignment by C. C. Carlisle to Osgood Land and Livestock Company, a Wyoming Corporation, assigning all of his rights to permits numbers 3770 and 3771 Reservoir.

Exhibit 38.

(Exhibit 19, page 63.)

This is a copy of Permit No. 3771 Reservoir together with application therefor, applicant, C. C. Carlisle with enlargement of Emma Matilda Reservoir, high water area 1130 acres, capacity, 60,900 acre feet, cost $56,000.

Exhibit 39.

This is the same as Exhibit 37.

Exhibit 40.

(Exhibit 19, page 105.)

This is a copy of an Agreement Made May 2, 1921, between Frank C. Emerson, State Engineer and The Osgood Land and Livestock Company, a corporation of Wyoming with offices at Idaho Falls, Idaho. It recites that a previous agreement had been made between the parties and one, C. C. Carlisle, and provides that said engineer will approve the applications and issue permits for the construction of the

enlargements of Two Ocean and Emma Matilda Reservoirs upon the delivery of a surety bond, guaranteeing the payments provided for.

The Osgood Land and Livestock Company agreed to make application to the General Land Office to secure the necessary rights of way for the construction of reservoirs and supply ditches and also agreed that upon the granting of such rights of way it would pay to the State Engineer $30,000 to be used in connection with the construction of certain bridges in installments as provided and also agreed to give surety bonds for the acts performed by it.

It was mutually agreed that in the event the rights of way were refused, that then the "agreement shall become null and void upon the said party of the second part surrendering and delivering to the party of the first part, for cancellation, the said permits to be issued by him and which are covered by this Agreement."

Exhibit 41.

(Exhibit 19, pages 109-110).

This is a stipulation between the Osgood Land and Livestock Company of Wyoming and the State Engineer, to the effect that if certain bonds should be delivered to the State Engineer, he would approve the Emma Matilda and Two Ocean Lake reservoirs, enlargement applications. The bonds were to total $30,000 and were to cover payment of that amount for the construction of certain bridges across the Snake River.

Exhibit 42.

This is a photostatic copy of Surety Bond referred to in the Agreement which is Exhibit 40 above.

Exhibit 43.

(Exhibit 19, pages 77-78)

This is a copy of a letter from the Department of the Interior, General Land Office, to Osgood Land and Livestock Company rejecting the application for the easement in connection with the enlargement of

Emma Matilda and Two Ocean Reservoirs.

Exhibit 44.

This is a photostatic copy of Permit No. 16190 and application therefor, applicant Osgood Land and Livestock Co. for Twin Reservoir Supply Canal. This is a secondary permit for a supply canal for the enlargement of Two Ocean Reservoir and Emma Matilda Reservoir.

Exhibit 45.

(Exhibit 19, page 72)

This is a copy of Permit No. 4232 Enlargement and application therefor by C. C. Carlisle for the enlargement of Twin Reservoir Supply Canal. The original permit is No. 16190.

Exhibit 46.

This is an assignment and quit-claim deed, from Osgood Land and Livestock Company, a defunct corporation of the state of Idaho, and its last Board of Directors, as trustees; also from O. A. Johannesen, individually, to Utah-Idaho Sugar Company, covering all of the rights of grantors to the water rights herein involved.

Exhibit 47.

This is a photostatic copy of an assignment and quit-claim deed from The Osgood Land and Livestock Company, a defunct corporation of Wyoming, and H. C. McKinstry, James L. Milner, O. A. Johannesen, the last Board of Directors; also from O. A. Johannesen, individually, to Utah-Idaho Sugar Company, covering all of the rights of the grantors to the water rights herein involved.

Exhibit A.

This is a copy of Abstract of Title covering

The Southeast quarter of the Northwest quarter; the east half of the Southwest quarter and the Lot Four of Section Seven, in Township Forty-Five North of Range, One Hundred Thirteen West of the Sixth Principal Meridian, Wyoming, containing One Hundred Sixty Six and Fifty-four Hundredths Acres.

This covers land conveyed by H. C. McKinstry to the Snake River Land Company, including pertinent water rights and shows certificate of appropriation under Secondary Permit No. 15185 in connection with Reservoir Permit No. 3487 for the irrigation of 136 acres within the lands conveyed to Snake River Land Company. The certificate of appropriation under Reservoir Permit No. 3487 is not shown.

Exhibit B.

This is a copy of Warranty Deed from Harold C. McKinstry and wife to Snake River Land Company conveying the land described in the abstract which is "Exhibit A".

Exhibit C.

This is a copy of an abstract of title conveying the

Southwest quarter of the southwest quarter of Section fourteen. The southeast quarter of the southeast quarter of Section fifteen, the northeast quarter of the northeast quarter of Section twenty-two, and the northwest quarter of the northwest quarter of Section twenty-three in Township forty-five North of Range one hundred fourteen west of the Sixth Principal Meridian, Wyoming, containing one hundred sixty acres.

It shows conveyances by Roy B. Lozier and wife to the Snake River Land Company, including pertinent water rights; it also shows certificate of appropriation of water under Secondary Permit No. 15569 Enlargement. It does not show certificate of appropriation under Reservoir Permit No. 3687.

Exhibit D.

This is a copy of a warranty deed from Elisa A. Lozier, wife of Roy B. Lozier, to Snake River Land Company, conveying the property described in the Abstract (Exhibit C), including all water rights appurtenant thereto.

Exhibit E.

This is a copy of an abstract covering the following described property:

> The Northeast Quarter of the Southeast Quarter, Lots Five and Six, the Southwest Quarter of the Southeast Quarter of the Northeast Quarter and the South Half of the Southeast Quarter of the South east Quarter of the Northeast Quarter of Section Sixteen; and the Lots nine and One of Section Twenty-One in Township Forty Five North of Range One Hundred Fourteen West of the Sixth Principal Meridian, Wyoming, containing One Hundred Fifty-nine and Thirty-Hundredths acres.

It shows the Certificate of Appropriation of Water under Secondary Permit 15569 from Markham Reservoir. It also shows Warranty Deed from Joseph J. Markham and wife to Snake River Land Company. It does not show the primary storage certificate of appropriation of water to which the above certificate of appropriation is secondary.

Exhibit F.

This is a copy of a Warranty Deed from Joseph J. Markham and wife to Snake River Land Company, conveying the property covered by the abstract "Exhibit E".

Exhibit G.

This is a copy of an abstract covering the following described property:

The South half of the northeast quarter, the southeast quarter of the northwest quarter and lots two, three and four of Section twenty-two in Township forty-five North of Range one hundred fourteen West of the Sixth Principal meridian, Wyoming, containing one hundred fifty Seven and forty-two hundredths acres.

It shows certificate of appropriation of water under what is indicated to be a secondary permit, without giving the number of such permit, and shows that the water is from Markham Reservoir. (Another name for Emma Matilda Reservoir). It does not show the Certificate of Appropriation for the primary storage right to which the above right is secondary. It also shows warranty deed from Oral W. Snell and wife to The Snake River Land Company.

Exhibit H.

This is a Warranty Deed from Orral W. Snell and wife to Snake River Land Company, conveying the property described in the abstract, Exhibit G.

Exhibit I.

This is a copy of an Executive Order made by Woodrow Wilson under date of January 28, 1921, temporarily withdrawing the lands described therein in accordance with and subject to the conditions, provisions and limitations of the Act of Congress approved June 25, 1910 (36 Stat. 847), as amended by the Act of August 24, 1912 (37 Stat. 497), for the purpose of classifying said lands, and pending enactment of appropriate legislation for their proper disposition.

Exhibit J.

This is a copy of an Executive Order by Woodrow Wilson, dated July 8, 1918, temporarily withdrawing the public lands therein

described under authority, and subject to the provisions, of the Act of Congress approved June 25, 1910, (36 Stat. 847), as amended by the Act of August 24, 1912 (37 Stat. 497).

The foregoing is a true and correct abstract in the above entitled cause.

John U. Loomis

Attorney for Appellant.

IN THE SUPREME COURT,

STATE OF WYOMING.

No. 2208.

6/30/41

In the Matter of the Appeal of the Utah-Idaho Sugar Company from the action of the State Engineer in the Endorsements placed upon Application for Amendment of Permits Nos. 3770 Res. and 3771 Res. and Applications for Secondary Permits from Two Ocean and Emma Matilda Reservoirs (Applications Nos. 13 1-2-3-4/357 and 14 3/138).

SNAKE RIVER LAND COMPANY,

Protestant and Respondent,

and

STATE BOARD OF CONTROL,

Respondent,

vs.

UTAH-IDAHO SUGAR COMPANY,

Applicant and Appellant.

BRIEF OF APPELLANT.

- - - -

John U. Loomis,
Ashby D. Boyle,
Otto E. McCutcheon,

Attorneys for Applicant and Appellant.

A

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HEBER J. GRANT
PRESIDENT

NATIONAL PARK SERVICE
RECEIVED
MAY 16 1938
ASSOCIATE DIRECTOR

WILLARD C. KNOWLTON
VICE PRES. & GEN. MGR.

UTAH-IDAHO SUGAR Company

EXECUTIVE OFFICES
BENEFICIAL LIFE BUILDING
SALT LAKE CITY, UTAH

May 11, 1938.

National Park Service
Washington, D. C.

Attention Mr. A. E. Demaray, Acting Director

Gentlemen:

At the time of Mr. Barton's recent visit in Salt Lake City a conference was arranged, at my request, by Mr. Moffat of the firm of Fabian & Clendenin, attorneys for Snake River Land Company, in order that I might explain the purpose of Utah-Idaho Sugar Company in the proceedings now pending before the State Engineer of Wyoming at Cheyenne. It has seemed to me that a misconception of our aims exists. This statement is sent in compliance with a wish expressed by Mr. Barton.

Our Company is entitled, under its contract of 1920 with Osgood Land & Livestock Company, to an assignment of some 5,000 acre feet of storage in Two Ocean and Emma Matilda Reservoirs in Teton County, Wyoming. The total capacity of the present reservoirs is as follows:

Two Ocean - 3060 acre feet;
Emma Matilda - 1340 acre feet.

When the contracts with the two groups of homesteaders were made, about 1919, by Mr. Oscar Johannesen, acting on behalf of the Osgood interests, it was agreed that priority should be accorded to McKinstry and Thompson, from Two Ocean, to the extent of the requirements of the McKinstry and Thompson ranches, not exceeding the first foot of storage or the lawful duty of water in Wyoming, and to Markham, Lozier and Snell, from Emma Matilda, to the extent of the requirements of the Markham, Lozier and Snell ranches, not exceeding the first two feet of storage or the lawful duty of water in Wyoming.

The Sugar Company has received each year, with one or two exceptions, the entire storage from Two Ocean Reservoir, and until about three years ago the whole of the storage in Emma Matilda. The amount delivered to us has varied somewhat (for reasons such as failure to lower the gates until springtime or an excess or shortage of available supply), but no conflict in interest appeared until the last two or three years, when Snake River Land Company utilized a portion of the storage in Emma Matilda.

I stated to Mr. Barton that the Sugar Company has no desire to enlarge the present impounding works at either Lake and will not assert the right to do so in the present or any future proceeding or application. Such has always been our position, though it is possible that the applications filed on our behalf by Mr. Albert of Casper do not make that attitude entirely clear.

The present dam at the outlet of Two Ocean Lake was constructed by us in 1928 with the knowledge of, and without objection from, the Forest Service; in fact, a fieldman of that Service was present at Two Ocean when work was commenced and directed our Engineer where to place the stake for the spillway level. This level corresponds with the previous storage level and is believed to be substantially identical with the natural high water level of the Lake. The superb beauty of Two Ocean and Emma Matilda has not been destroyed or impaired by the present dams. Each year since our interest in the storage was acquired the dam gates have been lowered and raised by a competent water man, residing in Jackson Hole, specially employed for that purpose and acting under the direction of the district watermaster at Idaho Falls in charge of the distribution of the waters of Upper Snake River. We have proceeded in an orderly manner throughout, believing in good faith that we were entitled to the storage of both reservoirs.

The recent irrigating activities and claims of Snake River Land Company appear to present a conflict in interest. None is necessary, however, for we shall be glad to work out a division of the storage along the lines of the Johannesen contract with the homesteaders whose holdings Snake River Land Company acquired, that is to say: we are willing to consent that from Two Ocean there be delivered to the Snake River Land Company the reasonable requirements of the McKinstry place (our Company purchased the Thompson ranch from Osgood and upon reselling to Snake River Land Company reserved, by separate agreement, all waters appurtenant to or used in connection with the Thompson place), and we are further willing to agree that from Emma Matilda there be delivered to Snake River Land Company the reasonable requirements of the Markham, Lozier and Snell ranches - provided, of course, that the residue of the storage in each reservoir, as now constructed, be accorded to us. This water is sorely needed by our Company for use upon our Osgood tract near Idaho Falls, a highly developed project of approximately 6,500 acres on which some 65 bona fide farmers and their families are now dependent for a livelihood.

The water division above suggested is equitable and cannot work to the prejudice of any one. We sincerely hope that our suggestion may commend itself to the Park Service and to Snake River Land Company and that each may find it possible to withdraw the protest filed by it.

Yours very respectfully,

UTAH-IDAHO SUGAR COMPANY,

B/W

By [signature], Attorney

34

THE STATE OF WYOMING)
: SS
COUNTY OF TETON)

IN THE DISTRICT COURT

THIRD JUDICIAL DISTRICT

In the Matter of the Appeal of the Utah-Idaho Sugar Company from the action of the State Engineer in the endorsements placed upon Applications for Amendment of Permits Nos. 3770 Res. and 3771 Res. and Applications for Secondary Permits from Two Ocean and Emma Matilda Reservoirs (Applications Nos. 13 1-2-3-4/357 and 14 3/138.

No. 447

JUDGMENT AND DECREE

The above entitled matter coming on regularly for hearing before the Court upon an appeal from the decision of the State Board of Control, applicant Utah-Idaho Sugar Company appearing by John U. Loomis, and Ashby D. Boyle, its attorneys; protestant Snake River Land Company appearing by D. Howe Moffat, and the State Board of Control appearing by Ewing T. Kerr, Attorney General, and the said matter having been submitted to the Court upon the record of the evidence given before the State Engineer and the State Board of Control, and the Court having heard the argument of counsel and having taken said matter under advisement and briefs having been filed herein, and the Court having given consideration to the evidence as given before the State Engineer and the State Board of Control and being fully advised in the premises;

IT IS THE JUDGMENT AND DECREE of this Court that the decision of the State Board of Control be, and the same is, hereby confirmed, excepting, however, the reason therein stated. To all of said judgment and ruling applicant excepts. Exception allowed.

Dated this 19th day of December, A. D. 1940.

H. R. CHRISTMAS

J U D G E

C O P Y

IN THE

DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT,

TETON COUNTY, WYOMING.

No. 447.

In the Matter of the Appeal of the Utah-Idaho Sugar Company from the action of the State Engineer in the Endorsements placed upon Applications for Amendment of Permits Nos. 3770 Res. and 3771 Res. and Applications for Secondary Permits from Two Ocean and Emma Matilda Reservoirs (Application Nos. 13 1-2-3-4/357 and 14 3/138.

BRIEF OF APPELLANT.

- - - - -

John U. Locmis,
Ashby D. Boyle,
Otto E. McCutcheon,

Attorneys of Appellant.

FILED
Sept. 24, 1940

E. N. Moody,
County Clerk and Ex-officio Clerk of District Court, Teton County, Wyoming

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IN THE
DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT.

TETON COUNTY, WYOMING.

In the Matter of the Appeal of the Utah-Idaho Sugar Company from the action of the State Engineer in the Endorsements placed upon Applications for Amendment of Permits Nos. 3770-Res. and 3771 Res. and Applications for Secondary Permits from Two Ocean and Emma Matilda Reservoirs (Application Nos. 13 1-2-3-4/357 and 14 3/138).	No. 447

BRIEF OF APPELLANT

- - - -

STATEMENT

Stripped of historical detail and the details of prior procedure, what the appellant seeks here involves a rather simple matter.

Generally speaking, the appellant seeks amendment of two existing reservoir permits which it has acquired by purchase, so that such permits will accord with the actual construction of impounding works completed within the time limited thereby, and further seeks authority to use the water involved in the State of Idaho. In connection with such applications to amend the appellant seeks also to relinquish its rights in certain other permits likewise acquired by purchase.

7B

To state the matter more concretely, the appellant acquired from the Osgood Land and Live Stock Company the rights of the latter in permits 3770-R and 3771-R for the enlargement of Two Ocean and Emma Matilda Reservoirs respectively. These original applications sought to greatly enlarge the Two Ocean Reservoir to an available capacity of 63605 acre feet and the Emma Matilda Reservoir to an available capacity of 60900 acre feet. The permits under both enlargement applications wereissued September 14, 1921, and provided that the construction of the proposed work should begin within one year from that date and that the time for completion should terminate December 31,1924.

The very extensive impounding works contemplated by these original enlargement applications were never completed, but impounding works to store the amount of water contemplated by applications for amendments here involved were actually constructed by Osgood Land and Live Stock Company as assignee of the permittee and have been in existence since at least 1921. In other words, impounding works contemplated by the applications for amendments now being heard were constructed by the assignee of the permittee well within the time required by the enlargement permits.

The original enlargement permits were conditioned upon compliance by the permittee with the terms and provisions of an agreement between the State Engineer and the permittee which provided that the permittee should make application to the U.S. General Land Office for rights of way or easements to construct the tremendous reservoirs then contemplated and upon receiving such

permission should pay a total amount of $30,000.00 for the construction of two bridges across the Snake River, giving surety bond for the faithful performance of such agreements. It was also agreed that should the General Land Office refuse to grant the rights of way or easements, then the agreement between the State Engineer and the permittee should become null and void upon the permittee delivering the permits to the State Engineer for cancellation.

The permittee carried out its part of the agreement so far as it was able to do so by making application to the General Land Office and giving the bond required, but the General Land Office refused the rights of way or easements for such large reservoirs. The permits have never been canceled by the State Engineer and remain in existence at this time, although the State Engineer by his order of December 3, 1938 in this proceeding attempted to cancel them. They have been duly assigned to the appellant.

The appellant by this proceeding now seeks amendments of the original permits to accord with the actual construction of impounding works which were constructed within the time limited therein. It also seeks permission to use the stored water in the State of Idaho. This permission is sought through applications for secondary permits and a request for the use of stored water outside Wyoming.

The appellant has actually used the stored water involved in the State of Idaho for a great number of years in the belief that it had purchased the right to do so.

The impounding works involved do not result in the storage of water above the highwater lines of Two Ocean and Emma Matilda Lakes, and, as we believe and contend; the existence and use of the impounding works does not detract from the natural beauty of these lakes, but, on the contrary, are factors in preserving such natural beauty.

The appellant has some rights in previous appropriations covering stored water in these lakes under permits 3487-R and 3561-R, although the exact nature and extent of these rights have not been definitely determined and are immaterial to this controversy, all that is material here being that such claims exist and form an additional basis for the rights now sought to be protected by the appellant.

The appellant also seeks to relinquish any rights it may have in the foregoing and other permits in excess of what it now seeks on this hearing.

In order to state the issues or controversy here involved it will be convenient to briefly analyze the various applications and the grounds of objection by Snake River Land Company and The National Park Service thereto.

Application for an amended permit to construct Two Ocean Reservoir (Permit No.3770-R)

This is an application by Utah-Idaho Sugar Company to amend a previous permit, No. 3770-R, to construct a reservoir in the bed of Two Ocean Lake, having a high water line area of 620 acres and available capacity of 3040 acre feet.

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Original Permit No. 3770-R was to construct a reservoir in the channel of Two Ocean Creek having a high water line area of 983 acres and available capacity of 63,605 acre feet.

Thus it appears the amendment seeks to reduce the high water line area from 983 acres to 620 acres and the available capacity from 63,605 acre feet to 3040 acre feet.

Application for secondary Permit to divert and appropriate from Two Ocean Reservoir.

This is an application by Utah-Idaho Sugar Company for authority to divert and appropriate water from Two Ocean Reservoir to the Osgood tract in Township 3 North, Range 37 East, Boise B. & M. for the irrigation of 5680.35 acres, with a capacity at the headgate of 2.5 cubic feet per second. It is an application for a secondary permit made in connection with Permit No. 3770-R.

Amended Application for Permit to construct Emma Matilda Reservoir (Permit No. 3771-R)

This is an application by Utah-Idaho sugar Company to amend a previous permit, No. 3771-R, to construct a reservoir in the bed of Emma Matilda Lake having a high water line area of 904.2 acres and an available capacity of 1340 acre feet.

Original Permit No. 3771-R was to construct a reservoir in the channel of Emma Matilda Creek having a high water line area of 1130 acres and an available capacity of 60,900 acre feet.

Thus it appears the amendment seeks to reduce the high water line area from 1130 acres to 904.2 acres and the available

capacity from 60,900 acre feet to 1340 acre feet.

Furthermore, the storage in acre feet sought is even less than that adjudicated under the original storage right. (3561-R).

Application for Secondary Permit to divert and appropriate from Emma Matilda Reservoir.

This is an application by Utah-Idaho Sugar Company for authority to divert and appropriate water from Emma Matilda Reservoir to the Osgood tract in Township 13 N., Range 37 E., Boise, B. & M. for the irrigation of 5680.35 acres with a capacity at the headgate of one cubic foot per second. It is an application for a secondary permit made in connection with Permit No. 3771-R.

Request for special permits to use stored water outside the State of Wyoming.

This is an application for permission to take a certain quantity of water from the State of Wyoming into the State of Idaho for application to beneficial use upon lands in Bonneville County, Idaho, which water is appropriated to the Utah-Idaho Sugar Company under Permits Nos. 3770-R and 3771-R and Secondary Permits Nos. 3770-R and 3771-R.

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Request for cancellation of Permits Nos. 3770-R 3771-R, P-16190 and 4232 Enlargement.

This is an application by Utah-Idaho Sugar Company for cancellation of the above numbered permits. Its actual purpose is to relinquish the rights of appellant in excess of what appellant seeks here.

Permit No. 16190 was to construct a ditch or canal known as Twin Reservoir Supply Canal 3.6 miles long, with a carrying capacity of 496.64 cubic feet per second from Pacific Creek.

Permit No. 4232 was for the enlargement of the Twin Reservoir Supply Canal to a carrying capacity of 500 cubic feet per second.

Thus it appears that Utah-Idaho Sugar Company offers to relinquish its right to construct the Twin Reservoir Supply Canal with an enlarged capacity of 500 cubic feet per second from Pacific Creek and offers to relinquish its right to storage in Two Ocean Reservoir in excess of 3040 acre feet and in Emma Matilda Reservoir in excess of 1340 acre feet.

Protest of Snake River Land Company.

To Application for use of water in Idaho under 3487-R.

The protest against this application is upon the following grounds: (a) The applicant has no special use permit from the Forest Service ; (b) the storage right was limited to use on the lands for which application has been made ; (c) the 512 acre feet appropriated is sufficient only for the Wyoming ranches.

To Application for use of water in Idaho under No.3561-R.

The protest against this application is upon the following grounds: (a) The appellant has no special use permit from the Forest Service: (b) the storage right was limited to use on the lands for which application has been made; (c) the appellants have no surplus over the 1710 acre feet of storage reserved for the Wyoming ranches.

To Application for amendments of permits 3770-R and 3771-R and Applications for use of water thereunder by secondary permit and special permit in Idaho; to Application to cancel Permit No. 16190 to construct Twin Reservoir Supply Canal and Permit 4232 for Enlargement thereof.

The protest against the foregoing applications is upon the following grounds: (a) The permits were conditioned upon the granting of easements for the reservoirs and supply ditches by the United States General Land Office, which condition has failed and the permits have no standing and are wholly void; (b) The appellant can have gained no right by prescription and was not misled; (1) the Wyoming law does not permit water rights to be gained by prescription, (2) the Sugar Company has averaged in use from 1920 to 1934 less than 50% of the 5000 acre feet claimed, (3) the State Engineer's records show that the appellant's vendor had no title.

General Protest. - The protestant states the following additional grounds of protest: (a) the appellant has no legal right or interest in any existing permit sought to be amended; (b) the appellant has no permit to use the water outside of

Wyoming; (c) The lands sought to be used for diverting and impounding works have been withdrawn from entry; (d) the granting of the applications will tend to defeat the purpose of the Snake River Land Company to preserve the scenic features and beauty of Two Ocean and Emma Matilda Lakes.

Protest of The National Park Service.

The National Park Service in its protest states no grounds in addition to those stated in the protest of Snake River Land Company.

Summary of Issues.

The issues thus framed may be conveniently stated as follows:

1. Whether the appellant owns and is entitled to an amendment of Permits Nos. 3770-R and 3771-R reducing the reservoir capacities thereof, and to permission to use the water thereunder in Idaho under the applications for secondary permits and the request for special permits, relinquishing any rights it may have inaddition thereto.

2. Whether the existence or non-existence of an executive order withdrawing from entry the lands wherein the impounding works are situate, or a special permit from the Forest Service are material in this proceeding at the present time.

3. Whether the storage rights under the existing certificates of appropriation are sufficient only for the Wyoming

ranches and have been limited to use on those particular lands.

4. Whether the number of acre feet adjudicated in connection with existing certificates of appropriation (3487-R and 3561-R) has the effect of excluding the applicant from participation under such appropriations.

5. Whether permits numbers 3770-R and 3771-R have been terminated or voided.

6. Whether the appellant should be given consideration before the Court by reason of its purchase of these water rights under the circumstances involved and its use of water thereunder.

7. Whether the appellant has title or should be granted the right to perfect its title to these water rights under the circumstances here involved.

8. Whether the granting of the applications will tend to defeat the purpose of the Snake River Land Company to preserve the scenic features and beauty of Two Ocean and Emma Matilda Lakes.

Decision of State Engineer.

A hearing was held before the State Engineer on June 1, 1938, and he made his decision in the form of a written "Opinion and Order" dated December 3, 1938, thereafter endorsed upon the applications, rejecting all of the applications and canceling Permits 3770 Res., 3771 Res., 16190 and 4232 Ena. and the secondary permits under 3770 Res. and 3771 Res. Further details appear under the argument with reference to this opinion and order.

Decision of the Board of Control.

An appeal was taken by the appellant from the decision of the State Engineer to the State Board of Control which heard the matter on April 20, 1939, and made its written "Findings and Order" dated April 24, 1939, sustaining the action of the State Engineer in rejecting the applications for the "reason that the State Engineer and the State Board of Control are now prohibited under Chapter 125, Session Laws of Wyoming, 1939, from granting permits for any appropriation or development of the State's waters while within the State's boundaries in whole or in part for use outside the state."

ARGUMENT

1. THE APPELLANT IS ENTITLED TO AN AMENDMENT OF PERMITS NOS. 3770-R and 3771-R REDUCING THE RESERVOIR CAPACITIES THEREOF, AND TO PERMISSION TO USE THE WATER THEREUNDER IN IDAHO UNDER THE APPLICATIONS FOR SECONDARY PERMITS AND THE REQUEST FOR SPECIAL PERMITS, RELINQUISHING ANY RIGHTS IT MAY HAVE IN ADDITION THERETO.

(a) Applications for amendments of 3770-R and 3771-R

We believe that the appellants have produced evidence clearly sufficient to justify the granting of all of the applications referred to in the above heading. It is not considered necessary to review in detail all of this evidence as it is largely formal in character, but we will comment briefly with reference to certain phases thereof.

The evidence submitted in connection with applications

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for amendment of 3770-R and 3771-R is amply sufficient to sustain the granting thereof, treating such applications as applications of this character ordinarily would be considered. The present status of original permits 3770-R and 3771-R will be considered separately below.

With reference to applications to amend 3770-R and 3771-R it will be noted that the effect of the application to amend 3770-R is to reduce the high water line area from 983 acres to 620 acres, and the available capacity from 63605 acre feet to 3040 acre feet, and that the effect of the amendment of 3771-R is to reduce the high water line area from 1130 acres to 904.2 acres and the available capacity from 60900 acre feet to 1340 acre feet. It will also be noted that the impounding works authorized by the original permits, to the extent that same are sought to be recognized by applications for amendments, have been in existence since long before the time to construct or make proof of construction formally expired under the conditions of the permits. That is, the applications for amendments seek permission to construct impounding works to impound 3040 acre feet under 3770-R and 1340 acre feet under 3771-R; and the evidence shows that impounding works sufficient to impound such an amount of water have been in existence since at least 1921, whereas original permits 3770-R and 3771-R provided that the time for completing the impounding works should terminate on December 31, 1924. Hence it also follows that the works had been completed prior to the time specified in the applications for amendments. (See Transcript, pp. 23, 34, 35, 44, 45, 46, 47).

(b) Rights and Title of Appellants under 3770-R and 3771-R.

The rights of the appellant under the rights mentioned in the heading and the appellant's title thereto as the same have a bearing upon the applications now under consideration appear from the evidence and may be briefly stated as follows:

Application 3770-R for the enlargement of Two Ocean Reservoir, was filed October 6, 1919, by C. C. Carlisle and is recorded in Book 12 at page 270 of Applications. (Ex. 36). It was assigned by C. C. Carlisle to the Osgood Land and Live Stock Company September 14, 1921, by assignment recorded in Book 7 Misc. at Page 1. (Ex. 37).

Application 3771-R for the enlargement of Emma Matilda Reservoir was filed October 6, 1919, by C.C.Carlisle and is recorded in Book 12 at page 271 of Applications. (Ex. 38). The permit was assigned by C.C.Carlisle to the Osgood Land and Live Stock Company on the ____ day of _____, 19___, the assignment being recorded in Book 7 Misc. at page 1. (Ex. 39).

Osgood Land and Live Stock Company by contract dated April 15, 1920, agreed to sell to the appellant certain lands and water rights, being the Osgood Tract in Idaho, including 5000 acre feet of stored water, the same being a storage right which the Osgood Land and Live Stock Company was securing for the use upon the Osgood Tract. (Exhibit 2). The evidence shows that the 5000 acre feet of stored water was stored water in Emma Matilda and Two Ocean Reservoirs (Tr. 12). Osgood Land and Live Stock Company with which the applicant contracted was an Idaho

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corporation and another corporation bearing the name The Osgood Land and Live Stock Company had been incorporated in the State of Wyoming. The latter corporation handled most of the transactions with reference to the stored water. Both corporations have transferred by assignment and quit claim deed to the appellant, all of their interests in the permits and other water rights herein involved. (Exs. 46 and 47).

(c) Status of 3770-R and 3771-R.

The applications for enlargements of Two Ocean and Emma Matilda Reservoirs known as Permits Nos. 3770-R and 3771-R, have the following status at the present time.

As has been previously pointed out, these original applications were for a very much greater storage capacity than the present applications for amendments thereof. The original permits each specified that they were conditioned upon the strict performance by the permittees, or their successors or assigns, of a certain agreement dated May 2nd, 1921, between the State Engineer and The Osgood Land and Live Stock Company and that they were subject to cancellation at any time if the terms of such agreement were not complied with. (Exs. 36, 38).

The agreement of April 29, 1921, referred to provided that upon execution thereof and the signing by The Osgood Land and Live Stock Company of surety bonds therein referred to, the State Engineer would issue the permits; that The Osgood Land and Live Stock Company should thereupon make application to the General Land Office of the United States for permits to construct

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the reservoirs in a United States Forest Reserve; that upon the granting of such permit by the General Land Office The Osgood Land and Live Stock Company would pay to the State Engineer the sum of $30,000.00 in installments as provided for the construction of two bridges over the Snake River. (Ex. 40). The surety bonds referred to were to guarantee performance by The Osgood-Land and Live Stock Company of the acts to be performedby it. (Ex. 42). It was also agreed between the parties that if the General Land Office should refuse to grant the permits that then the agreement should become null and void upon The Osgood Land and Live Stock Company delivering to the State Engineer for cancellation the permits issued by him. (Ex. 40).

The surety bond was given as agreed (Ex. 42) and the application was made to the General Land Office and was denied by letter of May 14, 1923, from the Commissioner of the General Land Office to the Register and Receiver at Evanston, Wyoming. (Ex. 43.)

The permits have never been cancelled by the State Engineer, except by the attempted cancellation in this proceeding contained in his Order of December 3, 1938.

While the construction of the reservoirs on the large scale contemplated by these permits was never undertaken or completed, it is a fact, shown by the evidence, that the impounding works, to the extent contemplated by the applications now pending for amendment of the permits, were actually undertaken and completed by Osgood Land and Live Stock Company, assignee of the permittee, prior to the time fixed for the completion of the work under

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permits numbers 3770-R and 3771-R (Tr. 23,34,35,44,45,46,47) and these reservoirs as so enlarged have been used by the appellant for each of the years 1920 to 1934 inclusive. (Tr. 10,30,32, 33, 37, 46, 48). Reconstruction work on Two Ocean Lake Reservoir in 1928 was done by appellant (Tr. 36,37), assignee of the permits and the dams were maintained after their original construction by assignees of the permittee. (Tr. 36,44). The State Engineer was on the ground at the time the original construction was proceeding and assented to it. (Tr. 49). A representative of the Forest Service set the stakes for the dam as it was reconstructed in 1928. (Tr. 28, 37, Ex. 17), to correspond with previous impounding capacity (Ex.16). The applications for amendments were filed in the year 1935.

At the present time therefore the appellant is in the position of claimant, as assignee, of these uncancelled permits for the enlargement of the reservoirs, and the reservoirs were, within the time limited by the permits, actually enlarged to the extent that the appellant now seeks amendments of the original permits. The State Engineer has often recognized the right of a permittee to make proof of completion after the time limit where the actual work was completed within the time prescribed by the permit. This appellant is now here asking such action in its behalf in a situation where the work sought to be recognized was actually completed within the time limited and the appellant has not only used the water for many years last past, but has also paid substantially for the right it seeks to have recognized. (Ex. 2).

It is true that the original permits were to some extent

conditioned upon the agreement to pay for two bridges, but it is obvious that this agreement was based upon the project in its original enlarged form and there is no basis for the State Engineer to press any such claim in connection with the permits as they are sought to be amended.

The State Engineer's Office has taken the position within recent years that it would be for the best interest of all, including the State, to have the enormous excess of potential storage represented by these permits cleared from the record. That position is sound. We submit that appellant now seeks by this proceeding to make it a reality.

(d) Permits 3487-R and 3561-R.

Permit 3487-R for Two Ocean Reservoir and Permit 3561-R for Emma Matilda or Markham Reservoir have both ripened into adjudicated storage rights.

The rights under 3487-R were adjudicated November 24, 1925, in favor of "H.C. McKinstry; Osgood Land and Live Stock Company," for 512 acre feet with date of priority of May 9, 1918, and Certificate of appropriation was issued under date of January 15, 1926, and is recorded in Certificate Record No. 45 at page 198. (Ex. 24). The actual storage capacity of Two Ocean Reservoir, as Mr. Roger's survey conclusively proves, is 3040 acre feet.

The rights under 3561-R were adjudicated under date of November 24, 1935, in favor of Joseph Markham and Roy B. Lozier, for 1710 acre feet, and Certificate of appropriation was issued

under date of January 15, 1926, and is recorded in Certificate Record No. 45, page 201. (Ex. 31). This adjudication is generous; Mr. Rogers found the actual storage capacity to be nearer 1340 acre feet.

All the right, title and interest of the original applicants, H. C. McKinstry and Wm. C. Thompson to permit 3487-R had been previously assigned as follows: H. C. McKinstry assigned to the Osgood Land and Live Stock Company by assignment filed March 12, 1921 and recorded in Book 6 Misc. at page 426. (Ex. 21). Wm. C. Thompson assigned to James L. Milner and A. T. Shane by assignment filed March 25, 1921 and recorded in Book 6 Misc. at page 430. (Ex. 22). James L. Milner and A. T. Shane assigned to the Osgood Land and Live Stock Company by assignment dated March 25, 1921, and recorded in Book 6 Misc. at page 431. (Ex. 23).

All the right, title and interest of the original applicants, Joseph Markham and Roy B. Lozier to permit No 3561-R had been previously assigned to the Osgood Land and Live Stock Company by assignments as follows: Joseph Markham and Roy B. Lozier assigned to H. C. McKinstry by assignment filed March 12, 1921 and recorded in Book 6 Misc. at page 427. (Ex. 29). H. C. McKinstry assigned to the Osgood Land and Live Stock Company by assignment dated March 12, 1921, and recorded in Book 6 Misc. at page 428. (Ex. 30).

Thus it appears that all right, title and interest in Permits 3487-R and 3561-R had been assigned to the Osgood Land and Live Stock Company prior to adjudication, and that 3487-R was adjudicated in the name of H. C. McKinstry; Osgood Land

and Live Stock Company. All right, title and interest of Osgood Land and Live Stock Company (both the Wyoming and the Idaho Companies) has been transferred by assignment and quit claim deed to Utah-Idaho Sugar Company. (Exs. 46, 47).

Two secondary rights have been adjudicated under No. 3487-R, the secondary permit being No. 15185.

Application for Permit 15185 was filed by Wm. C. Thompson and H. C. McKinstry May 9, 1918, and is recorded in Book 48 at page 282. The permit was issued under date of August 19, 1918. (Ex. 25). This secondary right was adjudicated to Osgood Land and Live Stock Company under date of November 24, 1925, recorded in Book 45, page 200, for 1.06 cubic feet per second of time, with priority of May 9, 1918, to irrigate 74.4 acres in Section 12-45-114. Certificate of appropriation was issued Jan. uary 15, 1926. (Ex. 26). Secondary right under this permit was also adjudicated to H. C. McKinstry November 24, 1925, recorded in Book 45 at page 199, for 1.96 cubic feet per second of time to irrigate 137 acres in Section 7-45-113, with date of priority May 9, 1918. Certificate of appropriation was issued January 15, 1926. (Ex. 27).

Three secondary rights have been adjudicated in connection with Permit 3561-R. These secondary rights were adjudicated under Permit 15569 filed by Joseph Markham, Roy B. Lozier and O. W. Snell on August 19, 1919, and recorded in Book 50 at page 65. Permit was issued September 18, 1919. (Ex. 32). The following rights have been adjudicated under this permit.

There was adjudicated to Joseph Markham under date of May 4, 1925, recorded in Book 45 at Page 202, an appropriation for 1.88 cubic feet per second of time, with priority for stored water of May 1, 1919, and for unstored water of August 18, 1919, for the irrigation of 131.61 acres in Section 6-45-11E. Certificate of appropriation was issued January 15, 1926, and recites that the rights thereunder for irrigation from the unstored flow of the stream shall not exceed one cubic foot for seventy acres. (Ex. 33½).

There was adjudicated to Roy B. Lozier under date of May 24, 1925, recorded in Book 45-203, 1.86 cubic feet per second, with date of priority of May 1, 1919, for stored water and August 18, 1919, for unstored water for irrigation of 130 acres in Section 4-45-11E. The certificate of appropriation was issued January 15, 1926, and likewise recites that the rights for the unstored flow of the stream shall not exceed one cubic foot for seventy acres. (Ex. 34).

There was adjudicated to C. W. Snell by adjudication dated November 24, 1925, recorded in Book 45, page 204, 1.78 cubic feet per second, with date of priority of May 1, 1919, for stored water and August 18, 1919, for unstored water, for the irrigation of 124.9 acres in Section 22-45-11E. This certificate also recites that the rights for the unstored flow of the stream shall not exceed one cubic foot for seventy acres. (Ex. 35).

Thus it appears that all right, title and interest in and to Permits 3487-R and 3561-R have been assigned to the

Osgood Land and Live Stock Company and by it transferred to Utah-Idaho Sugar Company. (Exs. 46, 47).

These reservoir rights (3487-R and 3561-R) have but an indirect bearing upon the controversy here, and it is of little importance at this time whether the secondary permits were issued with the intent, and had the effect, of adjudicating all of the stored water under these permits to the secondary permittees or not. It is sufficient to point out at this time that the appellant has prima facie rights to stored water under these reservoir rights. In this connection it appears that the storage right under 3487-R was adjudicated to H. C. McKinstry and Osgood Land and Live Stock Company jointly; that one of the secondary permits was adjudicated to the Osgood Land and Live Stock Company, individually, and has been acquired and reserved by Douglas Scalley for the benefit of, and conveyed to, the applicant; (Tr. 35, 40, 41); that there is nothing to indicate all of the water stored in either reservoir has been fully covered by secondary adjudications, the adjudications of water under the secondary permits being made on the basis of cubic feet per second of time, which has no bearing upon the amount of stored water to which each permittee may have been entitled; and that the adjudications in connection with the secondary permits under 3561-R included rights for both stored and direct flow water, and therefore cannot be depended upon as a basis for allocating the stored water. A further adjudication of some character may be necessary to determine the respective rights of applicant and others to these stored waters.

It follows that Utah-Idaho Sugar Company as successor in interest to Osgood Land and Live Stock Company has a clear right to stored water under 3487-R and 3561-R by reason of the following (1) adjudication of the storage rights under 3487-R jointly to H.C.McKinstry and Osgood Land and Live Stock Company; (2) adjudication under secondary permit 15185 for the irrigation of 74.4 acres in Section 12-54-14 to Osgood Land and Live Stock Company; (3) the residual right to stored water under both 3487-R and 3561-R by reason of assignments of the permits prior to adjudication to Osgood Land and Live Stock Company and their subsequent transfer by assignment and quit-claim deed to Utah-Idaho Sugar Company.

It should be remembered that stored water may be sold, leased, transferred and used in such manner and upon such lands as the owner may desire provided it is used for beneficial purposes. (122-1602, W.R.S. 1931). And the owner of a reservoir shall be held to be the owner of the right to impound the water and the right to sell or lease a portion or all of his right to the impounded waters. (122-1601)

The appellant through the Osgood Land and Live Stock Company has a right to stored waters under 3487-R and 3561-R and it is unnecessary and immaterial to determine the extent of that right at this time. Whatever right the appellant has under those permits forms an additional basis for its claim that it is entitled to the amendments of permits 3770-R and 3771-R which it now seeks.

Other than as hereinabove stated permits 3487-R and 3561-R have no material bearing upon the matter now under consideration by the State Engineer.

The large amount of space devoted to this question by protestants serves only to emphasize, so far as the present controversy is concerned, that the appellant does have rights under permits 3487-R and 3561-R.

(e) Application for permission to use in Idaho.

The evidence shows that as a practical matter the water involved in the applications now before the Court could not be used in Wyoming (Tr. 20-21, 24-25, 48), and that it has for several years actually been applied to beneficial use in Idaho. (Tr. 30, 32, 33, 37, 46, 48, Exs. 16, 17, 18). This has not been done in bad faith but under the belief by the users that they were entitled to the water and that their record title would ultimately be completed and perfected. (Tr. 36, 37, 41, 48-49). Clearly the mutual requirements of friendship between the States of Wyoming and Idaho with reference to the division of waters requires that under the circumstances the State Engineer should permit the use of this water in Idaho. The water cannot be used in Wyoming; it was purchased by the appellant; its use (as is hereinafter pointed out) will not have the effect of interfering with the beauty of the two lakes involved. The appellant does not question the reasonable requirements of other water users having storage and secondary rights. (Tr. 8-9) The protestant contends that the dams are a bad thing (Tr. 67) and yet proposes to continue to use them. (Tr. 68)

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This is an unreasonable position and should not be considered. The protestant makes no showing of any detriment to it which might result from the granting of the applications of Utah-Idaho Sugar Company. The evidence shows that there is enough water from the reservoirs for all appropriators, including the appellant. (Tr. 48).

(f) Applications to cancel or relinquish.

The appellant asks for nothing under this head which this Board should not be willing to grant upon mere request. The appellant wishes to make clear, however, that it does not seek cancellation but desires merely to relinquish any rights which it may have in the following permits without objection to cancellation to that extent.

The applications involved under this heading are as follows: P-16190, 4232 Enl. and the excess of 3770-R and 3771-R over that which is covered by the applications for amendment now pending.

(g) The contention of the protestant that it purchased lands and water rights without knowledge of the appellant's claims is without merit.

The position of the protestant under this contention is made clear by its witness Winger. Mr. Winger testified that the protestant bought the various lands under these reservoirs, "believing that we were buying all of the water rights appurtenant thereto, including storage rights." (Tr. p. 68); and again the same witness said with reference to the position of his

principal that "they felt that they were buying all water appurtenant to that land." (Tr. 66)

It is clear that the Snake River Land Company did get all water rights, including storage rights, appurtenant to its lands and was not misled or damaged by any failure on its part to ascertain the existing water rights of the appellant. In other words, the protestant got all of the water rights it expected to get and has no cause for complaint on any ground at this time. The appellant does not question the right of the protestant to satisfy its reasonable requirements under its purchased rights. (Transcript pp. 8-9).

2. THE EXISTENCE OR NON-EXISTENCE OF AN EXECUTIVE ORDER OF WITHDRAWAL OR A SPECIAL PERMIT FROM THE FOREST SERVICE HAS NO BEARING UPON THE MATTERS INVOLVED HERE AT THIS TIME.

All that the protestants have to say with reference to an executive order of withdrawal or a special use permit from the Forest Service is immaterial in this proceeding. The State Engineer grants permits without reference to any rights or easements which must be obtained in connection with the building of irrigation or impounding works. Even if the practice of the State Engineer were, as we do not understand it to be, that the granting of water rights would be made conditional upon the obtaining of such rights of way or easements, the question would still not be material here. If the applications here pending are granted it will then be the concern of the appellant here to make proper applications to the Forest Service for the needed rights of way or easements. There is no reason

to believe at this time that such rights of way or easements will not be granted in view of the fact, as we have pointed out, and will point out in more detail hereinafter, that the rights sought by the appellant here will not have the effect of interfering with the beauty of the lakes involved. We do not believe that protestants are justified in asserting that the Forest Service will not grant the necessary rights of way or easements and certainly the Forest Service is not before the State Engineer at this time. We believe the Forest Service is responsive to the needs and requirements of all our citizens and that it will readily see that the desired rights of way and easements will not be detrimental to the beauty of the country or to any other citizens. The fact that the General Land Office refused the request for rights of way and easements on the very much enlarged scale contemplated by the original applications has no apparent bearing on what the needs of the appellant will be under the amended applications. One of the reasons of the appellant in asking the amendments is to make its demands consistent with the preservation of the beauty of the two lakes involved, and we cannot believe that this attitude of the appellant will not receive favorable consideration by the Forest Service.

3. THE QUESTION WHETHER STORAGE RIGHTS UNDER EXISTING CERTIFICATES OF APPROPRIATION HAVE BEEN LIMITED TO USE ON ANY PARTICULAR LANDS IS NOT MATERIAL AT THIS TIME.

This issue was raised by the protestants with reference to Certificates 3487-R and 3571-R. There is nothing within the four corners of these documents which imports any such restriction. Moreover, as pointed out above, these certificates have only a very indirect bearing upon this controversy and it is not important at this time to determine whether the storage rights adjudicated under the permits referred to were limited to any particular lands or not. Certainly any rights of the appellant under the certificates referred to have not been adjudicated with reference to their places of use and if and when their rights are adjudicated those questions will arise, but such questions need not and should not be determined at this time.

4. THE QUESTION WHETHER THE NUMBER OF ACRE FEET ADJUDICATED IN CONNECTION WITH EXISTING CERTIFICATES OF APPROPRIATION HAS THE EFFECT OF EXCLUDING THE APPELLANT FROM PARTICIPATION UNDER SUCH APPROPRIATIONS IS LIKEWISE IMMATERIAL SO FAR AS THIS CONTROVERSY IS CONCERNED.

This issue was also raised by the protestants and refers to the rights under Permits 3487-R and 3561-R. The argument is that the number of acre feet adjudicated indicates an intention on the part of the Board to adjudicate all the water to secondary permittees under whom appellant claimed no rights. No evidence was offered in support of that contention. The great disparity between the allotments to the settlers, and the storage actually existing, at least in the case of Two Ocean, should in itself be sufficient to refute it. Besides, the assignments from the ranch-

ers to Osgood contain reservations in favor of assignors which definitely establish that their participation, while preferred, should not exhaust the total storage in normal seasons. The ranches other than Thompson, should not be denied their reasonable requirements. Appellant will not oppose such an arrangement, either under an interim working agreement or in any appropriate proceeding. The present proceeding would hardly seem to be a proper one in which to allot or re-allot storage waters previously adjudicated by the Board of Control.

5. PERMITS NUMBERS 3770-R and 3771-R HAVE NOT BEEN TERMINATED OR VOIDED.

We have already pointed out that under the contract between the State Engineer and the Osgood Land and Live Stock Company these permits are subject to cancellation upon their surrender by the permittees. No such surrender has ever been made and the permits have never been terminated or voided. They are still in existence for proper disposition, and we respectfully submit that under the showing here made the applications for amendment of the original permits to accord with the actual construction of impounding works within the time limited should be granted at this time. This would have the double effect of disposing of the original permits on the very much enlarged basis and giving the appellant a record title to the storage rights as limited by the impounding works actually constructed.

6. THE APPELLANT SHOULD BE GIVEN CONSIDERATION

BY REASON OF ITS PURCHASE OF THESE WATER RIGHTS, UNDER THE CIRCUMSTANCES INVOLVED, AND THE USE OF THE WATERS THEREUNDER.

We have already pointed out that the water involved in this controversy is but a part of 5000 acre feet which the appellant purchased from the Osgood Land and Live Stock Company. The purchase price of all of the properties involved in the transaction was very large, that is seven hundred thousand dollars. (Ex. 2, Ex. 19, pp. 130-132). The actual portion of the consideration allocable to the 5000 acre feet of water referred to has not been fixed and cannot be stated, but stored water in the amount of 5000 acre feet for use on such a project as was purchased by the Utah-Idaho Sugar Company is obviously valuable, and the evidence showed its importance and necessity, (Tr. 26,31,38), and a right for which the applicant may properly ask careful consideration. The appellant paid for this right and assumed that it would be delivered. Eventually it found that its title was involved, and in attempting to straighten it out discovered that its applications made for that purpose were the subject of protest, not by other water users in the State of Wyoming but by representatives of the Snake River Land Company and by the National Park Service. With commendable frankness the protestants have indicated that their protests are based upon the assumed and we believe erroneous ground, that the granting of the applications here will have the effect of detracting from the beauty of the lakes involved. We submit that the appellant is entitled to every consideration. At the risk of repetition we repeat the grounds for

this assertion: The appellant paid for the rights; the impounding works were constructed within the time limit by the assignee of the permittee and his successor in interest; the water has, in all good faith, been applied to beneficial uses for many years; the appellant is honestly endeavoring to quiet its title; the appellant is anxious to cooperate in the desires of the protestants and not to interfere with the beauty of the lakes involved; and finally, as we submit, the granting of the applications here will not mar the beauty of the lakes. As to the good faith of the appellant in using the water, see Transcript 36, 37, 41, 48-49, Ex. 16. In this connection it should be borne in mind that the State Engineer was on the ground and assented to the enlargement construction (Tr. 49); that a representative of the Forest Service set the stakes for the reconstruction work done in 1928, (Tr. 28, 37), and (Ex. 17) that there is no evidence of objection to the use of the water by the state water officials until 1935.

7. THE APPELLANT HAS FORMAL TRANSFERS OF ALL OF THE RIGHTS OF OSGOOD LAND AND LIVE STOCK COMPANY HEREIN INVOLVED.

As has already been pointed out the appellant has formal transfers by assignment and quit-claim deeds of all of the rights of Osgood Land and Live Stock Company, both the Idaho and Wyoming corporations, herein involved. These transfers cover all of the rights of Osgood Land and Live Stock Company under Permits 3770-R, 3771-R, 3487-R and 3561-R and all other water rights herein involved, including all interest and estate of Osgood Land and Live Stock Company in and to Two Ocean Lake Reservoir and Emma Matilda Lake Reservoir.

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8. THE GRANTING OF THE APPLICATIONS WILL NOT TEND TO DEFEAT THE PURPOSE OF THE SNAKE RIVER LAND COMPANY TO PRESERVE THE SCENIC FEATURES AND BEAUTY OF TWO OCEAN AND EMMA MATILDA LAKES.

The real graund for protest is that the effect of the granting of the applications will be to mar the beauty of the Two Ocean and Emma Matilda Lakes. The protest of the National Park Service states the fear that the granting of the applications may result in the building of very large reservoirs on the basis of the original applications 3770-R and 3771-R. If appellant has failed to make its purpose clear up to this point, we now wish to state unequivocally and that the appellant seeks only to quiet its title to rights under 3770-R and 3771-R to the extent that impounding works now exist, and have existed for many years, and to relinquish any rights in addition thereto, and we believe that its applications for amendments, cancellations and relinquishments so state. Clearly that is their effect and that is the purpose of the appellant.

The evidence shows that the height of the impounding works corresponds with the natural high water marks of the lakes (Tr. 20), and it seems impossible that there can be any contention under these circumstances that the existence of these rights and the impounding works thereunder can in any substantial way mar the beauty of the lakes involved. In fact we submit that on the contrary, advantages arise from the existence of these impounding works and the use of these lakes in the manner contemplated and in which they have actually been used. In other words, the effect

of these impounding works and the use of the water under these rights is to hold the water in the lakes and let it out gradually in a manner which does not mar or disturb the beauty of the lakes by erosion or otherwise. (Ex. 19, p. 1) The diversion works are very benign in appearance and could be easily made almost, if not absolutely, unobservable. (Exs. 7, 8).

Furthermore, the appellant is entirely in accord with the views of the protestants in the matter and is as anxious as the protestants to preserve the beauty of these lakes and the rights of all others involved.

And in any event we believe that the complaint of the Snake River Land Company under this heading is immaterial and should not be considered.

9. THE DECISION OF THE STATE ENGINEER IS ERRONEOUS AND IS NOT JUSTIFIED BY THE EVIDENCE AND SHOULD NOT BE FOLLOWED.

We respectfully disagree with the contention of the State Engineer that the agreement of May 2, 1921, between the then State Engineer and Osgood Land and Live Stock Company is subject to the interpretation he gives it under the circumstances here involved. The condition for cancellation upon refusal of United States General Land Office to grant necessary rights of way had reference to the very much enlarged reservoirs then contemplated. That it has no practical or actual application to the reservoirs contemplated by the amended applications involved in this proceeding as evident on the fact of the matter, and this interpretation has been fully recognized by the acquiescence of succeeding State Engineers. The cancellation provision provides for the surrender and

delivery of the permits to the State Engineer for cancellation and this has never been done or sought by any State Engineer except by the order of the State Engineer in this proceeding.

The State Engineer makes an unjustified assumption to the effect that the appellant cannot obtain rights of way to build or maintain the necessary storage works, which is entirely outside of the record.

The State Engineer's assumption that Permit No. 3771 Res. upon the Emma Matilda Reservoir is canceled by the mailing of a notice of forfeiture is contrary to law. The statute to which the State Engineer refers (Sec. 122-409) provides that default by the holder of the permit in completing the construction within the time specified shall work a forfeiture of the water right involved; provided, that the State Engineer shall give notice by registered mail at least three months before default. The statute does not provide that the giving of such notice shall constitute a cancellation of the certificate, but merely that such notice shall be a prerequisite to cancellation. That this is so was clearly recognized by the Legislature in 1937 by amending the section to provide by additional language that "The State Engineer may upon such default cancel the permit." Clearly the State Engineer's argument that the giving of the notice in itself canceled the permit is erroneous.

The argument of the State Engineer that Emma Matilda Reservoir had already been adjudicated to the extent of 1710 acre feet and that therefore the erection of a dam impounding 1340 acre feet could not constitute an enlargement, is without point. The

evidence is that the present impounding works, impounding 1340 acre feet, were actually constructed in 1919. Assuming that storage right to the extent of 1710 acre feet had previously been adjudicated as a matter of record, it is not inconsistent to grant a later enlargement right on the basis of new construction actually impounding a less amount of water than that previously adjudciated on paper. In other words, an adjudication of 1710 acre feet on paper may not represent an actual storage of 1340 acre feet. If a later construction actually, as shown by measurement and testimony, impounds only 1340 acre feet, there is no reason why an enlargement right should not be based upon the actual construction, particularly when those claiming under the enlargement do not dispute the right of those claiming under the original adjudication to such waters as they may need. There is no evidence that impounding works actually impounding 1710 acre feet of water were actually constructed, and it is entirely possible that the adjudication was based upon an estimate which was erroneous.

10. THE DECISION OF THE BOARD OF CONTROL IS BASED EXCLUSIVELY UPON THE GROUND THAT THE STATE ENGINEER AND THE STATE BOARD OF CONTROL ARE PROHIBITED FROM GRANTING THE APPLICATIONS UNDER CHAPTER 125, SESSION LAWS OF WYOMING, 1939, AND THIS CONCLUSION IS ERRONEOUS.

The Constitution of Wyoming provides that "the Board of Control, to be composed of the State Engineer and Superintendents of Water Divisions * * * shall, under such regulations as may be prescribed by law, have the supervision of the waters of the State and of their appropriation, distribution and diversion. Its decisions to be subject to review by the Courts of the State." (Article 8, Section 2).

The Legislature has now provided that "None of the waters of Wyoming shall ever be appropriated while within the state for use outside the State's boundaries except pursuant to a petition to the Legislature and an act by the legislature permitting any such diversion specifiaally described as such. The State Engineer, Board of Control, State Planning and Water Conservation Board, and any other officers, agents, agencies, or employees of the state are prohibited from granting permits for any such appropriation or development of the state's waters while within the state's boundaries, in whole or in part, for use outside the state. Any such grants, except in pursuance of the provisions of this section shall be null and void." (Session laws, 1939, Chapter 125, Section 1).

Thus it will be seen that the Constitution specifically delegates to the Board of Control, composed of the State Engineer and the Superintendents of the Water Divisions, the supervision of the waters of the state and their appropriation, distribution and diversion; and the Legislature has attempted in 1939 to take from the constitutional board the power to supervise the appropriation, distribution and diversion of certain waters of the state, that

is those which are to be used outside of the state.

The waters involved in this legislation are clearly "waters of the state" contemplated by the above constitutional provision, and the Legislature recognizes this by referring to them as "waters of Wyoming".

The Legislature apparently seeks to avoid the clear effect of the constitutional mandate by impliedly distinguishing between waters of the state which are to be used within the state and waters which are to be used without the state. This is a distinction which the constitutional provision does not state, and which it clearly does not contemplate. There would be as much reason for the legislature to attempt to take from the Board of Control similar power with reference to waters of the state which are to be used in a specified county of the state.

The 1939 legislation is a plain attempt on the part of the Legislature to seize powers which the Constitution has placed elsewhere, that is in the Board of Control.

There is nothing in this contention which is inconsistent with the holding of our Supreme Court in Simmons v. Ramsbottom, 51 Wyoming 419, to the effect that the constitutional provision has not vested the Board of Control with exclusive jurisdiction of actions to determine the priority of water rights, but that there is concurrent jurisdiction for that purpose in the courts. In fact the action of the 1939 Legislature is directly contrary to this holding, because such action attempts to place exclusive jurisdiction in the Legislature, and to the extent involved, to take such jurisdiction from the Board of Control.

It is true that the constitutional provision referrred to provides that the supervision of the Board of Controlshall be under such regulations as may be prescribed by law. This clearly refers to such regulations as may be consistent with the powers directly granted to the State Board of Control, and does not give the Legislature, under theguise of regulation, the power to usurp the very authority granted to the Board by the Constitution.

The Legislature seems to have recognized the futility of providing that none of the waters of the state can ever be appropriated for use outside of the state; and has resorted to an equal futility, that is the attempt to take the power of supervision over appropriation, distribution and diversion from the constitutional authority and give it to itself.

Assuming for the sake of argument, nut not admitting, that the Legislature might, consistently with the Constitution, have provided that the Board of Control should not approve the appropriation and distribution and diversion of water for use outside the State, until the Legislature had been given the opportunity to approve or disapprove a petition for such use outside the State, it is clear that this is not what the Legislature did or intended.

Furthermore, the legislature makes no attempt to provide for pending applications, and should not be interpreted to mean that such applications should be deniedand the rights of the appellant terminated prior to an adequate opportunity by the appellant to make the required petition to the Legislature.

The application here involved for permission to use in

the State of Idaho has been presented in due course, first to the State Engineer, as required by statute, and by appeal to the State Board of Control, which had the entire matter, including the question of use in the State of Idaho before it.

The very least that the court can order, under the circumstances, is that the application should not be denied upon the basis of the 1939 legislation until the appellant has had ample opportunity to present to the State Legislature a petition for use of the water outside of the State.

11. THE APPELLATE PROCEDURE INVOLVED CONTEMPLATES A TRIAL DE NOVO BY THIS COURT.

The Constitution provides that decisions of the Board of Control in the supervision of the waters of the State and of their appropriation, distribution and diversion, shall be subject to review by the courts of the State. (Article 8, Section 2).

The statutory provisions appear in Sections 122-119 to 127, both inclusive.

Section 122-123 provides that all proceedings on appeal shall be conducted according to the provisions of the Civil Code of Procedure, and the practice of appeals from the District Courts of the State to the Supreme Court; provided, that the practice on appeal in the District Court, as to pleadings necessary to be filed and the admission of evidence upon the trial, shall be the same as is now or may hereafter be provided for by law regulating appeals from the Justice Court.

Theeffect of the foregoing statutory provisions is that the matter shall be tried de novo on appeal to the District Court,

and our Supreme Court has so held in the case of Simmons v. Ramsbottom, 51 Wyo. 432, where the Court said:

> "This statute by its own and direct terms contemplates that when an appeal is taken from the State Board of Control to the district court, evidence may be taken in the hearing on appeal. It further provides that an appeal to the district court in such case shall follow the provisions regulating appeals from justice court. Section 62-1205, Rev. St. 1931 provides that when an appeal is taken from a justice court to the district court the trial in the latter case shall be de novo, in which case, of course, evidence may be introduced by either party."

12. SUMMARY.

The applications for amended permits 3770-R and 3771-R, to conform with the actual construction of impounding works for reservoirs of greatly reduced capacity should be granted in the absence of any substantial showing which would support a contrary ruling. The applications for amended permits were filed before any attempt at cancellation of the original permits and there is clear jurisdiction to support such action.

The corresponding secondary permits should likewise be granted.

The application to use the water in Idaho should be granted, the evidence leading to the necessary conclusion that the water could not be used in the State of Wyoming.

The position of the protestants is without merit. The contention that the beauty of the lakes will be adversely affected is not supported by the evidence; nor is this a legal objection; and in any event the appellant is wholly in accord with protestants desire in this regard. The appellant does not question

the right of protestants to satisfy their reasonable requirements under its existing water rights. They got all they ever bargained for.

The position of the State Engineer is unsound. The conditions attached to the original application clearly do not apply to the amended permits sought, and his office has so recognized by its long inaction. There is no evidence that a right of way or use permit cannot be obtained from the Secretary of the Interior, and there could be none, and the obtaining of the same is no part of this proceeding. Such permit involves nothing which has not been actually permitted for years. Original Permit 3771-Res. was never cancelled prior to the commencement of this proceeding as contended by the State Engineer and is still in existence. The appellant is entitled to the amended permit for 1340 acre feet in Emma Matilda, based upon actually constructed impounding works, regardless of a prior record adjudication of 1710 acre feet, and consistently with such adjudication.

The decision of the Board of Control is confined to a question of law and is erroneous. The power of supervision of the appropriation, distribution and diversion of the water of the State is vested by the constitution in the Board of Control. The Legislature could not take this power from the Board and vest it in the Legislature. The 1939 Legislation is unconstitutional, and void.

The trials is de novo and the court should make the order which should have been made by the State Engineer.

CONCLUSION.

All of the applications of the appellant should be granted.

Respectfully submitted,

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IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT IN AND FOR TETON COUNTY, STATE OF WYOMING

IN THE MATTER OF THE APPEAL OF THE UTAH-IDAHO SUGAR COMPANY FROM THE ACTION OF THE STATE ENGINEER IN THE ENDORSEMENTS PLACED UPON APPLICATIONS FOR AMENDMENT OF PERMITS NOS. 3770 Res. and 3771 Res. and Applications for Secondary Permits from Two Ocean and Emma Matilda Reservoirs (Application Nos. 13 1-2-3-4/357 and 14 3/128.)

No. 447

BRIEF OF PROTESTANT

Protestant's position in connection with this matter has been uniform since the contest became apparent in 1935. Any apparent inconsistencies in Protestant's position arise by reason of the various positions assumed from time to time by Applicant.

Applicant, on page 31 of its brief, attempts to state the position of the Snake River Land Company, and Protestant's only criticism is that the statement is incomplete. Applicant now concedes the Snake River Land Company is entitled to the water and water rights originally developed by McKinstry, Lozier, Markham and Snell, and contends that as to these four ranches and the water rights appurtenant thereto now owned by the Snake River Land Company, there is no contest at this time, no dispute, and no issue in this case. The Snake River Land Company will accede to this position.

There is, however, another ground on which the Snake River Land Company believes that the Applicant should be denied its application to amend Applications 3770-R and 3771-R and that briefly is the weakness of Applicant's case. In other words, the Snake River Land Company is the owner of rights in Emma Matilda and Two Ocean Lakes and believes that such excess storage capacity as may now exist in those lakes or might be developed belongs to the State of Wyoming, and not to Applicant, Utah-Idaho Sugar Company. Protestant believes that a historical statement of the facts in this matter is important and submits the following as such a statement.

May 1, 1919, Joseph Markham and Roy B. Lozier filed application for Permit No. 3561-R asking to build a dam three feet high at the outlet to Emma Matilda Lake, and to store 2579.7 acre feet of water. This permit was granted. (Ex. 28)

On May 9, 1919, H. C. McKinstry and William C. Thompson filed an application for Permit No. 3487-R to construct a dam two feet above stream bed on Two Ocean Lake to store 1024 acre feet of water. This application was approved. (Ex. 20)

On October 6, 1919, C. C. Carlisle filed an application for Permit No. 3770-R, asking the right to enlarge Two Ocean Lake Reservoir so as to store 63,605 acre feet of water. (Ex. 36) On the same date C. C. Carlisle filed an application for Permit No. 3771-R, asking for the privilege of incureasing the dam of Emma Matilda Lake so as to store 60,900 acre feet of water. (ex. 38) These last two permits to Carlisle were conditioned upon the strict performance of a certain agreement dated May 2, 1921, between the State Engineer of the State of Wyoming and the Osgood Land and Livestock Company, a Wyoming corporation, which agreement is in evidence as Exhibit 40.

At some time, the exact date of which is not certain, a two-foot impounding dam was constructed at the outlet of Two Ocean Reservoir, as provided by Permit No. 3487-R, and a three-foot impounding dam was constructed as provided by Permit No. 3561.

In 1919, according to H. C. McKinstry, he, as an employee of the Osgood Company (which of the two Osgood companies is not specified), constructed a six-foot dam on Two Ocean Reservoir, (Tr. 46); and evidently, from McKinstry's testimony, the original dam in Emma Matilda was a four-foot dam. (Tr. 47)

Thereafter, on February 5, 1921, McKinstry assigned his interest in Permit 3487-R to Osgood Land and Livestock Company, a Wyoming corporation. (Ex. 21) And on April 14, 1920, Thompson assigned his interest to Milner and Shane. (Ex. 22) And on March 21, 1921, Milner and Shane assigned the Thompson interest in Permit No. 3487-R to the Osgood Land and Livestock Company, a Wyoming corporation. (Ex. 23) On August 12, 1920, Markham

and Lozier assigned their interest in Permit No. 3561 to McKinstry. (Ex. 29) And on February 5, 1921 McKinstry assigned his interest in the Markham and Lozier permit No. 3561 to the Osgood Land and Livestock Company, a Wyoming corporation. And on September 14, 1921, C. C. Carlisle assigned his interest in Permits Nos. 3770-R and 3771-R, together with other permits, to the Osgood Land and Livestock Company, a Wyoming corporation.

Now, the Applicant in the matter now before the Court, on the 5th day of April, 1920, and while the reservoir permits were still held by the original settlers in Jackson Hole, entered into an agreement with the Osgood Land and Livestock Company, an Idaho corporation, and therein they attempt to base their claim for storage rights in Two Ocean and Emma Matilda Lakes. In this Agreement (Report 79), the Osgood Land and Livestock Company, an Idaho corporation, agrees to sell 5,000 acre feet of stored water, and they agree to do the construction work necessary to reservoir the 5,000 acre feet of water. There is nothing in that contract, or in any of the documents subsequent to the contract, to indicate that the 5,000 acre feet of water was to come from Two Ocean Lake, from Emma Matilda Lake, or from any other particular lake. And again referring to the fact that such storage rights as existed in the two lakes in question at that time belonged to the original settlers, there can be no presumption that this water was to come from these reservoirs rather than to come from Jackson Lake Reservoir, or any other reservoir on the Snake River system.

Simultaneously with the filing of Application for Permit No. 3487-R, McKinstry and Thompson filed application for a permit to divert and appropriate, under Permit No. 15185, wherein they specified that the water to be stored under Permit 3487-R was to be used on 211.4 acres of land in Teton County, Wyoming. The record fails to show that this permit was ever assigned or transferred to applicant, or that any other or additional permit to withdraw the same water has ever been made. (Ex. 25)

On August 15, 1919, Joseph Markham and Roy B. Lozier and O. W. Snell filed an application for permit to divert and appropriate water under Permit No. 15569 and specified 386.51 acres

of land in Teton County to be irrigated with the water. This application, so far as the record discloses, was never assigned or transferred to Applicant. (Ex. 32)

Subsequently, and subsequent to the Agreement between the Osgood Land and Livestock Company, the Idaho corporation, and the Applicant, the following certificates to appropriate water were issued by the Board of Control under date of January 15, 1926; the certificate for 512 acre feet was issued to McKinstry and the Osgood Land and Livestock Company, specifying that it was being appropriated from Two Ocean Reservoir. The certificate provides, "The use is restricted to the place where acquired and the purpose for which acquired." (Ex. 24) On the same date certificate to appropriate 1.06 cu. ft. of water was issued to the Osgood Land and Livestock Company to irrigate 74.4 acres of land in Teton County. It specified that this water was stored in Two Ocean Reservoir under Permit 3487-R. (Ex. 26) And on the same date a certificate to appropriate water is issued to H. C. McKinstry for 1.96 cu. ft. of water to irrigate 137 acres of land in Teton County, to be diverted from Two Ocean reservoir under Permit 3487-R. (Ex. 27) And on January 15, 1926, a certificate to appropriate water is issued to Markham and Lozier under Permit No. 3561-R. (Ex. 31) And on the same date a certificate to appropriate water is issued to Joseph Markham for 1.88 cu. ft. of water to irrigate 131.61 acres in Teton County. (Ex. 31) And on the same date a certificate of appropriation is issued to Roy B. Lozier for 1.36 cu. ft. per second to irrigate 130 acres of land located in Teton County, (Ex. 34) And on the same date a certificate was issued to O. W. Snell to divert 1.75 cu. ft. of water to irrigate 134.9 acres of land in Teton County. The last three certificates were all made to divert water from Emma Matilda under Permit 3561-r. There is nothing in the record to show that any of these certificates were ever assigned or transferred, legally or equitably, to Applicant. The fact that these certificates were, in1925, issued to the original settlers rather than to Applicant seems to indicate that at that time Applicant did not claim ownership of the rights in question.

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Actually, Applicant's case consists of the following: That a corporation, the Osgood Land and Livestock Company, an Idaho corporation, agreed to sell Applicant certain land and water in 1920. Applicant received from Osgood Land and Livestock Company, an Idaho corporation, all of the land and most of the water, but failed to receive the promised 5,000 acre feet of storage water. The money that was paid by the Applicant to Osgood Land and Livestock Company, an Idaho corporation, is evidently gone with the wind. For otherwise the Osgood Land and Livestock Company, an Idaho corporation, could be called upon to perform according to the terms of its Agreement. Applicant, nevertheless, caused certain waters to be diverted from Emma Matilda Reservoir and Two Ocean Reservoir into Snake River, and to be withdrawn by it and used in Idaho. When its right to doso was questioned by Protestant, it thrashed around for a legal basis on which to predicate a claim to the water it had been using. It found in its quest applications for Permits Nos. 3770-R (Ex. 36) and 3771-R (Ex. 38) and application for Permit No. 16190 (Ex. 34), and application for Permit No. 4232 (Ex. 45), and with these, together with the assignments from Markham, Lozier, McKinstry and Thompson, sought to establish a right for the raising, if there was any raising, of the original dams in Two Ocean and Emma Matilda Reservoirs.

It is respectfully submitted that Permits Nos. 3770-R and 3771-R and 16190 and 4232 were all conditioned upon obtaining the right from the General Land Office to store water upon the public domain and transport it over the public domain, and that although such right was applied for, it was denied, and an appeal was taken therefrom, and that the order of denial was upheld, and that upon its being upheld, all rights under and to those permits above specified ceased, and became as ineffectual as though they had never existed. Because these permits are still on file and have not long ago been cancelled, as they should have been, it is now sought to distort them out of all resemblance to their original purpose, and by means of quitclaim deeds procured between the time of the filing of the protest herein and the hearing before the State Engineer, to resuscitate these

dead permits and give a priority to claimant's claims. (Ex. 46-47) Applicant's position would today be just as strong if it had come in at this time and asked to appropriate water from Two Ocean and Emma Matilda Lakes, and forgotten all about all permits and deeds from defunct corporations.

We thus come to the actual situation. Someone, ostensibly the Osgood Land and Livestock Company of Wyoming, through a trespass on the lands of the United States Government, raised the dams at the outlets of Two Ocean and Emma Matilda Lakes, and by a trespass on the lands of the United States Government, and without any right from the State of Wyoming, stored waters in those lakes, and by trespass diverted those waters, and by trespass conveyed them over the lands of the United States Government into the Snake River, and there unlawfully comingled them with other waters, and without any right transported the waters across the State line and out of the State of Wyoming, and there diverted the waters from said Snake River and converted and used those waters on their so-called Osgood Tract near Idaho Falls without any right in law. And they now claim, by virtue of the series of trespasses and conversions which have gone on over a period of years, a right to continue to trespass and convert the waters of the State of Wyoming.

A portion of Applicant's Brief is devoted to the fact that the waters have been and can be beneficially used on the Osgood Tract. There is no law which justifies a trespass or a conversion because the waters can be beneficially used. A portion of Applicant's Brief is devoted to the need for the water, but there is nothing said in the Brief as to why other waters cannot be purchased from other sources to supply this need.

Exhibits A to H, inclusive, constitute the documentary evidence on file in Teton County concerning the water rights in question, and demonstrate such notice as Protestant received at the time of the purchase of the Snell, Lozier, Thompson, Markham and McKinstry places of the existence of any conflicting or other water claims in and to the waters of Emma Matilda and Two Ocean Reservoirs.

The Brief of the Attorney General on file herein on behalf of the Board of Control, in the opinion of Protestant, amply

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covers the question of Applicant's rights based upon prescription, and Protestant will say nothing on that subject.

Finally, in closing, it should be pointed out and it is respectfully submitted from a reading of the testimony before the State Engineer that the original construction was to the same height as the impounding works now existing at the outlet of the two lakes, and that this construction was done pursuant to the original Markham, Lozier, McKinstry and Thompson applications and was not done pursuant to Carlisle's applications.

Carlisle's plan involved the appropriation of water from Pacific Creek, not water from Emma Matilda or Two Ocean Lakes. These lakes were only reservoir sites under Carlisle's plan. The source of water was to be from Pacific Creek. Applicant's present position involves converting these applications into appropriations from Emma Matilda and Two Ocean Lakes so that the actual source of supply is being changed. And it is respectfully submitted that the testimony does not support the proposition that any increase was ever made in the height of the impounding works at the two lakes pursuant to the Carlisle applications. And furthermore, if any such increase was made it was not pursuant to any rights granted by reservoir permits 3770-R and 3771-R because these were conditional and as was pointed out by the Attorney General, conditions have never been met and the permits ceased to exist for all practical purposes when the Osgood Land and Livestock Company failed to obtain the necessary rights-of-way from the General Land Office.

At a time, the social and political philosophy of this country might have sustained the attempted exploitation of these two lakes by Applicant, but under the nebulous claim advanced in this case, it is respectfully submitted that with the passing of our frontier and the recognition of the ultimate value of these natural resources to the people of the several states, the burden is definitely upon the Applicant to prove compliance with the law as a prerequisite to the perfecting of rights to natural resources.

In conclusion, it is respectfully urged that the action of the State Engineer in cancelling permits Nos. 3770-R and 3771-R

16190 and 4232 Enl. should be sustained and the application for amendments to Permits Nos. 3770-R and 3771-R under filing No. 131 and 2/357 as rejected by the Engineer be sustained, because:

1. Rights acquired under Permits 3561-R and 3487-R are not now in issue;

2. Permit 3771-R and Permit No. 3770-R should have been cancelled for failure of condition and that should be done now;

3. Notice of cancellation of Permit #3771-R was given as provided by law on September 30, 1934;

4. More rights have been adjudicated in Emma Matilda under Permit No. 3561-R than the present storage capacity of the lake; hence no work could possibly have been done under Permit No. 3770-R, and it is now in default;

5. The unlawful diverting and using of water cannot be the basis of a right to use.

6. It is beyond the power of the Board of Control to grant a permit to transport developed water of the state to a point outside of the state for use there under the circumstances in this case.

Respectfully submitted,

Fabian, Clendenin, Moffat & Mabey

ATTORNEYS FOR SNAKE RIVER LAND COMPANY, PROTESTANT

THE STATE OF WYOMING)
) SS
COUNTY OF TETON)

IN THE DISTRICT COURT
THIRD JUDICIAL DISTRICT.

In the Matter of the Appeal of the Utah-Idaho Sugar Company from the action of the State Engineer in the Endorsements placed upon Applications for Amendment of Permits Nos. 3770 Res. and 3771 Res. and Applications for Secondary Permits from Two Ocean and Emma Matilda Reservoirs (Application Nos. 13 1-2-3-4/357 and 14 3/128.

No. 447

BRIEF ON BEHALF OF STATE BOARD OF CONTROL.

Statement of Facts

The question involved does not constitute, in the opinion of the State, any complicated question of law. Briefly the facts might be summarized as follows:

On September 14, 1921, Permits Nos. 3770 Res. and 3771 Res. for the enlargement of Two Ocean and Emma Matilda Lakes were granted to the Osgood Land and Livestock Company. These permits were conditional permits; that is to say, that prior to the granting of the permits, as aforesaid, the applicant, Osgood Land and Livestock Company, entered into a written agreement with the State Engineer for the State of Wyoming, dated May 2, 1921, in which it was expressly understood and agreed that the applicant would apply to the United States General Land Office for permits to obtain rights-of-way, and if the permits for rights-of-way were rejected by the United States General Land Office, then the applicant would submit said permits Nos. 3770 Res. and 3771 Res. to the State Engineer for cancellation. (See Exhibit 19, page 105) The applicant, Osgood Landand Livestock Company, applied to the United States General Land Office for rights-of-way, which application was rejected on May 14, 1923. The Osgood Land and Livestock Company, however, did not submit said Permits Nos.3770 Res. and 3771 Res. to the State Engineer for cancellation as was agreed between

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the State Engineer and applicant, and thereby breached the contract aforesaid.

The facts are undisputed that the Osgood Land and Livestock Company made application for the rights-of-way and that its application was rejected. (See Exhibit 19, page 77)

The Utah-Idaho Sugar Company, the applicant herein, later acquired the rights of the Osgood Land and Livestock Company.

On July 23, 1935, the Utah-Idaho Sugar Company made application to the State Engineer to amend permits Nos. 3770 Res. and 3771 Res. to conform to the extent of the works actually constructed, both before and after the granting of the permits, and to cancel the permits of the Twin Reservoir Supply Canal which was never constructed.

On June 1, 1938, a hearing was held before the State Engineer in order that the facts might be presented to him prior to rendering a decision. Upon final hearing, the State Engineer cancelled permits Nos. 3770 Res. and 3771 Res. and rejected the amendments. An appeal was taken to the Board of Control from the decision of the State Engineer, said Board having approved the findings of the State Engineer in all respects. The Board of Control further found that Chapter 125, Session Laws of Wyoming, 1939, prohibited the Board from issuing any permits which would involve the taking of Wyoming waters to another state. It would serve no useful purpose to discuss in this brief the reasons the Board of Control had, or might have had, in confirming the decision of the State Engineer. The fact remains that the decision of the State Engineer was affirmed and the reasons given are immaterial.

The authority of the State Engineer to cancel these permits must be found within the four corners of the contract entered into between the State Engineer and the Osgood Land and Livestock Company under date of May 2, 1921. (A copy of the contract is spread at large in Exhibit 19 at page 105) It will be observed that under the terms of said contract that, if the State Engineer granted and issued the storage reservoir applications, the applicant would do certain construction work to

increase the storage of Emma Matilda and Two-Ocean Lakes, and, in addition thereto, the applicant would construct a supply ditch from Pacific Creek to replenish the supply of the waters in these two lakes; that applicant would apply to the United States General Land Office for a permit for rights-of-way over government land over which the supply ditch was to run, and that since these lakes were located upon government land the applicant would likewise apply to the United States General Land Office for a permit to enlarge the lakes.

In this connection, it will suffice to say that the applicant applied to the United States General Land Office for a permit and the permit was denied on May 14, 1923. That, in addition thereto, the applicant agreed to deposit with the State Engineer the sum of $30,000.00 to be used in connection with the construction of two bridges in Jackson Hole across Snake River, at or near what is called Wilson, Wyoming, and also at a point near what is called Menor's Ferry. I quote herewith paragraph 5 of the contract:

> "It is finally agreed and understood between the parties hereto, that in the event of the United States General Land Office refusing to grant the necessary rights-of-way, required in the construction of the said reservoirs and supply ditches, than then this agreement shall become null and void upon the said party of the second part surrendering and delivering to the party of the first part, for cancellation, the said permits to be issued by him, and which are covered by this agreement."

The position of the State is (a) that the applicant did not obtain a permit from the United States General Land Office, (b) that applicant did not pay the sum of $30,000.00, or any part thereof, (c) that applicant failed to surrender and deliver to the State Engineer, for cancellation, Permits Nos. 3770 Res. and 3771 Res., all of which constituted a breach of the contract and authorized the State Engineer to cancel these permits at his pleasure.

The Utah-Idaho Sugar Company does not contend that they obtained the permits from the United States General Land Office, paid the sum of $30,000.00, or any part thereof to the State

Engineer, or surrendered the permits for cancellation.

Replenishing the water of these lakes was an important factor at the time the permits were issued by the State Engineer. Obviously, if the lakes are not replenished the water level is lowered to such an extent that it will result in stagnation and destroy the fish contained therein, as well as the scenic beauty of the lakes. Likewise, the construction of the bridges was an important factor and one of the considerations upon which the State Engineer issued these permits.

The State particularly directs the attention of the Court to the opinion and order of the State Engineer, dated December 5, 1938, which is attached to the pleadings in the original file. The thoroughness with which the State Engineer reviewed the entire matter is beyond any question. Every application and permit was taken into consideration and the State Engineer found that the terms of the agreement entered into between the former State Engineer, Frank C. Emerson, and the Osgood Land and Livestock Company had been breached in every respect. The State Engineer also took into consideration the testimony and affidavits offered on behalf of the applicant, the Utah-Idaho Sugar Company, successor to the Osgood Land and Livestock Company. Frequently, as this Court is well aware, administrative boards and commissions are lax in stating the grounds upon which findings are made; however, in this particular case the opinion is fully supported by the evidence and the law applicable thereto.

Prescriptive Right

I particularly direct the Court's attention to page 10 of the transcript of testimony in which the following question and answer appear:

> "Now, would the action and investigations and knowledge that you got at that time indicate to you why the applicant had not taken any action to perfect those rights before that time.
>
> "My recollection of this may be based partly on assumption, but as I recall, from early in the '20's, on which date position of enjoyment of water was given by the then owners and that position and enjoyment had been entirely uninterrupted, it had not occured to anyone to go ahead and perfect those rights, the paper rights."

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This answer clearly indicates that the applicant acquired a prescriptive right if such can be obtained under the laws of this State since 1890. This identical question has been passed upon by our Supreme Court in the case of Campbell v. Wyoming Development Company, 100 Pac. (2d) 124. At pages 138 and 139 the Court said:

> "As stated, the plaintiffs claim a right by prescription. It would seem to follow as a corollary from what has already been stated that no claim of a prescriptive right can be set up by plaintiffs, at least up to the time of the adjudication of the waters of Little Laramie River in 1892. That such prescriptive right can not be set up against other appropriators directly from the Little Laramie River has been held in German D. & R. Co. v. Irrigation Co., 67 Colo. 390, 176 P. 896; Bieser v. Stoddard, 73 Colo. 554, 216 P. 707; see Holbrook Irr. Dist. v. Arkansas, etc., Land Co., D. C., 42 F. 2d. 541, 546. * * *
>
> "We do not mean to intimate, or seem to concur in the view, that a prescriptive title to water may be acquired in this state, particularly since 1890, when the legislature enacted a law requiring the initiation of all water rights to be pursuant to a permit from the State Engineer. We do not need to enter into that question in this case. See the case of Wyoming Hereford Ranch v. Hammond Packing Co., 33 Wyo. 14, 236 Pac. 764."

After the rendition of this decision, the appellant was dissatisfied with the holding of the Court and petitioned for a rehearing. The court reviewed at length the question of a prescribed right in 102 Pac. (2d) 745. At page 748 the court said:

> "Counsel have again argued the question of prescription at length. That no prescriptive title was obtained up to the time of the adjudication of the Little Laramie in 1892 was so clearly pointed out in the original opinion that we need not say anything more on that point. The only possible question is as to prescription since that time, if a prescriptive title may be obtained at all in this state, which we refused to decide. The court's finding of fact No. 8, set out in the original opinion, substantially was to the effect that no such prescriptive title was acquired. What counsel now ask us to do included, in effect, that we should review that finding, and their contention includes the point that that finding was in fact erroneous and should have been broader. But they did not except to that finding, nor was an exception to the finding embraced within the motion for a new trial. It is generally held that in the absence of an exception, a finding of fact will not be reviewed by the appellate court. 3 C. J. 933; see also 3 C. J. 984, 1338, 1345. We may, however, say that the mere use of water, however long continued, does not give rise to a title by prescription."

Thus it will be seen that under the laws of the State of Wyoming, particularly since 1890, a right by prescription cannot be obtained in the State of Wyoming.

Since the applicant has discussed in detail the facts and circumstances from the original issuance of these permits, I deem it unnecessary for the State to reiterate the details of this case. In most every instance, I believe, the parties agree that there is no dispute as to the facts.

Conclusion.

In conclusion it is submitted that the consideration of the issuance of Permits Nos. 3770 Res. and 3771 Res. was based upon the terms of the contract entered into between the State Engineer and the Osgood Land and Livestock Company under date of May 2, 1921; that each and every term of the contract was breached by the applicant, namely: The applicant failed to get rights-of-way from the United States General Land Office, the applicant failed to deposit the sum of $30,000.00 with the State Engineer for the construction of two bridges, and the applicant failed to surrender the permits for cancellation after it, the said applicant, failed to obtain the permit from the United States General Land Office.

It is further submitted that under the laws of the State of Wyoming the applicant did not acquire a right by prescription.

We submit that the decision of the State Engineer, as affirmed by the State Board of Control, should be affirmed.

Respectfully submitted,

Ewing T. Kerr
Attorney General.

Hmold I. Bachelier
Deputy Attorney General.

Arthur Kline
Assistant Attorney General.

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IN THE

DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT

TETON COUNTY, WYOMING.

In the Matter of the Appeal of the Utah-Idaho Sugar Company from the action of the State Engineer in the Endorsements placed upon Applications for Amendment of Permits Nos. 3770 Res. and 3771 Res. and Applications for Secondary Permits from Two Ocean and Emma Matilda Reservoirs (Applications Nos. 13 1-2-3-4/ 357 and 14 3/138).	)	No. 447.

REPLY BRIEF OF APPELLANT.

The principal points made by the Attorney General as we read his brief, are as follows:

1. That the original enlargement applications were voided by reason of the failure of the conditions of the contract between the State Engineer and such original applicants.

2. That appellant's claim is based upon a prescriptive right, which cannot be acquired in Wyoming.

The principal point made by attorneys for the protestant is not clearly stated but in effect we take it to be as follows: That the applications of the appellant do not follow or accord with the facts, that is, that the enlargement works under which the appellant claims were not carried out under or in contemplation of the original enlargement applications involved.

We will briefly discuss these points in order and then make a short reference to a few further points made by our opponents.

I.

<u>The original enlargment applications have not been voided by reason of failure of conditions of the contract, under the circumstances here involved.</u>

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We have covered this point in our original brief at pages 14 to 17, inclusive, 25, 26, and 28. We submit that the Attorney General has not met, and could not meet, our contention that the conditions are not applicable to the appellant's applications in their present form. The construction of bridges costing $30,000.00 and the denial by the Secretary of the Interior of a permit to construct the very extensive irrigation works originally contemplated may have been consistent with the enlargement applications in their original form but they are entirely inconsistent with the very modest irrigation works of the appellant under its applications for amendment permits. It should not be forgotten that the State Engineer was on the ground at the time the irrigation works depended upon by the appellant were started and he assented to the commencement of such work. (Tr. pages 46 to 49). And the State Engineer never attempted to cancel the permits up to the time appellant's applications for amended permits were filed.

II.

It is not necessary for the appellant to stand upon a prescriptive right.

Nor is it necessary for us to admit that a prescriptive right may not be obtained in Wyoming. We submit that the Supreme Court has not said the last word on this subject and that in all likelihood it will eventually be held that prescriptive rights under some circumstances can be obtained. But the Attorney General mistakes our principal contention, which is that we or our predecessors proceeded under or in contemplation of the original enlargement permits and that the work was done thereunder within the time prescribed by statute and that to the extent of such work we are entitled to the amended permits which are based thereon, such original enlargement permits having been continuously in existence until after our applications for amended permits were filed. We

submit that there is no showing whatever in the record which would justify or support a decision against us on this proposition, and furthermore, that there is no evidence whatever in the record which would support a decision against us upon our application to use the water in Idaho, because the record shows that the water could not as a practical matter be used in this State.

Whether the acquisition of these rights by the appellant under its contract of purchase from Osgood Land and Live Stock Company and the subsequent long use of the rights by the appellant have any bearing upon the question of gaining a right by prescription, it is clear, we submit, that the circumstances involved entitled the appellant to equitable consideration, as well as such consideration as it is entitled to as a matter of law. The long user clearly indicates the intention of the appellant to use these rights under its contract of purchase, and its belief that it had rights in the water by reason of the action which had been taken with respect to impounding the water by Osgood Land and Live Stock Company and its predecessors and allied interests.

III.

The Idaho corporation known as Osgood Land and Live Stock Company and the Wyoming corporation known as The Osgood Land and Livestock Company, represent the same interest, and the impounding works constructed at Emma Matilda Lake and Two Ocean Lake in the summer of 1919 in behalf of the Osgood Companies were constructed under and in contemplation of Enlargement Permits 3770-R and 3771-R which are sought to be amended here. The 5000 feet of stored water sold by the Osgood Company to the applicant is the water represented by such permits as they are sought to be amended.

The evidence clearly shows the identity of interest be-

tween the two Osgood Land and Livestock Companies.

The Idaho Company was organized in 1909 as "Idaho Falls Dry Farm Association, Limited." James L. Milner and A. T. Shane, of Idaho Falls, Idaho, were incorporators. Mr. O. A. Johannesen was a stockholder and was the Notary before whom the articles were acknowledged. (Exhibit 19, pages 15-17, inclusive.) Mr. A. T. Shane was at the time President of theccorporation. (Exhibit 19, page 20). In 1916 the name of the corporation was changed to "Osgood Land and Live Stock Company". (Exhibit 19, pages 27-30, inclusive). Later on Mr. James L. Milner was President and Mr. A. T. Shane was Secretary. (Exhibit 19, pages 79 to 91, inclusive).

The Articles of Incorporation of the Wyoming company were executed in 1919 but were not filed until January, 1921. This company was organized for the specific object of constructing and developing Two Ocean Reservoir and Emma Matilda Reservoir. James L. Milner and O. A. Johannesen were incorporators and directors of the corporation and the articles were acknowledged at Idaho Falls, Idaho. Mr. E. C. McKinstry, who appears prominently as a Wyoming Engineer in connection with the development of the water rights as a witness in this proceeding, was an incorporator and acknowledged the articles at Idaho Falls, Idaho. (Exhibit 19, pages 32 to 35, inclusive.) O. A. Johannesen acted as attorney for the Wyoming company. Mr. James L. Milner was President. (Exhibit 19, pages 105 to 108, inclusive). Mr. A. T. Shane was secretary and Mr. O. A. Johannesen acted as Notary Public for papers executed in behalf of the corporation at least in one instance. (Exhibit 19, pages 111 to 115, inclusive).

It is submitted that but one reasonable conclusion can be reached from the foregoing evidence, that is: That the two corporations were organized and controlled by the same people and interests; and that the Wyoming corporation was organized to handle local water rights, that is the storage rights involved herein, in

the State of Wyoming.

The evidence shows with similar clarity that the impounding works constructed at Emma Matilda Lake and Two Ocean Lake in the sumer of 1919 were constructed in behalf of the Osgood corporation under and in contemplation of Enlargement Permits 3770-R and 3771-R. The original storage right on Two Ocean Lake was acquired under Permit 3487-R filed by H. C. McKinstry in July, 1918, on behalf of himself and William C. Thompson. (Exhibit 19, pages 37 to 41, inclusive). McKinstry assigned his interest to Osgood Land and Livestock Company of Wyoming by assignment acknowledged in Bonneville county, Idaho. (Exhibit 21). Thompson assigned his interest to James F. Milner and A. T. Shane. (Exhibit 22). Milner and Shane in turn assigned their interest to Osgood Land and Livestock Company of Wyoming by assignment acknowledged in Bonneville County, Idaho. (Exhibit 23). Certificate of Appropriation under Permit No. 3487 was actually issued in the names of H.C.McKinstry and Osgood Land and Livestock Co. (Exhibit 19, pages 42 to 43, inclusive). A significant agreement dated August 7, 1920, was made between H.C.McKinstry and O. A. Johannesen with reference to this original storage right on Two Ocean Lake. Johannesen acted in his own behalf and in behalf of Osgood Land and Live Stock Company, Ltd. The agreement recites that in July, 1919, McKinstry had agreed to assign to Johannesen or his order an undivided one-half interest in Permit 3487; that a company known as Osgood Land and Live Stock Company, Ltd. had become interested in the Johannesen agreement and the agreement was recognized by McKinstry. It was then agreed that the assignees should complete the reservoir under the permit and that they might enlarge upon the plans and provide for additional storage in any manner that might be authorized by the State Engineer of Wyoming. The agreement also recognized McKinstry's right to storage waters for a one hundred and sixty acre tract but that his rights should not exceed the quantity of water

stored in the first foot of sotrage above the low water line of Two Ocean Lake. (Exhibit 19, pages 44 to 47, inclusive).

The original storage right om Emma Matilda Lake was acquired under Permit 3561-R, application for which was made by H. C. McKinstry in behalf of Joseph Markham and Roy B. Lozier. (Exhibit 19, pages 48 to 51, inclusive). An agreement with respect to this storage right was made between Markham and Lozier, parties of the first part, and O. A. Johannesen for himself and in behalf of Osgood Land and Live Stock Company, Ltd., which agreement was simlar in substance with that made between McKinstry and Johannesen with reference to Two Ocean Lake. (Exhibit 19, pages 55 to 58, inclusive).

Permit 16190 covered a proposed supply ditch for the very much enlarged reservoirs originally contemplated at Two Ocean Lake. Application for this permit was executed by O. A. Johannesen in behalf of Osgood Land and Live Stock Co., whose address is recited to be Idaho Falls, Idaho. This application was dated August 23, 1919, which was two days after the Articles of Incorporation of The Osgood Land and Livestock Company of Wyoming were executed and was more than a year prior to the time such articles were filed, from which it is clear that Johannesen either acted in behalf of the Idaho corporation at that time or in behalf of the Wyoming corporation in contemplation of its organization which had not yet occurred.

Permit 3770-R for enlargement of the storage at Two Ocean Lake and Permit 3771-R for enlargement of Emma Matilda Lake were both made by C.C.Carlisle and were filed October 6, 1919 by one C. C. Carlisle. (Exhibit 19, pages 63-66 and 66-71, inclusive). Carlisle assigned his interest in these permits to Osgood Land and Livestock Company of Wyoming by assignment executed September 14, 1921. (Exhibit 37).

The agreement for the sale of the Osgood tract by Osgood Land and Live Stock Company of Idaho to the applicant herein was dated April 5, 1920, and was executed by James L. Milner as President and A. T. Shane as Secretary of the Osgood Land and Live Stock Company.

Mr. McKinstry testified that in the fall of 1918 he constructed a two foot dam at Two Ocean Lake under the application which he and Thompson had filed. The next year he disposed of his interests in this right to Osgood Land and Livestock Company, and in the summer of 1919 additional impounding works were constructed at Two Ocean Reservoir by him under instructions from the Osgood Company, which paid for the work. In the spring of 1920 the Osgood Company disposed of its rights to Utah-Idaho Sugar Company, and after that time he did some repair work on the dam intermittently until 1925, which work was paid for by the Utah-Idaho Sugar Company. Also in 1919, and as a part of the same job, he built the present impounding works at Emma Matilda Lake. This work was also paid for by the Osgood Company and the rights of that company were conveyed to the applicant in 1920. (Tr. pages 43 to 46, inclusive). From 1920 to 1925 he measured water, first for the Osgood Company, and then for the Utah-Idaho Sugar Company, and reported to Mr. Markham, Superintendent, at Moran. The impounding works he constructed at Two Ocean Reservoir for the Osgood Company in 1919 impounded six feet above the low water line. About five feet of water was impounded in average years. At the end of the first year the impounding works at Two Ocean Lake were washed out and were repaired at the end of that year (that would be in 1920). That dam continued to be there all the years that he was there. Impounding works at Emma Matilda Lake would impound four feet below extreme low water. During the year he was measuring water for these reservoirs it was used by the Utah-Idaho Sugar Company on the

Osgood project at Idaho Falls. During the same year he was getting water from Two Ocean Lake, and Lozier, Snell and Markham were getting water from Emma Matilda. When he built the impounding works for Osgood Land and Livestock Company State Engineer Emerson was on the ground. He looked over the entire project, including the supply canal then contemplated under Permit 16190, and went over the territory below the lakes and on down the river, with the idea of locating lands that might possibly be irrigated with this water, and in conclusion, gave no definite assurance as to what he could do except to express the opinion that it seemed to him in order and that the Engineer's office would issue permits. He said: "He could see no reason why preliminary work could not be started." (Tr. 46 to 49, inclusive).

Both the Idaho and the Wyoming corporations and their successors had assigned all of their interests in all of the permits and water rights involved in this proceeding to the applicant herein. (Exhibits 46 and 47).

It is submitted that this evidence inevitably leads to the conclusion that the impounding works at Two Ocean Lake and Emma Matilda Lake were constructed in 1919 in contemplation of the permits now sought to be amended in accordance with such construction work.

In 1919 Johannesen obtained agreements from the owners of the original storage rights in the two lakes for assignments to him of their rights, and these verbal agreements were later reduced to writing in behalf of Johannesen personally and the Osgood Company. In the same year, that is in 1919, McKinstry constructed the impounding works upon which these applications for amended permits are based, in behalf of the Osgood Company, as he also testified, At that time the State Engineer was on the gound and stated that he could see no reason why preliminary work could not be started. It is clear from the contracts between Johannesen and the owners

of the original storage rights that Johannesen who acted in behalf of himself and the Osgood Company, contemplated enlarged storage rights in any manner that might be authorized by the State Engineer. In other words, back in 1919 it was contemplated by the Osgood Company that the storage rights at these lakes should be enlarged to the extent that the State Engineer would permit and that the enlargements to the extent now depended upon were actually made in that year with the verbal consent of the State Engineer.

The applications for permits of which amendment is now sought were executed in the fall of 1919 and were filed by C. C. Carlisle and later assigned by him to the Osgood Land and Livestock Company. Application for Permit 16190, which covers a supply canal for the greatly enlarged reservoirs, was filed in August, 1919, by O. A. Johannesen in behalf of Osgood Land and Live Stock Co. of Idaho Falls, Idaho. Clearly then there must have been at that time a concert of interest between the Osgood people and C. C. Carlisle, and in any event it is entirely clear from all of the evidence that the actual enlargement works were constructed in 1919 in contemplation of such an application as was filed by C. C. Carlisle and that Carlisle's rights in the permit were later acquired by the Osgood interests. In other words, it is unimportant whether Carlisle acted in behalf of the Osgood people at the time he filed the application because the Osgood people acted in contemplation of such an application and thereafter acquired Carlisle's interest.

The evidence also clearly shows that the 5000 feet of stored water which was proposed by the Osgood Company was that stored in Two Ocean and Emma Matilda Lakes. Mr. Boyle, attorney for the applicant, has testified by affidavit adopted in his testimony, that the 5000 acre feet of storage water covered by the contract was the water stored in Two Ocean and Emma Matilda Lakes. And it is undisputed and is clearly shown by the testimony

of Mr. McKinstry that the applicant took possession of this storage water and has continued to use it as the storage water contemplated by the contract. Furthermore, the amount of storage water based upon the 1919 enlargement works is 3040 acres in Two Ocean Lake and 1340 acres in Emma Matilda Lake, or a total of 4340 acres, which is strong circumstantial evidence that the 4340 acre feet in the two lakes correspond with the 5000 feet mentioned in the contract.

It is submitted that on the record there can be no question as to the identity of the storage water contemplated by these applications for amended permits with that of the 5000 acre feet of storage water referred to in the contract by which the applicant purchased from the Osgood Company.

Statement by counsel for the protestant at page 8 of their brief to the effect that the construction work depended upon by the appellant was done pursuant to the original Markham, Lozier, McKinstry and Thompson applications and was not done pursuant to Carlisle's applications, is inconsistent upon the face of the protestant's brief and is contrary to the fact. At page 8 protestant states that the original McKinstry-Thompson application on Two Ocean Lake was to construct the dam two feet above the stream bed and that such dam was constructed some time prior to the construction of the six foot dam in 1919 by McKinstry for the Osgood Company.

At page 2 of its brief protestant states that permit No. 3561-R in favor of Markham and Lozier provided for a three foot dam, and at page 3 protestant admits that from McKinstry's testimony the original dam in Emma Matilda was a four foot dam. The testimony of McKinstry, who was the only one who knew anything about the matter, said that he built this dam for Osgood Land and Live Stock Company. (Tr. 47). Therefore if he built the dam for

Markham and Lozier he did so incidentally through his employment by Osgood Land and Live Stock Company. In other words, we submit the record is as admitted by the protestant in its brief, that the enlargement works were constructed by McKinstry for Osgood Land and Live Stock Company, and as we will show under the next heading, it is entirely clear that this work was done under and in contemplation of the enlarged permits which the appellant depends upon and it now seeks to have amended.

IV.

We briefly answer other points in the protestant's brief as follows: Protestant refers in a repetitious way to appellant's use of the water and lands involved as constituting trespass. If appellant's contention is correct as we insist, then the appellant has been no more a trespasser as to the water than any permittee is such a trespasser prior to final proof. As to trespass on the public lands involved, it is necessary to obtain the water right from a state source and a permit to use the lands from a Federal source. Such use of the lands as are involved is not, we submit, a trespass pending the time when the necessary permit can be obtained. The relatively long time involved between commencement of the use of water and application for the permit is readily explained by the circumstances involved. It should not be forgotten that when improvements to the impounding works were made in 1928 a representative of the Federal source from which such permit must be obtained was on the ground and set the stakes which determined the location of such works. It can hardly be contended that the appellant was using the lands involved by stealth under these circumstances, and any trespass involved must be of a highly technical character.

Protestant apparently complains at page 7 of its brief

that the evidence of appellant's rights were not found on the records of Teton County. Protestant would have found all of the rights here asserted on the records of the State Engineer, or upon the lakes themselves, or by the slightest inquiry, and there was no requirement that the rights in the form in which they exist should be spread upon the records of Teton County.

At page 8 protestant suggests that the sole source of water until Carlisle's plan was from Pacific Creek. It is true that Carlisle's very extensive plan included the diversion of water from Pacific Creek as the watershed of the two lakes was quite evidently not sufficient to supply the water to fill these very large reservoirs. There is no evidence, however, that Carlisle's plan intended to use water from Pacific Creek to the exclusion of the watershed of the two lakes, and there is no evidence to this effect in the record. On the contrary, the applications include the natural run-off into the lakes as one source of supply.

At page 9 of its brief protestant states that no impounding works could have been constructed on Emma Matilda Lake under Permit No. 3770-R because more water had been adjudicated under Permit No. 3561-R than the present storage capacity of the lake. We submit that if the impounding works under Permit 3561-R were not sufficient to sustain the storage rights adjudicated, and they were not, the protestant's proposition and contention is incorrect. On the contrary the storage works on this lake were constructed by Mr. McKinstry for Osgood Land and Live Stock Company, and he could not have constructed works under Permit 3561-R more extensive than provided for in that permit, that is three feet in height, and he did in fact construct works four feet in height.

CONCLUSION

We again submit that ll of the appellant's applications should be granted and all orders to the contrary set aside.

Respectfully submitted,

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00-00-0000: before state engineer state of wyoming: snake river land company vs. utah-idaho sugar company; brief of applicant

BEFORE JOHN D. QUINN, STATE ENGINEER,

STATE OF WYOMING.

SNAKE RIVER LAND COMPANY,

Protestant,

vs.

UTAH-IDAHO SUGAR COMPANY,

Applicant.

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BRIEF OF APPLICANT

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State Engineer

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BEFORE JOHN D. QUINN, STATE ENGINEER,

STATE OF WYOMING.

SNAKE RIVER LAND COMPANY, Protestant,

vs.

UTAH-IDAHO SUGAR COMPANY, Applicant.

BRIEF OF APPLICANT.

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STATEMENT

Stripped of historical detail and the details of prior procedure, what the applicant seeks here involves a rather simple matter.

Generally speaking, the applicant seeks amendment of two existing reservoir permits which it has acquired by purchase, so that such permits will accord with the actual construction of impounding works completed withint the time limited thereby, and further seeks authority to use the water involved in the State of Idaho. In connection with such applications to amend the applicant seeks also to relinquish its rights in certain other permits likewise acquired by purchase.

To state the matter more concretely, the applicant acquired from the Osgood Land and Live Stock Company the rights of the latter in permits 3770-R and 3771-R for the enlargement of Two Ocean and Emma Matilda Reservoirs respectively. These original applications sought to greatly enlarge the Two Ocean Reservoir to an available capacity of 63605 acre feet and the Emma Matilda Reservoir to an available capacity of 60900 acre feet. The permits under both enlargement applications were issued September 14, 1921, and provided that the construction of the proposed work should begin within one year from that date and that the time for completion should terminate December 31, 1924.

The very extensive impounding works contemplated by these original enlargement applications were never completed, but impounding works to store the amount of water contemplated by applications for amendments here involved were actually constructed by Osgood Land and Live Stock Company as assignee of the permittee and have been in existence since at least 1921. In other words, impounding works contemplated by the applications for amendments now being heard were constructed by the assignee of the permittee well within the time required by the enlargement permits.

The original enlargement permits were conditioned upon compliance by the permittee with the terms and provisions of an agreement between the State Engineer and the permittee which provided that the permittee should make application to the U.S.General Land Office for rights of way or easements to construct the tremendous reservoirs then contemplated and upon receiving such

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permission should pay a total amount of $30,000.00 for the construction of two bridges across the Snake River, giving surety bond for the faithful performance of such agreements. It was also agreed that should the General Land Office refuse to grant the rights of way or easements, then the agreement between the State Engineer and the permittee should become null and void upon the permittee delivering the permits to the State Engineer for cancellation.

The permittee carried out its part of the agreement so far as it was able to do so by making application to the General Land Office and giving the bond required, but the General Land Office refused the rights of way or easements for such large reservoirs. The permits have never been canceled by the State Engineer and remain in existence at this time. They have been duly assigned to the applicant.

The applicant by this proceeding now seeks amendments of the original permits to accord with the actual construction of impounding works which were constructed within the time limited therein. It also seeks permission to use the stored water in the State of Idaho. This permission is sought through applications for secondary permits and a request for the use of stored water outside Wyoming.

The applicant has actually used the stored water involved in the State of Idaho for a great number of years in the belief that it had purchased the right to do so.

The impounding works involved do not result in the storage of water above the highwater lines of Two Ocean and Emma

Matilda Lakes,and, as we believe and contend, the existence and use of the impounding works does not detract from the natural beauty of these lakes, but, on the contrary, are factors in preserving such natural beauty.

The applicant has some rights in previous appropriations covering stored water in these lakes under permits 3487-R and 3561-R, although the exact nature and extent of these rights have not been definitely determined and are immaterial to this controversy, all that is material here being that such claims exist and form an additional basis for the rights now sought to be protected by the applicant.

The applicant also seeks to relinquish any rights it may have in the foregoing and other permits in excess of what it now seeks on this hearing.

In order to state the issues or controversy here involved it will be convenient to briefly analyze the various applications before the Board and the grounds of objection by Snake River Land Company and The National Park Service thereto.

Application for an amended permit to construct Two Ocean Reservoir (Permit No. 3770-R).

This is an application by Utah-Idaho Sugar Company to amend a previous permit, No. 3770-R, to construct a reservoir in the bed of Two Ocean Lake, having a high water line area of 620 acres and available capacity of 3040 acre feet.

Original Permit No. 3770-R was to construct a reservoir

in the channel of Two Ocean Creek having a high water line area of 983 acres and available capacity of 63,605 acre feet.

Thus it appears the amendment seeks to reduce the high water line area from 983 acres to 620 acres and the available capacity from 63,605 acre feet to 3040 acre feet.

Application for secondary Permit to divert and appropriate from Two Ocean Reservoir.

This is an application by Utah-Idaho Sugar Company for authority to divert and appropriate water from Two Ocean Reservoir to the Osgood tract in Township 3 North, Range 37 East, Boise B. & M. for the irrigation of 5680.35 acres, with a capacity at the headgate of 2.5 cubic feet per second. It is an application for a secondary permit made in connection with Permit No. 3770-R.

Amended Application for Permit to construct Emma Matilda Reservoir (Permit No. 3771-R).

This is an application by Utah-Idaho Sugar Company to amend a previous permit, No. 3771-R, to construct a reservoir in the bed of Emma Matilda Lake having a high water line area of 904.2 acres and an available capacity of 1340 acre feet.

Original Permit No. 3771-R was to construct a reservoir in the channel of Emma Matilda Creek having a high water line area of 1130 acres and an available capacity of 60,900 acre feet.

Thus it appears the amendment seeks to reduce the high water line area from 1130 acres to 904.2 acres and the available

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capacity from 60,900 acre feet to 1340 acre feet.

Furthermore, the storage in acre feet sought is even less than that adjudicated under the original storage right, (3561-R).

Application for Secondary Permit to divert and appropriate from Emma Matilda Reservoir.

This is an application by Utah-Idaho Sugar Company for authority to divert and appropriate water from Emma Matilda Reservoir to the Osgood tract in Township 13 N., Range 37 E., Boise, B. & M. for the irrigation of 5660.35 acres with a capacity at the headgate of one cubic foot per second. It is an application for a secondary permit made in connection with Permit No. 3771-R.

Request for special permits to use stored water outside the State of Wyoming.

This is an application for permission to take a certain quantity of water from the State of Wyoming into the State of Idaho for application to beneficial use upon lands in Bonneville County, Idaho, which water is appropriated to the Utah-Idaho Sugar Company under Permits Nos. 3770-R and 3771-R and Secondary Permits Nos. 3770-R and 3771-R.

Request for cancellation of Permits Nos. 3770-R, 3771-R, P-16190 and 4232 Enlargement.

This is an application by Utah-Idaho Sugar Company for cancellation of the above numbered permits. Its actual purpose is to relinquish the rights of applicant in excess of what applicant seeks here.

Permit No. 16190 was to construct a ditch or canal known as Twin Reservoir Supply Canal 3.6 miles long, with a carrying capacity of 496.64 cubic feet per second from Pacific Creek.

Permit No. 4232 was for the enlargement of the Twin Reservoir Supply Canal to a carrying capacity of 500 cubic feet per second.

Thus it appears that Utah-Idaho Sugar Company offers to relinquish its right to construct the Twin Reservoir Supply Canal with an enlarged capacity of 500 cubic feet per second from Pacific Creek and offers to relinquish its right to storage in Two Ocean Reservoir in excess of 3040 acre feet and in Emma Matilda Reservoir in excess of 1340 acre feet.

Protest of Snake River Land Company.

To Application for use of water in Idaho under 3487-R.

The protest against this application is upon the following grounds: (a) The applicant has no special use permit from the Forest Service; (b) the storage right was limited to use on the lands for which application has been made; (c) the 512 acre feet appropriated is sufficient only for the Wyoming ranches.

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To Application for use of water in Idaho under No.3561-R.

The protest against this application is upon the following grounds: (a) The applicant has no special use permit from the Forest Service; (b) the storage right was limited to use on the lands for which application had been made; (c) the applicants have no surplus over the 1710 acre feet of storage reserved for the Wyoming ranches.

To Applications for amendment of permits 3770-R and 3771-R. and Applications for use of water thereunder by secondary permit and special permit in Idaho; to Application to cancel Permit No. 16190 to construct Twin Reservoir Supply Canal and Permit 4232 for Enlargement thereof.

The protest against the foregoing applications is upon the following grounds: (a) The permits were conditioned upon the granting of easements for the reservoirs and supply ditches by the United States General Land Office, whichcondition has failed and the permits have no standing and are wholly void; (b) the applicant can have gained no right by prescription and was not misled; (1) the Wyoming law does not permit water rights to be gained by prescription, (2) the Sugar Company has averaged in use from 1920 to 1934 less than 50% of the 5000 acre feet claimed, (3) the State Engineer's records show that the applicant's vendor had no title.

General Protest. - The protestant states the following additional grounds of protest: (a) the applicant has no legal right or interest in any existing permit sought to be amended; (b) the applicant has no permit to use the water outside of

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Wyoming; (c) the lands sought to be used for diverting and impounding works have been withdrawn from entry; (d) the granting of the applications will tend to defeat the purpose of the Snake River Land Company to preserve the scenic features and beauty of Two Ocean and Emma Matilda Lakes.

Protest of The National Park Service.

The National Park Service in its protest states no grounds in addition to those stated in the protest of Snake River Land Company.

Summary of Issues.

The issues thus framed may be conveniently stated as follows:

1. Whether the applicant owns and is entitled to an amendment of Permits Nos. 3770-R and 3771-R reducing the reservoir capacities thereof, and to permission to use the water thereunder in Idaho under the applications for secondary permits and the request for special permits, relinquishing any rights it may have in addition thereto.

2. Whether the existence or non-existence of an executive order withdrawing from entry the lands wherein the impounding works are situate, or a special permit from the Forest Service are material in this proceeding at the present time.

3. Whether the storage rights under the existing certificates of appropriation are sufficient only for the Wyoming

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ranches and have been limited to use on those particular lands.

4. Whether the number of acre feet adjudicated in connection with existing certificates of appropriation (3487-R and 3561-R) has the effect of excluding the applicant from participation under such appropriations.

5. Whether permits numbers 3770-R and 3771-R have been terminated or voided.

6. Whether the applicant should be given consideration before t is Board by reason of its purchase of these water rights under the circumstances involved and its use of water thereunder.

7. Whether the applicant has title or should be granted the right to perfect its title to these water rights under the circumstances here involved.

8. Whether the granting of the applications will tend to defeat the purpose of the Snake River Land Company to preserve the scenic features and beauty of Two Ocean and Emma Matilda Lakes.

ARGUMENT.

As a matter of convenience there is attached at the end of this brief as an appendix a list of the exhibits.

1. THE APPLICANT IS ENTITLED TO AN AMENDMENT OF PERMITS NOS. 3770-R AND 3771-R REDUCING THE RESERVOIR CAPACITIES THEREOF, AND TO PERMISSION TO USE THE WATER THEREUNDER IN IDAHO UNDER THE APPLICATIONS FOR SECONDARY PERMITS AND THE

REQUEST FOR SPECIAL PERMITS, RELINQUISHING ANY RIGHTS IT MAY HAVE IN ADDITION THERETO.

(a) Applications for amendments of 3770-R and 3771-R.

We believe that the applicants have produced evidence clearly sufficient to justify the granting of all of the applications referred to in the above heading. It is not considered necessary to review in detail all of this evidence as it is largely formal in character, but we will comment briefly with reference to certain phases thereof.

The evidence submitted in connection with applications for amendment of 3770-R and 3771-R is amply sufficient to sustain the granting thereof, treating such applications as applications of this character ordinarily would be considered. The present status of original permits 3770-R and 3771-R will be considered separately below.

With reference to applications to amend 3770-R and 3771-R, it will be noted that the effect of the application to amend 3770-R is to reduce the high water line area from 983 acres to 620 acres, and the available capacity from 63605 acre feet to 3040 acre feet, and that the effect of the amendment of 3771-R is to reduce the high water line area from 1130 acres to 904.2 acres and the available capacity from 60900 acre feet to 1340 acre feet. It will also be noted that the impounding works authorized by the original permits, to the extent that same are sought to be recognized by applications for amendments, have been in existence since long before the time to construct or make proof of construction formally expired under the conditions of the permits. That is, the applications for amendments seek permission to construct 154

impounding works to impound 3040 acre feet under 3770-R and 1340 acre feet under 3771-R; and the evidence shows that impounding works sufficient to impound such an amount of water have been in existence since at least 1921, whereas original permits 3770-R and 3771-R provided that the time for completing the impounding works should terminate on December 31, 1924. Hence it also follows that the works had been completed prior to the time specified in the applications for amendments. (See Transcript, pp. 23, 34, 35, 44, 45, 46, 47).

(b) Rights and Title of applicants under 3770-R and 3771-R.

The rights of the applicant under the rights mentioned in the heading and the applicant's title thereto as the same have a bearing upon the applications now under consideration appear from the evidence and may be briefly stated as follows:

Application 3770-R for the enlargement of Two Ocean Reservoir, was filed October 6, 1919, by C.C.Carlisle and is recorded in Book 12 at page 270 of Applications. (Ex. 36). It was assigned by C.C.Carlisle to the Osgood Land and Live Stock Company September 14, 1921, by assignment recorded in Book 7 Misc. at page 1. (Ex. 37).

Application 3771-R for the enlargement of Emma Matilda Reservoir was filed October 6, 1919, by C.C.Carlisle and is recorded in Book 12 at page 271 of Applications. (Ex. 38). The permit was assigned by C.C.Carlisle to the Osgood Land and Live Stock Company on the ____ day of _____, 19__, the assignment being recorded in Book 7 Misc. at page 1. (Ex. 39).

Osgood Land and Live Stock Company by contract dated April 15, 1920, agreed to sell to the applicant certain lands and water rights, being the Osgood Tract in Idaho, including 5000 acre feet of stored water, the same being a storage right which the Osgood Land and Live Stock Company was securing for the use upon the Osgood Tract. (Exhibit 2). The evidence shows that the 5000 acre feet of stored water was stored water in Emma Matilda and Two Ocean Reservoirs (Tr. 12). Osgood Land and Live Stock Company with which the applicant contracted was an Idaho corporation and another corporation bearing the name The Osgood Land and Live Stock Company had been incorporated in the State of Wyoming. The latter corporation handled most of the transactions with reference to the stored water. Both corporations have transferred by assignment and quit claim deed to the applicant, all of their interests in the permits and other water rights herein involved. (Exs. 46 and 47).

(c) Status of 3770-R and 3771-R.

The applications for enlargements of Two Ocean and Emma Matilda Reservoirs known as Permits Nos. 3770-R and 3771-R, have the following status at the present time.

As has been previously pointed out, these original applications were for a very much greater storage capacity than the present applications for amendments thereof. The original permits each specified that they were conditioned upon the strict performance by the permittees, or their successors or assigns, of a certain agreement dated May 2nd, 1921, between the State Engineer and The Osgood Land and Live Stock Company and that 27C

they were subject to cancellation at any time if the terms of such agreement were not complied with. (Exs. 36, 38).

The agreement of April 29, 1921, referred to provided that upon execution thereof and the signing by The Osgood Land and Live Stock Company of surety bonds therein referred to, the State Engineer would issue the permits; that The Osgood Land and Live Stock Company should thereupon make application to the General Land Office of the United States for permits to construct the reservoirs in a United States Forest Reserve; that upon the granting of such permit by the General Land Office The Osgood Land and Live Stock Company would pay to the State Engineer the sum of $30,000.00 in installments as provided for the construction of two bridges over the Snake River. (Ex. 40). The surety bonds referred to were to guarantee performance by The Osgood Land and Live Stock Company of the acts to be performed by it. (Ex. 42). It was also agreed between the parties that if the General Land Office should refuse to grant the permits that then the agreement should become null and void upon The Osgood Land and Live Stock Company delivering to the State Engineer for cancellation the permits issued by him. (Ex. 40).

The surety bond was given as agreed (Ex. 42) and the application was made to the General Land Office and was denied by letter of May 14, 1923, from the Commissioner of the General Land Office to the Register and Receiver at Evanston, Wyoming. (Ex. 43).

The permits have never been cancelled by the State Engineer.

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While the construction of the reservoirs on the large scale contemplated by these permits was never undertaken or completed, it is a fact, shown by the evidence, that the impounding works, to the extent contemplated by the applications now pending for amendment of the permits, were actually undertaken and completed by Osgood Land and Live Stock Company, assignee of the permittee, prior to the time fixed for the completion of the work under permits numbers 3770-R and 3771-R (Tr. 23, 34, 35, 44, 45, 46, 47) and these reservoirs as so enlarged have been used by the applicant for each of the years 1920 to 1934 inclusive. (Tr. 10, 30, 32, 33, 37, 46, 48). Reconstruction work on Two Ocean Lake Reservoir in 1928 was done by applicant (Tr. 36,37), assignee of the permits and the dams were maintained after their original construction by assignees of the permittee. (Tr. 36,44). The State Engineer was on the ground at the time the original construction was proceeding and assented to it. (Tr. 49). A representative of the Forest Service set the stakes for the dam as it was reconstructed in 1928. (Tr. 28, 37, Ex. 17), to correspond with previous impounding capacity (Ex. 16). The applications for amendments were filed in the year 1935.

At the present time therefore the applicant is in the position of claimant, as assignee, of these uncancelled permits for the enlargement of the reservoirs, and the reservoirs were, within the time limited by the permits, actually enlarged to the extent that the applicant now seeks amendments of the original permits. This office has often recognized the righ of a permittee to make proof of completion after the time limit where the actual work was completed within the time prescribed by the 24c

permit. This applicant is now here asking such action in its behalf in a situation where the work sought to be recognized was actually completed within the time limited and the applicant has not only used the water for many years last past, but has also paid substantially for the right it seeks to have recognized. (Ex.2).

It is true that the original permits were to some extent conditioned upon the agreement to pay for two bridges, but it is obvious that this agreement was based upon the project in its original enlarged form and the applicant believes that there will be no inclination on the part of the State Engineer to press any such claim in connection with the permits as they are sought to be amended.

The State Engineer's Office has taken the position within recent years that it would be for the best interest of all, including the State, to have the enormous excess of potential storage represented by these permits cleared from the record. That position is sound. We submit that applicant should not be penalized for the present attempt to make it a reality.

(d) Permits 3487-R and 3561-R.

Permit 3487-R for Two Ocean Reservoir and Permit 3561-R for Emma Matilda or Markham Reservoir have both ripened into adjudicated storage rights.

The rights under 3487-R were adjudicated November 24, 1925, in favor of "H.C.McKinstry; Osgood Land and Live Stock Company," for 512 acre feet with date of priority of May 9, 1918,

and Certificate of appropriation was issued under date of January 15, 1926, and is recorded in Certificate Record No. 45 at page 198. (Ex. 24). The actual storage capacity of Two Ocean Reservoir, as Mr. Roger's survey conclusively proves, is 3040 acre feet.

The rights under 3561-R were adjudicated under date of November 24, 1925, in favor of Joseph Markham and Roy B. Lozier, for 1710 acre feet, and Certificate of appropriation was issued under date of January 15, 1926, and is recorded in Certificate Record No. 45, page 201. (Ex. 31). This adjudication is generous; Mr. Rogers found the actual storage capacity to be nearer 1340 acre feet.

All the right, title and interest of the original applicants, H. C. McKinstry and Wm. C. Thompson to permit 3487-R had been previously assigned as follows: H. C. McKinstry assigned to the Osgood Land and Live Stock Company by assignment filed March 12, 1921 and recorded in Book 6 Misc. at page 426. (Ex. 21). Wm. C. Thompson assigned to James L. Milner and A. T. Shane by assignment filed March 25, 1921, and recorded in Book 6 Misc. at page 430. (Ex. 22). James L. Milner and A. T. Shane assigned to the Osgood Land and Live Stock Company by assignment dated March 25, 1921, and recorded in Book 6 Misc. at page 431. (Ex.23).

All the right, title and interest of the original applicants, Joseph Markham and Roy B. Lozier to permit No. 3561-R had been previously assigned to the Osgood Land and Live Stock Company by assignments as follows: Joseph Markham and Roy B. Lozier assigned to H. C. McKinstry by assignment filed March 12, 1921

and recorded in Book 6 Misc. at page 427. (Ex. 29). H. C. McKinstry assigned to the Osgood Land and Live Stock Company by assignment dated March 12, 1921, and recorded in Book 6 Misc. at page 428. (Ex. 20).

Thus it appears that all right, title, and interest in Permits 3487-R and 3561-R had been assigned to the Osgood Land and Live Stock Company prior to adjudication, and that 3487-R was adjudicated in the name of H. C. McKinstry; Osgood Land and Live Stock Company. All right, title and interest of Osgood Land and Live Stock Company (both the Wyoming and the Idaho Companies) has been transferred by assignment and quit claim deed to Utah-Idaho Sugar Company. (Exs. 46, 47).

Two secondary rights have been adjudicated under No. 3487-R, the secondary permit being No. 15185.

Application for Permit 15185 was filed by Wm. C. Thompson and H.C.McKinstry May 9, 1918, and is recorded in Book 48 at page 282. The permit was issued under date of August 19, 1918. (Ex. 25). This secondary right was adjudicated to Osgood Land and Live Stock Company under date of November 24, 1925, recorded in Book 45, page 200, for 1.08 cubic feet per second of time, with priority of May 9, 1918, to irrigate 74.4 acres in Section 12-45-114. Certificate of appropriation was issued January 15, 1926. (Ex. 26). Secondary right under this permit was also adjudicated to H. C. McKinstry November 24, 1925, recorded in Book 45 at page 199, for 1.96 cubic feet per second of time to irrigate 137 acres in Section 7-45-113, with date of priority

May 9, 1918. Certificate of appropriation was issued January 15, 1926. (Ex. 27).

Three secondary rights have been adjudicated in connection with Permit 3561-R. These secondary rights were adjudicated under Permit 15569 filed by Joseph Markham, Roy B. Lozier and O. W. Snell on August 19, 1919, and recorded in Book 50 at page 65. Permit was issued September 18, 1919. (Ex. 32). The following rights have been adjudicated under this permit.

There was adjudicated to Joseph Markham under date of May 4, 1925, recorded in Book 45 at page 202, an appropriation for 1.88 cubic feet per second of time, with priority for stored water of May 1, 1919, and for unstored water of August 18, 1919, for the irrigation of 131.61 acres in Section 6-45-114. Certificate of appropriation was issued January 15, 1926, and recites that the rights thereunder for irrigation from the unstored flow of the stream shall not exceed one cubic foot for seventy acres. (Ex.33).

There was adjudicated to Roy B. Lozier under date of May 24, 1925, recorded in Book 45-203, 1.86 cubic feet per second, with date of priority of May 1, 1919, for stored water and August 18, 1919, for unstored water for irrigation of 130 acres in Section 4-45-114. The certificate of appropriation was issued January 15, 1926, and likewise recites that the rights for the unstored flow of the stream shall not exceed one cubic foot for seventy acres. (Ex. 34).

There was adjudicated to O. W. Snell by adjudication dated November 24, 1925, recorded in Book 45, page 204, 1.78 cubic feet per second, with date of priority of May 1, 1919, for stored water and August 18, 1919, for unstored water, for the irrigation

of 124.9 acres in Section 22-45-114. This certificate also recites that the rights for the unstored flow of the stream shall not exceed one cubic foot for seventy acres. (Ex. 35).

Thus it appears that all right, title and interest in and to Permits 3487-R and 3561-R have been assigned to the Osgood Land and Live Stock Company and by it transferred to Utah-Idaho Sugar Company. (Exs. 46, 47).

These reservoir rights (3487-R and 3561-R) have but an indirect bearing upon the controversy here, and it is of little importance at this time whether the secondary permits were issued with the intent, and had the effect, of adjudicating all of the stored water under these permits to the secondary permittees or not. It is sufficient to point out at this time that the applicant has prima facie rights to stored water under these reservoir rights. In this connection it appears that the storage right under 3487-R was adjudicated to H. C. McKinstry and Osgood Land and Live Stock Company jointly; that one of the secondary permits was adjudicated to the Osgood Land and Live Stock Company, individually, and has been acquired and reserved by Douglas Scalley for the benefit of, and conveyed to, the applicant; (Tr. 35, 40, 41); that there is nothing to indicate all of the water stored in either reservoir has been fully covered by secondary adjudications, the adjudications of water under the secondary permits being made on the basis of cubic feet per second of time, which has no bearing upon the amount of stored water to which each permittee may have been entitled; and that the adjudications in connection with the secondary permits under 3561-R included

rights for both stored and direct flow water, and therefore cannot be depended upon as a basis for allocating the stored water. A further adjudication of some character may be necessary to determine the respective rights of applicant and others to these stored waters.

It follows that Utah-Idaho Sugar Company as successor in interest to Osgood Land and Live Stock Company has a clear right to stored water under 3487-R and 3561-R by reason of the following: (1) adjudication of the storage rights under 3487-R jointly to H.C. McKinstry and Osgood Land and Live Stock Company; (2) adjudication under secondary permit 15185 for the irrigation of 74.4 acres in Section 12-45-14 to Osgood Land and Live Stock Company; (3) the residual right to stored water under both 3487-R and 3561-R by reason of assignments of the permits prior to adjudication to Osgood Land and Live Stock Company and their subsequent transfer by assignment and quit-claim deed to Utah-Idaho Sugar Company.

It should be remembered that stored water may be sold, leased, transferred and used in such manner and upon such lands as the owner may desire provided it is used for beneficial purposes. (122-1602, W. R. S. 1931). And the owner of a reservoir shall be held to be the owner of the right to impound the water and the right to sell or lease a portion or all of his right to the impounded waters. (122-1601).

The applicant through the Osgood Land and Live Stock Company has a right to stored waters under 3487-R and 3561-R and it is unnecessary and immaterial to determine the extent of that right at this time. Whatever right the applicant has under those

permits forms an additional basis for its claim that it is entitled to the amendments of permits 3770-R and 3771-R which it now seeks.

Other than as hereinabove stated permits 3487-R and 3561-R have no material bearing upon the matter now under consideration by the State Engineer.

The large amount of space devoted to this question by protestants serves only to emphasize, so far as the present controversy is concerned, that the applicant does have rights under permits 3487-R and 3561-R.

(e) Application for permission to use in Idaho.

The evidence shows that as a practical matter the water involved in the applications now before the Board could not be used in Wyoming (Tr. 20-21, 24-25, 48), and that it has for several years actually been applied to beneficial use in Idaho (Tr. 30, 32, 33, 37, 46, 48, Exs. 16, 17, 18). This has not been done in bad faith but under the belief by the users that they were entitled to the water and that their record title would ultimately be completed and perfected. (Tr. 36, 37, 41, 48-49). Clearly the mutual requirements of friendship between the States of Wyoming and Idaho with reference to the division of waters requires that under the circumstances the State Engineer should permit the use of this water in Idaho. The water cannot be used in Wyoming; it was purchased by the applicant; its use (as is hereinafter pointed out) will not have the effect of interfering with the beauty of the two lakes involved. The applicant does not question the reason-

able requirements of other water users having storage and secondary rights. (Tr. 8-9) The protestant contends that the dams are a bad thing (Tr. 67) and yet proposes to continue to use them (Tr. 68). This is an unreasonable position and should not be considered. The protestant makes no showing of any detriment to it which might result from the granting of the applications of Utah-Idaho Sugar Company. The evidence shows that there is enough water from the reservoirs for all appropriators, including the applicant. (Tr. 48).

(f) Applications to cancel or relinquish.

The applicant asks for nothing under this head which this Board would not be willing to grant upon mere request. The applicant wishes to make clear, however, that it does not seek cancellation but desires merely to relinquish any rights which it may have in the following permits without objection to cancellation to that extent by the Board.

The applications involved under this heading are as follows: P-16190, 4232 Enl. and the excess of 3770-R and 3771-R over that which is covered by the applications for amendment thereto now before the Board.

(g) The contention of the protestant that it purchased lands and water rights without knowledge of the applicant's claims is without merit.

The position of the protestant under this contention is made clear by its witness Winger. Mr. Winger testified that the

protestant bought the various lands under these reservoirs "believing that we were buying all of the water rights appurtenant thereto, including storage rights." (Tr. p. 68); and again the same witness said with reference to the position of his principal that "they felt that they were buying all water appurtenant to that land". (Tr. 66).

It is clear that the Snake River Land Company did get all water rights, including storage rights, appurtenant to its lands and was not misled or damaged by any failure on its part to ascertain the existing water rights of the applicant. In other words, the protestant got all of the water rights it expected to get and has no cause for complaint on any ground at this time. The applicant does not question the right of the protestant to satisfy its reasonable requirements under its purchased rights. (Transcript pp. 8-9).

2. THE EXISTENCE OR NON-EXISTENCE OF AN EXECUTIVE ORDER OF WITHDRAWAL OR A SPECIAL PERMIT FROM THE FOREST SERVICE HAS NO BEARING UPON THE MATTERS INVOLVED HERE AT THIS TIME.

All that the protestants have to say with reference to an executive order of withdrawal or a special use permit from the Forest Service is immaterial in this proceeding. This State Engineer grants permits without reference to any rights or easements which must be obtained in connection with the building of irrigation or impounding works. Even if the practice of the State Engineer were, as we do not understand it to be, that the granting of water rights would be made conditional upon the ob-

taining of such rights of way or easements, the question would still not be material here. If the applications here pending are granted it will then be the concern of the applicant here to make proper applications to the Forest Service for the needed rights of way or easements. There is no reason to believe at this time that such rights of way or easements will not be granted in view of the fact, as we have pointed out, and will point out in more detail hereinafter, that the rights sought by the applicant here will not have the effect of interfering with the beauty of the lakes involved. We do not believe that protestants are justified in asserting that the Forest Service will not grant the necessary rights of way or easements and certainly the Forest Service is not before the State Engineer at this time. We believe the Forest Service is responsive to the needs and requirements of all our citizens and that it will readily see that the desired rights of way and easements will not be detrimental to the beauty of the country or to any other citizens. The fact that the General Land office refused the request for rights of way and easements on the very much enlarged scale contemplated by the original applications has no apparent bearing on what the needs of the applicant will be under the amended applications. One of the reasons of the applicant in asking the amendments is to make its demands consistent with the preservation of the beauty of the two lakes involved, and we cannot believe that this attitude of the applicant will not receive favorable consideration by the Forest Service.

3. THE QUESTION WHETHER STORAGE RIGHTS UNDER EXISTING CERTIFICATES OF APPROPRIATION HAVE BEEN LIMITED TO USE ON ANY PARTICULAR LANDS IS NOT MATERIAL AT THIS TIME.

This issue was raised by the protestants with reference to Certificates 3487-R and 3571-R. There is nothing within the four corners of these documents which imports any such restriction. Moreover, as pointed out above, these certificates have only a very/direct bearing upon this controversy and it is not important at this time to determine whether the storage rights adjudicated under the permits referred to were limited to any particular lands or not. Certainly any rights of the applicant under the certificates referred to have not been adjudicated with reference to their places of use and if and when their rights are adjudicated those questions will arise, but such questions need not and should not be determined at this time.

4. THE QUESTION WHETHER THE NUMBER OF ACRE FEET ADJUDICATED IN CONNECTION WITH EXISTING CERTIFICATES OF APPROPRIATION HAS THE EFFECT OF EXCLUDING THE APPLICANT FROM PARTICIPATION UNDER SUCH APPROPRIATIONS IS LIKEWISE IMMATERIAL SO FAR AS THIS CONTROVERSY IS CONCERNED.

This issue was also raised by the protestants and refers to the rights under Permits 3487-R and 3561-R. The argument is that the number of acre feet adjudicated indicates an intention on the part of the Board to adjudicate all the water to secondary permittees under whom applicant claimed no rights. No evidence was offered in support of that contention. The great disparity

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between the allotments to the settlers, and the storage actually existing, at least in the case of Two Ocean, should in itself be sufficient to refute it. Besides, the assignments from the ranchers to Osgood contain reservations in favor of assignors which definitely establish that their participation, while preferred, should not exhaust the total storage in normal seasons. The ranches, other than Thompson, should not be denied their reasonable requirements. Applicant will not oppose such an arrangement, either under an interim working agreement or in any appropriate proceeding. The present proceeding would hardly seem to be a proper one in which to allot or re-allot storage waters previously adjudicated by the Board of Control.

5. PERMITS NUMBERS 3770-R AND 3771-R HAVE NOT BEEN TERMINATED OR VOIDED.

We have already pointed out that under the contract between the State Engineer and the Osgood Land and Live Stock Company these permits are subject to cancellation upon their surrender by the permittees. No such surrender has ever been made and the permits have never been terminated or voided. They are still in existence for proper disposition, and we respectfully submit that under the showing here made the applications for amendment of the original permits to accord with the actual construction of impounding works within the time limited should be granted at this time. This would have the double effect of disposing of the original permits on the very much enlarged basis and giving the applicant a record title to the storage rights as limited

by the impounding works actually constructed.

6. THE APPLICANT SHOULD BE GIVEN CONSIDERATION BEFORE THE STATE ENGINEER BY REASON OF ITS PURCHASE OF THESE WATER RIGHTS, UNDER THE CIRCUMSTANCES INVOLVED, AND THE USE OF THE WATERS THEREUNDER.

We have already pointed out that the water involved in this controversy is but a part of 5000 acre feet which the applicant purchased from the Osgood Land and Live Stock Company. The purchase price of all of the properties involved in the transaction was very large, that is seven hundred thousand dollars. (Ex. 2, Ex. 19, pp. 130-132). The actual portion of the consideration allocable to the 5000 acre feet of water referred to has not been fixed and cannot be stated, but stored water in the amount of 5000 acre feet for use on such a project as was purchased by the Utah-Idaho Sugar Company is obviously valuable, and the evidence showed its importance and necessity (Tr. 26, 31, 38), and a right for which the applicant may properly ask careful consideration. The applicant paid for this right and assumed that it would be delivered. Eventually it found that its title was involved, and in attempting to straighten it out discovered that its applications made for that purpose were the subject of protest, not by other water users in the State of Wyoming but by representatives of the Snake River Land Company and by the National Park Service. With commendable frankness the protestants have indicated that their

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protests are based upon the assumed, and we believe erroneous ground, that the granting of the applications here will have the effect of detracting from the beauty of the lakes involved. We submit that the applicant is entitled to every consideration by this Board. At the risk of repetition we repeat the grounds for this assertion: The applicant paid for the rights; the impounding works were constructed within the time limit by the assignee of the permittee and his successor in interest; the water has, in all good faith, been applied to beneficial uses for many years; the applicant is honestly endeavoring to quiet its title; the applicant is anxious to cooperate in the desires of the protestants and not to interfere with the beauty of the lakes involved; and finally, as we submit, the granting of the applications here will not mar the beauty of the lakes. As to the good faith of the applicant in using the water, see Transcript 36, 37, 41, 48-49, Ex. 16. In this connection it should be borne in mind that the State Engineer was on the ground and assented to the enlargement construction (Tr. 49); that a representative of the Forest Service set the stakes for the reconstruction work done in 1928, (Tr. 28, 37), and (Ex. 17) that there is no evidence of objection to the use of the water by the State water officials until 1935.

7. THE APPLICANT HAS FORMAL TRANSFERS OF ALL OF THE RIGHTS OF OSGOOD LAND AND LIVE STOCK COMPANY HEREIN INVOLVED.

As has already been pointed out the applicant has formal transfers by assignment and quit-claim deeds of all of the rights of Osgood Land and Live Stock Company, both the Idaho and

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Wyoming corporations, herein involved. These transfers cover all of the rights of Osgood Land and Live Stock Company under Permits 3770-R, 3771-R, 3487-R and 3561-R and all other water rights herein involved, including all interest and estate of Osgood Land and Live Stock Company in and to Two Ocean Lake Reservoir and Emma Matilda Lake Reservoir.

8. THE GRANTING OF THE APPLICATIONS WILL NOT TEND TO DEFEAT THE PURPOSE OF THE SNAKE RIVER LAND COMPANY TO PRESERVE THE SCENIC FEATURES AND BEAUTY OF TWO OCEAN AND EMMA MATILDA LAKES.

The real ground for protest is that the effect of the granting of the applications will be to mar the beauty of the Two Ocean and Emma Matilda Lakes. The protest of the National Park Service states the fear that the granting of the applications may result in the building of very large reservoirs on the basis of the original applications 3770-R and 3771-R. If applicant has failed to make its purpose clear up to this point, we now wish to state unequivocally that the applicant seeks only to quiet its title/rights to under 3770-R and 3771-R to the extent that impounding works now exist, and have existed for many years, and to relinquish any rights in addition thereto, and we believe that its applications for amendments, cancellations and relinquishments so state. Clearly that is their effect and that is the purpose of the applicant.

The evidence shows that the height of the impounding works corresponds with the natural high water marks of the lakes (Tr. 20), and it seems impossible that there can be any contention 44c

under these circumstances that the existence of these rights and the impounding works thereunder can in any substantial way mar the beauty of the lakes involved. In fact we submit that on the contrary, advantages arise from the existence of these impounding works and the use of these lakes in the manner contemplated and in which they have actually been used. In other words, the effect of these impounding works and the use of the water under these rights is to hold the water in the lakes and let it out gradually in a manner which does not mar or disturb the beauty of the lakes by erosion or otherwise. (Ex. 19, p. 1) The diversion works are very benign in appearance and could be easily made almost, if not absolutely, unobservable. (Exs. 7, 8).

Furthermore, the applicant is entirely in accord with the views of the protestants in the matter and is as anxious as the protestants to preserve the beauty of these lakes and the rights of all others involved.

And in any event we believe that the complaint of the Snake River Land Company under this heading is immaterial and should not be considered by the State Engineer.

CONCLUSION.

Under all the circumstances we submit that the applications are eminently fair and that it would be an injustice and serve no useful or aesthetic purpose to deny the applications of

the applicant and deprive it of this stored water for the beneficial use to which it is put.

John U. Loomis

Ashby D. Boyle

Otto E. McCutcheon

Attorneys for Applicant

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A P P E N D I X

List of Exhibits.

Exhibit 1 Affidavit of Ashby D. Boyle.

" 2 Agreement and Sale Contract, between Osgood Land and Live Stock Company and Utah-Idaho Sugar Company.

" 3 Map to accompany application for amendment of permits for the construction of Two Ocean and Emma Matilda Reservoirs, Teton County, Wyoming.

" 4 Blue Print of so-called Osgood tract in connection with the secondary applications for use of water in Idaho.

" 5 Blue print map showing drainage area in the vicinity of Two Ocean and Emma Matilda Lakes and the Creeks connecting those lakes with Pacific Creek emptying into Snake River.

" 6 Blue print chart showing total area in Osgood tract of acres irrigated, etc.

" 7 Picture showing outlet and headgate of Emma Matilda Reservoir.

" 8 Picture showing outlet works and headgates at Two Ocean Lake.

" 9 Picture of Two Ocean Lake looking north from the headgate.

" 10 Picture showing close-up view of the outlet and headgate of Emma Matilda Lake.

" 11 Picture taken from the top of the outlet works at Two Ocean Lake.

" 12 Picture showing Beaver House on Emma Matilda Lake.

" 13 Picture of Two Ocean Lake with Teton Range in the background from east side.

" 14 Picture of Emma Matilda Lake with Teton Range in the background taken from east side.

" 15 Picture of Two Ocean Lake looking south toward Teton Range.

List of Exhibits (Continued)

Exhibit 16 Affidavit of Douglas Dealley.

" 17 Affidavit of M. H. Chapman.

" 18 Affidavit of Wilfred Y Cannon.

" 19 Copy of the Utah-Idaho Sugar Company report prepared by Mr. Albert and filed in the proceeding.

" 20 Application for permit No. 3487-R made by William C. Thompson and H. C. McKinstry, covering Two Ocean Reservoir.

" 21 Assignment from H. C. McKinstry to Osgood Company of all right and interest in Permit No. 3487-R.

" 22 Assignment by William C. Thompson to James L. Milner and A. T. Shane of all right and interest in and to Permit No. 3487-R.

" 23 Assignment of Permit No. 3487-R from James L. Milner and A. T. Shane to Osgood Land and Live Stock Company.

" 24 Certificate of appropriation Permit No. 3487-R.

" 25 Application for Permit No. 15185 by William C. Thompson and H. C. McKinstry.

" 26 Certificate of appropriation to Osgood Land and Live Stock Company under permit 15185.

" 27 Certificate of appropriation under Permit No. 15185 to H. C. McKinstry.

" 28 Application and Permit No. 3561-R by Joseph Markham and Roy B. Lozier.

" 29 Assignment of Permit 3561-R by Joseph Markham and Roy B. Lozier to H. C. McKinstry.

" 30 Assignment from H. C. McKinstry to Osgood Land and Live Stock Company of Permit 3561-R.

" 31 Certificate of appropriation under Permit 3561-R to Joseph Markham and Roy B. Lozier.

" 32 Application for permit 15569 by Joseph Markham, Roy B. Lozier and O. W. Snell.

" 33 Certified copy of Certificate of appropriation under Permit 15569 to Joseph Markham.

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List of Exhibits (Continued)

Exhibit 34 Certificate of appropriation under Permit No. 15569 to Roy B. Lozier.

" 35 Certificate of appropriation of water under Permit No. 15569 to O. E. Snell.

" 36 Application and Permit No. 3770-R by C. C.Carlisle.

" 37 Assignment of Permit 3770-R by C. C. Carlisle to Osgood Land and Live Stock Company.

" 38 Application for permit No. 3771-R by C. C. Carlisle.

" 39 Assignment of Permit No. 3771-R by C. C. Carlisle to Osgood Land and Live Stock Company.

" 40 Agreement between Frank C. Emerson and Osgood Land and Live Stock Company.

" 41 Agreement between Frank C. Emerson, State Engineer, C. C. Carlisle and A. J. Johannesen.

" 42 Bond in the penal sum of $30,000.00 from Osgood land and Live Stock Company to the State of Wyoming.

" 43 Copy of letter dated May 14, 1923, signed by William Spry, Land Office, Evanston, Wyoming.

" 44 Application and Permit No. 16190 made by Osgood Land and Live Stock Company.

" 45 Application and Permit No. 4238 Enl. made by C. C. Carlisle.

" 46 Assignment and Quit-Claim Deed from Osgood Land and Live Stock Company, et al to Utah-Idaho Sugar Company.

" 47 Assignment and Quit-Claim Deed from the Osgood Land and Live Stock Company to Utah-Idaho Sugar Company.

Exhibit A Abstract of title covering lands sold by H. C. McKinstry to Snake River Land Company.

" B Warranty deed from H. C. McKinstry and wife to Snake River Land Company.

" C Abstract of title covering property purchased by Snake River Land Company from Lozier and wife.

" D Deed from Eliza D. Lozier and Roy B. Lozier to Snake River Land Company.

List of Exhibits (Continued)

Exhibit E Abstract of title covering property purchased by Snake River Land Company from Joseph Markham.

" F Deed from Joseph Markham and wife to Snake River Land Company.

" G Abstract of title covering property purchased by Snake River Land Company from O. W. Snell.

" H Deed from O. W. Snell and wife to Snake River Land Company.

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RECEIVED
SEP 15 1938
Cheyenne, Wyoming
State Engineer

BEFORE JOHN D. QUINN, STATE ENGINEER,

STATE OF WYOMING.

SNAKE RIVER LAND COMPANY,

Protestant,

vs.

UTAH-IDAHO SUGAR COMPANY,

Applicant.

* * * * * * * * * * * * * * * * * * * *

REPLY BRIEF OF APPLICANT.

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John U. Loomis
Ashby D. Boyle,
Otto E. McCutcheon,

Attorneys for Applicant.

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BEFORE JOHN D. QUINN, STATE ENGINEER,

STATE OF WYOMING.

SNAKE RIVER LAND COMPANY,	)
Protestant,	)
vs.	)
UTAH-IDAHO SUGAR COMPANY,	)
Applicant.	)

REPLY BRIEF OF APPLICANT.

Replying to brief of protestant, we submit:

That the protestant has not met the basic contentions of the applicant; that the arguments of counsel for the protestant consist of mere statements of generalities; and that the brief of the protestant contains misleading statements.

Counsel for the protestant appear to stand upon the general proposition that the construction of the impounding works and the storage of the water and its use, as well as its transportation across the public domain, constitute trespass.

If trespass has been committed under the circumstances of this case, then every applicant for a permit to store

water is, in a sense, a trespasser pending the time storage rights have been adjudicated. Clearly such a contention is unsound. Counsel do not point out whose rights have been injured by the claimed trespass, and it is noteworthy that so far as the record shows no one has ever asserted a claim of injury thereby. Even in this proceeding the protestant seeks to have the claims of the applicant denied only upon the ground that the granting of such claims will detract from the beauty of the countryside, and it is clear that no violation of any property right of the applicant is involved.

We submit that no actual trespass involving injury to any property rights has occurred. The contention is purely technical and does not involve any violation of the principle of beneficial use of water as understood and applied in the State of Wyoming. In this State it is well established that the waters are the property of the State and rights thereto can be acquired only by appropriation to beneficial use. It is true that the laws governing appropriation and use of water contemplate a system of orderly procedure under the supervision of the State officials, but the actual application of water to beneficial uses by the applicant is in entire accord with the basic principle governing water rights in the State of Wyoming. Such basic principle is that the waters of the State shall be put to the greatest possible beneficial use, and clearly the actual use of water for beneficial purposes, in the absence of any injury to other users, is not inconsistent with this principle. 53C

The use of the word "trespass" in this connection is but a generality and is meaningless. Furthermore, so far as any trespass upon the public domain is concerned, its immateriality to this controversy is obvious.

On pages 2 and 3 of the protestant's brief, it is stated that H. C. McKinstry "as an employee of the Osgood Company * * * constructed a six-foot dam on Two Ocean Reservoir; and evidently from McKinstry's testimony the original dam in Emma Matilda was a four-foot dam." This is a misleading statement because it is not complete.

The testimony of McKinstry was that after the enlargement permits were granted to the Osgood Company, he, under the instructions of that Company, in the summer of 1919, constructed additional impounding works at the Two Ocean Reservoir, and that such impounding works were sufficient to impound six feet of water; also that at the same time, he built the present existing impounding works at Emma Matilda Lake for the Osgood Company. (Tr. 43-47). The State Engineer was at the site of the dams at the time the work was being undertaken, and assented to the enlargement work by stating that he saw no reason why the preliminary work under the enlargement permits should not proceed. (Tr. 49). It is clear that these impounding works constructed by McKinstry for the Osgood Company after the enlargement permits had been granted to that Company were sufficient to impound the amount of water now claimed by the applicant in this proceeding. Counsel for protestant admit at page eight of

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their brief that the dams at the outlets of Two Ocean and Emma Matilda Lakes were raised.

At page 4 of their beif, counsel for the protestant state that there is nothing in the applicant's contract of purchase from the Osgood Company, or any of the subsequent documents, to indicate that the 5000 feet of water was to come from Two Ocean Lake. This is a misleading statement, as it states only part of what the record shows. Mr. Boyle testified that the 5000 acre feet of water mentioned in the contract referred to the water in Emma Matilda and Two Ocean Lakes. (Tr. 12).

At page 9 of their brief, counsel for protestant refer to Exhibits A to H, apparently to indicate that they constitute the only record notice to protestant of existing water rights. As pointed out in our original brief, protestant has no complaint on this score, because it got all it bargained for in the way of water rights. Furthermore, protestant knew as a matter of law that pending applications for water rights would appear of record only in the Office of the State Engineer.

At page 9 of their brief, counsel for protestant concede that the water rights of protestant are not involved in this hearing, and state that the primary purpose of protestant is to conserve "resources and beauty", so that "the land, trees, the lakes and the rivers may be left and kept as God made them." Obviously therefore, protestant does not claim any violation of its property rights. As stated in our original brief, applicant is in

entire accord with the purposes of the protestant to preserve the beauty of the country, but the general conclusion of the protestant that any attempt at reservoiring runs counter to such purpose is not sustained by the evidence. The only conclusion which can be sustained by the evidence is that the reservoirs, as they exist, and as contemplated by applicant's claims, do not mar the beauty of the country. Under these circumstances, and assuming, contrary to our belief, that protestant has any standing in this proceeding, it would seem only reasonable that protestant recognize existing conditions which may be of considerable benefit to the applicant and of no detriment to the protestant.

It is respectfully submitted that the several applications of the applicant should be granted.

John U. Loomis

Ashby Boyle

Otto K. McCutcheon

Attorneys for Applicant.

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STATE OF WYOMING)
) SS
WATER DIVISION NO. 4)

BEFORE THE HONORABLE
BOARD OF CONTROL.

In the Matter of the Application of the Utah-Idaho Sugar Company for Amendment of Permits Nos. 3770 Res. and 3771 Res., and for Cancellation of Permits Nos. 16190 and 4232 Enl.

SNAKE RIVER LAND COMPANY, :
Protestant, :
vs. : S T I P U L A T I O N
UTAH-IDAHO SUGAR COMPANY, :
Applicant. :

IT IS HEREBY STIPULATED AND AGREED between Utah-Idaho Sugar Company and Snake River Land Company that all issues in this cause may be submitted to the Honorable Board of Control upon the record made and the briefs filed herein when the matter was pending before the State Engineer of the State of Wyoming, and that either party shall have the right to argue said cause orally before said Board or, if it prefers, file an additional brief, and in the event oral argument is made or additional brief presented by either party the opposing party shall have the right to answer orally or to file within thirty days an answer brief.

Dated: Salt Lake City, April 17, 1939.

/s/ John U. Loomis
/s/ Otto E. McCutcheon
/s/ Ashley D. Boyle

For Utah-Idaho Sugar Company

/s/ Fabian, Clendenin, Moffat & Mabey

For Snake River Land Company.

Filed April 20, 1939.
Earl Lloyd, Ex-officio
Secretary, State Board
of Control.

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IN THE MATTER OF THE APPEAL OF THE UTAH-IDAHO SUGAR COMPANY FROM THE ACTION OF THE STATE ENGINEER IN THE ENDORSEMENTS PLACED UPON APPLICATIONS FOR AMENDMENT OF PERMITS NO'S 3770 RES. AND 3771 RES. AND APPLICATIONS FOR SECONDARY PERMITS FROM TWO OCEAN AND EMMA MATILDA RESERVOIRS (APPLICATION NO.'S 13 1-2-3-4/357 AND 14 3/138.

IN WATER DIVISION NUMBER FOUR

FINDINGS AND ORDER

THIS MATTER coming regularly before the State Board of Control this 24th day of April, 1939, the Board FINDS:

THAT the Utah-Idaho Sugar Company, through its Attorney, John U. Loomis, filed in the office of the State Board of Control on January 31, 1939, an Appeal from the endorsement made by the State Engineer upon the applications of the Utah-Idaho Sugar Company for amendment of Permit No.'s 3770 Res. and 3771 Res., as issued for the construction of reservoirs at Two Ocean and Emma Matilda Lakes, and upon the applications for secondary permits from the said reservoirs, and special permit to take water from the State of Wyoming into the State of Idaho for beneficial use (Application No.'s 13 1-2-3-4/357 and 14 3/138);

THAT the Utah-Idaho Sugar Company under date of July 22, 1935, filed applications in the office of the State Engineer to amend Permits No.'s 3770 Res. and 3771 Res., and for secondary permits to apply water stored in Two Oceans Reservoir and Emma Matilda Reservoir to lands in Idaho, and for a special permit to use this water stored within the State of Wyoming upon lands located in the State of Idaho;

THAT the Snake River Land Company on October 10th, 1936 filed a protest against the granting of permits under

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said applications;

THAT a hearing upon the protest was held by John D. Quinn , State Engineer, on June 1, 1938 in order that all facts might be before him when rendering a decision;

THAT John D. Quinn, State Engineer, under date of December 3, 1938, entered an Opinion and Order that said applications be rejected;

THAT under date of January 16th, 1939, John D. Quinn, State Engineer rejected the above mentioned applications for the reason that approval of the applications would be detrimental to public interest;

THAT the Appeal of the Utah-Idaho Sugar Company to the State Board of Control from the endorsement of the State Engineer on said applications was duly filed in the office of the Board on January 31, 1939;

THAT a hearing on this Appeal was set by the Ex-officio Secretary of the Board of Control for ten o'clock A.M., Thursday, April 20th, 1939, in the office of the State Board of Control, Room 201, Capitol Building, Cheyenne, Wyoming and the Utah-Idaho Sugar Company and the Snake River Land Company were duly notified thereof through their attorneys by registered mail;

THAT a hearing was held at the time and place stated in the notice, there appearing for the Utah-Idaho Sugar Company, its attorneys, John U. Loomis, Ashby D. Boyle and Otto E. McCutcheon and for the Snake River Land Company, its Attorney, D. Howe Moffatt, and Mr. Richard Winger;

THAT after hearing the statements made by the attorneys, the Board took this matter under advisement; a decision to be made after reviewing the testimony and briefs previously presented in this matter;

The Board, having now considered the Appeal and being advised by the records of the office of the State Engineer and

59C

State Board of Control and the showings presented in the matter, THEREFORE ORDERS:

That the Appeal of the Utah-Idaho Sugar Company from the endorsement of the State Engineer in rejecting applications for secondary permits to apply water stored in Two Ocean and Emma Matilda Reservoirs and application for special permit for the use of this stored water in Idaho (Applications No.'s 13 1-2-3-4/357 and 14 3/138) be DENIED:

THAT the action of the State Engineer in rejecting said applications is hereby sustained for the reason that the State Engineer and the State Board of Control are now prohibited under Chapter 125, Session Laws of Wyoming, 1939, from granting permits for any appropriation or development of the state's water while within the State's boundaries in whole or in part for use outside the State.

DONE AT CHEYENNE, COUNTY OF LARAMIE, STATE OF WYOMING, THIS 24TH DAY OF APRIL, 1939.

STATE BOARD OF CONTROL

L. C. Bishop
L. C. BISHOP, President

ATTEST:

Earl Lloyd
EARL LLOYD, Ex-officio Secretary
ENTERED: May 18, 1939

60C

Copy

STATE OF WYOMING)
) SS
WATER DIVISION NO.4)

BEFORE JOHN D. QUINN,
STATE ENGINEER.

In the Matter of the Application of the Utah-Idaho Sugar Co., for Amendment of Permits Nos. 3770 Res. and 3771 Res., and for Cancellation of Permits Nos. 16190 and 4232 Enl.

SNAKE RIVER LAND CO.,
Protestant,

vs.

A P P E A L.

UTAH-IDAHO SUGAR CO.,
Applicant.

To JOHN D. QUINN, State Engineer of the State of Wyoming and the BOARD OF CONTROL OF THE STATE OF WYOMING:

You, and each of you, are hereby notified that the applicant, Utah-Idaho Sugar Company, hereby appeals from the endorsements made by the State Engineer upon the applications of the applicant numbered, headed and dated as follows, to-wit:

No. 3770 R, being an application for an amended permit to construct the Two Ocean Reservoir, etc., verified July 22, 1935.

No. 3770 R, being an application for Secondary Permit to divert and appropriate water from the Two Ocean Reservoir, etc., verification dated July 22, 1935.

No. 3771 R, being an application for an amended permit to construct the Emma Matilda Reservoir, verification dated July 22, 1935.

No. 3771 R, being an application for a Secondary Permit to divert water from the Emma Matilda Reservoir, etc., verification dated July 22, 1935.

No. 3770-R and 3771-R, being an application for special permit to take water from the State of Wyoming into the State of Idaho for application to beneficial use, said application being undated but being received for record July 23, 1935;

and any and all other applications of applicant covered or referred to by the Opinion and Order of the State Engineer dated at Cheyenne, Wyoming, the 3rd day of December, 1938, in the above entitled matter,

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under and in accordance with the provisions of Section 122-410, Wyoming Revised Statutes, 1931, said endorsement having been made upon said applications on the 16th day of January, 1939.

Dated at Cheyenne, Wyoming, January 31, 1939.

UTAH-IDAHO SUGAR CO.,
Applicant,

By /s/ John U. Loomis
Its Attorney.

Received and filed in the office of the State Board of Control this 31st day of January, 1939.

/s/ Earl Lloyd
EARL LLOYD,
Ex officio Secretary.

62C

C E R T I F I C A T E

UNITED STATES OF AMERICA)
)
STATE OF WYOMING) SS.
)
COUNTY OF LARAMIE.)

I, Earl Lloyd, Deputy State Engineer and Ex-officio Secretary of the State Board of Control of the State of Wyoming, hereby certify under the seal of said State Board of Control, that attached hereto are true, full and correct copies of the following papers, proceedings and orders filed in the office of the State Engineer, unless otherwise specified, on the dates hereinafter indicated, or made and entered on the dates hereinafter indicated, as the case may be, to-wit:

1. Application for an Amended Permit to construct Two Ocean Reservoir (Permit No. 3770-R).
2. Application for Secondary Permit to divert and appropriate from Two Ocean Reservoir.
3. Amended Application for Permit to construct Emma Matilda Reservoir (Permit No. 3771-R).
4. Application for Secondary Permit to divert and appropriate from Emma Matilda Reservoir.
5. Request for special permits to use stored water outside the State of Wyoming.
6. Request for cancellation of Permits Nos. 3770-R, 3771-R, P-16190 and 4232 Enlargement.
7. Protest of Snake River Land Company.
8. Protest of The National Park Service
9. Opinion and Order of State Engineer.
10. Appeal - Notice of appeal directed to John D. Quinn, State Engineer, notifying him of appeal to the State Board of Control.
11. Stipulation between Attorneys for Utah-Idaho Sugar Co. and Snake River Land Co.
12. Findings and Order of State Board of Control.
13. Clerk's Notice of Appeal (Clerk of the District Court of Teton County, Wyoming)
14. Petition on Appeal. (To the District Court of Teton County, Wyoming).

all of said papers, proceedings or orders having been filed, made or entered, as the case may be, in a proceeding wherein Utah-Idaho Sugar Company was applicant and Snake River Land Company was protestant, upon the following applications, to-wit:

63C

1. Application for an amended permit to construct Two Ocean Reservoir, (Permit No. 3770-R).

2. Application for secondary permit to divert and appropriate from Two Ocean Reservoir.

3. Amended application for permit to construct Emma Matilda Reservoir (Permit No. 3771-R).

4. Application for secondary permit to divert and appropriate from Emma Matilda Reservoir.

5. Request for Special permits to use stored water outside the State of Wyoming.

6. Request for cancellation of Permits Nos. 3770-R, 3771-R, P. -16190 and 4232 Enlargement.

Dated the 28th day of December, 1939.

EARL LLOYD
Deputy State Engineer, and
Ex-Officio Secretary of the
State Board of Control.

(SEAL)

64C

IN TH E DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT,

TETON COUNTY, WYOMING.

In the Matter of the Appeal of the Utah-Idaho Sugar Company from the action of the State Engineer in the Endorsements placed upon Applications for Amendmen t of Permits No.'s 3770 Res. and 3771 Res. and Applications for Secondary Permits from Two Ocean and Emma Matilda Reservoirs (Application No.'s 13 1-2-3-4/357 and 14 3/138.

P E T I T I O N.

Comes now Utah-Idaho Sugar Company, appellant herein, and for its petition and complaint against the order and determination of the State Board of Control heretofore made herein and entered on the 18th day of May, 1939, alleges and States as follows, to-wit:

1. That the order and determination of the State Board of Control is not sustained by sufficient evidence and is contrary to the evidence.

2. That the order and determination of the State Board of Control is contrary to law.

WHEREFORE, appellant prays that said order and determination be set aside and that an order and determination be made herein granting the applications of the appellant to amend permits numbers 3770 Res. and 3771 Res., and for secondary permits to apply water stored in Two Ocean Reservoirs and Emma Matilda Reservoir to lands in Idaho, and for a special permit to use this water stored within the State of Wyoming upon lands located in the State of Idaho.

UTAH-IDAHO SUGAR COMPANY,

By John U. Loomis

Ashby D. Boyle

Otto K. McCutcheon

Its Attorneys

65C

The State of Wyoming,)
) ss.
County of Laramie.)

JOHN U. LOOMIS being first duly sworn upon his oath according to law, deposes and says; that he is one of the attorneys for the appellant in the above entitled cause; that he has read the foregoing petition, and knows the contents thereof, and that the facts therein stated are true as he verily believes.

John U. Loomis

Subscribed in my presence and sworn to before me this 12th day of July, A. D. 1939.

My commission expires Oct. 11, 1941.

Jennie M. Tupper
Notary Public

(SEAL)

66C

Copy

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT IN AND FOR TETON COUNTY, WYOMING.

In the Matter of the Appeal of the Utah-Idaho Sugar Company from the action of the State Engineer in the Endorsements placed upon Applications for Amendment of Permits Nos. 3770 Res. and 3771 Res. and Applications for Secondary Permits from Two Ocean and Emma Matilda Reservoirs (Application Nos. 12 1-2-3-4/357 and 14 3/138).

DEMURRER

Comes now Snake River Land Company, a corporation, and demurs to the Petition of Utah-Idaho Sugar Company in the above entitled matter, on the grounds that said Petition does not state facts sufficient to constitute a cause of action.

Dated this 31st day of January, 1940.

Fabian, Clendenin, Moffat & Mabey
ATTORNEYS FOR SNAKE RIVER LAND COMPANY

67C

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT IN AND

FOR TETON COUNTY, WYOMING

In the Matter of the Appeal of the Utah-Idaho Sugar Company from the action of the State Engineer in the Endorsements placed upon Applications for Amendment of Permits Nos. 3770 Res. and 3771 Res. and Applications for Secondary Permits from Two Ocean and Emma Matilda Reservoirs (Application N os. 12 1-2-3-4/357 and 14 3/138.)

A N S W E R

Comes now Snake River Land Company, appellee herein, and in answer to the petition and complaint of Utah-Idaho Sugar Company in the above entitled matter, admits, denies and alleges as follows:

1. Answering paragraph #1 of appellant's petition appellee denies the allegations of said paragraph and the whole thereof.

2. Answering paragraph #2 of appellant's petition, appellee denies the allegations of said paragraph and the whole thereof.

WHEREFORE, Appellee, having fully answered appellant's petition and complaint, prays that the order and determination of the State Board of Control be affirmed in all respects and that the petition of appellant be dismissed.

Fabian, Clendenin, Moffat & Mabey
ATTORNEYS FOR APPELLEE
SNAKE RIVER LAND COMPANY.

STATE OF UTAH)
(SS
COUNTY OF SALT LAKE)

D. HOWE MOFFAT, being first duly sworn upon his oath according to law, deposes and says; that he is one of the attorneys for the appellee in the above entitled cause; that he has read the foregoing answer, and knows the contents thereof, and that 68-

the facts therein stated are true as he verily believes.

D. HOWE MOFFAT
(D. Howe Moffat)

Subscribed and sworn to before me this 31st day of January, 1940.

MARJORIE MEYERSAHM
Notary Public

69L

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT IN

FOR TETON COUNTY, WYOMING.

In the matter of the Appeal of the Utah-Idaho Sugar Company from the action of the State Engineer in the endorsements placed upon Applications for Amendment of Permits Nos. 3770 Res. and 3771 Res. and Applications for Secondary Permits from Two Ocean and Emma Matilda Reservoirs (Application Nos. 12 1-2-3-4/357 and 14 3/138.)

ANSWER OF THE STATE BOARD OF CONTROL OF THE STATE OF WYOMING.

Comes now the State Board of Control of the State of Wyoming and for its answer to the petition of the Utah-Idaho Sugar Company admits, alleges and denies:

1. The State Board of Control of the State of Wyoming denies each and every allegation of fact contained in paragraph 1 of appellant's petition, denies that the order and determination of the State Board of Control of the State of Wyoming is not sustained by sufficient evidence and is contrary to the evidence.

2. Denies each and every allegation of fact contained in paragraph 2 of appellant's petition, denies the order and determination of the State Board of Control of the State of Wyoming is contrary to law.

WHEREFORE, the State Board of Control of the State of Wyoming prays that the order and determination of the State Board of Control of the State of Wyoming be affirmed and that the petition of the Utah-Idaho Sugar Company be dismissed.

THE STATE BOARD OF CONTROL OF THE STATE OF WYOMING

By L. C. Bishop
President.

70C

THE STATE OF WYOMING)
) SS
COUNTY OF LARAMIE)

Ewing T. Kerr, being first duly sworn on oath according to law, deposes and says:

That the is the duly appointed, qualified and acting Attorney General of the State of Wyoming and as such Attorney General is one of the attorneys for the State Board of Control of the State of Wyoming; that he has read the above and foregoing Answer and that the facts therein alleged are true as he verily believes.

Ewing T. Kerr

Subscribed and sworn to before me this 22nd day of March, A. D. 1940.

Ruby B. Salyer
Notary Public.

71C

Part I -
Case Before State
Board of Control

STATE OF WYOMING)
) SS
WATER DIVISION NO. 4)

BEFORE JOHN D. QUINN,
STATE ENGINEER.

In the Matter of the Application of the Utah-Idaho Sugar Co. for Amendment of Permits Nos. 3770 Res. and 3771 Res., and for Cancellation of Permits Nos. 16190 and 4232 Enl.

SNAKE RIVER LAND CO.,)
Protestant,)
)
Vs.)
)
UTAH-IDAHO SUGAR CO.,)
Applicant.)

OPINION AND ORDER

INTRODUCTION

This matter involves the use of two reservoirs constructed upon Two Ocean and Emma Matilda Lakes, located in Teton County, Wyoming. The run-off of these lakes flows into Pacific Creek, a tributary of Snake River. The Utah-Idaho Sugar Company, has made application to the State Engineer of Wyoming for amendment of two reservoir permits for the enlargement of these reservoirs, and for the cancellation of certain other permits acquired in connection therewith. The Snake River Land Company has filed its protest to the recognition of any rights under these permits in either the original or amended form.

STATEMENT

1. Existing Appropriations (Permits Nos. 3487 Res., 3561 Res., 15185, 15186, and 15569.)

A short historical reference to the various permits issued in connection with these two reservoirs will assist in stating the controversy.

On August 19, 1918, Permit No. 3487 Res., was issued to H. C. McKinstry and William C. Thompson for the construction of Two Ocean Reservoir with a capacity of 1024 acre feet, under priority date of May 9, 1918. At the same time secondary permits for the beneficial application of the water stored in Two Ocean Reservoir were granted. These were Permits Nos. 15185 and 15186 issued for the irrigation of 246.6 acres in Teton County, Wyoming. Final proof of construction was submitted under Permit No. 3487 Res., and the right to impound water in the Two Ocean Reservoir was adjudicated for a capacity of 512 acre feet (State Board of Control, Order Record 6, Page 589, Certificate Record 45, Page 198). Likewise rights under secondary Permit No. 15185 were adjudicated to 211.4 acres of land "lying and being in Teton County, Wyoming."

Permit No. 3561 Res. was issued to Joseph Markham and Roy B. Lozier

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT,

TETON COUNTY, WYOMING.

In the Matter of the Appeal of the Utah-Idaho Sugar Company from the action of the State Engineer in the Endorsements placed upon Applications for Amendment of Permits No.'s 3770 Res. and 3771 Res. and Applications for Secondary Permits from Two Ocean and Emma Matilda Reservoirs (Application No.'s 13 1-2-3-4/357 and 14 3/138.

CLERK'S NOTICE OF APPEAL

TO THE SECRETARY OF THE STATE BOARD OF CONTROL:

You are hereby notified that an appeal has been perfected in this Court by the filing herein on the 15th day of July, 1939, of Notice of Appeal, together with Bond or Undertaking on Appeal, approved by H. R. Christmas, Judge of this Court. Such appeal is from an order and determination of the State Board of Control heretofore made and entered in the records of the Board on the 18th day of May, 1939, denying the application of the Utah-Idaho Sugar Company to amend permits numbers 3770 Res. and 3771 Res., and for secondary permits to apply water stored in Two Ocean Reservoir and Emma Matilda Reservoir to lands in Idaho, and for a special permit to use this water stored within the State of Wyoming upon lands located in the State of Idaho, in the above entitled proceeding. Please file and record this notice on the records of the State Board of Control, and prepare, certify and transmit to this office within six months from the 15th day of July, 1939, a certified transcript of the proceeding in which such order and determination of the State Board of Control was made and entered, including a certified copy of all of the records of the State Board of Control relating to such order and determination, a certified copy of all the evidence offered before said Board therein, the measurements of

streams, tributaries and ditches, if any, involved therein, together with a copy of the petition of the appellant.

Dated the 15th day of July, 1939.

Seal

E. N. Moody

Clerk of the District Court of the Third Judicial District, Teton County, Wyoming.

CLERK OF COURT'S CERTIFICATE OF COPY—Form No. 24

THE STATE OF WYOMING,
County of Teton } ss.

I, E. N. Moody clerk of the Third Judicial District Court within and for the County and State aforesaid, do hereby certify the foregoing to be a true and complete copy of "Clerk's Notice of Appeal" in the Matter of the Appeal of the Utah-Idaho Sugar Company from the action of the State Engineer-- Teton County Civil File No. 447

IN TESTIMONY WHEREOF, I have hereunto subscribed my hand and affixed the official seal of said Court at my office in Jackson, Wyoming, this 15th day of July A. D. 19 39.

E. N. Moody
Clerk of the District Court.

By _____ Deputy. 3E

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IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT,

TETON COUNTY, WYOMING.

In the Matter of the Appeal of the Utah-Idaho Sugar Company from the action of the State Engineer in the Endorsements placed upon Applications for Amendment of Permits No.'s 3770 Res. and 3771 Res. and Applications for Secondary Permits from Two Ocean and Emma Matilda Reservoirs (Application No.'s 13 1-2-3-4/357 and 14 3/136.

ACKNOWLEDGMENT OF SERVICE.

Service of Clerk's Notice of Appeal in the above entitled matter and receipt of certified copy thereof is hereby acknowledged this _____ day of _____, 1939.

_____

Associate Director, National Park Service.

5E

for the construction of a reservoir of 2579.7 acre feet capacity upon Emma Matilda Lake, under priority date of May 1, 1919. Secondary Permit No. 15569 was granted to Markham, Lozier, and O. W. Snell for the beneficial application of these stored waters to 386.5 acres of land in Teton County. Final proofs of construction and appropriation were submitted under the two permits, Permit No. 3561 Res. being adjudicated for a capacity of 1710 acre feet, and Permit No. 15569 for the irrigation of the 386.5 acres described therein. (Order Record 6, Page 589, Certificate Record 45, Pages 201, 202, 203, and 204).

The Utah-Idaho Sugar Company claims some interest in these two reservoirs by virtue of a series of assignments and by later quit claim deeds from the original permitees and mesne assigners. The Snake River Land Company also claims some rights under these permits as purchaser of much of the land to which water was adjudicated under the secondary permits. No rights under the above permits are involved in the matter now pending, and they are set out here only to show the extent of the rights in the two reservoirs existing at the time of the inception of the permits now contested, and to show the interest of the parties to the controversy.

2. Permits Nos. 3770 Res., 3771 Res., 16190 and 4232 Enl.

After the permits referred to in the preceeding discussion were granted, plans were made to construct extensive impounding works and greatly enlarge the capacity of both reservoirs. On October 6, 1919, C. C. Carlisle filed applications in the office of the State Engineer to enlarge the Two Ocean Reservoir to an available capacity of 63,605 acre feet and the Emma Matilda Reservoir to an available capacity of 60,900 acre feet. To provide a water supply to fill the enlarged reservoirs, application was made for a permit to divert water from Pacific Creek into the reservoirs by the construction of the Twin Reservoir Supply Canal.

These applications were subsequently granted on September 14, 1921, as Permits Nos. 3770 Res. and 3771 Res. for the enlargement of the Two Ocean and Emma Matilda Reservoirs respectively, Permit No. 16190 for the Twin Reservoir Supply Canal and Permit No. 4232 Enl. for the enlargement of the canal, subject to certain conditions explained below. By original application or by assignment, the Osgood Land and Livestock Company, a Wyoming Corporation became the holder of these permits.

The lands which were to be inundated by the enlargement of these reservoirs, and also the land across which the supply canal was to be constructed, are public domain of the United States, and were temporarily withdrawn from settlement, location, sale or entry by Executive Order of the President, No. 2905, dated July 8, 1918. The operation of this order was extended by the second withdrawal made by Executive Order, No. 3394, dated January 28, 1921. Evidently as a result of this withdrawal and the difficulty of obtaining necessary rights-of-way suggested thereby, an agreement was entered into by and between the then State Engineer and the Osgood Land and Livestock Company, before these four applications for permits were approved.

By the terms of this agreement, dated May 2, 1921, the State Engineer agreed to approve the applications and grant the permits, and the Osgood Company agreed to make application to the General Land Office of the United States for the necessary rights-of-way, and to pay to the State Engineer as trustee the sum of thirty thousand dollars ($30,000) for the construction of certain bridges, upon the said rights-of-way being granted by the General Land Office. The Osgood Company further agreed to furnish surety bonds guaranteeing this payment "if said permits and rights-of-way pertaining thereto are duly issued and granted". Paragraph V of the agreement is in the following words:

> "Is is finally agreed and understood between the parties hereto, that in the event of the United States General Land Office refusing to grant the necessary rights-of-way, required in the construction of the said reservoirs and supply ditches, that then this agreement shall become null and void upon the said party of the second part surrendering and delivering to the party of the first part, for cancellation, the said permits to be issued by him, and which are covered by this agreement."

Pursuant to this agreement the Osgood Company filed its surety bond, and on September 14, 1921, the State Engineer granted Permits Nos. 3770 Res., 3771 Res., 16190 and 4232 Enl. Each of these four permits bears the following endorsement: "This permit is conditioned upon the strict performance by the permitees, or their successors or assigns, of the certain agreement dated May 2, 1921, between Frank C. Emerson, State Engineer, and the Osgood Land and Livestock Company, and is subject to cancellation at any time the terms of said agreement are not complied with."

The application of the Osgood Company for rights-of-way was denied by letter of May 14, 1923, from William Spry, Commissioner of the General

Land Office, to the Register and Receiver at Evanston, Wyoming. (Evanston 08875 "F" MN). No money has ever been paid to the State Engineer under the agreement of May 2, 1921.

In the meantime, under date of April 15, 1920, an Idaho Corporation, the Osgood Land and Livestock Company, entered into a contract, under date of April 15, 1920, agreeing to sell to the Utah-Idaho Sugar Company, the present applicant, certain lands in Idaho, and among other water rights, 5,000 acre feet of stored water, the rights for which were being acquired by the vendor. It is now asserted that this 5,000 acre feet applied to the Osgood Company's right in the Two Ocean and Emma Matilda Reservoirs. The applicant bases its claims to Permits Nos. 3770 Res., and 3771 Res. upon this contract and subsequent deed issued in compliance therewith.

It appears that in 1919, several years before the expiration of time for completion of construction under Permits Nos. 3770 Res. and 3771 Res. (viz. Dec. 31, 1924), The Osgood Company of Wyoming did enlarge the impounding works at Two Ocean Reservoir, and did some work at the Emma Matilda, the nature and extent of which is not shown.

On July 23, 1935, the Utah-Idaho Sugar Company made application to the State Engineer to amend Permits Nos. 3770 Res. and 3771 Res. to conform to the extent of the works actually constructed, and to cancel the permits for the Twin Reservoir Supply Canal, which was never constructed. This application shows that the Two Ocean Reservoir was constructed to a total capacity of 3040 acre feet, and Emma Matilda Reservoir to 1340 acre feet. Application was also made for secondary permits to apply this water to lands in Idaho, and for a special permit to use this water stored within the state upon lands located outside the state, as required by Wyo. R. S. 1931, Sec. 122-1601, (S. L. 1921, C. 141, Sec. 1).

The Snake River Land Company filed its protest to the application for amendment, upon two grounds, first, as owner of certain lands in Wyoming included under secondary permits and adjudications of the original construction of these reservoirs, and, second, as a company "formed for the purpose of acquiring and retaining for present and future generations, through government ownership and control, certain of the scenic features and beauty spots in Jackson Hole".

On June 1, 1938, a hearing was held before the State Engineer in order that all facts might be before him when rendering decision, both parties being present.

At this hearing, the applicant attempted to correct any difficulty arising from the fact that its claim is based upon conveyance from an Idaho Corporation, whereas the permits in question were issued or assigned to a Wyoming Corporation, by filing quit claim deeds from individuals as the statutory trustees of the now defunct Wyoming Corporation.

The National Park Service also filed a protest, and was represented at this hearing, upon the understanding that any evidence submitted by it could not be considered, as it is not in fact an interested party.

OPINION

The relative titles and interests of the two parties in the original rights and works (Permits Nos. 3487 Res., 3561 Res., 15185, 15186, and 15569, and adjudications thereunder) is not made clear by the considerable amount of evidence thereon introduced at the hearing. The same is true of the various assignments and deeds by which the applicant claims title and interest from the two Osgood Corporations. However, the decision of these questions is not properly one for the State Engineer, and is immaterial to the decision of the present controversy.

Permits Nos. 3770 Res., 3771 Res., 16190, and 4232 Enl. were granted subject to cancellation for noncompliance of the terms of the agreement of May 2, 1921, with the State Engineer. By the express terms this agreement was made conditional upon the grant or refusal of the necessary rights-of-way by the General Land Office. The obvious intent of this agreement was that upon refusal of the necessary rights-of-way, not only the agreement itself became void, but also that the permits issued under its terms should likewise fail and become subject to cancellation. This is the only logical construction which can be placed upon the words of paragraph V of the agreement. It is apparent that Permits Nos. 3770 Res, 3771 Res., 16190, and 4232 Enl. should be cancelled. It follows that the applications for secondary permits and special permit to use stored water outside the state must fall with the storage rights which are their source of supply. To grant these secondary and special permits, when the applicant does not have, and cannot obtain the rights-of-way or easements to build or maintain the necessary storage works, would certainly be detrimental to the public interest as encouraging trespass and creating unnecessary difficulties in the administration of the water.

(Wyo. R. S. 1931, Sec. 122-406)

There exists a further reason for cancelling Permit No. 3771 Res. upon the Emma Matilde Reservoir. By the terms of this permit, final construction was to be completed by December 31, 1924. Failure to complete construction within the time required by the permit is a default in its specified requirements operating as a forfeiture of the water right. (Wyo. R. S. 1931, Sec. 122-409). No proceeding is required to effect the forfeiture, the only requirement being that the State Engineer shall by registered mail, at least three months before default shall become operative, notify the permitee of the expiration date. There is no question but that such notice was given in this case on September 30, 1934.

The rights under Permit No. 3561 Res., acquired before Permit No. 3771 Res. was granted, have been adjudicated in the capacity of 1710 acre feet. The plans submitted upon the application to amend Permit No. 3561 Res. show the present total capacity of Emma Matilda Reservoir to be 1340 acre feet, an amount less than that previously adjudicated. It is thus clear that no construction resulting in the enlargement of Emma Matilda Reservoir above the adjudicated capacity was ever done, and that there now exist a default in the terms of Permit No. 3771 Res.

The applicant has requested that Permits Nos. 16190 and 4232 Enl. be cancelled upon the grounds that the supply canal therein described has never been constructed.

IT IS THEREFORE ORDERED that Permits Nos. 3770 Res., 3771 Res., 16190, and 4232 Enl. be and the same hereby are CANCELLED, and that applications for amendments of Permits Nos. 3770 Res. and 3771 Res. under filing Nos 13 1 & 2/357 be and the same are hereby REJECTED.

IT IS FURTHER ORDERED that applications for secondary permits for use of water stored under Permits Nos. 3770 Res. and 3771 Res., under filing numbers 13 3 & 4/357, and application for special permit to use water stored in Two Ocean and Emma Matilda Reservoirs outside the State of Wyoming be and the same hereby are REJECTED.

Dated at Cheyenne, Wyoming, this 3rd day of December, 1938.

John D. Quinn

JOHN D. QUINN, State Engineer.

Other Supporting Information

CLC:GD

Cheyenne, Wyoming
August 27, 1941

The Attorney General
Department of Justice
Washington, D. C.

IN RE: Matter of appeal of Utah-Idaho Sugar Company, District Court, Third Judicial District, Teton County, Wyoming.
Dept. of Justice File 90-1-2-82.

Sir:

Further referring to your letter dated July 16, 1941 (CRD-MMacD) concerning the above mentioned matter:

Enclosed are duplicate copies of brief of Snake River Land Company by Fabian, Clendenin, Moffat & Mabey, which was served and filed August 6, 1941.

A reply brief is expected by Mr. John U. Loomis, attorney for the appellant. As soon as it is filed I shall have copies made and sent to you. Copies of this letter and enclosure are being sent to Hon. Joseph E. Taylor, Regional Attorney, National Park Service, 601 Sheldon Building, San Francisco, California, and to the Director of the National Park Service, Department of the Interior, Washington, D. C.

Respectfully,

CARL L. CACKETT
United States Attorney

1-A

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O
P
Y

CLS:MF

Cheyenne, Wyoming
August 5, 1941

The Attorney General
Department of Justice
Washington, D. C.

IN RE: Matter of appeal of Utah-Idaho Sugar Company, District Court, Third Judicial District, Teton County, Wyoming. Department of Justice File No. 90-1-2-82.

Sir:

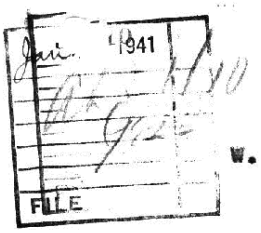
Further answering your letter of July 16, 1941, (CRD-NMacD), and supplementing my letter of July 28, 1941, to you in the above matter, you are advised that upon receipt of a copy of the brief of the Attorney General for the State of Wyoming, filed in the Supreme Court in the above case on August 2, 1941, I have made a copy thereof and enclose duplicate copies herewith. The Wyoming Attorney General advised me that he prepared this brief following a conference with the attorneys for the Snake River Land Company of Salt Lake City, and has forwarded them a copy and that their brief will be filed August 15th and that a copy will be forwarded to me by attorneys for the Snake River Land Company upon receipt of which I shall prepare copies and forward to you and then review the briefs and give you my recommendation.

I am sending copy of this letter together with a copy of the enclosed brief to Hon. Joseph E. Taylor, Regional Attorney, National Park Service, 601 Sheldon Building, San Francisco, California, and to the Director of the National Park Service, Department of the Interior, Washington, D. C.

Respectfully,

CARL L. SACKETT
United States Attorney

16¼A



W.

Cheyenne, Wyoming,
January 8, 1941.

THE ATTORNEY GENERAL,
Department of Justice,
Washington, D. C.

Sir: In Re: In the matter of the appeal of Utah-Idaho Sugar Company, District Court, Third Judicial District, Teton County, Wyoming. Dept. of Justice File No. 90-1-2-82 REM-CEF

Referring to your letter of date December 16, 1940, initialed and numbered REM-CEF, 90-1-2-82, in the above matter, there are enclosed herewith two copies of the judgment and decree entered by Judge H. H. Christmas on December 19th, 1940.

Mr. John U. Loomis, attorney for the Utah-Idaho Sugar Company, advises that an appeal will be taken, and that notice of appeal has been served.

A copy of this letter, together with a copy of the above-mentioned decree has this day been forwarded to Hon. Joseph R. Taylor, Regional Attorney, National Park Service, 601 Sheldon Building, San Francisco, California, and to The Director, National Park Service, Department of the Interior, Washington, D. C.

Respectfully,

Carl L. Sackett,
United States Attorney.

BMP

REM-CEV

90-1-2-82

October 28, 1940

Honorable Oscar L. Chapman,
Assistant Secretary,
Department of the Interior,
Washington, D. C.

Dear Mr. Chapman:

There is enclosed herewith for your information a copy of a letter dated October 22, 1940, from the United States Attorney at Cheyenne, Wyoming, with further reference to the case entitled "In the Matter of the Appeal of the Utah-Idaho Sugar Company from the action of the State Engineer in the Endorsements placed upon Applications for Amendment of Permits Nos. 3770 Res. and 3771 Res. and Applications for Secondary Permits from Two Ocean and Emma Matilda Reservoirs" in the District Court of the Third Judicial District, Teton County, Wyoming. There also are enclosed for your information copies of the briefs of appellant Utah-Idaho Sugar Company, protestant Snake River Land Company, and the Attorney General of Wyoming, filed on behalf of the State Board of Control.

You will note that it is the view of the United States Attorney that the briefs submitted by the Snake River Land Company and the Attorney General of Wyoming adequately present the case and that there is no necessity for the United States to take any action at this time. If an appeal is taken to the Supreme Court of Wyoming from the decision of the District Court, it may be desirable to file suggestions amicus curiae on behalf of the United States.

You will be kept advised of further developments.

Respectfully,
For the Attorney General,

NORMAN M. LITTELL,
Assistant Attorney General.

Enc. 111735

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JCP:W

Cheyenne, Wyoming,
October 22, 1940.

THE ATTORNEY GENERAL,
Department of Justice,
Washington, D. C.

Sir:

In Re: Matter of the appeal of Utah-Idaho Sugar Company, District Court, 3rd Judicial District, Teton County, Wyoming.
Dept. of Justice File No. 90-1-2-82.

Enclosed herewith you will find two copies of all briefs which have been filed with the District Court by parties in the above matter. It is believed that these briefs sufficiently cover the points raised at the trial, and that nothing further should be filed by the United States unless an appeal is taken to the Supreme Court of Wyoming after the decision of the District Court.

Respectfully,

Carl L. Sackett,
United States Attorney,

John C. Pickett

John C. Pickett,
Asst. United States Attorney.

2B

09-20-1940: letter to attorney general from assistant u. s. attorney regarding appeal of utah-idaho sugar company

JCP:GD

Cheyenne, Wyoming
September 20, 1940

The Attorney General
Department of Justice
Washington, D. C.

RE: In the matter of the appeal of Utah-Idaho Sugar Company, District Court, Third Judicial District, Teton County, Wyoming.
Dept. of Justice File 90-1-2-82.

Sir:

Receipt is acknowledged of your letter dated September 4, 1940 (REM-CKF) concerning the above mentioned matter.

In reply you are advised that the case was heard in Jackson, Wyoming before the Honorable H. R. Christmas, Judge of the Third Judicial District for Wyoming. It had previously been stipulated between the parties that the case might be tried to the court upon transcript of the evidence previously introduced before the State Engineer of the State of Wyoming. This was satisfactory to the Court and no further testimony was produced.

John U. Loomis argued the case for the appellant and contended as follows:

1. That Chapter 125 Session Laws of Wyoming 1939 was unconstitutional for the reason that the constitution provided that the control of the waters of the state was placed in the State Engineer, and the State Board of Control; and that the Legislature could not remove the control from the Engineer and the Board and place it in the Legislature. The State Engineer, in his ruling against the appellant, set out in detail the reasons for his decision. The State Board, in affirming the decision of the Engineer merely stated that the Chapter above referred to prohibited the Board from taking any action in the matter.

2. That the appellant had purchased the water, but had never perfected the paper rights to the reservoir permit, but had for approximately 20 years continued to use the water without objection. He stated that this was a

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customary procedure in that vicinity due to the abundance of water there.

3. He contended that the Snake River Land Company was the only protestant to the appellant's application, and stated that the granting of the application would not in any way affect the water rights of that company. He also stated that it would not affect the beauty of the lakes if permits were granted. This was one of the grounds in the objection of the Snake River Land Company. He stated that the Alberts report, which is in the testimony, showed that it would enhance the beauty of the lakes.

4. He contended that one of the grounds given by the State Engineer in denying the application was that the Secretary of the Interior would not grant necessary use permits, and contended that the State Engineer and the Board had no right to assume the attitude of the Secretary of the Interior. He stated that extensive repairs were made to the reservoir in 1938; and that a representative of the Interior Department was present and set the stakes for the water level showing the level which would be satisfactory to the Interior Department.

5. He argued that the State Engineer contended in his decision that the application was forfeited by the mailing of a notice of forfeiture as provided in the statutes, this notice being mailed in 1935. He contended that this did not amount to an automatic forfeiture, but constitutes only a basis for cancellation of the permit upon hearing.

Mr. D. Howe Moffat of the firm of Fabian, Clendenin, Moffat and Mabey of Salt Lake City presented the matter for the Snake River Land Company. Mr. Moffat pointed out that the reservoir permit was a conditional permit and became an established right only upon the performance of the conditions, that these conditions were set forth in a contract entered into between the applicant and the State Engineer which provided, among other things, that certain rights of way should be obtained from the Department of the Interior. That upon the denial of these rights of way by the Department of the Interior the permit became void. He also discussed the other conditions in the contract which were not met or performed by the applicant. This contract is part of the evidence. He stated that the conditions of the permits became impossible over 18 years ago, and that the same should have been cancelled.

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Ewing T. Kerr, Attorney General for the State of Wyoming, represented the State Engineer and the State Board of Control. He also discussed the agreement herein referred to and the notice of cancellation sent by State Engineer Emerson to the applicants in 1925 notifying the applicants that the permit would be cancelled on a date mentioned. No resistance was made to this, but no actual cancellation was ever effected. He stated that the evidence and the argument of counsel indicated that the applicant might be claiming a prescriptive right because of user. He referred to recent decisions of the State of Wyoming in which it was held that mere use of water, no matter how long continued, does not give a right by prescription; and that every requirement of the law must be met before a right to water may be secured.

The parties stated to the Court that they desired to file briefs in the matter. The appellant was given 10 days to file its brief, the State 10 days to file its brief, and the appellant 5 days to reply. The parties have all agreed to furnish this office with copies of their briefs. The matter was very fully covered by counsel in their arguments, and it is believed that it will be in the briefs. However, if after considering the same, it is believed that any additional information would be helpful to the Court permission will be asked to furnish the same.

You will be kept advised as to developments.

Respectfully,

CARL L. SACKETT
United States Attorney

John C. Pickett

By JOHN C. PICKETT
Assistant

10E

03-29-1940: letter to assistant secretary for attorney general from assistant attorney general regarding a copy of the letter relative t

Grand Teton

ADDRESS REPLY TO "THE ATTORNEY GENERAL" AND REFER TO INITIALS AND NUMBER

DEPARTMENT OF JUSTICE

WASHINGTON, D. C.

WMK - C.S.T.

90-1-2-82

NATIONAL PARK SERVICE RECEIVED APR 10 1940 MAILS AND FILES

March 29, 1940

OFFICE OF INDIAN AFFAIRS RECEIVED APR - 2 1940

INTER OR DEPT. RECEIVED MAR 30 1940 DEPARTMENT MAIL ROOM TO SOLICITOR

INTERIOR DEPT RECEIVED MAR 30 1940 SOLICITOR

DEPT. OF THE INTERIOR RECEIVED APR - 2 1940 SEC'S OFF. DIV. OF MAIL & FILES TO INDIAN OFFICE

DEPT. OF THE INTERIOR RECEIVED APR 6 1940 SEC'S OFFICE DIV. OF MAIL & RECORDS

DEPT. OF THE INTERIOR RECEIVED APR 10 1940 SEC'S OFFICE DIV. OF MAIL & FILES TO NATIONAL PARKS

Honorable Oscar L. Chapman
Assistant Secretary
Department of the Interior
Washington, D.C.

Dear Mr. Chapman:

There is transmitted herewith a copy of a letter dated March 23, 1940, from the United States Attorney at Cheyenne, Wyoming, relative to the appeal by the Utah-Idaho Sugar Company from the Wyoming State Board of Control to the District Court of the Third Judicial District, Teton County, Wyoming, in the case entitled "In the Matter of the Appeal of the Utah-Idaho Sugar Company from the Action of the State Engineer in the Endorsements Placed upon Applications for Amendment of Permits Nos. 3770 Res. and 3771 Res., and Applications for Secondary Permits from Two Ocean and Emma Matilda Reservoirs." The United States Attorney furnished this Department with only one copy of each of the papers referred to in his letter and he is being requested to forward additional copies which will be transmitted to you when received.

This Department agrees with the view of the United States Attorney that there appears to be no necessity for any action by the Government at this time. When the brief of the Utah-Idaho Sugar Company has been received, further consideration will be given to whether a brief by the United States as amicus curiae would be appropriate.

You will be advised promptly of further developments.

Respectfully,
For the Attorney General,

NORMAN M. LITTELL,
Assistant Attorney General.

Enclosure No. 53687

APR 6 40 90236 15E

CLS:CD

Cheyenne, Wyoming
March 25, 1940

The Attorney General
Department of Justice
Washington, D. C.

IN RE: Your letter of March 16, 1940
Dept. of Justice File 90-02, (WHK)
Docket in the case of:

In the matter of the appeal of the Utah-Idaho Sugar Company from the action of the State Engineer in the Endorsements placed upon applications for amendment of Permits Nos. 3770 Res. and 3771 Res. and applications for secondary permits from Two Ocean and Emma Matilda reservoirs (Application Nos. 13 1-2-3-4/357 and 14 3/138.
In Water Division Number Four. Case No.447.
Dept. of Justice File 90-1-2-82.

Sir:

Receipt is acknowledged of your letter dated March 16, 1940 (WHK) in the above mentioned matter.

In reply you are advised that the issues are now made up in the above entitled proceeding. I enclose duplicate copies of the following:

1. History of permits No. 3487 reservoir (Two Ocean Lake), 3861 Reservoir (Emma Matilda Lake), 16190, 3770, 3771, 4245 Enl.

2. Brief of Utah-Idaho Sugar Company by John U. Loomis et al, filed with State Engineer July 19, 1938.

3. Reply brief of Utah-Idaho Sugar Company, John U. Loomis et al, filed with the State Engineer September 15, 1938.

4. Stipulation, Utah-Idaho Sugar Company and Snake River Land Company, filed with Secretary of State Board of Control, April 20, 1939.

5. Findings and order of the State Board of Con-

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trol, dated April 24, 1939.

6. Appeal of Utah-Idaho Sugar Company filed in the office of the State Board of Control, January 31, 1939.

7. Certificate of Earl Lloyd, Deputy State Engineer dated December 28, 1939, to papers transmitted to the Clerk of the District Court of Teton County, Wyo.

8. Petition of Utah-Idaho Sugar Company in District Court, Teton County, Wyoming, verified July 12, 1939.

9. Demurrer of Snake River Land Company dated January 31, 1940.

10. Answer of Snake River Land Company verified January 31, 1940.

11. Answer of State Board of Control by Ewing T. Kerr, Attorney General, verified March 22, 1940.

I do not have the filing dates of the above papers in the District Court of Teton County.

I have not made copies of the analysis of the report of the Sugar Company and protest against its application made by Snake River Land Company by Fabian and Clendenin served October 6, 1936, or of the protest of the National Park Service mailed April 22, 1938, or of the brief of the Snake River Land Company by Fabian and Clendenin before the State Engineer, because I assume that the Department has copies of these briefs. I have copy of the transcript of testimony of the hearing before the State Engineer of June 1, 1938. The Wyoming Attorney General has the original from the office of the State Engineer. Mr. John U. Loomis was to permit me to use the record when he obtains it from the Clerk of the District Court of Teton County, to prepare his brief. His Secretary advises me that he has never yet received it.

A short time ago I talked with Mr. Loomis, attorney for the sugar company. He advised me that negotiations were still pending with Fabian and Clendenin in an effort to obtain stipulation for the use of the transcript of the testimony taken before the State Engineer as evidence on the hearing in the District Court of Teton County with the right to introduce further and additional evidence by either party. I have no information that any agreement has been reached,

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and the Wyoming Attorney General advises me that he has no information as to that. However, the Attorney General says he has no objection to the making of such a stipulation.

All attorneys here are of the opinion that the case will probably come up at Jackson in latter June or early July, as that will be as early as travel will be safe from snow at Jackson.

The Attorney General is writing to Judge Robert Christmas to have the case set down in early July.

Pleadings in the District Court are almost useless because the matters before the State Engineer and State Board of Control are tried de novo in the District Court on the issues as made before the State Board of Control. I had a conference yesterday with the Attorney General and his assistants, and with the State Engineer, going over all of the matters with reference to the case, and obtained some maps. The Attorney General says that he will be pleased to have the cooperation of the United States, and to have its representative appear as amicus curiae and present briefs.

The Wyoming Attorney General and I are uncertain as to any additional contention that the sugar company may make. We are both of the opinion that the decision of the State Engineer and of the State Board of Control is just, and that no reversal will be obtained by the sugar company on appeal. We are also of the opinion that the briefs filed by both parties before the state officers are comprehensive, and that the brief of Fabian and Clendenin states the position to be taken by the state and the government. Neither of us see any advantage in preparing additional briefs at this time until the issues are made up in the state court, and until we have had the brief of the sugar company. The court will certainly give the State of Wyoming and the Snake River Land Company and the United States ample time to file answer briefs.

I am sending copies of the enclosures to Joseph T. Taylor, Regional Attorney of the National Park Service, 601 Sheldon Building, Sanfrancisco, California; and am sending a copy of this letter to Fabian and Clendenin, attorneys, 803 Continental Bank Building, Salt Lake City, Utah. If any copies of any papers in the office of the State Engineer or the Wyoming Attorney General are desired by Fabian and Clendenin or your office, please make the request and the copies will be made and forwarded.

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No docket of the above case has been made in my office, as it is not pending in any Federal Court.

The Wyoming statutes require the Wyoming Attorney General to appear in all such cases. The Attorney General is regarded as representing the State of Wyoming on the appeal, and he will be sent all papers and notices in the above proceeding on appeal, and will advise me when any new papers are received and when the case is set. I shall either call upon the Attorney General and Secretary of the State Board of Control or phone them with reference to these matters and confer with them from time to time as occasion warrants.

Very truly,

CARL L. SACKETT
United States Attorney

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00-00-0000: letter to attorney general from nps regarding two copies of a notice of appeal by the utah-idaho sugar company from th

RECEIVED AUG 2 - 1939

UNITED STATES
DEPARTMENT OF THE INTERIOR
OFFICE OF THE SECRETARY
WASHINGTON

AUG 2 1939

The Honorable

The Attorney General.

My dear Mr. Attorney General:

There are transmitted herewith two copies of a notice of appeal by the Utah-Idaho Sugar Company from the Wyoming State Board of Control to the District Court of the Third Judicial District, Teton County, Wyoming, in the case entitled as follows: "In the Matter of the Appeal of the Utah-Idaho Sugar Company from the action of the State Engineer in the Endorsements placed upon Applications for Amendment of Permits No.'s 3770 Res. and 3771 Res. and Applications for Secondary Permits from Two Ocean and Emma Matilda Reservoirs (Application No.'s 13 1-2-3-4/337 and 14 3/138.")

There also are enclosed two copies of a letter of July 22 from Mr. John U. Loomis, Lacey & Loomis, Cheyenne, Wyoming, Attorneys for the Utah-Idaho Sugar Company, to the Acting Director of the National Park Service, transmitting a certified copy of the notice of appeal and a request that the Acting Director accept service. The Acting Director has notified Mr. Loomis that he declines to accept service and that the matter has been referred to the Department of Justice.

This Department has no record of the order of the State Board of Control from which the present appeal has been taken, but we are informed that such order was in affirmance of the order of the State Engineer of Wyoming entered December 3, 1938, two copies of which are enclosed, and which contain a complete statement of the case. The order was entered after a hearing held June 1, 1938 before the State Engineer of Wyoming, at which hearing there appeared an attorney of the National Park Service, Mr. Joseph K. Taylor, whose address is 601 Sheldon Building, San Francisco, California. The National Park Service was not recognized as having an interest in the proceedings, as stated in the order of December 3, 1938.

This Department is interested in the matter by reason of the proposed extension of the boundaries of Grand Teton National Park to include Emma Matilda and Two Ocean Lakes, Teton County, Wyoming, which the Utah-Idaho Sugar Company seeks to use as reservoirs for the storage of water for the purpose of irrigating lands in Idaho. The lands which include and surround the two lakes are part of the Teton National Forest, but

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have been withdrawn from entry by Executive Order No. 2905, July 2, 1918, in aid of pending legislation. A second withdrawal embracing the same lands was made by Executive Order No. 3394, January 28, 1921, for the purpose of classifying the lands and pending enactment of appropriate legislation for their disposal. Bills were introduced in the 73rd and 74th Congresses for the purpose of adding those lands to Grand Teton National Park. The proposal for such disposition is still under consideration, and this Department is interested in protecting the two lakes against any use which would be inconsistent with their preservation in their natural state. This Department has a further interest in the matter by reason of the fact that certain water rights in the two lakes are claimed by the Snake River Land Company, which owns approximately 33,000 acres of land in the vicinity, and which holds all its lands for the purpose of donating them to the United States for national park purposes. If and when there is authority to accept those lands by donation, it will be desirable to secure such water rights as may then be appurtenant to, or usable in connection with, the lands so donated.

The matter is referred to your Department for such action on behalf of the United States as you may consider appropriate. The Office of the Chief Counsel of the National Park Service is entirely familiar with the details of the case, and that Office will willingly render any assistance which may be desired by your Department. The attorneys for the Snake River Land Company, Fabian and Clendenin, Continental Bank Building, Salt Lake City, Utah, have taken a leading part in the case and have consulted with the National Park Service regarding it.

Sincerely yours,

Assistant Secretary.

Enclosure 1775827.

9 cc
cc: Regional Director, Region II (with copy of enclosure) (by NPS)
Supt., Grand Teton National Park (by NPS)
Regional Attorney Taylor (with copy of enclosure) (by NPS) ✓
Mr. Fabian (by NPS)

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07-22-1939: letter to nps from lacey & loomis regarding certified copy of clerk's notice of appeal

Gr. Teton 660057

JOHN W. LACEY
1868-1936
JOHN U. LOOMIS
BRADFORD ROSS

LACEY & LOOMIS
CHEYENNE, WYOMING

NATIONAL PARK SERVICE
RECEIVED
JUL 24 1939
ASSOCIATE DIRECTOR

July 22, 1939.

Mr. A. E. Demaray,
Acting Director, National Park Service,
Interior Department Building,
Washington, D. C.

Dear Sir:

I enclose herewith certified copy of Clerk's Notice of Appeal in the matter of the appeal of Utah-Idaho Sugar Company, etc., together with Acknowledgment of Service thereof.

I will appreciate it if you will kindly acknowledge this service, returning the acknowledgment to me, thus saving some expense of publication. I enclose copy of the Acknowledgment of Service for your files.

Very truly yours,

John U. Loomis

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12-19-1938: letter to nps from state engineer's office regarding photostatic copy of the 'opinion and order' by the state engineer of

NATIONAL PARK SERVICE
RECEIVED
DEC 21 1938
DIRECTOR

State of Wyoming

STATE ENGINEER'S OFFICE
Cheyenne

Mr Demaray
Mr White
Mr Mosby
Baltimore

December 19, 1938

Honorable Arno B. Cammerer,
Director National Park Service
Department of the Interior
Washington, D. C.

Dear Mr. Cammerer:

For your information we are enclosing herewith, by registered mail, a photostatic copy of the "Opinion and Order" of John D. Quinn, State Engineer of Wyoming, in the case of the Snake River Land Company, Protestant, vs. Utah-Idaho Sugar Company, Applicant, in regard to the application of the Utah-Idaho Sugar Company for amendment of Permits Nos. 3770 Res., 3771 Res. and for the cancellation of Permits Nos. 16190 and 4232 Enl.

This "Opinion and Order" was rendered under date of December 3, 1938, and the enclosed copy will advise you as to the points covered in the decision. Since a protest in this matter was filed by the National Park Service, a copy of the decision is being furnished to you.

Yours very truly,
JOHN D. QUINN,
State Engineer.

Earl Lloyd
by EARL LLOYD,
Deputy State Engineer.

EL:RT
Enc.

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NATIONAL PARK SERVICE RECEIVED OCT 7 - 1938 MAILS AND FILES ADDRESS ONLY THE DIRECTOR, NATIONAL PARK SERVICE

UNITED STATES
DEPARTMENT OF THE INTERIOR
NATIONAL PARK SERVICE
WASHINGTON

Mr. Demaray
Mr. Tolson
Mr. Bryan
Mr. Drake

October 6, 1938.

HT
660-05.7

Memorandum for the Director:

As instructed by Mr. Demaray I visited Mr. N. C. Grover who is the United States representative on the Interstate Compact Commission for the diversion of the waters of the Snake River. I told Mr. Grover all that I know of the background, personalities and methods used by the irrigationists and power people in the West. I pointed out to him that although the act authorizing the Commission specifically excludes the Grand Tetons and Yellowstone areas he should watch for any proposed storage agreements below the Grand Tetons which might contemplate a capacity in excess of what can reasonably be expected from the Snake River alone. Such additional storage could be only in the hope of eventual diversion of additional water from Yellowstone.

The provision in the authorizing act excluding Grand Tetons is particularly badly drawn. The act states that no waters within the boundaries of the Grand Tetons, including extensions are to be considered. This is so indefinite that the provision might be extended to apply to an indefinite limit. The act does not state what the extension area is limited to and while it is assumed that it means that land now under consideration, it is not necessarily limited to this. Moreover, within this extension is situated Jackson Lake which is now a Reclamation project, at least partially paid for if not entirely so by Idaho people. Under the provisions of the authorizing act consideration of Jackson Lake is excluded because it is within the boundaries of the proposed extension. Consideration of Jackson Lake can not be excluded, certainly not until some date in the future when it might be released by the Idaho people. Therefore, it becomes necessary to start to violate the provisions of the act and once violated, I can see no reason why they can't go further.

Mr. Grover's position is very uncertain and difficult because of the failure to define the limits of the extension and also provide special consideration for Jackson Lake. The Commission from Wyoming is composed of the following:

John C. Simpson	of	Jackson
James G. Imeson	of	Jackson
E. M. Barrus	of	Afton

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The Idaho Committee is composed of Judge Davis from Rexbury as Chairman and probably the following:

E. H. Neal of Aberdeen
O. O. Knight of Driggs.

I have discussed Mr. Simpson of Wyoming Commission with Ben Thompson and have passed on to Mr. Grover the fact that Mr. Simpson is one of the active opposition to the extension. I have also told him of Mr. Winger at Jackson and suggested that he will probably be able to give him the most complete and less biased picture of the situation in Wyoming. Mr. Grover is leaving tonight to go to Reno, Nevada. Most of the State Commissioners will attend a Bureau of Reclamation meeting at Reno and the meeting of the Snake River Commission will be held at that time merely for convenience. Mr. Grover does not plan on going to the Snake River Basin on this trip and he doubts that he will see Mr. Winger, but he will get in touch with him at the first opportunity.

Edd. F. Preece.

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05-21-1938: letter to attorney, utah-idaho sugar company from nps regarding applications of the utah-idaho sugar company for stor

UNITED STATES
DEPARTMENT OF THE INTERIOR
NATIONAL PARK SERVICE
WASHINGTON

ADDRESS ONLY
THE DIRECTOR, NATIONAL PARK SERVICE

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May 21, 1938.

Ashby D. Boyle, Esq.,
Attorney, Utah-Idaho Sugar Company,
Beneficial Life Building,
Salt Lake City, Utah.

My dear Mr. Boyle:

Reference is made to your letter of May 11, relating to the proceedings now pending before the State Engineer of Wyoming, in the matter of the applications of the Utah-Idaho Sugar Company for storage rights in Emma Matilda and Two Ocean Lakes, Teton County, Wyoming.

The present attitude of the Utah-Idaho Sugar Company, as restated and clarified in your letter and in the conference in the office of Fabian and Clendenin on May 2, undoubtedly removes some of the bases of conflict as they appeared in the record which came to our attention. However, the State of Wyoming, represented by the State Engineer, is not merely an arbiter between conflicting interests, but has an independent interest in the subject matter. In view of that fact, we do not feel that it is within our province to settle the matter by way of compromise. A compromise would not be binding upon the State Engineer, in any event.

Although it appears to be within the discretion of the State Engineer to hold hearings on such matters, he is not required by law to do so, and he is not required to give any weight to statements or protests filed by interested parties. The equities of the Utah-Idaho Sugar Company will undoubtedly be given proper consideration by the State Engineer, and his decision will not be influenced by the extent to which our protest may be irrelevant to the issues presented for his consideration at the hearing. Therefore, it seems unnecessary and inadvisable to withdraw our protest prior to the hearing. We think the matter should be left to the State Engineer, who, presumably, will give the proper weight to all material factors in the case.

Sincerely yours,

cc: Mr. Webb
Mr. Fabian
Mr. Jos. E. Taylor (S.F.)
Mr. Jos. E. Taylor (Field)
Regional Dir. Reg. II
(all with copy of incoming letter)

Acting Director.

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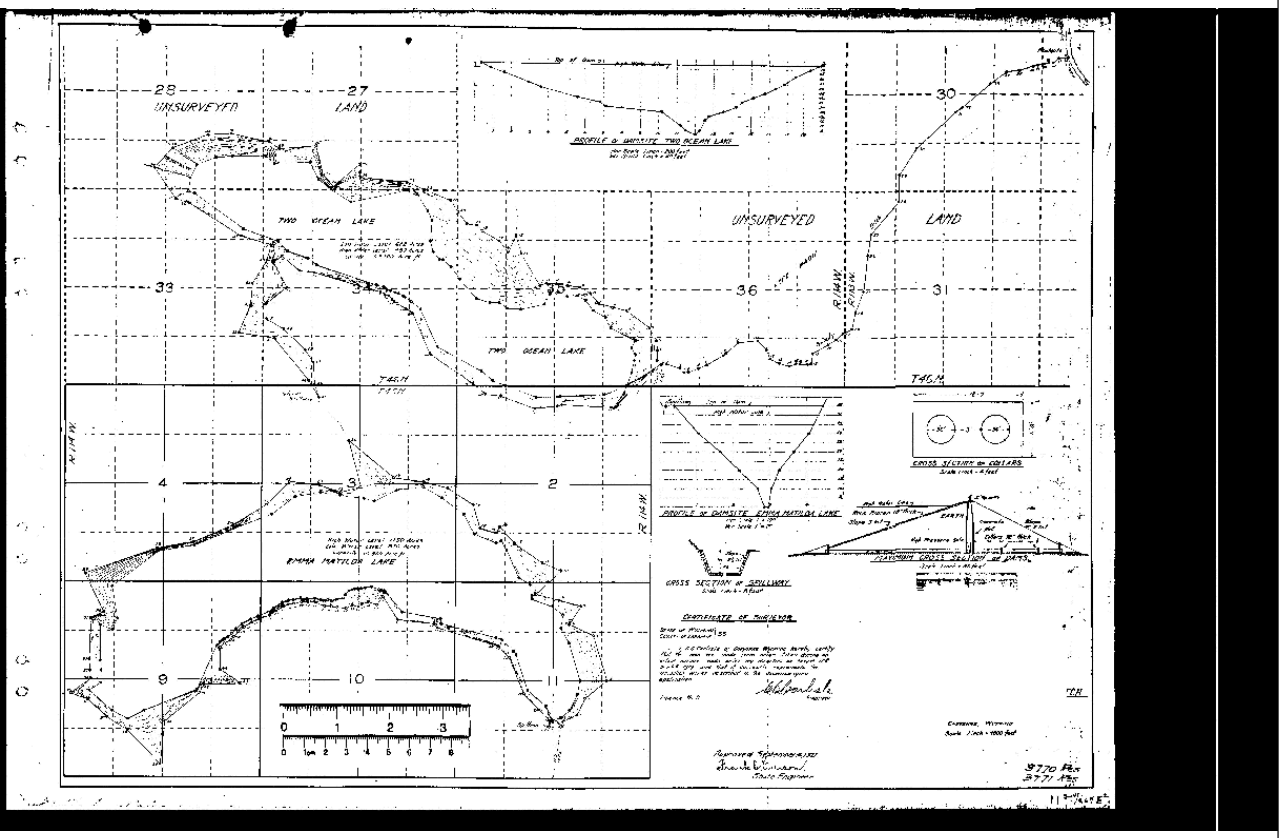
History of Permit No. 3770.

Oct. 6, 1919, C. C. Carlisle filed for storate of 63,605 acre-feet in Two Ocean Lake.

Sept. 14, 1923, permit issued, conditioned on agreement of May 2, 1921, - Carlisle assigned to Osgood Land and Livestock Company.

gc

09-14-1921: map to accompany application for the enlargement of twin lakes reservoir and supply ditch



Docket Information

Number of Documents in Docket 320

Documents Dated from 9/14/1921 to 7/3/2012

Docket Compiled: 7/3/2012