[Title of District Court and Cause.]

EXCEPTIONS TO SUPPLEMENTAL REPORT OF SPECIAL MASTER AND RECOMMENDED CHANGES IN PROPOSED DECREE

Come now Walker River Irrigation District and other defendants represented by the undersigned counsel and except and object to the Master's supplemental report and recommended changes in the proposed decree and findings filed August 23, 1933, and respectfully set forth the following exceptions thereto:

First Exception: The above designated defendants except to the recommendation and findings of the Master wherein the Master recommends that the claim of the Antelope Valley Mutual Water Company under its second exception to the Master's original proposed decree be allowed and that the proposed decree be amended on page 18, line 23, by substituting the matter contained in lines 23 to 32 inclusive, page 14, and line 1, page 15, of the supplemental report of the Master.

In support of the above exception, the exceptors state and submit: That the said change is not warranted by the plead- [373] ings or the evidence thereunder; that there is no pleading to support the change; that the said proposed change is in effect a new appropriation of water and a re-establishment of a use of water long abandoned by non-use; that the said proposed change, if ordered and allowed, permits a greater quantity of water per acre

to be used upon lands of Antelope Valley Mutual Water Company than awarded by Decree 731 and authorizes the use of water upon new lands not heretofore irrigated or authorized to be irrigated by virtue of Decree 731 and is tantamount to a new appropriation of water with a priority dating back to 1864; that it is in direct conflict with the terms of Decree 731 and the stipulation in the instant case; that it amounts to a determination of issues not presented by the pleadings nor anticipated thereby so as to properly or at all raise the question of abandonment and non-use of water for a period sufficient to constitute an abandonment; that it re-adjudicates matters previously adjudicated in Decree 731, which decree is res adjudicata as to all matters therein decided between and among all parties to it.

Wherefore, these defendants pray that the said Master's supplemental report and recommended change in the proposed decree as hereinabove set forth be disallowed and that the original recommendation of the Master with respect thereto be adopted.

Second Exception: Defendant, Walker River Irrigation District, excepts to the supplemental report of the Special Master in this: That it omits therefrom entirely certain matters covered by the stipulation of the defendants herein, particularly the rights of the Walker River Irrigation District, for the storage of water in Topaz Lake acquired from T. B. Rickey under a filing of the year 1902.

The actual testimony in the record supports this claim without contradiction, aside from the fact that it is embodied [374] in the stipulation.

Wherefore, said defendant prays that the said Master's supplemental report be modified and corrected in accordance with the foregoing exceptions.

Dated: September 9, 1933.

W. M. KEARNEY
Attorney for Defendant, Walker River Irrigation District, and certain other defendants.

Service of the within, Exceptions to Supplemental Report of Special Master and Recommended Changes in Proposed Decree, by copy, is hereby admitted this 11th day of September, 1933.

ROBERT M. PRICE
Special Master. By C. M. M.

THATCHER & WOODBURN
Attorneys for Sierra Pacific Power Company, a corporation.

GREEN & LUNSFORD
Attorneys for certain defendants.

[Endorsed]: Filed September 12, 1933. [375]

[Title of District Court and Cause.]

Plaintiff was represented by H. H. Atkinson, United States Attorney, as successor to George Springmeyer, former United States Attorney, and

by Ethelbert Ward and Cole L. Harwood, special assistants to the Attorney General.

William M. Kearney represented a large number of the defendants, including Walker River Irrigation District.

George L. Sanford represented a number of the defendants originally represented by Platt and Sanford.

Green and Lunsford represented a number of the defendants including Antelope Valley Mutual Water Company, the successor to Antelope Valley Land and Cattle Company, originally represented by Thatcher and Woodburn, and Minnie M. Powell, originally represented by Thomas F. Moran and Sardis Summerfield. [376]

Thatcher and Woodburn, with William Forman as counsel, represented Sierra Pacific Power Company and Bank of Nevada Savings and Trust Company, the latter being the successor of Joseph P. Perazzo and Perazzo Brothers, originally represented by Arthur Lasher.

W. H. Metson, with E. B. Mering as counsel, attorneys for certain defendants, were represented at the taking of the testimony and arguments before the Special Master by Green and Lunsford.

W. W. Watson, attorney for Bertrand Salles, was represented at the taking of the testimony and argument before the Special Master by George L. Sanford.

OPINION

St. Sure, District Judge.

This is a suit in equity brought by the United States as plaintiff, hereinafter referred to as the government, against 253 defendants, all appropriators and users of the waters of Walker River, East Walker River, West Walker River and the tributaries thereof, in the irrigation of lands in the Walker River Basin owned or possessed by defendants. The suit is brought on behalf of the government by direction and authority of the Attorney General, by request of the Secretary of the Interior, under the provisions of Chap. 345, 42 U. S. Stat. 849. The government, in its "sovereign and proprietary" capacity, claiming to be "the owner of," "approriator of and entitled to the use and benefit of a vested water right" in and to 150 cubic [377] feet per second of time of the waters of said rivers and their tributaries, seeks to quiet title thereto, and asks that defendants be restrained from in any manner interfering with the natural flow of said quantity of water to and upon the Walker Indian Reservation in the State of Nevada.

The Complaint was filed on July 3, 1924, and an amended bill was filed on March 19, 1926. The amended complaint alleges that the United States on November 29, 1859, being the owner of the lands now constituting Walker River Indian Reservation, reserved and set aside said lands for the use of the Pahute and other Indians for the purpose of affording them the opportunity to acquire the arts

of husbandry and civilization; that said lands are arid and incapable of producing crops without artificial irrigation; that approximately eleven thousand acres of said lands are susceptible to irrigation from Walker River and have no other source of water supply; that the government began the irrigation of said lands in the year 1859 and gradually increased the irrigated area thereof until approximately two thousand acres are now being irrigated and producing crops of hay, grain and vegetables; that about five hundred twenty Indians live upon said lands; that the President of the United States by order on March 23, 1874, withdrew from sale the lands of said reservation; that the government has expended in constructing canals, ditches and improvements and in reclaiming said lands $175,000.00 and is maintaining upon said reservation an extensive Indian agency and school for said Indians; that one hundred fifty cubic feet of water per second of time from said river are necessary for the irrigation of the irrigable lands of said reservation and without said water said lands will become of [378] little or no value; that the government by the reservation of said lands reserved one hundred fifty cubic feet of water per second for the irrigation thereof; that the defendants are using the waters of said river and its tributaries and preventing them from flowing down to said reservation and threaten to use all of said waters upon their lands and threaten to prevent the government and said Indians from using any of the water upon said reservation, and,

unless enjoined, will cause the government irreparable loss and damage; that the government recognizes as binding the water rights on said river and its tributaries in Nevada and California which were adjudicated in that suit in said court entitled Pacific Livestock Company, a corporation, against T. B. Rickey, et al., in equity, No. 731, hereinafter referred to as Decree No. 731, but only to the extent that in asserting its own claim, it will not disturb the relative rights, as among themselves, of the parties to that decree who are parties to this suit. The prayer is for injunctive relief and that the court adjudge the government to have a prior right to one hundred fifty cubic feet of water per second; that its right thereto be quieted and that the relative rights of the parties to this suit to the waters of Walker River be adjudicated; that a Water Master be appointed for the carrying out of the decree.

The defendants filed their several answers and counterclaims to said amended complaint denying the rights of the government to said water, admitting the order of the President withdrawing said lands from sale, admitting that the lands are arid, denying that they are wrongfully diverting said water, but admitting that they are diverting and using said water under said Decree No. 731, and setting up [379] their respective lands, claiming the water of Walker River for the irrigation thereof with dates of priority and use. The defendants further allege that their lands were acquired from the United States under the homestead and desert land

laws; that the water claimed by the defendants is necessary for the irrigation of their lands; that they and their predecessors in interest have been using the water of said river for more than fifty years; that the government permitted them, without objection, to expend millions of dollars in the construction of irrigation works for the irrigation of their lands, in reclaiming their lands and in constructing houses and other improvements, all with the knowledge, assistance and acquiescence of the government and they pray that the government take nothing by its said suit against the defendants and that their claimed rights be decreed to them. The defendants admit the use by the government of water from the Walker River stream system upon some of the lands within the reservation, based upon use as shown in Decree 731, as follows:

Priority	Cubic Feet Per Second	Acres
1868	4.70	385.95
1872	3.55	295.80
1875	6.15	512.80
1883	7.50	625.20
1886	1.03	85.80

The defendant, Sierra Pacific Power Company, claims for its lands situated in the State of California, riparian rights, alleging that its rights were not determined by decree No. 731.

Walker River is a non-navigable, interstate stream. It consists of two main branches, East and West Walker, which are fed by many small streams rising high on the [380] eastern slopes of the Sierra Nevada Mountains in Mono and Alpine counties,

California. The West Walker in the course of its descent flows through Leavitt and Pickle Meadows, two high mountain valleys, thence through a canyon with practically no cultivated area, thence northerly and northeasterly through Antelope Valley into the State of Nevada, thence through Smith Valley to the head of Mason Valley where it joins the East Walker River. The principal streams forming the East Walker River combine in Bridgeport Meadows, which is a large area devoted to the raising of wild grasses and pasturage at an elevation of seven thousand feet above sea level. The East Walker River flows thence northerly and northeasterly through canyons and sparsely populated valleys to Mason Valley where it unites with the West Walker River and forms the main Walker River. This river flows northerly and northeasterly, descends through the latter valley to near the town of Wabuska where it turns abruptly to the southeast and flows through the Walker River Indian Reservation and thence into Walker Lake. The mountains at the source of these streams are sparsely forested and afford little protection for the snows, resulting in a rapid runoff of the water upon the advent of warm spring days. The distance from the source of the two main branches of Walker River to the reservation are great, resulting in large losses of the water through evaporation and seepage. From the source of the East Walker to its junction with the West Walker, the distance is approximately seventy miles. From the source of the West Walker to the junction is

approximately sixty-seven miles and from the junction through Mason Valley and to the point of diversion on the reservation the distance is approximately thirty-five miles, and from the latter point [381] to Walker Lake approximately twelve miles. The peak of the flow usually occurs in May or June and thereafter the water subsides rapidly so that in most recent years the flow by the middle of July is insufficient, without storage facilities, to meet the requirements of the lands along the river which have been brought under cultivation. Even under natural conditions, that is, in the absence of upstream diversions, the water would not in some years reach the lands of the Walker River Indian Reservation by the end of July by reason of seepage and high evaporation loss occurring with the streams in a depleted condition at their source. Estimates show that the loss in transit between the lower end of Mason Valley to the diversion point in the reservation, when the flow had diminished to ten or twelve second feet, would be 100%, that is, that the entire flow when reduced to that volume would be lost by evaporation and seepage before reaching the diversion point on the reservation. There is a considerable return flow into the river from the water diverted for the irrigation of Bridgeport, Antelope, Smith and Mason valleys, which in a measure augments the flow to the Indian reservation.

Bridgeport, the county seat of Mono county, California, is situated on the East Walker in Bridge-

port Meadows. It has a population of about six hundred. The principal town in the water shed of the main Walker River is Yerington, the county seat of Lyon county, Nevada, having a population of approximately eight hundred. On the tributaries and on the main river the aggregate population of the district which embraces the lands claiming rights to the use of the waters of Walker River, exclusive of Indians, is approximately three thousand. The region of the Walker River and its tributaries is arid and incapable of producing crops without [382] artificial irrigation and that river and its tributaries are the only source of water supply for the irrigation of the lands of the parties to this suit. By reason of the low precipitation, averaging annually less than ten inches of water, the lands would be dry and arid and of little value without irrigation. The estimated annual value of the crops of hay, grain and vegetables produced upon the lands of the defendants in this suit, together with the value of the stock and fowl raised thereon amounts to approximately $1,750,000.00 and the assessed valuation of the lands in the district, exclusive of the lands of the government, is approximately $4,000,000.00.

The irrigated areas, exclusive of the reservation lands, are approximately as follows: Bridgeport Meadows, 20,000 acres; Narrow Valleys on East Walker, 16,000 acres; Antelope Valley, 12,000 acres; Smith Valley, 15,000 acres; Mason Valley, 48,000 acres.

There are two reservoirs constructed by the defendant Walker River Irrigation District, for the purpose of conserving the surplus water of Walker River, namely, the Bridgeport Reservoir situated on the East Walker River just below the Town of Bridgeport, having a present capacity of forty-two thousand acre feet, and Topaz Reservoir situated near the West Walker River just below Antelope Valley, having a present capacity of fifty thousand acre feet. There are also some small reservoirs situated on the East and West forks of said river. Most of the defendants in this action have certain rights in one or both of said reservoirs.

On November 29, 1859, the Commissioner of Indian Affairs wrote to the Commissioner of the General Land Office, requesting him to direct the Surveyor General of [383] Utah Territory, which then embraced the present State of Nevada, to respect the reservation of a tract of land in the northwestern portion of the valley of the Truckee River including Pyramid Lake and a tract in the northeastern portion of the valley of the Walker River including Walker Lake as indicated by the red coloring upon the map accompanying the letter, when the public surveys should be extended over that portion of the territory; and requested that in the meantime the proper local land offices be instructed to respect these reservations upon the books of their offices when such offices shall have been established. The Commissioner of the General Land Office, under date of December 9, 1859, in-

structed the Surveyor General at Salt Lake City to reserve for Indian purposes the territory embraced within the reservations delineated upon the map referred to in the said letter of the Commissioner of Indian Affairs to the Commissioner of the General Land Office. The correspondence shows that it was the intention to provide homes on the Walker River Indian Reservation for the Pahute tribe of Indians in order that they might be protected and enabled to support themselves. The United States in 1859 took steps to prevent trespassing upon said reservation. Subsequently a survey of said reservation was made and on March 23, 1874, the President issued the following executive order:

"The President.

"Executive Mansion, March 23, 1874.

"It is hereby ordered that the tract of country known and occupied as the Walker Lake Indian Reservation in Nevada, as surveyed by Eugene Monroe, in January, 1865, and indicated by red lines, according to the courses and distances given in tabular form on accompanying diagrams, be withdrawn from sale or other disposition, and set apart for the Pah-Ute and other Indians residing thereon.

"U. S. GRANT."

[384]

The executive order of the President became effective as of the date the lands were withdrawn by the Commissioner of Indian Affairs in his letter to

the Commissioner of the General Land Office, November 29, 1859.

The issues raised by the pleadings were referred to a Special Master in Chancery "to take evidence and testimony herein and to report the same to the court with his recommendations for the advice of the court as to conclusions of fact and of law and as to the form and substance of the decree to be entered." Hearings were had and testimony taken, commencing on March 22, 1928, and continuing thereafter from time to time until December 30, 1932. During the hearing the government, in order to shorten the time of the trial of this suit, conceded to the defendants, and the government and the defendants, except the defendant Sierra Pacific Power Company stipulated, through their respective attorneys, that all defendants' rights should be measured and determined under the doctrine of appropriation and beneficial use and that the rights of all defendants who were parties to Decree 731 should stand as fixed by said decree. The Master rendered his report with proposed findings of fact and decree. Arguments of respective counsel on exceptions to the report and findings were heard by this Court commencing May 22, 1933, and continuing five days. Certain matters were re-referred to the Master for further hearing and report and he has since filed herein a supplemental report. At the close of the argument the Court, accompanied by counsel in the case, made a tour of the Walker River Basin viewing the valleys, meadows, the Walker River Indian

Reservation, the storage reservoirs, a site [385] of a proposed reservoir, and points of diversion of waters for irrigation. The transcript of the argument and final hearing was received by this Court on November 21, 1934.

The Master found that there was no necessity for the cultivation of a larger area of land than two thousand one hundred acres on the reservation, and that a "flow of water from said river of 26.25 second feet at the point or points of diversion during the irrigating season of one hundred eighty days is necessary for the proper irrigation of said two thousand one hundred acres."

As a conclusion of law the Master recommended the following:

> "The plaintiff, United States of America, is entitled to the continuous flow of 26.25 cubic feet of water per second to be diverted from Walker River upon or above Walker River Indian Reservation during the irrigation season of one hundred eighty days for the irrigation of two thousand one hundred acres of land of said Reservation and the flow of water reasonably necessary for domestic and stock watering purposes and for power purposes to the extent now used by it, during the non-irrigating season, with a priority of November 29, 1859, and the plaintiff is entitled to an injunction against the defendants enjoining them from preventing or interfering with the natural flow of the above described quantities of water

in the natural channels of Walker River and its tributaries to and upon Walker River Indian Reservation."

The government excepts to said finding and proposed conclusion of the Master, in that he "recommends the granting of a water right for only 2100 acres of land, with a flow of 26.25 cubic feet per second, whereas," * * * he "should have recommended the granting of a water right to the government for 10,000 acres of land, and the corresponding amount of water, to-wit, 150 cubic feet per second of the flow of the Walker River during the irrigation season from March 15th to September 15th in each year."

"The case," say counsel for the government, "comes [386] down to the consideration of the proposition that may be put something like this: Shall the United States in the performance of one of the highest and most solemn obligations it has assumed in its governmental and sovereign capacity, namely, the care, education and protection of the Indians, be deprived of the means to carry out this policy; be deprived of the property it reserved and set aside for those specific purposes, and shall these helpless wards of the government be deprived of their homes allotted and set apart to them, because of the neglect of the government officials, or because Congress itself neglected to act?"

It is the contention of the government that the action of the Commissioner of Indian Affairs, in

1859, calling attention to the "propriety and necessity of reserving" from sale and settlement, for the use of the tribe of Pahute Indians, a tract of land "in the northeastern part of the valley of Walker's River, including Walker's Lake," followed by the President's executive order, in 1874, setting apart the Walker Lake Indian Reservation, reserved not only the land therein but also reserved and appropriated from the waters of the Walker River 150 cubic feet of water per second of time.

Main reliance is placed by the government upon the ruling in the case of Winters v. United States, 207 U. S., 564, but the facts in that case are readily distinguishable from those in the case at bar. There the decision was based solely upon an agreement or treaty with the Indians, whereas here there was neither agreement or treaty. Indeed, history shows that neither was possible at the time, as the Pahutes were at war with the whites for some time subsequent to 1859. It is necessary to mention only a few instances with dates. In Thompson & [387] West's History of Nevada, page 149, is to be found a letter of Isaac Roop, Governor of Nevada Territory, to General Clarke, Department of Pacific, predicting war with the Pahutes because of the murder of eight men by the Indians; at page 149 mention is made of the Ormsby massacre of May 12, 1860; at page 152, an account of the burning of Williams Station where five men were murdered; at page 165, during April and May, 1861, over 1500 Indians assembled at the fisheries near the mouth

of the Walker River, headed by Wa-he and plotted against the agent and against Ft. Churchill, Wa-he fled to Oregon, returned in 1862 and was killed by two Pahute chiefs. The legislature adopted a memorial to Congress relative to the depredations committed by Indians in the Territory of Nevada, asking the appointment of a commission to consider reimbursement of the settlers of Nevada and California for their expenses in protecting the settlements. (Laws of Nevada Territory, 1862, page 196.) The legislature passed a joint resolution asking for a federal military force to protect the Overland Trail and mail route from Nevada to the Missouri River against hostile Indians; "the Indian massacres which occurred in the summer and fall of 1864 are now being reinacted." (Statutes of Nevada 1864-5, page 462.) The legislature passed a senate memorial and joint resolution addressed to Major General Halleck, Commanding Department of the Pacific, asking a suitable force of cavalry, etc., to repress the depredations of hostile Indians in Nevada, declaring there had been depredations "every year since the settlment of the Territory." (Laws of 1866, page 267.) "That in May and June, 1861, the Overland Mail and immigrant routes were attacked by Indians and communications closed [388] between the Atlantic states and Pacific Coast." (Report to U. S. Senate on Rebellion War Claims of Nevada.) "That on account of a general uprising among the Indians along the entire Overland routes and branch lines and espe-

cially that portion between Salt Lake City in the Territory of Utah and the Sierra Nevada mountains * * * the maintenance and protection of the Overland mail and emigrant route through those sections, was regarded by the government as a military necessity." (Statement by Hon. W. M. Stewart, U. S. Senator, Aug. 10, 1888. 50th Cong. 1st sess., page 2.)

The evidence shows that within a few years after the creation of the reservation, the lands along Walker River were taken up by white settlers under the homestead and preemption laws and the Desert Land Act, and the water of the river was gradually applied by them to a beneficial use until all of the water of the river had been fully appropriated; that the white settlers were more diligent in applying the water to their lands than was the government in applying the water to the lands in the reservation; that the United States has for the past sixty years, or more, encouraged the settlers above the reservation to take up the public lands along Walker River and has sold and patented those lands to them; that the officials of the government in charge of the disposal of those lands knew that the lands were arid and incapable of economic use by the purchasers and without value except by means of irrigation and that the Walker River was the only source of water for their irrigation; that no protest was ever made or objection raised by the government to the growing use of the waters of the river upon the lands of the

upstream appropriators until the [389] entire flow of the river had been applied to a beneficial use.

The records of the government show that since the creation of the reservation there never have been as many as a thousand Indians living on the reservation; there was a population of about 600 in 1866, about 800 in 1875, and the findings of the Master, sustained by the evidence, show that there are now "upon said reservation approximately five hundred Indians. Ninety-six individual Indians are farming parts of one hundred forty allotments of twenty acres each and ninety-six allotments have homes on them. The Indians generally refuse to irrigate at night and there results a considerable loss of water by reason thereof. The number of Indians upon said reservation is not increasing and it has not been shown that there is the necessity or demand by the Indians for the cultivation of a larger area of land than two thousand one hundred acres."

The Sixty-ninth Congress, first session, passed an act (Chapter 714, 44 U. S. Statutes at Large, part 2, page 779) "For reconnaissance work in Schurz Canyon, on the Walker River, state of Nevada, to determine to what extent the water supply of the river can be augmented and conserved by the impounding of its said waters, and to determine if there is a feasible reservoir site, or sites, available for the storage of such waters and for securing information concerning the feasibility of the construction of the necessary dam, or dams, and

appurtenant structures, and for the purpose of determining the amount necessary for the purchase and acquisition of necessary lands and rights of way in connection with the construction of said dam or dams and appurtenant structures, which are proposed [390] in order to provide water for irrigation purposes, * * *."

Following such authorization, an investigation was had and report was made to the Department of the Interior. The report is a very comprehensive one, containing 121 closely printed pages, known as the Blomgren "report on water supply and storage investigations of Walker River Indian Reservation, Nevada," December 26, 1926; House document 767. On page 23, under the caption, "Necessity for Storage," appears the following:

> "The subject of storage or a more dependable irrigation water supply for the Walker River Reservation has been a serious consideration since the inception of the irrigation system, and every superintendent in charge of the reservation has strongly recommended the construction of a storage reservoir.
>
> "The office is no doubt familiar with the past water supply difficulties, as correspondence on the subject in the local files is very voluminous and the inclusion of all this in the report would require considerable space."

Then follows brief extracts and excerpts copied from letters and reports summarizing early opinion upon the subject, supporting above statement.

Upon page 92 of the report is found the following illuminating statement of the supervising engineer relative to the water supply of the rivers:

> "Taking the records available and interpreting them in the light of experience, it is my judgment that even though it were possible to restore natural conditions—that is, blot out all development on the river above the reservation—the uncontrolled stream flow would be adequate for the full-season irrigation of the total irrigable area (10,000 acres) of the reservation only one *season of every two.*" (Italics supplied.)

And the recommendations of the supervising engineer (page 96) are as follows:

> "(1) That water rights be adjudicated at the earliest possible date.
>
> "(2) That the entire river system be placed in charge of a water commissioner appointed by the Federal court, with instructions to require the installation of suitable weirs, head gates, and measuring devices by all diverters. [391]
>
> "(3) That a storage reservoir be created for the Indian land of Walker River Indian Reservation by the construction of a dam at the Rio Vista site, and that the irrigation system be extended to cover the entire irrigable area of the reservation."

The litigation begun in 1924 has continued, but the dam and storage reservoir at Rio Vista have not been constructed. The government's water problem at the reservation might be solved by accepting and acting upon the recommendations of its engineers. The construction of the proposed dam and reservoir would undoubtedly greatly increase the present supply and probably insure water sufficient for all needs of the reservation throughout the year.

In 1859 Nevada was a part of Utah Territory, became the Territory of Nevada in 1861, and was admitted to statehood in 1864. The common law of riparian rights was recognized as the law at that time. Van Sickle v. Haines, 7 Nev. 249. Later the Supreme Court of Nevada adopted the rule of appropriation as applicable to the arid lands of the state. Jones v. Adams, 19 Nev. 78; Reno Smelting Works v. Stevenson, 20 Nev. 269.

In the "stipulation as to the trial of the case" of Pacific Livestock Company v. Rickey et al, which resulted in Decree 731, the government was given an "option" to become a party to the suit. The government was invited to "file' * its pleading in this suit, which pleading need not be in any particular form, but which shall set forth, specially and particularly, what rights the government claims in or to the waters of said Walker River, and the basis and origin of the rights so claimed, and the times at which they respectively accrued; and such pleading shall be deemed sufficient to entitle said

government, in the most liberal manner possible, to the full and complete presentation of its cause of action or defense or equitable rights concerning the matters in controversy in this suit, or in anywise appertaining thereto, [392] and to have the same adjudicated in and by the decree of the court in this suit." By this suit, the owners of lands in the Walker River Basin and the appropriators of water from the Walker River and its tributaries for beneficial use upon said lands, were desirous of settling for all time the respective rights of all parties concerned, and though requested to become a party, the government did not choose to do so.

The exhibits in the instant case, and the official letters and reports of the Indian Bureau show that the government relied upon the doctrine of appropriation as late as 1910, and when the superintendent of the reservation, in behalf of the Indians, made application to appropriate public waters of the state of Nevada.

All of such actions and circumstances above related, when considered with the "silent acquiescence" of the government to the diversion of water by the white settlers, amount to an administrative construction of the local laws then in force and "should be respected and not overruled except for cogent reasons." United States v. Finnell, 185 U. S. 236, 244; United States v. Johnson, 124 U. S. 236, 253.

The decision of the United States Supreme Court in the case of The California Oregon Power Com-

pany v. Beaver Portland Cement Company, et al, No. 612, decided April 29, 1935, is applicable to the facts in this case. The decision is most important as directly affecting owners of lands in the desert-land states, acquired under the homestead and pre-emption laws, the Desert Land act and other acts passed by the Congress, and the appropriators [393] of waters for beneficial use upon said lands. Suit was brought by the owner of lands in Oregon whose predecessor in interest acquired them by patent from the United States under the Homestead Act of May 20, 1862. The primary question presented to the Supreme Court for decision was whether the homestead patent carried with it as part of the granted estate the common-law rights which attach to riparian ownership. Justice Sutherland delivered the opinion of the court, which says, in part:

> "For many years prior to the passage of the Act of July 26, 1866, C. 262, Sec. 9, 14 Stat. 251, 253, the right to the use of waters for mining and other beneficial purposes in California and the arid region generally was fixed and regulated by local rules and customs. The first appropriator of water for a beneficial use was uniformly recognized as having the better right to the extent of his actual use. The common law with respect to riparian rights was not considered applicable, or, if so, only to a limited degree. Water was carried by means of ditches and flumes great distances for consumption by those engaged in mining and agricul-

ture. Jennison v. Kirk, 98 U. S. 453, 457-458. The rule generally recognized throughout the states and territories of the arid region was that the acquisition of water by prior appropriation for a beneficial use was entitled to protection; and the rule applied whether the water was diverted for manufacturing, irrigation, or mining purposes. The rule was evidenced not alone by legislation and judicial decision, but by local and customary law and usage as well. Basey v. Gallagher, 20 Wall. 670, 683-684; Atchison v. Peterson, 20 Wall. 507, 512-513.

"This general policy was approved by the silent acquiescence of the federal government, until it received formal confirmation at the hands of Congress by the Act of 1866, supra. Atchison v. Peterson, supra. Section 9 of that act provides:

" 'That whenever, by priority of possession, rights to the use of water for mining, agricultural, manufacturing, or other purposes, have vested and accrued, and the same are recognized and acknowledged by the local customs laws, and the decisions of courts, the possessors and owners of such vested rights shall be maintained and protected in the same; and the right of way for the construction of ditches and canals for the purposes aforesaid is hereby acknowledged and confirmed: * * *'

"This provision was 'rather a voluntary recognition of a pre-existing right of possession, constituting a valid claim to its continued use, than the establishment of a new one'. Broder v. Water Co., 101 U. S. 274, 276; United States v. Rio Grande Irrig. Co., 174 U. S. 690, 704-705. And in order to make it clear that the grantees [394] of the United States would take their lands charged with the existing servitude, the Act of July 9, 1870, c. 235, Sec. 17, 16 Stat. 217, 218, amending the Act of 1866, provided that—

"'* * * all patents granted, or preemption or homesteads allowed, shall be subject to any vested and accrued water rights, or rights to ditches and reservoirs used in connection with such water rights, as may have been acquired under or recognized by the ninth section of the act of which this act is amendatory.'

* * * * * *

"The effect of these acts is not limited to rights acquired before 1866. They reach into the future as well, and approve and confirm the policy of appropriation for a beneficial use, as recognized by local rules and customs, and the legislation and judicial decisions of the arid-land states, as the test and measure of private rights in and to the non-navigable waters on the public domain. Jones v. Adams, 19 Nev. 78, 86; Jacob v. Lorenz, 98 Cal. 332, 335-336.

"If the acts of 1866 and 1870 did not constitute an entire abandonment of the common-law rule of running waters in so far as the public lands and subsequent grantees thereof were concerned, they foreshadowed the more positive declarations of the Desert Land Act of 1877, which it is contended did bring about that result. That act allows the entry and reclamation of desert lands within the states of California, Oregon, and Nevada (to which Colorado was later added), and the then territories of Washington, Idaho, Montana, Utah, Wyoming, Arizona, New Mexico, and Dakota, with a proviso to the effect that the right to the use of waters by the claimant shall depend upon bona fide prior appropriation, not to exceed the amount of waters actually appropriated and necessarily used for the purpose of irrigation and reclamation. Then follows the clause of the proviso with which we are here concerned:

"'* * * all surplus water over and above such actual appropriation and use, together with the water of all lakes, rivers and other sources of water supply upon the public lands and not navigable, shall remain and be held free for the appropriation and use of the public for irrigation, mining and manufacturing purposes subject to existing rights.'" Ch. 107, 19 Stat. 377.

* * * * * *

"The fair construction of the provision now under review is that Congress intended to establish the rule that for the future the land should be patented separately; and that all non-navigable waters thereon should be reserved for the use of the public under the laws of the states and territories named. The words that the water of all sources of water supply upon the public lands and not navigable 'shall remain and be held free for the appropriation and use of the public' are not susceptible of any other construction. The only exception made is that in favor of existing rights; and the only rule spoken of is that of appropriation. It is hard to see how a more definite intention to sever the land and water could be evinced. The terms of the statute, thus construed, must be read into every patent thereafter issued, with the same [395] force as though expressly incorporated therein, with the result that the grantee will take the legal title to the land conveyed, and such title, and only such title, to the flowing waters thereon as shall be fixed or acknowledged by the customs, laws, and judicial decisions of the state of their location.

* * * * * *

"Nothing we have said is meant to suggest that the act, as we construe it, has the effect of curtailing the power of the states affected to legislate in respect of waters and water

rights as they deem wise in the public interest. What we hold is that following the act of 1877 if not before, all non-navigable waters then a part of the public domain became publici juris, subject to the plenary control of the designated states, including those since created out of the territories named, with the right in each to determine for itself to what extent the rule of appropriation or the common-law rule in respect to riparian rights should obtain. For since 'Congress cannot enforce either rule upon any state' Kansas v. Colorado, 206 U. S. 46, 94, the full power' of choice must remain with the state. The Desert Land Act does not bind or purport to bind the states to any policy. It simply recognizes and gives sanction, in so far as the United States and it future grantees are concerned, to the state and local doctrine of appropriation, and seeks to remove what otherwise might be an impediment to its full and successful operation. See Wyoming v. Colorado, 259 U. S. 419, 465."

See also United States v. Central Stockholder's Corp. of Vallejo, et al, 52 Fed. (2) 322.

Under the facts before this court and the rule announced by the United States Supreme Court in above-quoted case, neither the contentions of the government for a water right of 150 cubic feet per second, nor the proposed finding and conclusion of the Master, awarding the government 26.25

cubic feet per second with a priority of 1859, can be sustained. The government owns the lands in the reservation with the usual Indian right of occupancy in the Pahutes. "As the owner of the public domain, the government possessed the power to dispose of land and water thereon together, or to dispose of them separately. Howell v. Johnson, 89 Fed. 556, 558." (Cited with approval in The California Oregon Power Co. v. Beaver Portland Cement Co., supra.) In the present instance the government has disposed of both land and water to white settlers on the upper reaches of the Walker River and its tributaries, above the reservation. [396] Those who have acquired water by prior appropriation for beneficial use are entitled to protection. The government reserved no rights to water for use on the reservation and there are therefore no existing rights in its favor, under the exception in the Desert Land Act. The rights of the government, in its use of the waters of the Walker River and its tributaries for purposes of irrigation, like the rights of all other diverters in the Walker River Basin, are to be adjudged, measured, and administered in accordance with the laws of appropriation as established by the state of Nevada.

The Sierra Pacific Power Company, hereinafter called the Sierra Company, claims ownership to 2482 acres of land situate in Mono County, California, riparian to the West Walker River. In its answer and counterclaim the Sierra Company alleges that by virtue of its riparian rights it "is

entitled to have all the waters of said river flowing by, over, through and upon its said lands, and is entitled to take, divert and use said water for the irrigation of its arid lands for the watering of livestock thereon, for domestic purposes, and for all such purposes and uses as a riparian owner is entitled to the use of said waters." And this Court is asked to confirm such riparian right. In his report the Master says:

> "The testimony shows that Sierra Pacific Power Company has title to 994.74 acres of riparian lands acquired by the State of California under the Act of Congress of September 28, 1850, known as the Swamp Land Act and has title to 1631.21 acres of riparian lands acquired by the State of California under the Act of Congress of March 3, 1853, known as the School Land Act, four hundred acres being school lands and 1231.21 acres being school lieu lands. The testimony further shows that approximately four hundred acres of these swamp lands and school and school lieu lands have been irrigated since sometime prior to 1901 from the waters of West Walker River and its tributaries, by the annual overflow of the streams flowing through said lands and by means of some nine or more [397] diversion ditches and that wild grass and pasturage have been raised on said lands. It does not appear that any substantial improvements have been made upon said lands or any large sums of

money expended in the construction of ditches or in the dams for diverting the water upon the lands."

From statements made at the oral argument by counsel for the Sierra Company it appears that the company claims a right by appropriation to irrigate 350 acres of land. It is an alleged precriptive right, which has not been determined as to priority or quantity, and mentioned above by the Master as approximately 400 acres irrigated annually by the stream overflow.

What the Sierra Company particularly stresses is its claim to a right to impound water for power purposes in a reservoir to be constructed upon land in Pickle Meadows on the West Walker, asserting such right by virtue of riparian ownership under the laws of California. It is admitted that neither said company nor its predecessors have ever made any use, beneficial or otherwise, of said alleged riparian right.

With the exception of the defendant Sierra Company, all defendants, both in Nevada and in California, have stipulated that the law of appropriation shall govern in the determination of their claims to the waters of the Walker River and its tributaries. The predecessors of Sierra Company were parties in the case entitled "Pacific Livestock Company v. T. B. Rickey, et al, referred to herein as having been decided in Decree 731. A large part of the lands of the Sierra Company were purchased

from the successor of the defendant Rickey during the pendency of the present suit. Practically all of the remaining lands now owned by the Sierra Company and for which it claims a riparian right to store water for power purposes were acquired subsequent to the filing of the Pacific Livestock Company suit. [398] In Decree 731 all of the rights of the predecessors of Sierra Company were fixed by the law of appropriation. The other defendants who were parties to Decree 731 and who are also parties in the instant suit object to the granting of a riparian right to Sierra Pacific Power Company.

Walker River and its tributaries, known as "flash" or seasonal streams, comprise a single system. The evidence shows that during the irrigation season of six month all of the water of the rivers, except flood water, has been fully appropriated, and is necessary for the irrigation of lands which have been brought under cultivation. It is to the interest of all concerned that the rights of all claimants to the beneficial use of water on the stream system be adjudicated. The rights to be adjusted are in California and Nevada, subject to different laws. California recognizes both appropriation and riparian rights. Its riparian doctrine, invoked by the Sierra Company, has been recently modified by a constitutional amendment, hereinafter quoted and discussed. The amendment having been passed under and by virtue of a reasonable exercise of the police power, constitutes a lawful abridgment of

the riparian right. Tulare Irrigation District, et al, v. Lindsay-Strathmore District, Sac. No. 4041, decided by the California Supreme Court May 3, 1935. Nevada, a desert-land state, necessarily clings to the arid region doctrine of appropriation. The defendants having appeared in this suit and submitted themselves to the jurisdiction, all of the rights of the parties are before the Court.

An interesting question of law arises under the circumstances here disclosed. It has been suggested that this Court has not jurisdiction to make a decree in rem [399] affecting the land and water rights outside of the state of Nevada, citing Miller & Lux v. Rickey (which is case No. 731, referred to above) 127 F. 573, 575, 580. The point is discussed in Vineyard L. & Stock Co. v. Twin Falls S. R. L. & W. Co., 245 F. 9, 26, where the court says:

> "As to the main question, this court has determined, by the case of Rickey Land & Cattle Co. v. Miller & Lux, 152 Fed. 11, 81 C. C. A. 207, that a suit of the nature here maintained is essentially one to quiet title to real property, and that it is local and not transitory. The Rickey Land & Cattle Company, in that case, set up certain rights in California that it claimed to the waters of the stream, and we held that its cross-complaint setting up such rights could not operate to defeat complainant's cause, but only defensively, 'and not to give the defendant a right to have its title also quieted in the state of California.' Hawley,

District Judge, in the same case, on the trial in the District Court, had this to say:

" 'It (the court) cannot, by any decree which it may make in this suit, directly reach the dams, reservoirs, or ditches belonging to the defendant located entirely within the State of California.' Miller & Lux v. Rickey (C.C.) 127 Fed. 573, 575.

"In this expression of the law we concur. But has the plaintiff no remedy where a defendant has been personally served and appears in the court, and is enjoined forever from doing certain things in another state to the detriment of plaintiff's rights? The authorities are clear that he has. Such a remedy was sustained in the Rickey Land & Cattle Co. case, supra."

In Miller & Lux v. Rickey, supra, and in Rickey L. & Cattle Co. v. Miller & Lux, supra, the identical land and waters of the Walker River Basin here invovled were there in controversy. The language used and the holding of the last mentioned case are peculiarly opposite to the case at bar. The Court, at pages 17-18, says:

"The appellant's counsel maintain that, because the appellant has set up in its answer and cross-bill to the original suit that it has an appropriation in California for the purpose of irrigating lands in that state, therefore the court in Nevada has no jurisdiction to deter-

mine its rights in the state of California. The contention seems to us to be beside the question. The defendant will not be permitted, by thus setting up a [400] cause of suit in the state of California, to defeat the jurisdiction of the court in the state of Nevada. The complainant must be permitted to proceed upon the case made by its pleadings, and the defendant cannot defeat the jurisdiction by alleging that it has rights elsewhere which may conflict with the rights of the complainant. It may be said that the Court in Nevada has not the power to quiet the title of the defendant in the State of California. But the defendant has the right to set up its conflicting interests, which arose in California, as a defense against the attempt of the complainant to have its title in Nevada quieted, because the complainant's title must depend upon whether it has the better right as against the defendant—the rights of the parties arising in the states in which their respective interests are found. So that the answer and cross-complaint of the defendant can only operate defensively in the original suit, and not to give the defendant a right to have its title also quieted in the state of California. Though the Nevada court is not authorized or empowered to settle the rights of the parties in the state of California, it may look, nevertheless, under the defensive answer to the appropriation in the state of California, to ascertain

and determine whether such appropriation is prior and paramount to the complainant's appropriation, and, if not, then to settle and quiet complainant's title and rights thereto.

"That our position may be fully understood, we will extend the discussion a little. The water in the stream, which has a propensity to seek its level, and will continue in its current to the sea, is in strict reality the veritable thing in controversy. It knows not imaginary state or county lines, and is a thing in which no man has a property until captured to be applied to a beneficial use. The right of appropriation is recognized in law, which means the right of diversion and use. It is the right, not to any specific water, but to some definite quantity of that which may at the time be running in the stream. So the right acquired by an appropriation includes the right to have the water flow in the stream to the point of diversion. The fact of a state line intersecting the stream does not, within itself, impinge upon the right. In other words, the appropriation may still be acquired although the stream is interstate and not local to one state; nor will the mere fact that the stream has its source in one state authorize a diversion of all the water thereof as against an earlier and prior appropriator across the line in another state. On the contrary, one who has acquired a right to the water of a stream by prior appropriation, in

accordance with the laws of the state where made, is protected in such right as against subsequent appropriators, though the latter withdraw the water within the limits of a different state. Howell v. Johnson (C.C.) 89 Fed. 556; Hoge v. Eaton (C.C.) 135 Fed. 411; Anderson v. Bassman (C.C.) 140 Fed. 14. So that, in determining the right of appropriation in one state, it may become necessary to ascertain what are the rights in another, and a mere [401] assertion of rights in the courts of the latter state cannot operate to preclude the courts of the former from exercising cognizance over the entire subject-matter before them. The very question that appellant makes was determined in the case of Anderson v. Bassman, supra:

"'It is objected by the defendants,' says Morrow, Circuit Judge, 'that the relief sought by the bill, in determining the rights of the complainants to a specific quantity of the waters of the West Fork of the Carson River, is beyond the jurisdiction of this court, in that it is asking the court to pass upon titles to real property in another state.'

"And the decision was against the contention. So the decision here must be against appellant's contention upon the point urged."

The above case went to the United States Supreme Court on certiorari (Rickey Land and Cat-

tle Co. v. Miller & Lux, 218 U. S., 258) and was affirmed. Suits had been brought by respective parties in California and Nevada. Before the Supreme Court the petitioner contended that there was no conflict of jurisdiction, and that the proceedings in the California court should go on. Justice Holmes, who delivered the opinion for the Court, said in part:

> "We are of the opinion that the petitioner fails to establish the conclusion for which he contends. The alleged rights of Miller & Lux involve a relation between the parcels of land that cannot be brought within the same jurisdiction. This relation depends as well upon the permission of the laws of Nevada as upon the compulsion of the laws of California. It is true that the acts necessary to enforce it must be done in California and require the assent of that state so far as this court does not decide that they may be demanded as a consequence of whatever right, if any, it may attribute to Nevada. But, leaving the latter possibility on one side, if California recognizes private rights that cross the border line, the analogies are in favor of allowing them to be enforced within the jurisdiction of either party to the joint arrangement. Great Falls Mfg. Co. v. Worster, 23 N. H., 462. Full justice cannot be done and anomalous results avoided unless all the rights of the parties before the court in virtue of the jurisdiction previously acquired

are taken in hand. To adjust the rights of the parties within the state requires the adjustment of the rights of the others outside of it. Of course, the court sitting in Nevada would not attempt to apply the law of Nevada, so far as that may be different from the law of California, to burden land or water beyond the state line, but the necessity of considering the law of California is no insuperable difficulty in dealing with the case. Foreign law often has to be ascertained and acted upon, and one court ought to deal with the whole matter. [402]

"We are of opinion, therefore, that there was concurrent jurisdiction in the two courts, and that the substantive issues in Nevada and California suits were so far the same that the court first seized should proceed to the determination without interference, on the principles now settled as between the courts of the United States and of the states. Prout v. Star, 188 U. S. 537, 544 Ex parte Young, 209 U. S., 123, 161, 162."

This leads to a consideration of the law of California for the purpose of ascertaining whether or not the Sierra Company, by reason of the fact that it owns lands bordering on the West Walker River, has a riparian use to store water for power purposes. For many years the courts of California created the water law of the state without constitutional direction. What was known as the Cal-

ifornia riparian doctrine has been changed by adoption of Section 3 of Article XIV of the Constitution of California which became effective in November, 1928. In Tulare Irrigation District, et al, v. Lindsay-Strathmore Irrigation District, supra, Chief Justice Waste of the California Supreme Court stated that the effect of the amendment has been to modify the long-standing riparian doctrine heretofore announced by the Court in several leading cases, and to apply by constitutional mandate the doctrine of reasonable use between riparian owners and appropriators. The effect of the amendment is fully discussed by Justice Shenk, speaking for the state court, in the case of Peabody v. City of Vallejo, 89 Cal. Dec. 165. Quoting from the opinion:

> "In adopting a policy modifying the long standing riparian doctrine of this state, California has done by constitutional amendment what many of the western states have done by statute or court decisions. Of the seventeen western states which are generally referred to as the irrigation states, nine now recognize the modified doctrine of riparian rights and eight have entirely abrogated the doctrine of riparian rights and recognize only the doctrine of appropriation. The nine are North Dakota, South Dakota, Nebraska, Kansas, Oklahoma, Texas, Washington, Oregon and California; and the eight are Montana, Idaho, [403] Wyoming, Nevada, Utah, Colorado, Arizona and

New Mexico. (Weil on Water Rights, secs. 117-118.) Mr. Weil at the time properly listed Montana as a riparian state, but in 1921 it was held in Mettler v. Ames, 61 Mont. 152, 201 Pac. 702, that the doctrine of riparian rights was abrogated and that the doctrine of prior appropriation obtained exclusively in that state.

"In further clarifying the new state policy we have no hesitancy in doing so without fear of infringing upon any provision of the federal Constitution. The attitude of the Supreme Court of the United States has been consistent in leaving the question of private water rights, which do not involve federal or interstate interests, to the control of local state policies. (United States v. Rio Grande Irr. Co., 174 U. S. 690, 702-3; Hudson County Water Co. v. McCarter, 209 U. S. 349, 356; State of Connecticut v. Commonwealth of Massachusetts, 282 U. S. 660, 670.)

"Section 3 of article XIV of the California Constitution, inserted as a new section by amendment in 1928, is as follows: 'It is hereby declared that because of the conditions prevailing in this State the general welfare requires that the water resources of the State be put to beneficial use to the fullest extent of which they are capable, and that the waste or unreasonable use or unreasonable method of use of water be prevented, and that the conservation of such waters is to be exercised with a view to the

reasonable and beneficial use thereof in the interest of the people and for the public welfare. The right to water or to the use or flow of water in or from any natural stream or watercourse in this State is and shall be limited to such water as shall be reasonably required for the beneficial use to be served, and such right does not and shall not extend to the waste or unreasonable use or unreasonable method of use or unreasonable method of diversion of water. Riparian rights in a stream or watercourse attach to, but to no more than so much of the flow thereof as may be required or used consistently with this section, for the purposes for which such lands are, or may be made adaptable, in view of such reasonable and beneficial uses provided, however, that nothing herein contained shall be construed as depriving any riparian owner of the reasonable use of water of the stream to which his land is riparian under reasonable methods of diversion and use, or of depriving any appropriator of water to which he is lawfully entitled. This section shall be self-executing, and the Legislature may also enact laws in the furtherance of the policy in this section contained.'

"The rule of reasonableness of use as a measure of the water right has been applied by this court as between riparian owners (Pabst v. Finmand, 190 Cal. 124), as between owners overlying an underground water sup-

ply (Katz v. Walkinshaw, 141 Cal. 116); as between appropriators (Natoma W. & M. Co. v. Hancock, 101 Cal. 42); as between overlying owners and exporters from an underground basin to nonoverlying lands (Burr v. Maclay Rancho Water Co., 154 Cal. 428); and as between riparian [404] owners and overlying owners under the doctrine of common source of supply (Hudson v. Dailey, 156 Cal. 617); but the court has denied its application as between a riparian owner and an appropriator. The constitutional amendment, from its effective date, and as interpreted in the Gin Chow case, has enjoined the doctrine of reasonable use as between the riparian owner and an appropriator. The limitations and prohibitions of the constitutional amendment now apply to every water right and every method of diversion. Epitomized, the amendment declares:

"1. The right to the use of water is limited to such water as shall be reasonably required for the beneficial use to be served.

"2. Such right does not extend to the waste of water.

"3. Such right does not extend to unreasonable use or unreasonable method of use or unreasonable method of diversion of water.

"4. Riparian rights attach to, but to no more than so much of the flow as may be required or used consistently with this section of the Constitution.

"The foregoing mandates are plain, they are positive, and admit of no exception. They apply to the use of all water, under whatever right the use may be enjoyed. The problem is to apply these rules in the varying circumstances of cases as they arise.

"The waters of our streams are not like land which is static, can be measured and divided and the division remain the same. Water is constantly shifting, and the supply changes to some extent every day. A stream supply may be divided but the product of the division in no wise remains the same. When the supply is limited public interest requires that there be the greatest number of beneficial uses which the supply can yield."

It is settled law in California that the storage of water for power purposes is not a legitimate riparian use. It was so held in Colorado P. Co. v. Pacific G. & E. Co., 218 Cal. 559, 564. "This point has been so recently before this court," quoting from the opinion, "and so fully and completely disposed of adversely to defendant's contention that no necessity exists for a lengthy discussion here. Seasonal storage of water for power purposes is not a proper riparian use but constitutes an appropriation, so that if continued for time prescribed by statute of limitations it will ripen into a prescriptive right." Citing Herminghaus v. [405] Southern California Edison Co., 200 Cal. 81 and

Seneca Con. Gold Mines Co. v. Great Western P. Co., 209 Cal. 206. "In the Herminghaus case, the action was by a lower riparian against an upper riparian owner who proposed to store seasonably and artificially the flow of the waters of the stream. The upper riparian owner contended that this was a proper riparian use. The point presented for discussion was whether or not seasonal storage was a proper riparian use, and this court squarely held it was not." (page 565.)

It was also held in Peabody v. City of Vallejo, supra, that the right to waste of water is not now included in the riparian right, and when needed for beneficial uses it may be stored or restrained by appropriation, subject to the rights of those who have a lawful priority in a reasonable beneficial use and that the riparian has no right to have the flood and freshet waters leave the natural channel of the stream, overflow his lands and never return to the channel.

It follows from what has been said that the Sierra Company has not a riparian use for the impounding or storage of water for power purposes, and its prayer for judgment and decree confirming such rights must be denied. Doubtless appreciating the difficulties of the situation counsel for the Sierra Company, in oral argument, stated that he recognized that the proposed diversion and storage "must be a reasonable one which must not interfere with the use of a lower appropriator." But we are not here concerned with what had been de-

scribed as "the use of the hydraulic effect of the stream for the generation of electric current," which has been held to be a legitimate exercise of the [406] riparian right. Mentone etc. v. Redlands, 155 Cal. 323; Seneca C. G. M. Co. v. Great Western Power Co., 209 Cal. 206, 215. The Sierra Company is demanding confirmation of its claimed rights as a riparian owner to divert and impound water for power purposes, which is inhibited by law. All of the water in the rivers having been heretofore appropriated and put to beneficial uses, whatever rights to the waters of the West Walker, whether as riparian or appropriator, said company may now have or hereafter assert, it is clear that such rights are subject and subordinate to the prior rights of the lower appropriators, who are entitled to protection against interference, obstruction and diminution of the natural seasonal stream flow.

Mention has been made herein of 350 or 400 acres of land, owned by the Sierra Company, which it is said has been irrigated since 1901, and of which there has been no determination as to priority or quantity. The case will be referred to the Master to take evidence and hear counsel for the purpose of determining what rights, their quantity and priority, if any, said company has in the premises. Said company may have thirty days from date hereof, if so advised, in which to offer the necessary proofs. At the conclusion of the hearing the Master is directed to prepare and submit to this Court forms of findings of fact and conclusions of law

and decree giving effect to this decision. Counsel for respective parties shall have ten days after notice to them by the Master of the filing of his report and said forms with the clerk, in which to submit their objections.

Except as indicated by the views herein expressed, the exceptions to the Master's proposed findings and conclusions of law and decree, heretofore submitted, will be overruled.

Dated, June 6, 1935.

[Endorsed]: Filed June 7, 1935. [407]

[Title of District Court and Cause.]

NOTICE OF FILING OF PROPOSED FINDINGS OF FACT, CONCLUSIONS OF LAW AND DECREE WITH THE CLERK OF THE SAID COURT.

To William S. Boyle and Ethelbert Ward (care of William S. Boyle), Thatcher and Woodburn, William Forman, Green and Lunsford, W. H. Metson (care of Green and Lunsford), George L. Sanford, William M. Kearney, and W. W. Watson (care of George L. Sanford):

You and each of you will please take notice that the Special Master has filed with the Clerk of the above entitled court, pursuant to the order of Honorable A. F. St. Sure made June 6, 1935, a copy of the redrafted findings of fact, conclusions of law and decree in the above entitled case drawn to conform to the opinion of the court.

You are further notified that, pursuant to the order of said court, counsel have ten days from the date hereof within which to file objections to said findings of fact, conclusions of law, and decree.

Dated August 9, 1935.

ROBERT M. PRICE
Special Master [408]

Received a copy of the foregoing notice of filing proposed findings of fact, conclusions of law and decree this 9th day of August, 1935.

WM. S. BOYLE
ETHELBERT WARD
Attorneys for Plaintiff
By J. K.

Received a copy of the foregoing notice of filing proposed findings of fact, conclusions of law and decree this 9th day of August, 1935.

THATCHER & WOODBURN
WILLIAM FORMAN
Attorneys for Sierra Pacific Power Co.

Received a copy of the foregoing notice of filing proposed findings of fact, conclusions of law and decree this 9th day of August, 1935.

WILLIAM H. METSON
GREEN & LUNSFORD
Attorneys for certain defendants.

Received a copy of the foregoing notice of filing proposed findings of fact, conclusions of law and decree this 9th day of August, 1935.

W. M. KEARNEY
By G. NEWMAN
Attorney for certain defendants

Received a copy of the foregoing notice of filing proposed findings of fact, conclusions of law and decree this 9th day of August, 1935.

GEORGE L. SANFORD
Attorneys for certain defendants.

[Endorsed]: Filed Aug. 10, 1935. [409]

[Title of District Court and Cause.]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This cause came on regularly for hearing on March 22, 1928, upon the plaintiff's complaint and the answers and counterclaims thereto filed by the several defendants, before Hon. B. F. Curler, Special Master, appointed by the Court to take testimony and hearings were had before him from time to time and by his successor, Robert M. Price, until July 24, 1931, when said cause was submitted for decision. Thereafter, the Master prepared and submitted to counsel for the several parties to the suit for corrections and amendments, proposed find-

ings of fact and conclusions of law and decree. The cause was reopened upon the request of counsel for the taking of further evidence, which was presented, arguments made and the suit again submitted for decision on May 20, 1932. The Special Master thereupon made its report to the Court, submitting proposed findings of fact, conclusions of law and decree. Objections having been made thereto by several parties to the suit, the Court ordered a hearing at [410] Carson City, Nevada, on May 22, 1933, at which hearing arguments were presented at length by the attorneys representing the several parties to the suit and the cause was submitted to the Court for decision. The Court on May 27, 1933, re-referred the matter to the Special Master to take further testimony respecting claimed rights of certain parties. Thereupon further hearings were had and revised findings of fact, conclusions of law and decree were submitted to the Court. The Court, after considering the same and the law applicable in the case, held that all the rights of the several parties to the suit were governed by the law of appropriation and re-referred the case to the Special Master to determine what rights, if any, Sierra Pacific Power Company had as an appropriator in and to the waters of West Walker River in Mono County, California.

The several parties to this suit were represented by the several attorneys as shown in the decree accompanying these findings, to which decree reference is expressly made for the names of the parties to the suit and their respective attorneys.

The Special Master having taken further testimony redrafted and re-submitted to the Court proposed findings of fact, conclusions of law and decree in accordance with the opinion of the Court theretofore rendered on June 6, 1935, and the Court, having considered the law and the evidence, finds as follows:

I. Walker River Indian Reservation, hereinafter referred to as "Reservation", was set aside by the United States of America on November 29, 1859, for the use of the Pahute tribe of Indians for the purpose of affording them an opportunity to acquire the arts of husbandry and civilization. In setting aside said Reservation the United States of America made no reservation of any water rights for the irrigation of the lands thereof. [411]

II. Walker River is an unnavigable, interstate stream consisting of two main branches, the East and West Walker Rivers, which are fed by many small streams most of which rise on the eastern slope of the Sierra Nevada Mountains in Alpine and Mono Counties, California. The West Walker River flows through Leavitt and Pickle Meadows, two high mountain valleys, thence through a canyon with practically no cultivated area, thence northerly and northeasterly through Antelope Valley into the State of Nevada, thence through Smith Valley to the head of Mason Valley where it joins the East Walker River. The principal streams forming the East Walker River combine in Bridgeport Meadows, which is a large area devoted to the rais-

ing of wild grasses and pasturage at an elevation of about sixty-eight hundred feet above sea level. The East Walker River flows thence northerly and northeasterly through canyons and sparsely populated valleys to Mason Valley, where it joins the West Walker River and forms the main Walker River. This river flows northerly and northeasterly through Mason Valley to near the town of Wabuska, where it turns abruptly to the southeast and flows through the Reservation and thence into Walker Lake. The mountains at the source of these streams are sparsely forested and afford little protection for the snows which melt rapidly in the spring months resulting in a rapid runoff of the water. From the source of the West Walker River to its junction with the East Walker River the distance is approximately sixty-six miles; from the source of the East Walker River to its junction with the West Walker River the distance is approximately seventy-four miles; and from the junction through Mason Valley to the point of diversion on the Reservation the distance is approximately thirty-seven miles; and from the latter point to Walker Lake the distance is approximately twelve miles. The [412] flow of said river is variable from day to day, from month to month and from year to year. The peak flow occurs late in May or early in June and thereafter the water subsides rapidly so that in most years the flow by the middle of July is insufficient, without storage facilities, to meet the requirements of the lands along the river which have been brought

under cultivation. Even under natural conditions, that is, without upstream diversions, the water would not, in some years of low flow, reach the lands of the Reservation by the end of July by reason of seepage and high evaporation loss.

III. The lands along Walker River, including the lands in the Reservation, are arid and incapable of producing crops without artificial irrigation and there is no source of supply for the irrigation of the lands of the parties to this suit except Walker River and its tributaries.

IV. The first use of water from said river by the plaintiff and by the predecessors of the defendants was by means of the overflow of the river in periods of high water, but within a few years after said Reservation was set aside the plaintiff and the settlers upstream commenced the construction of ditches and dams for the diversion of the water upon their lands. The plaintiff from time to time enlarged and extended the irrigation ditches upon said Reservation until there are now two canals thereon having a combined length of seventeen miles, a combined capacity of one hundred fifteen cubic feet per second and lateral ditches having a combined length of thirteen miles. There are approximately two thousand one hundred acres of said Reservation under cultivation and irrigation and the Indians produce thereon valuable crops of alfalfa hay, grain, vegetables, fowl and livestock, part of which they are enabled to sell. [413]

V. There are upon said Reservation approximately five hundred Indians. Ninety-six individual

Indians are farming parts of one hundred forty allotments of twenty acres each and ninety-six allotments have homes on them. The Indians generally refuse to irrigate at night and there results a considerable loss of water by reason thereof. The number of Indians upon said Reservation is not increasing and it has not been shown that there is the necessity or demand by the Indians for the cultivation of a larger area of land than two thousand one hundred acres.

VI. The lands along Walker River and its tributaries above the Reservation were purchased from the United States under acts of Congress by the white settlers, the earliest title originating shortly after the establishment of said Reservation and the water of Walker River was applied to said lands by successive appropriations, the earliest appropriation being in 1860. In order to supplement the supply for irrigation purposes the settlers through the defendant, Walker River Irrigation District, constructed in 1922 Topaz Lake Reservoir having a capacity of approximately fifty thousand acre feet and in 1924-25 Bridgeport Reservoir having a capacity of approximately forty-two thousand acre feet and is storing therein the surplus or flood waters of said river. The aggregate cost of these reservoirs was over Eight Hundred Thousand Dollars. No objection was made by the United States of America to the appropriation of water by the white settlers or their construction of expensive irrigation works and no proceedings were taken to

determine or preserve the respective rights of the United States of America and the white settlers along said river until the commencement of this suit, notwithstanding the United States of America was given an opportunity to become a party to the suit in this Court entitled "Pacific Live- [414] stock Company, a corporation, plaintiff, vs. T. B. Rickey, et al., defendants," No. 731 (hereinafter referred to as suit No. 731), which suit was brought for the purpose of determining all of the water rights in and to the waters of Walker River and its tributaries, commenced in 1904 and decided March 22, 1919, and was invited to file its pleadings in said suit as stipulated by nearly all of the parties thereto under date of May, 1907. The United States of America as late as 1910 relied upon the doctrine of appropriation for its rights, in which year the superintendent of the Reservation, on behalf of the Indians, made application to appropriate public waters of the State of Nevada. The Sixty-ninth Congress authorized a reconnaissance in Schurz Canyon to determine to what extent the water supply of Walker River might be augmented, the feasibility of reservoir sites, the cost of rights of way, etc. Pursuant to this authorization, a comprehensive report known as the Blomgren report was made December 26, 1926, and the supervising engineer recommended to the government as follows:

"1. That water rights be adjudicated at the earliest possible date.

2. That the entire river system be placed in charge of a water commissioner appointed by

the Federal court, with instructions to require the installation of suitable weirs, headgates, and measuring devices by all diverters.

3. That a storage reservoir be created for the Indian land of Walker River Indian Reservation by the construction of a dam at the Rio Vista site, and that the irrigation system be extended to cover the entire irrigable area of the Reservation."

It was found by Special Master Henry Thurtell in said [415] suit No. 731 and conceded by the defendants in this suit that the United States of America had appropriated from the Walker River and applied to beneficial use upon the lands of the Reservation for the use of the Indians, the quantities of water in cubic feet per second with dates of priority and the number of acres irrigated thereby, as follows:

Priority	*c. f. s*	*Acres*
1868	4.70	385.95
1872	3.55	295.80
1875	6.15	512.80
1883	7.50	625.20
1886	1.03	85.80

VII. The areas irrigated from said river, exclusive of the irrigated lands in the Reservation, are approximately as follows:

Bridgeport Meadows	20,000 acres
Narrow valleys on East Walker	16,000 acres
Antelope Valley	12,000 acres
Smith Valley	15,000 acres
Mason Valley	48,000 acres

VIII. There is a considerable return flow into Walker River from the water diverted for irrigation in the valleys above said Reservation, which augments to a certain extent the flow in the river at said Reservation, but the data furnished in the evidence is insufficient upon which to base any findings as to the quantity of such return flow.

IX. The assessed valuation of the lands in Walker River Irrigation District is approximately Four Million Dollars. The annual production consisting of alfalfa hay, vegetables, grain, honey, dairy products, wool, eggs, fowl and livestock pro- [416] duced upon the lands watered by said river, exclusive of the lands of said Reservation, are of the value of upwards of Two Million Dollars. Walker River Irrigation District covers an area of one hundred sixty thousand acres of irrigable land, not all of which is irrigated, and extends up Walker River and its tributaries to the California State Line. The population of the District is approximately three thousand and that of Bridgeport and Antelope Valleys, in California, approximately six hundred.

X. The parties to this suit in their pleadings have recognized as effective and binding the water and ditch rights along Walker River with the priorities which were adjudicated by the final decree of this court in the cause entitled "Pacific Livestock Company, a corporation, plaintiff, vs. T. B. Rickey, et al, defendants," in Equity No. 731, but subject to the rights and priorities which the court shall find the plaintiff and Sierra Pacific Power Com-

pany shall be entitled to, which adjudicated rights are set forth in detail in the decree accompanying these findings and which description in said decree is made a part hereof by reference as fully as though said description were fully set forth herein.

XI. The parties to this suit have stipulated as follows respecting the relative water rights other than those of the plaintiff and Sierra Pacific Power Company, of the water users along the Walker River and its tributaries, which were not adjudicated by said decree in said Suit No. 731: [417].

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In order to shorten the trial of this case, and to facilitate its early determination, the plaintiff is willing to make concessions to certain defendants, provided they are assented to by the other parties hereto.

The plaintiff concedes to the defendants hereinafter named for and appurtenant to the lands belonging to said defendants respectively, the following water rights on and along the Walker River and its tributaries in Nevada and in California, with the priorities also hereafter named in connection therewith; except that the priorities and water rights of the plaintiff, United States of America, as they may be fixed and determined by the court shall take their places in the order of priorities so that said defend-

ants' rights as so conceded, which are subsequent to the rights of the United States as they may be fixed and determined by the court herein shall be subordinate to the rights of the United States.

All the rights of the defendants as hereby conceded shall be fixed and determined upon the basis of the doctrine or law of appropriation and not upon the doctrine or law of riparian rights.

The duty of water shall be at the rate of .016 cubic feet of water per second of time per acre for [418] each acre of land irrigated during the irrigation season. In Bridgeport Valley on the East Fork of the Walker River, and at all points above Coleville Gauging Station on the West Fork of the Walker River, the irrigation season covers the period from March 1st to September 15th in each year, and at other points on said river the irrigation season shall conform to the season fixed in Decree No. 731. The water shall be measured at the point of diversion from the river.

The names of the defendants included in this concession; the description of the lands; the dates of priorities, and the areas are as follows:"

(For the sake of brevity the schedule of the rights covered by this stipulation is not set forth herein, but is set forth in detail in the decree accompanying these findings under the head of

"Rights of Other Defendants not included in the Decree in said suit No. 731", which schedule in said decree is made a part hereof by reference as fully as though said description were fully set forth herein.)

"The irrigated areas and reservoir capacities referred to in the foregoing tabulation shall be verified by rough survey made by the engineers or representatives of the said defendants above named, and checked and approved by the engineers or representatives of the plaintiff prior to insertion in any final decree entered herein. In the preparation of the recommended and final decree in this cause, the plaintiff shall [419] not be precluded from correcting any errors, omissions, mis-calculations, land descriptions or duplications of lands or water rights contained in the foregoing tabulations.

The court shall retain jurisdiction of this cause for the purpose of changing the duty of water or for correcting or modifying the decree to be entered; also for other regulatory purposes, including a change of the place of use of any water user, but no water shall be sold or delivered outside of the basin of the Walker River (except that appurtenant to the lands of Mrs. J. A. Conway and R. P. Conway, referred to in the foregoing tabulation). The decree shall provide for the method and character of notice to be given respecting any proposed changes or modifications thereof. The de-

cree shall contain such other provisions as may be determined proper by the court for the administration of the decree and the distribution of water thereunder.

All the foregoing is subject to such rights and priority or priorities for the plaintiff's lands, and water rights as may be determined by the court.

This, and the foregoing concession and tabulation does not include and does not refer to the lands and water rights of the Sierra Pacific Power Company, and is without prejudice to their claim of riparian rights. Whatever rights are claimed by said Sierra Pacific Power Company are unaffected by this concession to the other defendants, and are unaffected by their assent thereto." [420]

XII. The irrigation season along the Walker River, its branches and its tributaries, extends from the first day of March to the thirtieth day of September of each year, except that in Bridgeport Valley on the East Walker River and at all points above Coleville Gauging Station on the West Walker River the irrigation season covers the period from March first to September fifteenth of each year.

XIII. Sierra Pacific Power Company is the owner of 2638.95 acres of land in Mono County, California, at the head waters of West Walker River, described as follows:

Swamp lands acquired under the Act of Congress of September 28, 1850.

S½ of NE¼, E½ of SW¼, SE¼ of Sec. 23; S½ of NE¼ of Sec. 24; SE¼ of NE¼ of Sec. 25; W½ of NE¼, E½ of NW¼, E½ of SW¼, NW¼ of SE¼, Sec. 26; NE¼ of SE¼, Sec. 27; T. 6 N., R. 22 E.

N½ of SE¼, SW¼ of SE¼, SE¼ of SW¼, Sec. 18; NW¼ of NW¼, Sec. 22; NW¼ of NW¼, Sec. 30; T. 6 N., R. 23 E. M. D. B. & M.

School lands acquired under the Act of Congress of March 3, 1853, described as follows:

W½ of NE¼, E½ of NW¼, SE¼, NE¼ of SW¼, Sec. 16; T. 7 N., R. 23 E. M. D. B. & M. Surveyed March 30, 1880.

School lieu lands acquired under the Act of Congress of March 3, 1853, with certificate numbers of selection by the State of California and the date of approval by the Secretary of the Interior, as follows:

SW¼ of SW¼, Sec. 10; T. 6 N., R. 23 E. SW¼ of SW¼, Sec. 22; W½ of NW¼, NW¼ of SW¼, Sec. 27; T. 7 N., R. 23 E. M. D. B. & M.

Acquired under certificate 12,717, approved June 25, 1896. [421]

SE¼ of NW¼, SE¼ of SW¼, Sec. 4; E½ of NW¼, NE¼ of SW¼, W½ of SE¼, Sec. 9; E½ of NE¼, Sec. 21; T. 7 N., R. 23 E. M. D. B. & M.

Acquired under certificate 12,163, approved June 25, 1896.

Lots 2 and 3 of Section 4; T. 7 N., R. 23 E. M. D. B. & M.

Acquired under certificate 13,649, approved June 25, 1896.

W½ of NE¼, W½ of SE¼, Sec. 33; T. 8 N., R. 23 E. M. D. B. & M.

Acquired under certificate 12,593, approved June 25, 1896.

W½ of NW¼, W½ of SW¼, Sec. 15; T. 6 N., R. 23 E.

NE¼ of NE¼, Sec. 28; T. 8 N., R. 23 E. M. D. B. & M.

Acquired under certificate 12,865, approved June 15, 1898.

NW¼ of NE¼, Sec. 28; T. 8 N., R. 23 E., excepting 3.79 acres, rectangular in form, at the Northwest corner of said NW¼ of NE¼. M. D. B. & M.

Acquired under certificate 17,485, approved June 15, 1898.

SE¼ of SE¼, Sec. 4; T. 6 N., R. 23 E. E½ of SE¼, Sec. 21; E½ of NE¼, Sec. 28; T. 7 N., R. 23 E. M. D. B. & M.

Acquired under certificate 12,157, approved January 2, 1902.

The above described lands are riparian to West Walker River and its tributaries at the head waters thereof in that each separate tract originally acquired under a single title boarders on said river or

its tributaries. The water has been diverted from said river and its tributaries, Green Creek and Poor Creek, by said Sierra Pacific Power Company and its predecessors in interest from the year 1901 and for sometime prior thereto by means of nine small ditches and applied to the lands for the irrigation thereof. The lands so irrigated comprise three hundred twenty-two acres of irrigated land and twelve acres of natural overflowed land situated in the following described [422] parcels in Pickle Meadows, Mono County, California:

> S½ of NE¼, E½ of SW¼, SE¼, Sec. 23; S½ of NE¼, Sec. 24; W½ of NE¼, E½ of NW¼, E½ of SW¼, NW¼ of SE¼, Sec. 26; T. 6 N., R. 22 E.
>
> N½ of SE¼, SW¼ of SE¼, SE¼ of SW¼, Sec. 18 T. 6 N., R. 23 E. M. D. B. & M.

The time of appropriation prior to 1901 was not established by the evidence. The irrigating season in said Pickle Meadows was stipulated to be from April first to September fifteenth of each year. One-fortieth of a cubic foot of water per second is necessary for the irrigation of each of said three hundred twenty-two acres of land, or a total of 8.05 cubic feet per second for all of said land.

By reason of the situation of said lands and the fall of the waters flowing over and across the same, said waters can be beneficially used by said Sierra Pacific Power Company for the generation of electricity and that part of said lands may be used for the storage of the waters of said West

Walker River and its tributaries but the evidence does not show that said Sierra Pacific Power Company has constructed or determined to construct a power plant or the means for storing said water for power purposes.

XIV. During the final hearings before the Master, it was stipulated by counsel representing all of the parties to the suit that H. S. Morgan, successor to Spence W. Gregory, by his predecessors in interest, appropriated in 1860 and beneficially used thereafter from the waters of Rough Creek and its tributaries 1.20 c. f. s. of water for the irrigation of seventy-five acres of land out of the following described parcels situated in Township [423] 5 North, Range 27 East.

> SE¼ of SE¼ of Section 8; SW¼ of SW¼ of Section 9; NW¼ of NW¼ of Section 16; E½ of NE¼ of Section 17.

and it was further stipulated that a supplemental answer and counterclaim of H. S. Morgan setting forth such rights be waived and that he be adjudged to have such rights.

XV. It was also stipulated that as to the rights of Ira Fallon set forth in the stipulation respecting the rights other than those covered by said decree No. 731, a duplication of rights amounting to 4.58 c. f. s. had been included in said stipulation and that 4.58 c. f. s. of water should be deducted from the stipulated rights so that the allotment to him under said last mentioned stipulation should read as follows:

Date	Water used for irrigation in c. f. s.	Acres Irrigated	Stream
1874	5.14	428	Walker River
1880	2.644	220	
1891	.936	78	

for use upon the following described lands:

NE¼, Sec. 2; T. 14 N., R. 25 E. W½ of SE¼, Sec. 23; E½ of SW¼, Sec. 24; W½ of SW¼, SE¼ of SW¼, E½ of NW¼, Sec. 25; W½ of NE¼, E½ of SE¼, Sec. 26; NE¼, E½ of NW¼, NE¼ of SW¼, NE¼ of SE¼, S½ of SE¼, Sec. 35; W½ of W½, Sec. 36; T. 15 N., R. 25 E.

XVI. It was also stipulated that Joe Scierine acquired from Mono County, California, under date of May 6, 1929, since the commencement of this suit, the following described lands and the water rights for the irrigation thereof from Virginia and Dogtown Creeks, to-wit: [424]

Date	Wated used for irrigation in c. f. s.	Acres irrigated	Description
1861	1.28	80	N½ of NE¼, SE¼ of NE¼, NE¼ of NW¼, Sec. 21; SW¼ of NW¼, Sec. 22; T. 4 N., R. 25 E. M. D. B. and M.
1863	1.28	80	

and it was further stipulated that the filing of a supplemental answer and cross complaint by said Joe Scierine be waived and that he be entitled to said claim in the decree.

XVII. Antelope Valley Mutual Water Company is a corporation organized under the laws of the State of Nevada. It is the successor in interest of all the rights of Antelope Valley Land and Cattle Company in and to the waters of West Walker River and its tributaries except certain rights conveyed to A. A. Pitt, Edmond Powell, J. A. McAllister and Bruce Chichester, aggregating 5.86 c. f. s. It has no interest in the lands upon which said water is used but acts as an agent for the distribution of such waters to the owners of the lands who in the main acquired them from Antelope Valley Land and Cattle Company. Antelope Valley Mutual Water Company has changed its application of the water under its priority of 1864 for 17.60 cubic feet of water per second for the irrigation of eleven hundred acres of land along the West Walker River known as the Nevada Lands, Rickey Ranch, as shown in said suit No. 731, to the following described lands and that such substitution does not impair the rights of other parties to this suit.

NW¼ of NW¼, Sec. 4; E½ of E½, SW¼ of NE¼, SE¼ of NW¼, NW¼ of SE¼, Sec. 5; SE¼ of NW¼, W½ of SE¼, Sec. 8; T. 8 N., R. 23 E.

N½ of NE¼, Sec. 31; T. 9 N., R. 23 E. S½ of NE¼, SW¼ of SE¼, Sec. 12; N½ of NW¼, SW¼ of SW¼, Sec. 13; SE¼ of NE¼, Sec. 36; T. 9 N., R. 22 E. SW¼ of NW¼, Sec. 7, W½ of SW¼, Sec. [425] 16; SW¼ of NW¼, W½ of SW¼, Sec. 33; T. 9 N., R. 23 E.

XVIII. The defendant, Walker River Irrigation District, a corporation, is the owner of Bridgeport Reservoir, having a present capacity of forty-two thousand acre feet, situated on the East Walker River below the Town of Bridgeport, and has made application to the State Water Commission of the State of California for water appropriation from the flood and unappropriated waters of East Walker River and its tributaries for the purpose of storing said water in said reservoir and distributing the same to its shareholders, to supplement the use of water to which they are entitled under the decree in case No. 731 as recognized by the stipulations hereinbefore set forth when the flow of water in said river is insufficient to meet their several recognized rights.

Said appropriation is as follows:

Amended application number 1389, permit number 2536, received by said Commission March 11, 1925, for sixty-three thousand acre feet per annum, approved June 18, 1926, for the amount of water applied for which can be beneficially used, not to exceed fifty-seven thousand acre feet per annum, subject to vested rights, for storage to be collected from East Walker River from September first to about July twentieth of each season, the construction work was required to be completed thereunder on or before July 1, 1927, and complete application of the water to the proposed uses to be made on or before August 1, 1929.

And said Walker River Irrigation District is the owner of Topaz Lake Reservoir, having a present

capacity of fifty thousand acre feet, situated near West Walker River below Antelope Valley and has made applications to the State Water Commission of the State of California for appropriations from [426]

the flood and unappropriated waters of West Walker River and its tributaries for the purpose of storing said water in said reservoir and distributing the same to its shareholders, to supplement the use of water to which they are entitled under the decree in case No. 731 as recognized by the stipulations hereinbefore set forth when the flow of water in said river is insufficient to meet their several recognized rights.

Said appropriations are as follows:

Amended application number 2221, permit number 2537, received by said Commission March 11, 1925, for eighty-five thousand acre feet per annum, approved June 18, 1926, for the amount of water which can be beneficially used, not to exceed eighty-five thousand acre feet per annum, subject to vested rights, for storage in Topaz Lake Reservoir, to be collected from West Walker River from about October first to July fifteenth of each season, the construction work was required to be completed thereunder on or before January 1, 1930.

Amended application number 2615, permit number 2538, received by said Commission April 26, 1923, for two hundred acre feet per annum, approved June 18, 1926, for the amount of water which can be beneficially used, not to exceed two hundred

acre feet per annum, subject to vested rights, for storage in Topaz Lake Reservoir, to be collected from an unnamed stream, tributary of Topaz (formerly Alkali) Lake, from January first to December thirty-first of each season, construction work was required to be completed thereunder on or before June 1, 1930, and complete application of the water to the proposed use to be made on or before August 1, 1932.

Said defendant, Walker River Irrigation District, has also made application to the State Water Commission of the State of California for water appropriation for storage purposes as follows:

[427]

Amended application number 1097, permit number 2534, received by said Commission March 11, 1925, for thirty-five thousand acre feet per annum, approved June 18, 1926, for the amount of water which can be beneficially used, not to exceed thirty-five thousand acre feet per annum, subject to vested rights, for storage in Leavitt Meadows, to be collected from West Walker River from about January first to December thirty-first of each season, the construction work was required to be completed thereunder on or before December 1, 1928, and complete application of the water to the proposed use to be made on or before August 1, 1930.

Amended application number 1098, permit number 2535, received by said Commission March 11, 1925, for one hundred fifteen thousand acre feet per annum, approved June 18, 1926, for the

amount of water which can be beneficially used, not to exceed one hundred fifteen thousand acre feet per annum, subject to vested rights, for storage in Pickle Meadow to be collected from West Walker River from January first to December thirty-first of each season, the construction work was required to be completed thereunder on or before December 1, 1929, and complete application of the water to the proposed use to be made on or before August 1, 1930.

The storage of water in said reservoirs between the first of November and the first of the succeeding March will not interfere with the water required for irrigation purposes by the other parties to this suit and the storage of water in said reservoirs from the water in said river in excess of the amounts adjudicated to the parties hereto under the decree in said suit No. 731 and recognized in [428] the stipulations hereinbefore contained, and found herein for the United States of America and Sierra Pacific Power Company, will not interfere with the rights of the parties to this suit.

XIX. During the final hearings before the Master, it was stipulated by the attorneys for the parties to this suit that the applicants for permits filed with the State Engineer of Nevada for the use of water from Walker River and its tributaries so far as the applications therefor are in force, may be decreed such rights in such waters as they may have, subject to vested rights and subject to final action thereon by said State Engineer. [429]

* * * * * * * *

CONCLUSIONS OF LAW

The court concludes as follows:

I. The law or doctrine of appropriation and not of riparian rights applies to all the claims of all the parties to this suit in and to the waters of Walker River and its tributaries.

II. The plaintiff, the United States of America, is entitled to a decree that it is the owner and entitled to the use of, upon the Reservation, by right of appropriation, the amounts of water from Walker River at the points of diversion with priorities and the acreage to be irrigated as set forth in the aforesaid findings of fact.

III. Sierra Pacific Power Company, a corporation, is entitled to a decree that it is the owner of the lands in the State of California described in paragraph XIII, of the aforesaid findings of fact and that said corporation is the owner of and entitled to the use of a flow of 8.05 c.f.s. with priority of 1901 of the waters of West Walker River, Green Creek and Poor Creek, tributaries of West Walker River, for the irrigation of three hundred twenty-two acres of land in Pickle Meadows, Mono County, California, and embraced within the land specifically described in paragraph XIII of the aforesaid findings of fact.

IV. The parties to this suit and their successors in interest claiming rights under the decree in suit No. 731 in this court, are entitled to a decree that they are the owners and entitled to the use of the several quantities of water from Walker River and

its tributaries under the priorities and applicable to the lands as found in paragraph X. of the aforesaid findings of fact and as set forth in the tabulations revised to show the [434] present ownership as specifically set forth in the decree accompanying the findings of fact aforesaid and these conclusions of law.

V. The parties defendant to this suit other than those whose rights were adjudicated under said decree No. 731, are entitled to a decree that they are the owners and entitled to the use of the several quantities of water under the priorities and applicable to the lands described in the stipulation set forth in paragraph XI. of the aforesaid findings of fact with the specific amounts of water, priorities and land to which applicable, included in the stipulation and set forth in detail in the decree accompanying the findings of fact aforesaid and these conclusions of law.

VI. H. S. Morgan is entitled to a decree adjudging him to be the owner and entitled to the use of 1.2 c. f. s. of the water of Rough Creek, a tributary of East Walker River, with a priority of 1860, for the irrigation of seventy-five acres of land described in paragraph XIV. of the aforesaid findings of fact.

VII. Ira Fallon is entitled to a decree adjudging him to be the owner of and entitled to the use of 5.14 c. f. s. of the priority of 1874, 2.644 c. f. s. of the priority of 1880 and .936 c. f. s. of the priority of 1891, of the waters of Walker River, in addi-

tion to the water allocated to him under said decree No. 731, for use upon the lands specifically described in paragraph XV. of the aforesaid findings of fact.

VIII. Joe Scierine, as the successor of Mono County, California, in the lands hereinafter referred to, is entitled to a decree adjudging him to be the owner and entitled to the use of 1.28 c. f. s. of the priority of 1861 and 1.28 c. f. s. of the priority of 1863, of the waters of Virginia and Dogtown Creeks for application upon the lands specifically described in paragraph XVI. of the aforesaid findings of fact [435]

IX. Walker River Irrigation District, a corporation, is entitled to a decree adjudging it to be the owner of Bridgeport Reservoir on East Walker River, having a present capacity of forty-two thousand acre feet and to be the owner of Topaz Lake Reservoir near West Walker River, having a present capacity of fifty thousand acre feet and authorized to divert and store in said reservoirs from the East and West Walker Rivers, respectively, and their tributaries, flood and unappropriated waters of said streams to the extent of the respective capacities of said reservoirs for the use of its shareholders, such diversion to be made annually during the season from November first to March first and at other times when there is an excess of water in said rivers over the amounts severally adjudicated to the other parties to this suit, but such diversion should not be permitted to the extent of depriving such parties of water for stock watering and for

domestic purposes and/or water now in use for power purposes.

Said Walker River Irrigation District is entitled to a decree for storage purposes of flood and unappropriated waters under applications made to and approved by the State Water Commission of the State of California for fifteen thousand acre feet per annum from East Walker River for storage in Bridgeport Reservoir, being the difference between the quantity approved by said Commission under permit No. 2536 and the present capacity of said reservoir; thirty-five thousand acre feet per annum from West Walker River for storage in Topaz Lake Reservoir, being the difference between the quantity approved by said Commission under permit No. 2537 and the present capacity of said reservoir; two hundred acre feet per annum from an unnamed stream flowing into [436] Topaz Lake Reservoir, formerly Alkali Lake, for storage in said reservoir; thirty-five thousand acre feet per annum from West Walker River for storage in a reservoir to be constructed in Leavitt Meadows and one hundred fifteen thousand acre feet per annum from West Walker River for storage in a reservoir to be constructed in Pickle Meadows, subject to vested rights and subject to prior appropriation made under permits issued by the State engineer of the State of Nevada and subject to final action on said applications made by said Walker River Irrigation District to the State Water Commission of the State of California.

X. The following persons:

Frank A. Arentz
Paul Regli
J. D. Yeager
Henry Carney
Samuel Arentz
J. D. Butler
Franklin Arentz
Oliver A. Perry
Charles C. Perry
Annette D. Lewis
R. W. Allum
John H. and James H. Wichman

who have made applications to the State Engineer of the State of Nevada for permits for use of water of Walker River and its tributaries specifically set forth in the findings of fact aforesaid, are entitled to a decree adjudging them to be severally the owners and entitled to the use of the amounts of water, the land to which the water is to be applied and the priorities allowed by said State Engineer, subject to compliance with the requirements under the respective permits issued to them and to final action thereon by said State Engineer, and subject to prior vested rights.

Done in open court this ..... day of ....., 193.....

United States District Judge. [437]

Received a copy of the proposed foregoing findings of fact and conclusions of law this 7th day of August, 1935.

GREEN & LUNSFORD
Attorneys for certain defendants

Received a copy of the proposed foregoing findings of fact and conclusions of law this 7th day of August, 1935.

W. M. KEARNEY
Attorney for certain defendants

Received a copy of the proposed foregoing findings of fact and conclusions of law this 7th day of August, 1935.

THATCHER & WOODBURN
Attorneys for Sierra Pacific Power Co.

Received a copy of the proposed foregoing findings of fact and conclusions of law this 7th day of August, 1935.

WILLIAM S. BOYLE
Attorney for Plaintiff

[Endorsed]: Filed August 8, 1935. [438]

[Title of District Court and Cause.]

DECREE

This suit was commenced on July 3, 1924. The plaintiff thereafter filed an amended complaint to which amended complaint the several defendants filed their answers and cross complaints.

The parties to said suit were represented by attorneys as follows:

The United States of America was represented [442] originally by George Springmeyer, United States attorney for the District of Nevada, and subsequently by his successor, H. H. Atkinson, United States attorney for said District, and by Cole L. Harwood and Ethelbert Ward, special attorneys for the plaintiff.

William M. Kearney represented the following defendants:

Ernest Aeschlimann; Emillio Aiazzi; J. Arouze; Mrs. C. Baker, successor to Henry Baker; Carlo Barbagelata; W. L. Blackwell; Dora Williams Borge; August Bunkowski, successor to F. W. Simpson; Cecil Burkham, and Peter Savini, co-partners doing business under the firm name and style of Burkham & Savini; V. S. Connell; Mrs. M. E. Conway and Mrs. A. G. Sturgeon, Executrices of the Estate of Patrick J. Conway, Deceased; Frank Cordrey; Battista Cremetti; F. Dill, C. Metzger and B. F. Edwards, doing business as Dill, Metzger & Edwards; Fred Dunn; Frank W. Estes, successor to Harriet Estes; Bertha M. Evans (sued as Bertha Simpson), successor to Frank Simpson; Joe Faber; Ira Fallon; Mrs. J. C. Farral; Mrs. Ernina Francisconi, successor to Amanda Fenili; J. F. Fredericks; Geo. W. Friedhoff, sued as George Freidhoff; Fred Fulston; G. H. Fulstone, sued as George H. Fulstone; Mr. and Mrs. Wm. Gardiner; Mrs. Kate Gibbons,

sued as J. G. Gibbons; Ugo Giorgi and Guilio Giorgi, co-partners doing business under the firm name of Giorgi Brothers, successors to D. J. Butler; A. Glock, successor to Mrs. Mary E. Young; M. J. Green; Greenwood Ditch Company, a corporation; A. Grulli, Menina Grulli and Manuel Grulli (sued as A. Grulli); Thomas Hay; Peter Henrichs; Mrs. Adeline Hilbun; James Hilbun; Chas. Hinds; Joe Jaunsaras, John Juansaras and Joe Azcarraga (successors to F. W. Simpson); Joseph Jeppesen, successor to J. P. Perazzo; Hans C. Jesson, successor to Frank W. Simpson; Andrew Johnston; Bertha Johnston; Hattie F. Kremmel; Anetta D. Lewis; C. [443]
B. Logan; Fred Lomori, sued as Fred Lammon, Antone Manha; Alice Martin; Clara Masterson; Guilio Menesini and Earnesto Tognetti, doing business under the firm name of Menesini & Tognetti (a partnership, sued as Minesini & Tonitti); Mickey Ditch Company, a corporation; Mrs. Laura Dickinson Miller, a successor to Plymouth Company; J. G. McGowan; Louise McGowan, (Mrs. T. M.), W. R. McGowan; John Nagel, successor to Bertha Ann Johnson; Ester S. W. Neilson; Mrs. N. P. Neilson; A. M. Nesmith and Jennie Nesmith, his wife, successors to Plymouth Company; R. H. Okey; Geo. Parker; Mrs. Mary J. Parker, successor to J. O. Parker; Herbert Penrose, successor to Wm. Penrose; Reynold Penrose; Wm. M. Penrose; C. C. Perry; Mrs. Anna B. Philatro; George Plummer, Jr.; F. Poli, successor to Mrs. Lizzie Hirony-

mous; Arthur Pursel, (successor to Morris Pursel); H. M. Pursel; Wilton Pursel, successor to Morris Pursel; Mrs. Sarah Jane Rallens; W. H. Roach; Ambro Rosaschi; Amos Santina, successor to L. D. Santina; Carlo Scatena; Joe Sceirine; H. W. Schacht; A. B. Silva, sued as A. B. Silia; Frank W. Simpson; Spragg & Woodcock Ditch Company, a corporation; F. O. Stickney; I. A. Strosnider; I. A. and Fred Strosnider; A. D. Sturgeon and Maude Sturgeon, successors to P. J. Conway and H. F. Swasey and S. W. Gregory; A. Tomagni, sued as Antone Gamagni; Mrs. Lydia Trankle; A. J. Van Fleet, successor to A. H. Barlow and Wm. Penrose Estate; Fred Wade, sued as Edward Frederick Wade; Walker River Irrigation District, a corporation; Florence Williams Walmsley, sued as Florence Williams; Mamie Williams Walmsley; L. L. Wedertz; Henry Williams; George F. Willis, administrator of the Estate of Hester Wise, deceased; George W. Wilson; J. I. Wilson, sued as J. Q. Wilson; William G. Wise, successor to H. W. (Wm.) Schacht; J. D. Yeager, J. W. Wilson.

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George L. Sanford represented the following defendants:

Leon Auchoberry (successor to H. F. Powell); Fred J. Brooks; L. R. Bassman; Elizabeth Chichester; Bruce Chichester; A. and F. Charlebois; Roy G. Chichester; Frank Compston; James and Hachquet Compston; Douglas County Farmers Bank, a corporation; Estate of John B. Gallagher, deceased, C. W. Gallagher, Elizabeth Galla-

gher DeSousa, et al; Fox Ditch Company, a corporation; Penrose and Wast Guild; Charles Groso; Kate Smith Gage; Fred A. Hall; S. H. Hunewill and Millie Morris; A. Jensen, Jr.; Hans Krauspe; J. S. Mann; Mono Land & Livestock Company, a corporation; H. S. Morgan; W. H. Morgan; Arthur and Melio Maionchi; F. B. Mann; John Menza; Eliza McKay; Geo. C. McVicar; Jas. T. and Alta M. McKay; Neil McVicar; Mrs. C. A. McVicar; James McAllister; A. A. Pitts; Minnie M. Powell; Edmond Powell; F. W. Settlemeyer; Schacht, Settlemeyer and Settlemeyer; Nellie Sunstedt; J. C. Snyder; Louis Saroni; Schreck Bros.; Bertrand Salles; The Plymouth Land and Stock Company, a corporation; G. M. Terry; R. C. Terry; Thomas Williams; Lee Wilkerson; James H. and John Wichman.

Green & Lunsford represented the following defendants.

Antelope Valley Mutual Water Company, a California corporation; Mary E. Conway; Richard P. Conway; Charles E. Day; James H. Day; Leland S. Day; Charles M. Kirkwood; Idelle Balzar, Pearl Kirkwood, Lotta Twelves; Mrs. A. B. Philatro; David S. Jones.

W. H. Metson, with E. B. Mering, as counsel, represented the following defendants:

Adel Balzar; Mary A. Conway; Richard P. Conway; Leland Day; C. E. Day; C. M. Kirkwood; Mrs. C. M. Kirkwood; Lotta Twelves. [445]

At the hearings, these defendants and their counsel were represented by Green & Lunsford.

Thomas F. Moran and Sardis Summerfield originally represented Minnie M. Powell, as the successor in interest of James Powell, who was subsequently represented by George L. Sanford.

W. W. Watson represented Bertrand Salles, sued herein as Mrs. Bertrand Salles. This defendant and his counsel were represented at the hearings by George L. Sanford.

Arthur F. Lasher represented Joseph P. Perazzo, successor in interest to Perazzo Brothers. These interests were, during the pendency of the suit, acquired by the Bank of Nevada Savings and Trust Company and were represented by Thatcher and Woodburn and William Forman.

George B. Thatcher and William Woodburn, with William Forman as counsel, represented Sierra Pacific Power Company, successor to Truckee River General Electric Company, Bank of Nevada Savings and Trust Company, Antelope Valley Land and Cattle Company, and originally represented Antelope Valley Mutual Water Company, which was subsequently represented by Green and Lunsford.

This suit was referred to B. F. Curler, appointed by the court on March 12, 1928, as Special Master in Chancery, to take testimony in the suit and report to the court "as to conclusions of fact and of law and as to the form and substance of the decree to be entered." Testimony was thereafter taken by said Special Master and documentary evidence received. Before the completion of the taking of testimony said B. F. Curler resigned and Robert M.

Price was appointed by the court Special Master in his stead with like instructions and powers as those given to said B. F. Curler. Upon the appointment and qualification of said Robert M. Price as Special Master, further hearings were had, the cause argued by counsel for all of the parties to

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the suit and on July 24, 1931, submitted for decision. The Special Master thereupon prepared and submitted to the attorneys for the several parties to the suit, a proposed report, findings of fact and conclusions of law and decree, for the purpose of enabling corrections of descriptions and in other minor matters to be made. Thereafter the case was, at the request of the attorneys for the several parties, reopened for the presentation of further evidence respecting other rights than those which had been determined in the proposed decree and further hearings were had and evidence, oral and documentary, presented. Thereafter the cause was further argued by counsel, corrections in and additions to the proposed decree were made and the cause again submitted to the Special Master. The Special Master thereupon made his report to the Court, submitting proposed findings of fact, conclusions of law and decree. Objections having been made thereto by several parties to the suit, the Court ordered a hearing at Carson City, Nevada, on May 22, 1933, at which hearing arguments were presented at length by the attorneys representing the several parties to the suit and the cause was submitted to the Court for decision. The Court, on

May 27, 1933, referred the matter to the Special Master to take further testimony respecting claimed rights of certain parties. Thereupon further hearings were had and redrafted findings of fact, conclusions of law and decree were submitted to the Court. The Court, after considering the same and the law applicable in the case, held that all the rights of the several parties to the suit were governed by the law of appropriation and re-referred the case to the Special Master to determine what rights, if any, Sierra Pacific Power Company had as an appropriator in and to the waters of West Walker River in Mono County, California. The Special Master having taken further testimony and redrafted and resubmitted [447] to the Court proposed findings of fact, conclusions of law and decree in accordance with the opinion of the Court theretofore rendered on June 6, 1935, and the Court having considered the law and the evidence and having made its finding of fact and conclusion of law, orders, adjudges and decrees as follows:

RIGHTS OF THE UNITED STATES OF AMERICA

I. The plaintiff, United States of America, is hereby judged to be the owner of the several rights acquired by appropriation in and to the waters of Walker River for use upon Walker River Indian Reservation in the State of Nevada as set forth in the following tabulation, which shows in columns reading from left to right the years in which the

several rights of appropriation accrued, the amounts of water expressed in cubic feet per second at the point of diversion acquired in such years respectively, and the number of acres irrigated under such appropriations.

Priority	Cu. Ft. per Sec.	Acres irrigated
1868	4.70	385.95
1872	3.55	295.80
1875	6.15	512.80
1883	7.50	625.20
1886	1.03	85.80

RIGHTS OF DEFENDANTS RECOGNIZED IN DECREE No. 731

II. The parties defendant to this suit, or their succesors in interest, hereinafter in this paragraph II. mentioned, whose rights were adjudicated for them, or their predecessors in interest, in the decree of this Court in the suit entitled, "Pacific Livestock Company, a corporation, Plaintiff, vs. T. B. Rickey, et al., Defendants" in Equity No. 731, are hereby severally [448] adjudged to be the owners of certain rights acquired by appropriation in and to the waters of Walker River and/or its tributaries and are hereby decreed the rights as appropriators as set forth in the following tabulation, which gives in separate columns reading from left to right the name of the present owner of an existing right, the name of the stream from which the appropriation was made, the year when the right of appropriation accrued, the amount of water expressed in cubic feet per second to the use of which the owner is

entitled at the point of diversion, the number of acres irrigated by such water and the description of the land to which the appropriated waters have been conducted or applied to a beneficial use. All of the land below described is situated in townships north and ranges east of Mount Diablo Base and Meridian and the designation "M. D. B. & M." is made a part of each description of land as fully as if specifically set forth. Where the number of acres described under the several priorities is in excess of the number of acres irrigated, it is understood that the number of acres irrigated are included in the specific description of the land and that the land to be irrigated from the several priorities is the number of acres specifically set forth under "No. of acres irrigated."

* * * * * * *

X. The parties above named are hereby adjudged to be the owners of the use of the several amounts of water from the several streams as above set forth and are entitled to divert and use such waters of Walker River and/or its tributaries as the case may be, for the beneficial purposes specified, subject to and in accord with the priorities above set forth. Wherever two or more persons are given a priority as of the same year and from the same stream, such priorities shall be deemed to be identical in point of time and equal in point of right with due regard to the amount hereby allowed to each. Any of the said parties shall be entitled to change the manner, means, place or purpose of use or the point of diversion of the said waters or any thereof in the manner provided by law, so far as

they may do so without injury to the rights of other parties hereto, as the same are fixed hereby.

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XI. Each and every party to this suit and their and each of their servants, agents and attorneys and all persons claiming by, through or under them, and their successors and assigns in and to the water rights and lands herein described, be and each of them hereby is forever enjoined and restrained from claiming any rights in or to the waters of Walker River and/or its branches and/or its tributaries, except the rights set up and specified in this decree and each of the said parties is hereby enjoined and restrained from taking, diverting or interfering in any way with the waters of the said Walker River or its branches or tributaries so as to in any way or manner interfere with the diversion, enjoyment and use of the waters of any of the other parties to this suit as set forth in this decree, having due regard to the relative priorities herein set forth; and each of the said parties is hereby enjoined and restrained from ever taking, diverting, carrying away, or otherwise using or claiming any of the water so allotted to them in any manner or at any time so as to in any way interfere with the prior rights of other parties to this suit as the same are herein set forth, or until such parties having prior rights as herein specified have received upon their several lands the waters so adjudicated to them.

XII. This decree shall be deemed to determine all of the rights of the parties to this suit and their

successors in interest in and to the waters of Walker River and its tributaries, except the undetermined rights of Walker River Irrigation District under its application to the State Water Commission of the State of California and the undetermined rights of the applicants for permits from the State Engineer of the State of Nevada hereinabove specified, and it is hereby ordered, adjudged and decreed

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that none of the parties to this suit has any right, title, interest or estate in or to the waters of said Walker River, its branches or its tributaries other than as above set forth, excepting the undetermined rights of Walker River Irrigation District and the several applicants for permits from the State Engineer of the State of Nevada. Nothing herein shall prejudice the rights of any of the parties defendant hereto under any transfer or legal succession in interest since the commencement of this suit to any of the rights hereby adjudicated to the several parties defendant.

XIII. Nothing herein shall affect the right of any of the parties hereto to rotate the use of water, or to combine or exchange the use thereof, so far as they may do so without injuriously affecting the rights of any of the other parties hereto, and the Water Master, hereinafter mentioned, may permit the said parties to rotate the use of said water or to combine or exchange the use thereof, having due regard to the priorities herein fixed, so far as the same may be done without injuriously affecting the rights of the other parties to this suit.

XIV. The court retains jurisdiction of this cause for the purpose of changing the duty of water or for correcting or modifying this decree; also for regulatory purposes, including a change of the place of use of any water user, but no water shall be sold or delivered outside of the basin of the Walker River except that appurtenant to the lands of Mrs. J. A. Conway and R. P. Conway referred to in the foregoing tabulation.

The court shall hereafter make such regulations as to notice and form or substance of any applications for change or modification of this decree, or for change of place or manner of use of water as it may deem necessary. [510]

The owner of each ditch or canal herein authorized to divert water from the Walker River or its tributaries shall at his own expense install and at all times maintain at or near the intake of such ditch or canal, a reliable, sufficient and easily operated regulating headgate and a locking measuring box, flume or other device to be approved by the Water Master, whereby the water diverted into such ditch or canal may be regulated and correctly measured. Upon failure of any owner of such ditch or canal to install such regulating, locking and measuring device on or before the ..... day of ....., 193....., or at such earlier date as may be fixed or demanded by the Water Master, upon ten days' notice, or to maintain such regulating, locking or measuring device, the Water Master shall cut off the water from such ditch or canal until the same shall be so installed and maintained.

XV. There is hereby appointed .....to act as Water Master, who is hereby charged with the duty of apportioning and distributing the waters of the Walker River, its forks and tributaries in the State of Nevada and in the State of California, including water for storage and stored water, in accordance with the provisions of this decree. That said Water Master shall serve until the further order of this court and may be removed by the court at any time. The Water Master shall have authority to appoint ..... deputies to assist him. Upon application to the court he may employ such additional assistants as the circumstances may require. The said Water Master shall receive an annual salary of $....., payable in monthly installments of $.....The compensation of his assistants shall be fixed by the court from time to time. The

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said Water Master also shall be authorized to rent, furnish and maintain an office for his use and to incur necessary expenses for transportation of himself and his assistants and for other proper purposes, all of which shall be reported to and be approved by the court twice yearly, that is to say, on the first day of May and the first day of November in each year.

The compensation of the Water Master and his assistants and all expenses connected with his employment shall be apportioned among the several parties hereto, both in the State of Nevada and in the State of California, according to the acreage

of the lands irrigated under this decree, including stored water and the court reserved jurisdiction to hereafter enter judgment for any unpaid portion of said expenses and to make and enforce such regulations for the collection of said money as may be necessary and proper.

The said Water Master, with the approval of the court, may make such rules as may be necessary and proper for the enforcement of this decree and for the carrying out of its purposes and objects and the proper apportionment and distribution, including rotation of the use of water where necessary, of the waters of said Walker River among and to the persons entitled thereto, including water for storage and stored water.

XVI. The irrigation season along the Walker River, its branches and its tributaries, extends from the first day of March to the thirtieth day of September of each year, except that in Bridgeport Valley on the East Walker River and at all points above Coleville Gauging Station on the West Walker River the irrigating season covers the period from March first to September fifteenth of each year. [512]

XVII. Each of the parties to this suit shall severally pay their costs therein expended.

XVIII. The Special Masters, B. F. Curler and Robert M. Price, heretofore appointed by the Court "to take the evidence and testimony herein, and to report the same to the Court with his recommendations for the advice of the Court as to conclusions of fact and law, and as to the form and sub-

stance of the decree to be entered" shall be paid for their several services by the United States of America, such sums respectively as the Court shall hereafter order.

Done in open court this ..... day of ....., 1935.

.....,
United States District Judge.

Received a copy of the proposed foregoing Decree this 7th day of August, 1935.

GREEN & LUNSFORD
Attorneys for certain defendants

Received a copy of the proposed foregoing Decree this 7th day of August, 1935.

W. M. KEARNEY
Attorney for certain defendants

Received a copy of the proposed foregoing Decree this 7th day of August, 1935.

THATCHER & WOODBURN
Attorneys for Sierra Pacific Power Co.

Received a copy of the proposed foregoing Decree this 7th day of August, 1935.

WILLIAM S. BOYLE
Attorney for Plaintiff

[Endorsed]: Filed as of Aug. 8, 1935 this 19th day of November, 1937. [514]

[Title of District Court and Cause.]

ORDER EXTENDING TIME

Good cause being shown therefor, it is hereby ordered that the parties, plaintiff and defendants in the above-entitled cause have until September 29, 1935 to file objections to Findings of Fact and Conclusions of Law and Decree, filed with the above-entitled Court on August 9, 1935.

Dated: August 14, 1935.

A. F. ST. SURE
United States District Judge.

[Endorsed]: Filed Aug. 15, 1935.

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[Title of District Court and Cause.]

EXCEPTIONS OF PLAINTIFF TO FINDINGS OF FACT, CONCLUSIONS OF LAW, AND DECREE

Comes Now the United States of America, plaintiff herein, and excepts to the Master's Report, Findings of Fact, Conclusions of Law and Decree filed herein on August 9, 1935, in and for cause of exceptions, shows:

EXCEPTIONS TO THE FINDINGS OF FACT

First Exception: The Findings of Fact in Paragraph I, page 2, are erroneous in the following portion thereof:

"In setting aside said reservation the United States of America made no reservation of any water rights for the irrigation of lands thereof,"

for the reason: (A) that the setting aside of the Reservation by the United States on November 29, 1859, for the use [516] of the Piute Tribe of the Walker River Indian Reservation for the purpose of affording them an opportunity to acquire the arts of husbandry and civilization, by necessary implication set aside and reserved so much of the then unused, unappropriated undisposed of and surplus waters of the Walker River as would in the future be needed by the Indians for the cultivation and irrigation of the lands of the Reservation because no crops can be raised on these lands without irrigation. (B) That the evidence proves that the intention of the government was to reserve and did reserve and use such waters by immediately encouraging the Indians in constructing ditches and in planting crops and in raising crops through irrigation and (C) throughout the whole history of this Reservation, large amounts of money were appropriated by Congress and used for the purpose of affording the Indians the opportunity of acquiring the arts of husbandry and civilization.

Second Exception: The Findings of Fact in Paragraph II, page 4, are erroneous in the following portion thereof:

"The peak flow (in Walker River) occurs late in May or early in June, and thereafter

> the water subsides rapidly so that in most years the flow by the middle of June is insufficient without storage facilities to meet the requirements of the lands along the river which have been brought under cultivation,"

for the reason that the evidence shows that the white settlers on the river above the Reservation have unlawfully diverted and wastefully used water upon their lands prior to the construction of the Topaz or Bridgeport Reservoir, thereby depriving the Government of its water for its Indian Reservation and depleting the flow in the river.

Third Exception: That the Findings of Fact in Paragraph II, page 4, are erroneous in the following portion thereof: [517]

> "Even under natural conditions; that is, without upstream diversions, the water would not in some years of low flow reach the lands of the Reservation by the end of July by reason of seepage and high evaporation loss,"

for the reason (a) there is no evidence in the case to that effect; (b) no such conditions have ever been present since irrigation by the upstream settlers commenced; and (c) the inference from the testimony is to the contrary.

Fourth Exception: The Findings of Fact in Paragraph V, page 5, are erroneous in the portions thereof stating that

> "the Indians generally refuse to irrigate at night and there results a considerable loss of water by reason thereof,"

for reason that the Indians follow the practice of the white settlers by generally refusing to irrigate at night.

Fifth Exception: The Findings of Fact in Paragraph V, page 5, are erroneous in the portion thereof stating that

> "the number of Indians upon said reservation is not increasing, and it has not been shown that there is the necessity or demand by the Indians for the cultivation or a larger area of land than two thousand one hundred acres,"

for the reason that it has been shown, and notwithstanding the constant interference by the upstream users and their taking of water from the river: (a) that about 2,100 acres of land had been irrigated and cultivated by the Indians as found by the Master and this under the greatest difficulties and discouragement because of said interference; and (b) that the Indians did not wish to dispose of their allotments but desired to irrigate additional lands, and that the 10,000 acres of lands claimed by the Plaintiff would eventually be irrigated by the Indians; (c) the Master should have found in accordance with the evidence that the United States immediately after the creation of the Reservation began to encourage and teach the Indians to practice farming and irriga- [518] tion upon the Reservation; furnish them with seed and implements for farming; that ditches for irrigation were constructed not later than 1866; that from the creation of the Reservation in 1859, the United States has

continuously encouraged and assisted the Indians in cultivating, irrigating farms and irrigating crops; that the first irrigation was in what was known as "Campbell Valley" in the Walker River Indian Reservation above the present irrigated lands; that, on account of high water the Agency and area where cultivation and irrigation were practiced, were changed to what is now called "Walker Lake Valley"; that a diversion dam was constructed at or near the location of the present diversion dam as early as 1872; that ditches were taken out from said diversion dam on both sides of the river which were continuously used thereafter by the Indians and which formed part of the present irrigation system; that the irrigated area was greatly increased by the Indians with the assistance and encouragement of the United States; that in 1910 a diversion dam and irrigation ditches were constructed, enlarged and extended so that they were then in the same condition practically that they are now; that by this said irrigation system, as then constructed and as it has since been maintained, about 3600 acres of lands can be irrigated on the Reservation without extension or enlargement of the ditches; and that with the extensions and some enlargements of the ditches approximately 8,000 acres can be irrigated; that all of the lands covered by said irrigation system and capable of being irrigated therefrom was allotted to the Indians in 1906 in the form of agricultural Trust Patents pursuant to the public statutes of the

United States and that 504 such allotments were made to the Indians in tracts or parcels of 20 acres each; that a portion of said allotments was located in "Campbell Valley" where the first irri- [519] gation was practiced by the Indians with the assistance of the United States soon after the reservation was created; and the Master should have further found in accordance with the evidence that the plaintiff had designed and to a large extent constructed an irrigation system for the ultimate irrigation of not less than 10,000 acres of the lands upon the Reservation and that the said 504 trust allotments of 20 acres each could be irrigated thereby.

Sixth Exception: The plaintiff excepts to the statement in the Findings of Fact in Paragraph VI. on the lower portion of p. 5, to the effect that the United States Government did not make any objection nor take any action regarding its reserved water rights for its Walker River Indian Reservation until after this suit was begun, for the reason that there was no evidence to support such finding.

Seventh Exception: Plaintiff excepts to the statement in Paragraph VI in the Findings of Fact to the effect that the government not having appeared in a water suit No. 731 between private parties, defendants, such failure operates as an estoppel against the sovereign United States for the reasons: (a) That the United States was and is the sovereign proprietor of the lands and water for the Walker River Indian Reservation reserved by the govern-

ment on Nov. 29, 1859; and (b) as such sovereign government it cannot be estopped by any action or non-action on the part of its subordinate unauthorized employes relating to such properties. The sovereign United States can be estopped only by direct positive action of Congress. Non-action of Congress does not estop the United States.

Eighth Exception: The Findings of Fact in Paragraph VI on page 6, are erroneous in the portion thereof stating:

> "The United States, as late as 1910, relied upon the doctrine of appropriation for its [520] rights, in which year the Superintendent of the Reservation on behalf of the Indians made application to appropriate public waters of the State of Nevada,"

for the reason that the United States has never relied upon the doctrine of appropriation of its own water for its rights for its Indian Reservations and that the Superintendent of the Walker River Indian Reservation, by filing an application with the State Engineer for a permit to appropriate public waters of the State of Nevada, did not estop the sovereign United States from using its own reserved waters and did not release or surrender the water reserved by the United States in 1859, for the irrigation of its Indian Reservation; and for the further reason that the unappropriated waters of the Walker River did not belong to the State of Nevada but belonged to the United States.

Ninth Exception: The plaintiff calls attention to the statement in the Findings of Fact in Paragraph VI, on page 6, as follows:

> "The 69th Congress authorized a reconnoissance in Schurz Canyon to determine to what extent the water supply of Walker River might be augmented, the feasibility of reservoir sites, the cost of right of way, etc.",

and states that the appropriation of $10,000.00 was made by Congress after commencement of this suit for the purpose of investigating the feasibility of the construction of a reservoir on the reservation. We call especial attention to the fact that an investigation was made and a reservoir for 30,000 acre feet was recommended by Supervising Engineer Engle, of the Indian Irrigation Service; that the recommendation of Engle has not been approved by his superiors but that Congress has made no further appropriation or authorization for the construction of any reservoir, nor has the secretary of the Interior authorized the construction of any reservoir.

Tenth Exception: The Findings of Fact in Paragraph VI, page 6 are erroneous in the portion thereof stating that [521] a comprehensive report known as the Blomgren Report was made December 28, 1926 and plaintiff excepts to the same; the so-called Blomgren report was not introduced in evidence and was not signed by Blomgren and no part of this document has ever been approved by

the Indian Bureau or the Secretary of the Interior or by Congress.

Eleventh Exception: The Findings of Fact in the last portion of Paragraph VI, pp. 6 and 7, in which are set out certain findings by Special Master, Henry Thurtell, in Suit No. 731, in which the United States was not a party, but which were conceded by the defendants in this suit. These findings should have been, under the facts and the law, a finding that the United States on November 29, 1859 had reserved of the surplus and unappropriated waters of the Walker River 150 second feet for diversion and beneficial use upon the irrigable portions of the allotments to the Indians upon the Walker River Indian Reservation, instead of the five separate priorities dated 1868, 1872, 1875, 1883 and 1886, aggregating a diversion of 22.93 second feet for the irrigation of 1905.55 acres. The Plaintiff states that said concessions by defendants and said findings by said Thurtell are as follows:

Priority	c. f. s.	Acres
1868	4.70	385.95
1872	3.55	295.80
1875	6.15	512.80
1883	7.50	625.20
1886	1.03	85.80

EXCEPTIONS TO THE CONCLUSIONS OF LAW

1. The Conclusions of Law in Paragraph I, p. 25, are as follows:

> "The law or doctrine of appropriation [522] and not of riparian rights applies to all the

claims of all parties in this suit in and to the waters of Walker River and its tributaries."

The plaintiff excepts to the above for the reason that neither the doctrine of appropriation nor the doctrine of riparian rights applies to the rights of the United States of America for its water reserved for irrigation uses upon its Walker River Indian Reservation; but the doctrine which applies to the United States herein is the doctrine that the sovereign United States reserves its own waters for its own uses upon its own lands. On November 29, 1859 the Indian Reservation was established by the United States and so much of the unused, unappropriated and undisposed waters of the Walker River as would in the future be needed for the irrigation of the lands of the Walker River Indian Reservation, were reserved for the use and benefit of the Indians thereon with a priority right of November 29, 1859.

2. The conclusions of law in Paragraph II, p. 25, are erroneous in that the 22.93 second feet of water with priorities for various amounts dated 1868, 1872, 1875, 1883 and 1886, aggregating 22.93 second feet should have been all a reserved priority right of November 29, 1859, and an additional amount of 127.07 second feet of water should also have been found as a conclusion of law as having been reserved by the Government in 1859, making a total reservation of 150 second feet for the irrigation of 10,000 acres of irrigable allotments upon the Reservation with a priority of November 29, 1859.

EXCEPTIONS TO THE DECREE

The Master's Decree herein as set forth in Paragraph numbered I is erroneous in that the rights adjudged the United States for five appropriations aggregating 22.93 second feet of water with priorities dated 1868, 1872, 1875, 1883 and 1886, [523] should have been a reserved priority right of November 29, 1859, and in addition thereto there should have been an additional amount of 127.07 second feet with a reserved priority of November 29, 1859, making a total reserved right to divert 150 second feet from the Walker River, a non-navigable stream, with a priority of November 29, 1859, for the irrigation and other beneficial uses upon 10,000 acres of irrigable allotments on the Walker River Indian Reservation. The reason for this, as before stated in Exceptions to the Findings of Fact and Conclusions of Law, is that the Government on November 29, 1859, was the absolute sovereign owner of all surplus unappropriated, unused and undisposed of waters in the Walker River, and by the establishment of the Reservation on November 29, 1859, withdrew from further appropriation and use so much of the said waters of the Walker River as would in the future be needed for beneficial uses upon the lands of its Walker River Indian Reservation, and that the amount of water so required, needed and reserved is 150 second feet diversion right with a priority of November 29, 1859.

Wherefore, Plaintiff, having specified its exceptions to the Master's Findings of Fact, Conclusions of Law and Decree, prays that said Findings of Fact, Conclusions of Law and Decree be modified in accordance with the facts and the law, giving a decree for the United States for 150 second feet of water for the irrigation and other beneficial uses upon 10,000 acres of irrigable lands upon the Walker River Indian Reservation.

Respectfully submitted,

ETHELBERT WARD
Special Assistant to the Attorney General
WILLIAM A. BOYLE
Special Assistant to the Attorney General
Solicitors for Plaintiff

[Endorsed]: Filed Sept. 27, 1935.

[524]

[Title of District Court and Cause.]

EXCEPTIONS OF DEFENDANT, WALKER RIVER IRRIGATION DISTRICT, TO MASTER'S PROPOSED FINDINGS OF FACT, CONCLUSIONS OF LAW AND DECREE

Comes now Walker River Irrigation District, one of the defendants above named, and excepts to the Master's proposed findings of fact, conclusions of law and decree filed herein on the 9th day of August, 1935, and for its exceptions, shows:

First Exception: This defendant excepts to the said findings of fact and decree as proposed in that there is omitted therefrom the following claims and rights of Walker River Irrigation District, which should be included in the decree as Subdivisions (f), (g), (h) and (i), paragraph VIII, page 65, and in paragraph XVIII, page 20 of the decree:

"(f) That Walker River Irrigation District is entitled to a water right from the West Walker River with a priority of September 11, 1902, but subject to the rights of all defendants embraced within Decree No. 731, entitled 'Pacific Livestock Company vs. T. B. Rickey et al.', in the above-entitled court for a right to divert [525] from West Walker River 1,000 cubic feet of water per second (50,000 miners' inches, measured under four-inch pressure), not to exceed 85,000 feet per annum for the purpose of storing said water in what is known as Alkali or Topaz Lake Reservoir, which said right to store said water shall not be in addition to the storage rights in said Topaz Lake elsewhere in this decree specified. The said water rights is evidenced by a notice recorded in Book "C" of Water Locations, page 289, in the office of the County Recorder of Mono County, California.

"(g) Walker River Irrigation District is also entitled to an appropriation of water as follows: A water right for 3,000 cubic feet of water per second of the waters of the East

Walker River, evidenced by application No. 5440 filed with the State Engineer of the State of Nevada on the 3d day of April, 1919, which said application is still in full force and effect and subject, however, to said application being completed pursuant to the laws of the State of Nevada.

"(h) Walker River Irrigation District is also entitled to an appropriation of water as follows: A water right for 3,000 cubic feet of water per second of the waters of the West Walker River, evidenced by Application No. 5528, filed with the State Engineer of the State of Nevada on the 6th day of June, 1919, which said application was duly approved by the State Engineer of Nevada, and a permit issued thereon, which said application and permit are still in full force and effect, subject, however, to said permit being completed pursuant to the laws of the State of Nevada. [526]

"(i) Walker River Irrigation District is also entitled to an appropriation of water as follows: A water right for two cubic feet of water per second of an Unnamed Stream to be diverted at a point in the NE¼ of NW¼ of Section 32, Township 10 North, Range 22 East, M. D. B. & M., for storage in Topaz Lake, evidenced by Application No. 6583 filed with the State Engineer of the State of Nevada on the 3d day of November, 1931, which said application is still in full force and effect, subject,

however, to said application being completed pursuant to the laws of the State of Nevada."

That the foregoing rights appear to have been omitted from both the findings and decree, notwithstanding that proof was made of the same.

Wherefore, this defendant, Walker River Irrigation District, requests that the foregoing omission be added to the decree and findings as finally adopted.

Dated: September 28, 1935.

Service of the foregoing Exceptions, by copy, admitted this 28th day of September, 1935.

W. M. KEARNEY
Attorney for Defendant, Walker River Irrigation District.

.....
Special Master.

.....
Special Assistant to the Attorney General—Of Solicitors for Plaintiff.

THATCHER & WOODBURN
Attorneys for Defendant, Sierra Pacific Power Company, a corporation.

GREEN & LUNSFORD
Attorneys for Certain Defendants.

[Endorsed]: Filed Sept. 28, 1935. [527]

[Title of District Court and Cause.]

EXCEPTIONS OF DEFENDANT, GEORGE PARKER, TO MASTER'S PROPOSED FINDINGS OF FACT, CONCLUSIONS OF LAW AND DECREE.

Comes now George Parker, one of the defendants above named, and excepts to the Master's proposed findings of fact, conclusions of law and decree filed herein on the 9th day of August, 1935, and for his exceptions, shows:

First Exception: This defendant excepts to the said findings of fact and decree as proposed in that there is omitted therefrom the following claim and right of this defendant, which should be included in the findings and decree:

> "That defendant, George Parker, is entitled to an additional water right from Birmingham Slough, a tributary of Walker River, for 0.8782 cubic feet per second, or 263.46 acre feet per annum, with a priority of March 13, 1916, for the irrigation of 87.82 acres of land in Section 20, Township 15 North, Range 26 East, M. D. B. & M., as evidenced by Certificate No. 1178, Book 5 page 1178, Records of the State Engineer of the State of Nevada, [528] which said certificate was issued under Permit No. 3830."

That said water right was omitted from the findings and decree, notwithstanding proof of such right was duly made.

Wherefore, this defendant, George Parker, requests that the foregoing omission be added to the decree and findings as finally adopted.

W. M. KEARNEY
Attorney for Defendant,
George Parker

Service of the foregoing Exceptions, by copy, is hereby admitted this 28th day of September, 1935.

.....
Special Master

.....
Special Assistant to the Attorney General—
of Solicitors for Plaintiff

THATCHER & WOODBURN
Attorneys for Defendant, Sierra Pacific
Power Company, a corporation

GREEN & LUNSFORD
Attorneys for Certain Defendants

[Endorsed]: Filed Sept. 28, 1935. [529]

George B. Thatcher
William Woodburn
William J. Forman

THATCHER AND WOODBURN
Attorneys and Counselors at Law
206 North Virginia Street
Reno, Nevada

January 10, 1938

O. E. Benham, Clerk
U. S. District Court
Carson City, Nevada

Dear Mr. Benham:

We are in receipt of a letter from Mr. Roy W. Stoddard, Special Assistant to the Attorney General, in respect to the Walker River suit, in which he states that copies of the defendant's exceptions to the master's proposed findings of fact were to be typed in the clerk's office and the respective defendants billed accordingly.

The defendant, The Sierra Pacific Power Company, is not involved or affected by the appeal now pending by the government and we do not desire to have the exceptions of the Power Company certified to the Appellate Court or included in the printed record on appeal.

Mr. Stoddard states that if we would advise you of this fact it would save the cost of typing the copies.

Yours very truly,
THATCHER & WOODBURN.

WJF/aa

Received Jan. 11, 1938. Clerk's Office. [530]

[Title of District Court and Cause.]

OPINION.

St. Sure, District Judge.

The Government objects to the holding of this court (11 Fed. Supp. 158) and the proposed finding, that in setting aside the Walker River Indian Reservation no express reservation of water for purposes of irrigation was made in the executive order of 1859. The Government contends (citing Winters vs. United States, 207 U. S. 564; McFadden v. Mountain View Min. & Mill. Co., 97 Fed. 670; Gibson v. Anderson, 131 Fed. 39; Opinions of Attorney General Vol. 34, page 171) that there was an implied reservation of water.

Even if a reservation of water may be implied in the executive order, however the Indian rights may be defined or labeled in this instance, this court is of the opinion that the facts and circumstances have placed the white settlers in an inexpugnable position. Briefly, the facts, as dis- [531] closed by the evidence and narrated in this court's opinion in 11 Fed. Supp. 158, show that after the establishment of the Reservation in 1859 (then and thereafter the Indians being at war with the whites), commencing 1860 the whites acquired title from the United States to lands above the Indian Reservation, bordering on and adjacent to the Walker River and its tributaries; that they also acquired water by prior appropriation for a beneficial use, and actually irrigated and reclaimed such lands; that they have en-

joyed undisputed and undisturbed possession of such lands and such water rights for more than fifty years; that to dispossess them now would bring ruin to long-established settlers, and return to waste the lands which they, by their industry and with the acquiescence of the Government, reclaimed from the desert.

Under such facts and circumstances this court is not moved to give a decree destroying the rights of the white pioneers.

Dated: March 21, 1936.

[Endorsed]: Filed Mar. 23, 1936. [532]

[Title of District Court and Cause.]

ORDER.

Ordered that the exceptions of plaintiff to findings of fact, conclusions of law, and decree be, and the same are hereby overruled.

Dated: April 14, 1936.

A. F. ST. SURE,
United States District Judge.

[Endorsed]: Filed April 15, 1936. [533]

[Title of District Court and Cause.]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The above entitled cause having been submitted for decision on January 10, 1936, and the Court having considered the law and the evidence, finds as follows:

I. Walker River Indian Reservation, hereinafter referred to as "Reservation", was set aside by the United States of America on November 29, 1859, for the use of the Pahute tribe of Indians. In setting aside said Reservation the United States of America made no express reservation of any water rights for the irrigation of the lands thereof. [534]

II. Walker River is an unnavigable, interstate stream consisting of two main branches, the East and West Walker Rivers, which are fed by many small streams most of which rise on the eastern slope of the Sierra Nevada Mountains in Alpine and Mono Counties, California. The West Walker River flows through Leavitt and Pickle Meadows, two high mountain valleys, thence through a canyon with practically no cultivated area, thence northerly and northeasterly through Antelope Valley into the State of Nevada, thence through Smith Valley to the head of Mason Valley where it joins the East Walker River. The principal streams forming the East Walker River combine in Bridgeport Meadows, which is a large area devoted to the raising of wild grasses and pasturage at an elevation of about sixty-eight hundred feet above sea level. The

East Walker River flows thence northerly and northeasterly through canyons and sparsely populated valleys to Mason Valley, where it joins the West Walker River and forms the main Walker River. This river flows northerly and northeasterly through Mason Valley to near the town of Wabuska, where it turns abruptly to the southeast and flows through the Reservation and thence into Walker Lake. The mountains at the source of these streams are sparsely forested and afford little protection for the snows which melt rapidly in the spring months resulting in a rapid runoff of the water. From the source of the West Walker River to its junction with the East Walker River the distance is approximately sixty-six miles; from the source of the East Walker River to its junction with the West Walker River the distance is approximately seventy-four miles; and from the junction through Mason Valley to the point of diversion on the Reservation the distance is approximately thirty-seven miles; and from the latter point to [535] Walker Lake the distance is approximately twelve miles. The flow of said river is variable from day to day, from month to month and from year to year. The peak flow occurs late in May or early in June and thereafter the water subsides rapidly so that in most years the flow by the middle of July is insufficient, without storage facilities, to meet the requirements of the lands along the river which have been brought under cultivation. Even under natural conditions, that is, without upstream diversions, the water would not, in some years of low flow, reach the lands

of the Reservation by the end of July by reason of seepage and high evaporation loss.

III. The lands along Walker River, including the lands in the Reservation, are arid and incapable of producing crops without artificial irrigation and there is no source of supply for the irrigation of the lands of the parties to this suit except Walker River and its tributaries.

IV. The first use of water from said river by the plaintiff and by the predecessors of the defendants was by means of the overflow of the river in periods of high water, but within a few years after said Reservation was set aside the plaintiff and the settlers upstream commenced the construction of ditches and dams for the diversion of the water upon their lands. The plaintiff from time to time enlarged and extended the irrigation ditches upon said Reservation until there are now two canals thereon having a combined length of seventeen miles, a combined capacity of one hundred fifteen cubic feet per second and lateral ditches having a combined length of thirteen miles. There are approximately two thousand one hundred acres of said Reservation under cultivation and irrigation and the Indians produce thereon valuable crops of alfalfa hay, grain, vegetables, fowl and livestock, part of which they are enabled to sell. [536]

V. There are upon said Reservation approximately five hundred Indians. Ninety-six individual Indians are farming parts of one hundred forty allotments of twenty acres each and ninety-six allotments have homes on them. The Indians general-

ly refuse to irrigate at night and there results a considerable loss of water by reason thereof. The number of Indians upon said Reservation is not increasing and it has not been shown that there is the necessity or demand by the Indians for the cultivation of a larger area of land than two thousand one hundred acres.

VI. The lands along Walker River and its tributaries above the Reservation were purchased from the United States under acts of Congress by the white settlers, the earliest title originating shortly after the establishment of said Reservation and the water of Walker River was applied to beneficial use upon said lands by successive appropriations, the earliest appropriation being in 1860. In order to supplement the supply for irrigation purposes the settlers through the defendant, Walker River Irrigation District, constructed in 1922 Topaz Lake Reservoir having a capacity of approximately fifty thousand acre feet and in 1924-25 Bridgeport Reservoir having a capacity of approximately forty-two thousand acre feet and is storing therein the surplus or flood waters of said river. The aggregate cost of these reservoirs was over Eight Hundred Thousand Dollars. No objection was made by the United States of America to the appropriation of water by the white settlers or their construction of expensive irrigation works and no proceedings were taken to determine or preserve the respective rights of the United States of America and the white settlers along said river until the commencement of this

suit, notwithstanding the United States of America was given an opportunity to become a party to the suit in this Court entitled [537] "Pacific Livestock Company, a corporation, plaintiff, vs. T. B. Rickey, et al., defendants," No. 731 (hereinafter referred to as suit No. 731), which suit was brought for the purpose of determining all of the water rights in and to the waters of Walker River and its tributaries, commenced in 1904 and decided March 22, 1919, and was invited to file its pleadings in said suit as stipulated by nearly all of the parties thereto under date of May, 1907. The United States of America as late as 1910 relied upon the doctrine of appropriation for its rights, in which year the superintendent of the Reservation, on behalf of the Indians, made application to appropriate public waters of the State of Nevada. The Sixty-ninth Congress authorized a reconnaissance in Schurz Canyon to determine to what extent the water supply of Walker River might be augmented, the feasibility of reservoir sites, the cost of rights of way, etc. Pursuant to this authorization, a comprehensive report known as the Blomgren report was made December 26, 1926, and the supervising engineer recommended to the government as follows:

"1. That water rights be adjudicated at the earliest possible date.

2. That the entire river system be placed in charge of a water commissioner appointed by the Federal court, with instructions to require the installation of suitable weirs, headgates, and measuring devices by all diverters.

3. That a storage reservoir be created for the Indian land of Walker River Indian Reservation by the construction of a dam at the Rio Vista site, and that the irrigation system be extended to cover the entire irrigable area of the Reservation."

It was found by Special Master Henry Thurtell in said [538] suit No. 731 and conceded by the defendants in this suit that the United States of America had appropriated from the Walker River and applied to beneficial use upon the lands of the Reservation for the use of the Indians, the quantities of water in cubic feet per second with dates of priority and the number of acres irrigated thereby, as follows:

Priority	*c. f. s*	*Acres*
1868	4.70	385.95
1872	3.55	295.80
1875	6.15	512.80
1883	7.50	625.20
1886	1.03	85.80

VII. The areas irrigated from said river, exclusive of the irrigated lands in the Reservation, are approximately as follows:

Bridgeport Meadows	20,000 acres
Narrow valleys on East Walker	16,000 acres
Antelope Valley	12,000 acres
Smith Valley	15,000 acres
Mason Valley	48,000 acres

VIII. There is a considerable return flow into Walker River from the water diverted for irriga-

tion in the valleys above said Reservation, which augments to a certain extent the flow in the river at said Reservation, but the data furnished in the evidence is insufficient upon which to base any findings as to the quantity of such return flow.

IX. The assessed valuation of the lands in Walker River Irrigation District is approximately Four Million Dollars. The annual production consisting of alfalfa hay, vegetables, grain, dairy products, wool, eggs, fowl and livestock produced upon the lands watered by said river, exclusive of the lands of said Reservation, are of the value of upwards of [539] Two Million Dollars. Walker River Irrigation District covers an area of one hundred sixty thousand acres of irrigable land, not all of which is irrigated, and extends up Walker River and its tributaries to the California State Line. The population of the District is approximately three thousand and that of Bridgeport and Antelope Valleys, in California, approximately six hundred.

X. The parties to this suit in their pleadings have recognized as effective and binding the water and ditch rights along Walker River with the priorities which were adjudicated by the final decree of this court in the cause entitled "Pacific Livestock Company, a corporation, plaintiff, vs. T. B. Rickey, et al, defendants," in Equity No. 731, but subject to the rights and priorities which the court shall find the plaintiff and Sierra Pacific Power Company shall be entitled to, which adjudicated rights are set forth in detail in the decree accompanying

these findings and which description in said decree is made a part hereof by reference as fully as though said description were fully set forth herein.

XI. The parties to this suit have stipulated as follows respecting the relative water rights other than those of the plaintiff and Sierra Pacific Power Company, of the water users along the Walker River and its tributaries, which were not adjudicated by said decree in said Suit No. 731: [540]

"UNITED STATES vs. WALKER RIVER IRRIGATION DISTRICT, ET AL,
C-125

In order to shorten the trial of this case, and to facilitate its early determination, the plaintiff is willing to make concessions to certain defendants, provided they are assented to by the other parties hereto.

The plaintiff concedes to the defendants hereinafter named for and appurtenant to the lands belonging to said defendants respectively, the following water rights on and along the Walker River and its tributaries in Nevada and in California, with the priorities also hereafter named in connection therewith; except that the priorities and water rights of the plaintiff, United States of America, as they may be fixed and determined by the court shall take their places in the order of priorities so that said defendants' rights as so conceded, which are subsequent to the rights of the United States as they

may be fixed and determined by the court herein shall be subordinate to the rights of the United States.

All the rights of the defendants as hereby conceded shall be fixed and determined upon the basis of the doctrine or law of appropriation and not upon the doctrine or law of riparian rights.

The duty of water shall be at the rate of .016 cubic feet of water per second of time per acre for [541] each acre of land irrigated during the irrigation season. In Bridgeport Valley on the East Fork of the Walker River, and at all points above Coleville Gauging Station on the West Fork of the Walker River, the irrigation season covers the period from March 1st to September 15th in each year, and at other points on said river the irrigation season shall conform to the season fixed in Decree No. 731. The water shall be measured at the point of diversion from the river.

The names of the defendants included in this concession; the description of the lands; the dates of priorities, and the areas are as follows:"

(For the sake of brevity the schedule of the rights covered by this stipulation is not set forth herein, but is set forth in detail in the decree accompanying these findings under the head of "Rights of Other Defendants not included in the Decree in said suit No. 731", which schedule in said

decree is made a part hereof by reference as fully as though said description were fully set forth herein.)

"The irrigated areas and reservoir capacities referred to in the foregoing tabulation shall be verified by rough survey made by the engineers or representatives of the said defendants above named, and checked and approved by the engineers or representatives of the plaintiff prior to insertion in any final decree entered herein. In the preparation of the recommended and final decree in this cause, the plaintiff shall [542] not be precluded from correcting any errors, omissions, mis-calculations, land descriptions or duplications of lands or water rights contained in the foregoing tabulations.

The court shall retain jurisdiction of this cause for the purpose of changing the duty of water or for correcting or modifying the decree to be entered; also for other regulatory purposes, including a change of the place of use of any water user, but no water shall be sold or delivered outside of the basin of the Walker River (except that appurtenant to the lands of Mrs. J. A. Conway and R. P. Conway, referred to in the foregoing tabulation). The decree shall provide for the method and character of notice to be given respecting any proposed changes or modifications thereof. The decree shall contain such other provisions as may be determined proper by the court for the ad-

ministration of the decree and the distribution of water thereunder.

All the foregoing is subject to such rights and priority or priorities for the plaintiff's lands, and water rights as may be determined by the court.

This, and the foregoing concession and tabulation does not include and does not refer to the lands and water rights of the Sierra Pacific Power Company, and is without prejudice to their claim of riparian rights. Whatever rights are claimed by said Sierra Pacific Power Company are unaffected by this concession to the other defendants, and are unaffected by their assent thereto." [543]

XII. The irrigation season along the Walker River, its branches and its tributaries, extends from the first day of March to the thirtieth day of September of each year, except that in Bridgeport Valley on the East Walker River and at all points above Coleville Gauging Station on the West Walker River the irrigation season covers the period from March first to September fifteenth of each year.

XIII. Sierra Pacific Power Company is the owner of 2638.95 acres of land in Mono County, California, at the head waters of West Walker River, described as follows:

Swamp lands acquired under the Act of Congress of September 28, 1850.

S½ of NE¼, E½ of SW¼, SE¼ of Sec. 23; S½ of NE¼ of Sec. 24; SE¼ of NE¼ of Sec. 25; W½ of NE¼, E½ of NW¼, E½ of SW¼, NW¼ of SE¼, Sec. 26; NE¼ of SE¼, Sec. 27; T. 6 N., R. 22 E.

N½ of SE¼, SW¼ of SE¼, SE¼ of SW¼, Sec. 18; NW¼ of NW¼, Sec. 22; NW¼ of NW¼, Sec. 30; T. 6 N., R. 23 E. M. D. B. & M.

School lands acquired under the Act of Congress of March 3, 1853, described as follows:

W½ of NE¼, E½ of NW¼, SE¼, NE¼ of SW¼, Sec. 16; T. 7 N., R. 23 E. M. D. B. & M. Surveyed March 30, 1880.

School lieu lands acquired under the Act of Congress of March 3, 1853, with certificate numbers of selection by the State of California and the date of approval by the Secretary of the Interior, as follows:

SW¼ of SW¼, Sec. 10; T. 6 N., R. 23 E. SW¼ of SW¼, Sec. 22; W½ of NW¼, NW¼ of SW¼, Sec. 27; T. 7 N., R. 23 E. M. D. B. & M.

Acquired under certificate 12,717, approved June 25, 1896. [544]

SE¼ of NW¼, SE¼ of SW¼, Sec. 4; E½ of NW¼, NE¼ of SW¼, W½ of SE¼, Sec. 9; E½ of NE¼, Sec. 21; T. 7 N., R. 23 E. M. D. B. & M.

Acquired under certificate 12,163, approved June 25, 1896.

Lots 2 and 3 of Section 4; T. 7 N., R. 23 E. M. D. B. & M.

Acquired under certificate 13,649, approved June 25, 1896.

W½ of NE¼, W½ of SE¼, Sec. 33; T. 8 N., R. 23 E. M. D. B. & M.

Acquired under certificate 12,593, approved June 25, 1896.

W½ of NW¼, W½ of SW¼, Sec. 15; T. 6 N., R. 23 E.

NE¼ of NE¼, Sec. 28; T. 8 N., R. 23 E. M. D. B. & M.

Acquired under certificate 12,865, approved June 15, 1898.

NW¼ of NE¼, Sec. 28; T. 8 N., R. 23 E., excepting 3.79 acres, rectangular in form, at the Northwest corner of said NW¼ of NE¼. M. D. B. & M.

Acquired under certificate 17,485, approved June 15, 1898.

SE¼ of SE¼, Sec. 4; T. 6 N., R. 23 E. E½ of SE¼, Sec. 21; E½ of NE¼, Sec. 28; T. 7 N., R. 23 E. M. D. B. & M.

Acquired under certificate 12,157, approved January 2, 1902.

The above described lands are riparian to West Walker River and its tributaries at the head waters thereof in that each separate tract originally ac-