EXHIBIT 11

November 24, 1939 letter to the Attorney General from Roy W. Stoddard, Special Assistant, to the Attorney General

WRPT007793

DEPARTMENT OF JUSTICE

TRIAL SECTION
Lands Division
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Action due: 7-14

P.O. Box 2229,
Reno, Nevada.
November 24, 1939.

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The Attorney General,
Washington, D. C.

Re: United States v. Walker River Irrigation District et al - U. S. District Court - Nevada.

DEC 4 1939

Sir:

Please refer to your letter of the 4th instant with attached copy of letter from Mr. Chapman, Assistant Secretary of the Interior, dated the 1st instant and "Memorandum for Irrigation" dated October 29, 1939 signed "Flickinger, Assistant Chief Counsel", all relating to the above matter.

Mr. Kearney and myself conferred for several hours yesterday afternoon with relation to stipulation for entry of amended decree to conform to the Writ of Mandate, and did not get along too well as to the form of decree.

Referring first to the request of the Department of the Interior that the amended decree should specifically recite "that the priority of the United States on behalf of the Indians of the Walker River Indian Reservation is a first priority to the use of water as of November 29, 1859". Mr. Kearney objected to any such insertion, and of course pointed out the decree speaks for itself and that the earliest priority awarded therein is the right of the United States for 26.25 c.f.s. with a priority of November 29, 1859. He is, of course, correct in this contention as all other priorities awarded in the decree commence with the year 1860 and continue through each of the years up to 1921.

Mr. Kearney's particular objection, which seems to be well founded, is that while the United States has the first priority on the stream, it does not necessarily have the first right to the use of water as a practical matter because there is generally sufficient water to satisfy the United States diversion rights downstream because of return flow which permits diversion of junior rights upstream without infringing upon the Government's diversion. Then, too, storage water released from defendants' reservoirs is released and diverted by defendants only and is, of course, not available for the United States.

EXHIBIT 11

Inasmuch as the decree very plainly discloses upon its face that the United States has the earliest priority upon the stream, and for the reason that I do not believe that the Court would adopt the suggestion of the Department of the Interior in this respect, I do not believe that we should insist upon this suggested change.

I believe that Mr. Kearney, and from other conferences I have had with Mr. Lunsford, I believe that he too will agree to the following change on page 10 of the proposed amended decree attached to our motion dated October 24, 1939:

Insert after the word "reservation" line 32, page 10, the following:

> ", provided however, that any change in point or points of diversion sought to be made by the United States of America to a point or points above the present boundaries of the Walker River Indian Reservation, shall not be made, except upon petition to this Court and its approval obtained after hearing upon such notice as the court may order."

It will be observed that if this proposed clause is inserted in the proposed amended decree, the United States may, at its option, change its point or points of diversion with the present boundaries of the Reservation to any extent that it desires, but that neither the Government nor the Indians can change the point of diversion upstream above the present boundaries of the Reservation without first applying to the Court for an order authorizing such change, in the same manner that defendants are required to do as set forth in Paragraph XIV of the proposed Amended Decree (pp.72-73).

The quite strenuous objection of not only Mr. Kearney, but also of Mr. Lunsford, to authority of the United States to change its point of diversion upstream at will could very readily substantially damage and prejudice a junior right. It has been pointed out to me that construction of the east side drain has been completed and that it affords a substantial accretion to the stream just above the Parker Ranch--which is the ranch that adjoins the Reservation upstream. It was also pointed out that construction of the west side drain is nearly complete and it is believed that when completed this drain will also furnish substantial accretions to the stream above the Parker Ranch.

It is the belief of defendants that these accretions together with other return flow will usually satisfy the decreed right of the Government of 25.25 C.F.S. without any additional burden upon the stream that would result in the shutting down of junior priorities to any greater extent than would otherwise be necessary. On the

other hand, if the Government did move its point of diversion, and particularly above the confluence of these two drains, it could take out its 26.25 c.f.s. at its upstream point of diversion and receive in addition the benefit of these accretions and return flow, which would in effect substantially increase the amount of water available to the Government over that which is now available.

It seems to me that the Government would be in the same position as an individual appropriator and subject to the rule--that an appropriator may not change his point of diversion or place of use to the prejudice of a junior appropriator.

As above stated, it is my understanding that attorneys for defendants will stipulate for the inclusion of the above insert if it is approved by the Department and the Secretary of the Interior.

In this connection defendants' attorneys suggest the insertion of the words "of point of diversion or" after the words "a change" on line 3, page 73, Par. XIV of the proposed amended decree, in order that defendants may not change a point of diversion without application first being made to the Court. I see no objection to this suggested change.

Referring to the third paragraph of the letter of Mr. Chapman, Assistant Secretary of the Interior, addressed to the Department under date of the 1st instant and the attached Memo of Mr. Flickinger and the Department's letter to me dated the 4th instant, wherein it is suggested that the proposed amended decree either specifically set forth the storage priority of the Indians' Weber Reservoir, construction of which was commenced in July 1933, or insert language so that Par. XII would include the statement "also excepting the undetermined storage rights of plaintiff."

Defendants' attorneys, particularly Mr. Kearney, were very much exercised over this suggestion and expressed the fear that the Government may hereafter claim a storage right as of November 29, 1859 for the Weber Reservoir. It is my belief that he particularly fears that the United States may in the future contend for a priority for the Weber Reservoir that will ante-date the contemplated, but never constructed, reservoirs included in the applications of the Walker River Irrigation District as set out on pages 64 and 65 of the Decree, and which are referred to in Par. XII, page 72, lines 4-6 of the Decree as follows: "except the undetermined rights of the Walker River Irrigation District under its applications to the State Water Commission of the State of California.

Mr. Kearney further objected to this proposal on the ground that there is nothing in the record before the trial court that discloses commencement or completion of the construction of

Weber Reservoir, or that there is anything in the record before the trial court which indicates any present intention of the Government to construct such reservoir.

This is a fact as I understand the record, and it is my further understanding that any reference to this reservoir was particularly avoided by the Government attorneys trying the case.

During the course of our discussion, it was pointed out that as a matter of law the wording of Par. XII does not preclude the plaintiff or any of the defendants from initiating new and additional rights after the entry of the decree and with priorities subsequent to the date of its entry. You will recall that the decree is dated April 14, 1936 and was entered on April 15,1936. Mr. Kearney argued that whether the priority was 1933, 1936 or 1939 would be immaterial if there were no intervening priorities.

The thing that bothers Mr. Kearney is, of course, the probability that there will be a very long delay in the future before the Walker River Irrigation District constructs (if at all) the reservoirs mentioned in its applications for permit with the California Water Commission as described on pages 64 and 65 of the decree, and which are referred to in Par. XII on page 72 thereof. Hence, a long delay will not permit the District to relate back to 1926, the date of the filing of its application, as against the Government's priority for Weber Reservoir storage.

It is my understanding that neither you nor the Department of the Interior contend for a priority for Weber Reservoir at least earlier than the commencement of construction. In view of the fact that the Government did not offer any proof of the commencement of such construction or its completion prior to the entry of the decree, although construction had in fact been commenced, would, I think, preclude us from attempting to have the trial court include the date of priority of Weber Reservoir, which would necessarily have to be first determined from some evidence presented to it in the absence of a stipulation by opposing counsel.

The motion now pending before the Court is purely one for entry of an amended decree pursuant to the Writ of Mandate. Necessarily, it seems to me that if we desire determination by the trial court of the right of a storage priority for Weber Reservoir, we must either proceed by motion to open up the decree and permit the taking of further testimony or bring new suit as against the Walker River Irrigation District and any other storage rights to determine the storage right of this Indian reservoir.

I have informed Mr. Kearney that if his statement that there are no intervening priorities between 1933 and 1936 is correct, then there can be no valid objection by defendants to inserting

the following: "as of the 14th day of April 1936" after the word "tributaries" being the last word on line 3, page 72, and that the date on the last page immediately preceding the signature of the Judge be changed so as to read as follows:

> "DONE IN OPEN COURT this 14th day of April, 1936, and as modified by the decision of the Circuit Court of Appeals on June 5, 1939.
>
> Dated December _____ 1939.
>
> _____
> United States District Judge."

If there are no intervening priorities between July 1933 and April 1936, I believe the suggested changes would meet the situation in that the Government would not be barred from claiming a priority for Weber Reservoir as of April 15, 1936 at any time that it may seek to assert such a right in the future, and I also believe that the suggested changes, while not directly mentioned in the Writ of Mandate, would clarify Par. XII of the proposed amended decree.

Mr. Kearney stated that before replying to my suggestions, he desired to confer with other counsel and with the Walker River Irrigation District, and that he would let me know some time in the future whether or not they would agree to such a change. I think they will agree.

It is my belief that defendants will stipulate for entry of a proposed amended decree after the inserts above mentioned on page 10 commencing after the word "reservation" line 32; the insert "as of the 14th day of April 1936" following the word "tributaries" line 3, page 72, and the insert "of point of diversion or" after the word "change" line 3, page 73, and the change in the dates immediately preceding the signature of the trial judge are included.

It is also my belief that with these inserts as suggested, the rights of the Government are protected, and I very much doubt whether we could secure the other changes mentioned in your letter of the 4th instant.

Enclosed herewith for the Department's information and files are copies of Mr. Kearney's letter to Judge St. Sure dated the 21st instant and copies of Judge St. Sure's reply thereto dated the 22nd instant and copies of my letter to Judge St. Sure dated today.

WRPT007798

Also enclosed herewith for the Department's files is another copy of the proposed amended decree as attached to our motion for order for entry of same.

Please advise me as promptly as possible if the above suggested inserts meet the approval of the Department, and I would also appreciate any comments the Department may have to offer.

Respectfully,

Roy W. Stoddard

Roy W. Stoddard,
Special Assistant to the
Attorney General.

RWS:JP
Enc.

P.S. If the Department approves a stipulation along the lines above indicated, I think it important first to ascertain whether there are any intervening storage priorities between July 1, 1933 and April 14, 1936 by applications for permit to store water. Perhaps the local Indian superintendent could arrange for such a check-up or the services of Mr. Kronquist could be secured for that purpose.

R.W.S.

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