No. 9 Original

IN THE

SUPREME COURT

OF THE

UNITED STATES

October Term, 1937

THE STATE OF NEBRASKA,
Complainant,

VS.

THE STATE OF WYOMING,
Defendant,

AND

THE STATE OF COLORADO, IMPLEADED,
Defendant.

OBJECTION OF COMPLAINANT, STATE OF NEBRASKA, TO INTERVENTION BY THE UNITED STATES, AND BRIEF IN SUPPORT THEREOF

RICHARD C. HUNTER,
Attorney General of the State of Nebraska,
PAUL F. GOOD, Special Counsel,
Solicitors for the Complainant.

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RICHARD C. HUNTER,
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Solicitors for the Complainant.

The State of Nebraska, complainant herein, respectfully objects to permission being granted by this court to the United States to intervene in this cause and objects to leave being granted by this court to the United States to file its proposed petition in intervention. The grounds for these objections are as follows:

1. This court has already, in this cause, affirmatively decided the issues raised by the motion of the United States for leave to intervene and has already held that the interests asserted by the United States are sufficiently represented by the respective states which are parties to this litigation.

> *Nebraska* v. *Wyoming,* 295 U. S. 40 at p. 43, 79 L. Ed. 1289 at 1291.

2. The assertion is made as one of the grounds for the proposed intervention, that the respective states have refused to defend the appropriations made by the United States for use in Nebraska (Motion, pp. 15 to 16; Proposed Petition in Intervention, pp. 25 to 26). In support of this assertion pp. 1260 to 1264, and 1291 to 1296 of the record already made before the Special Master in this cause are cited.

Nebraska denies the allegation made and asserts that it has at all times affirmatively undertaken to defend the priority of all diversions made for use in Nebraska. Nebraska further challenges the conclusion drawn from the above cited parts of the record and for that purpose has caused a certified transcript of those portions of the record to be filed with the Clerk herein and this portion of the record is printed herewith as a supplement hereto. This record shows that counsel for Nebraska affirmatively undertook to defend the priority of appropriations made in

Wyoming for use in Nebraska including the Reclamation Projects. It is not asserted nor claimed that either Nebraska or Wyoming has ever refused any request made on behalf of the Reclamation Bureau, the Secretary of the Interior or any person interested in any of the projects of the United States to take any steps in connection with such projects looking toward the presentation of such evidence.

3. The claim of the United States of beneficial ownership of the waters of the North Platte River and to the right to control the same is negatived by a long line of decisions of this court and by a series of Acts of Congress (cited in the brief attached hereto). Development of the waters of the Western states has proceeded for 70 years upon the theory of state sovereignty and control, such development being based upon Acts of Congress and decisions of this court. Any change of rule in this respect at this time would cause upset and confusion and would jeopardize existing vested rights.

4. The claim of the United States to operation of the projects developed under the Bureau of Reclamation free from state control is contrary to and in violation of Sec. 8 of the Reclamation Act (Act of June 17, 1902, Chapter 1093; 32 Statutes 388; U. S. Code, Title 43, Sec. 383) and to previous decisions of this court. Any divorcement of such federal reclamation projects from state control would lead to confusion and would disrupt the orderly administration of the river.

5. The claim of the United States to control of the river and ownership of the waters therein is denied by the State of Nebraska. The State of Nebraska asserts its sovereignty

over the waters of the non-navigable streams within its borders to the same extent and under like conditions as the thirteen original states are possessed of sovereignty over the waters of the non-navigable streams within their borders. The United States possesses the right to make use of those waters for the development of public lands which are arid and as an appropriator possesses the rights which it has acquired as an appropriator under the state laws to be exercised in accordance with the laws of those states. No assertion is made in the motion or in the proposed petition that any publicly owned arid lands are susceptible of improvement or development from the waters of the North Platte River.

6. Intervention at this time and at this stage of the proceedings would cause great confusion and would interrupt the orderly course of these proceedings.

On October 14, 1935, this court appointed the Honorable Michael J. Doherty of St. Paul, Minneapolis, as Special Master herein (296 U. S. 542, 80 L. Ed. 385). Hearings commenced in July, 1936, before said Special Master and these hearings have extended through many weeks of sessions, before said Special Master, with many thousands of pages of testimony taken, and over 500 exhibits introduced, all on the theory of the principles announced by this court in its opinion in this cause, 295 U. S. p. 40, 79 L. Ed. 1289. The intervention of another party at this stage of the proceedings asserting other and different theories of the distribution of the waters of the North Platte River would disrupt and confuse this cause and would be contrary to orderly procedure.

WHEREFORE, this complainant respectfully urges that this court deny the motion of the United States for leave to intervene; but in any event respectfully prays that before intervention is permitted this court allow oral argument to be presented to this court upon the motion for leave to intervene.

R. C. HUNTER, Attorney General of
the State of Nebraska,
PAUL F. GOOD, Special Counsel,
Solicitors for Complainant,
State of Nebraska.

BRIEF IN SUPPORT OF OBJECTIONS OF THE STATE OF NEBRASKA TO INTERVENTION BY THE UNITED STATES

While many abstract rights are asserted in the brief filed on behalf of the United States in support of its petition in intervention and much discussion is made of fundamental questions of sovereignty and of derivation of rights, etc., the question of the right of the United States to intervene must be determined upon the right of the United States to the relief asked for *(Smith* v. *Gale,* 144 U. S. 509, 36 L. Ed. 524). If the relief may not be granted then it is proper for this court to reject the motion and to deny leave to the United States to intervene. *(Arizona* v. *California,* 298 U. S. 558, 80 L. Ed. 1331.)

We must therefore consider the relief sought by the United States in order to determine whether leave should be granted. This relief consists of the following:

(1) The United States asks that it may be perimtted to come into this court in order to protect the appropria-

tions made by the United States for diversions in Wyoming, but for use in Nebraska.

(2) The United States asks this court to allocate to it free from the sovereign supervision or control of any state, so much of the waters of the North Platte river as the United States has appropriated.

(3) The United States asks this court to decree that the United States is the owner of unappropriated waters of the North Platte River.

If the United States is entitled to relief in any of these three particulars, leave should be granted to it to intervene. Conversely, if the United States is not entitled to any such relief, then leave should be denied. This court is not interested in the discussion of abstract principles of law, disengaged from any specific relief which may be granted (*Arizona* v. *California,* 283 U. S. 423, 75 L. Ed. 1154). However interesting academically, it is wholly unimportant whether the United States was originally the owner of all of the land and water within the territorial limits involved in this litigation. It is wholly immaterial whether the present rights of appropriators of the North Platte River are derived from the United States or from a State. The questions before this court are those raised by the prayer of the United States and those alone.

ARGUMENT

Point I.

The assertion that Nebraska has refused to defend the priority rights to divert in Wyoming and use in Nebraska waters of the North Platte River which are a part of the United States Reclamation projects, is not founded on fact;

is contrary to the record cited in support of it and must be dismissed.

This claim is made in two separate portions of the documents filed on behalf of the United States; (a) on pages 15 and 16 the claim is made that Wyoming in the record in this cause has already indicated that it will not defend the priorities of diversion of water in Wyoming for use in Nebraska and that Nebraska has taken the position that Wyoming must defend those priorities. (b) On page twenty-six it is asserted that neither state has expressed any willingness to have the waters diverted by the United States for use in Nebraska included in the portion of the waters of this river which is to be allocated to it; and it is further asserted that both states have refused to defend the priorities of these diversions of the United States.

In the first place this assertion is directly contrary to this record. Attached hereto is a copy of pages 1260 to 1265 and of pages 1291 to 1296 of the record. These are the pages referred to on page 16 of the motion filed on behalf of the United States. The most casual reading of this record shows conclusively that Nebraska has taken the position that it will protect for all purposes the priorities and the appropriation rights of those canals which divert in Wyoming and serve lands in Nebraska, including the reclamation projects, insofar as they furnish water to Nebraska lands. We particularly call attention to the languge of counsel for Nebraska on pages 1293 and 1294 as follows:

> "Where resort to this court is the only method, Nebraska asks through the medium of this suit, that this court make possible the orderly administration of the

waters of the river by an interstate administration on the principle of priority of appropriation. The enforcement of this principle is for the protection of all Nebraska approriators, in their priority rights, and the Reclamation projects while junior to some, are senior to others. We ask the court to protect these projects against encroachments by others which are junior to them. We further ask the court to protect them, in accordance with the principle of priority of appropriation, against diversions by senior canals of an amount of water which is in excess of the amount of the appropriations of those senior canals."

We also call attention to the following language on page 1296:

"Nebraska will also ask that in its decree this court should protect Nebraska appropriators under all canals diverting in Wyoming, in the rights to which their priorities entitle them, against future violations of the principle of priority by the State of Wyoming, and by Wyoming appropriators whether from the stream or under such canals."

For better understanding of the theory above expressed, we wish particularly to call attention to the fact that the rights of these appropriators, and the irrigation rights involved, are actually not the property of the United States but of the land owners. It has recently been held by this court that in the reclamation projects the United States has no beneficial ownership of the water nor any rights to the use thereof. Such rights are the property of the landowners and the United States is merely a carrier of the waters. *(Ickes* v. *Fox,* 300 U. S. 82, 81 L. Ed. 525.)

This necessarily follows from the Reclamation Act *(Act of June 17, 1902, Chapter 1093, 32 Statutes 388)* and particularly of Section 8 thereof. This is paralleled by the

Nebraska Statutes which makes irrigation rights appurtenant to the land. *(C. S. Nebraska 1929, 81-6312, 81-6316, 81-6319; Farmers Canal Co.* v. *Frank, 72 Neb. 136, 100 N. W. 286.)* A similar statute in Wyoming likewise makes water rights for irrigation appurtenant to the land to be irrigated. Therefore the only rights in Nebraska under the canals constructed by the United States and watering the lands in Nebraska are the rights of lands served by such canals and, as above pointed out, Nebraska has taken upon itself the full responsibility of making proof of the priorities of such lands and of protecting such priorities against encroachments being made against them.

The rights of the United States as carrier of water to such lands must of course necessarily be included in the protection thus asserted by Nebraska since it is obvious that the rights of these lands could not be protected unless the waters were to be carried to them under the priority in question.

Upon this point attention should be further called to the fact that the United States, in its motion and proposed petition in intervention, nowhere asserts that any request or demand has been made upon either Nebraska or Wyoming to take any steps in connection with protecting these priorities. While the record does not yet disclose the affirmative steps taken by the Attorney General of Nebraska and counsel employed in this case under him, we may here assert the fact which can and will be supported by proper showing at the appropriate time, that the Attorney General of Nebraska commenced to take steps many months ago to prepare for presentation the evidence connected with these priorities and for that purpose commenced to cooperate with Nebraska managers of the pro-

jects serving Nebraska lands assuring them of his willingness to introduce such appropriate evidence as they might desire him to introduce and of his intention to introduce evidence as to their projects only after fullest consultations and cooperation with them.

Point II.

The question of the position of the United States in connection with this litigation is settled and has become res judicata by the decision of this court 295 U. S. 40, rendered in this cause on Wyoming's motion to dismiss.

We quote from the opinion 295 U. S. 40, 79 L. Ed. 1291:

> "The motion asserts that the Secretary of the Interior is an indispensable party. The bill alleges, and we know as matter of law, that the Secretary and his agents, acting by authority of the Reclamation Act and supplementary legislation, must obtain permits and priorities for the use of water from the State of Wyoming in the same manner as a private appropriator or an irrigation district formed under the state law. His rights can rise no higher than those of Wyoming, and an adjudication of the defendant's rights will necessarily bind him. Wyoming will stand in judgment for him as for any other appropriator in that state. He is not a necessary party."

It is argued by counsel for the United States that this statement of this court refers only to the Secretary of the Interior and does not refer to the United States. However, it is clear from the Reclamation Act that everything done in connection therewith is to be done under the Secretary of the Interior (U. S. Code, Title 43, Sec. 373). It does not seem possible that in the above quoted language this court meant anything but that the rights of the United States

in connection with the Reclamation projects were subordinated by Act of Congress to the authority of the state so that each state represents the United States as to the Reclamation projects within its border. We believe that the decision already rendered by this court conclusively settles all questions of this case; However, out of an excess of caution, we proceed to an examination of the contentions of the United States.

Point III.

The authority of the United States over waters and streams located in the various states is limited to two features: (1) the control of navigability so that nothing shall be done to impair that feature of waters otherwise navigable, and (2) the preservation of water rights equitably incident to public lands, and the reclamation of such public lands as are arid, through irrigation. Except as limited by such rights and powers of the United States, each state has complete and absolute authority over such waters, not only as to prescribing the method of use, and the choice between administration in accordance with the riparian rights or prior appropriation; but each state has also authority to establish administrative departments with power to fix priorities and to administer and allot the waters in accordance with fixed rules.

The above principle is established by a series of cases.

The interest of the United States in streams flowing within one or more states is confined to two matters only, namely, navigability, and likewise the rights, appurtenant or otherwise, which the United States as owner of the

public lands, may have in the flow of streams bordering the public lands.

> *U. S.* v. *Rio Grande Dam & Irrigation Co.,* 174 U. S. 690, 703-706, 43 L. Ed. 1136, 1141-1142.
>
> *Gutierres* v. *Albuquerque Land & Irr. Co.,* 188 U. S. 545, 552-556, 47 L. Ed. 588, 592-593.
>
> *Wyoming* v. *Colorado,* 259 U. S. 419, 460-465, 66 L. Ed. 999, 1011-1014.
>
> *California-Oregon Power Co.* v. *Beaver Portland Cement Co.,* 295 U. S. 142, 158-160, 79 L. Ed. 1356, 1362.

Excepting only these rights of the United States, each state has exclusive jurisdiction and control of its waters, and the western states, admitted to the Union from time to time after the adoption of the Constitution, have no less power or authority over their streams respectively, than have those states which were among the thirteen original colonies.

> *Kansas* v. *Colorado,* 206 U. S. 46, 85-95, 51 L. Ed. 956, 970-973.

The legislation of Congress on this subject was reviewed in *U. S.* v. *Rio Grande Dam & Irrigation Co., supra,* and *Gutierres* v. *Albuquerque Land & Irrigation Co., supra.* In those cases it was held that Congress had given its approval to the adoption by any state or territory of the doctrine of prior appropriation and use of waters on non-riparian lands, as a substitute for the common law principles of riparian rights.

In *Kansas* v. *Colorado*, 206 U. S. 46, 91-92, 51 L. Ed. 956, 972, this court said:

"At the time of the adoption of the Constitution within the known and conceded limits of the United States there were no large tracts of arid land, and nothing which called for any further action than that which might be taken by the legislature of the State in which any particular tract of such land was to be found; and the Constitution therefore, makes no provision for a national control of the arid regions or their reclamation. But, as our national territory has been enlarged, we have within our borders extensive tracts of arid lands which ought to be reclaimed, and it may well be that no power is adequate for their reclamation other than that of the national government. But if no such power has been granted, none can be exercised.

"It does not follow from this that the national government is entirely powerless in respect to this matter. These arid lands are largely within the territories, and over them, by virtue of the second paragraph of #3 of article 4, heretofore quoted, or by virtue of the power vested in the national government to acquire territory by treaties, Congress has full power of legislation, subject to no restrictions other than those expressly named in the Constitution, and therefore, it may legislate in respect to all arid lands within their limits. As to those lands within the limits of the states, at least of the Western states, the national government is the most considerable owner and has power to dispose of and make all needful rules and regulations respecting its property. We do not mean that its legislation can override state laws in respect to the general subject of reclamation. While arid lands are to be found mainly, if not only, in the Western and newer states, yet the powers of the national government within the limits of those states are the same (no greater and no less) than those within the limits of the original thirteen; and it would be strange if, in the absence of a definite

> grant of power, the national government could enter the territory of the states along the Atlantic and legislate in respect to improving, by irrigation or otherwise, the lands within their borders. Nor do we understand that hitherto Congress has acted in disregard to this limitation."

It is to be noted that in the Kansas-Colorado case, the United States intervened and was a party to the adjudication.

In *Wyoming* v. *Colorado*, 259 U. S. 419, 462, 66 L. Ed. 999, 1012, this court said:

> "Of the legislation thus far recited it was said, in *United States* v. *Rio Grande Dam & Irr. Co.*, 174 U. S. 690, 706, 43 L. Ed. 1136, 1142, 19 Sup. Ct. Rep. 770: 'Obviously by these acts, so far as they extended, Congress recognized and assented to the appropriation of water in contravention of the common-law rule as to continuous flow'; and again: 'The obvious purpose of Congress was to give its assent, so far as the public lands were concerned, to any system, although in contravention to the common-law rule, which permitted the appropriation of those waters for legitimate industries.' "

Point IV.

In the exercise of rights in streams, the United States is limited by the Acts of Congress; even in connection with an undisputed Federal function such as improvement of navigability, those powers for development of the stream which are possessed by the United States may not be exercised contrary to the applicable Congressional legislation, nor may they be exercised unless Congress authorizes them.

The above principle is recognized and applied by this court in the case of *United States* v. *Arizona*, 295 U. S. 174,

79 L. Ed. 1371. In that case the Secretary of the Interior undertook to construct a dam in the main stream of the Colorado River, and the State of Arizona undertook to prevent the construction of the dam. The action was brought as an original action in this court to restrain the State of Arizona from said interference. This court held that even though the construction was in aid of navigability the Secretary of the Interior had no power to construct it since no specific authorization had been obtained from Congress and the Act of March 3, 1899, had forbidden the construction of a dam across a navigable stream of the United States until the consent of Congress had been obtained. We must therefore look to the acts of Congress for authority of the United States to exercise any powers in connection with the waters of the North Platte River.

Where Congress has defined those rights and powers, it is not the business of any other agency of the United States to assert any other or different rights or powers. We believe that Congress has sufficiently spoken with reference (a) to the Reclamation Projects, making them subordinate to state laws and state authority; and (b) with reference to the unappropriated waters upon the public domain making them subject to appropriation by private individuals in accordance with the laws of the respective states in which they flow.

Point V.

By a series of acts of Congress, the United States has recognized the powers of the states above outlined, and has provided that federal action in the reclamation of arid

public lands shall be under the authority of, and subject to regulation by such state authority as may be set up to regulate the appropriation of waters for irrigation purposes.

The above is borne out by the following statutes and decisions:

Act of July 26, 1866, Ch. 262, Sec. 9, 14 Stat. at L. 251, U. S. C. A. Tit. 43, Sec. 661.

Act of July 9, 1870, Ch. 235, Sec. 17, 16 Stat. at L. 217, 218, U. S. C. A. Tit. 43, Sec. 661.

Act of March 3, 1877, Ch. 107, Sec. 1, 19 Stat. at L. 377, U. S. C. A. Tit. 43, Sec. 321.

Act of August 18, 1894, Ch. 301, Sec. 4, 28 Stat. at L. 422, U. S. C. A. Tit. 43, 641.

Act of June 17, 1902, Ch. 1093, Sec. 8, 32 Stat. at L. 390, U. S. C. A. Tit. 43, Sec. 383.

Broder v. *Natoma Water & Mining Co.,* 101 U. S. 274, 25 L. Ed. 790.

United States v. *Rio Grande Dam & I. Co.,* 174 U. S. 690, 703-706, 43 L. Ed. 1136, 1141-1142.

Gutierres v. *Albuquerque Land & Irr. Co.,* 188 U. S. 545, 47 L. Ed. 588.

Kansas v. *Colorado,* 206 U. S. 46, 85-95, 51 L. Ed. 956, 970-974.

Winters v. *United States,* 207 U. S. 564, 52 L. Ed. 340.

Bean v. *Morris,* 221 U. S. 485, 55 L. Ed. 821.

Wyoming v. *Colorado,* 259 U. S. 419, 460-465, 66 L. Ed. 999, 1011-1014.

Nebraska v. *Wyoming,* 295 U. S. 40, 4379 L. Ed. 1289 at 1291.

Ickes v. *Fox,* 300 U. S. 82, 94-95, 81 L. Ed. 525, 530.

United States v. *Hanson,* (C. C. A. 9th Circ.) 167 Fed. 881.

Burley v. *United States,* (C. C. A. 9th Circ.) 179 Fed. 1.

Twin Falls Salmon River Land & Water Co. v. *Caldwell,* (C. C. A. 9th Circ.) 272 Fed. 356.

In view of the language of Section 8 of the Reclamation Act it would seem unnecessary to devote any extended space to the discussion of the above principle. The pertinent portion is as follows:

"The Secretary of the Interior in carrying out the provisions of this chapter shall proceed in conformity with such laws." (The reference being to "the laws of any state or territory relating to the control, appropriation, use or distribution of water used in irrigation.")

The only argument made in the brief of the United States on this point is that the above language was "directory and not mandatory."

It is difficult to imagine what use or validity lies in such a distinction in the present issue. It is suggested (pp. 69 to 70) that the effect of this distinction is as follows: If the provision is mandatory, then a departure from it would entitle third persons or the state, to treat the action of the Secretary as nugatory. If it is directory only, it prescribed a rule of administrative conduct. However in either case, it is surely as binding upon the United States and upon those exercising the rights of the United States as Congress could possibly make it. Even if Congress had merely prescribed how the Secretary was to act, that would not justify the United States or any agency, from

departing from the congressional direction. It would not justify the operation of Reclamation projects independent of and free from the control of the State authorities. When Congress gives a direction, it should be presumed that this direction is to be followed and that the agencies of the United States are not to operate independently of such control when Congress has expressly said that they are to be subordinated to state control.

Another argument made in opposition of this principle of State control is made on page 62 of the brief of the United States, namely, that the Act of Congress might be changed; that the grant of authority to the states was revocable. It is difficult to see how this question can be brought into the instant case. We are dealing with the situation as it now exists; not with a claim which might be made at some future time based upon some future Act of Congress. This question is moot until Congress seeks, by legislation, to assert independent Federal control over the Reclamation projects and seeks to exempt them from state control. It cannot be known until Congress acts whether an attempt will be made to release the Reclamation projects from state control or if so, upon what terms release will be sought.

We respectfully submit that whether or not congressional legislation is revocable, it must be obeyed so long as it is in force, and furthermore that the Reclamation projects must continue to operate in accordance with state laws and under such reasonable control as the state laws prescribe at least until Congress attempts to change the rule.

Point VI.

By a series of Acts of Congress the United States has recognized the right of individuals to appropriate waters of streams on the public domain in those states and territories where the rule of appropriation for beneficial use prevails, and therefore even though the United States may have ownership rights in those waters those rights cannot now be asserted against the rights of private appropriators to take water from such streams under state laws.

The following Acts of Congress and decisions of this court demonstrate the above principle:

Act of July 26, 1866, Ch. 262, Sec. 9, 14 Stat. at L. 251, U. S. C. A. Tit. 43, Sec. 661.

Act of July 9, 1870, Ch. 235, Sec. 17, 16 Stat. at L. 217, 218, U. S. C. A. Tit. 43, Sec. 661.

Act of March 3, 1877, Ch. 107, Sec. 1, 19 Stat. at L. 377, U. S. C. A., Tit. 43, Sec. 321.

Act of August 18, 1894, Ch. 301, Sec. 4, 28 Stat. at L. 422, U. S. C. A. Tit. 43, Sec. 641.

Act of June 17, 1902, Ch. 1093, Sec. 8, 32 Stat. at L. 390, U. S. C. A. Tit. 43, Sec. 383.

Broder v. *Natoma Water & Mining Co.,* 101 U. S. 274, 25 L. Ed. 790.

Atchison v. *Peterson,* 20 Wall 507, 22 L. Ed. 414.

Basey v. *Gallagher,* 20 Wall 670, 22 L. Ed. 452.

United States v. *Rio Grande Dam & I. Co.,* 174 U. S. 690, 703-706, 43 L. Ed. 1136, 1141-1142.

Gutierres v. *Albuquerque Land & Irr. Co.,* 188 U. S. 545, 47 L. Ed. 588.

Kansas v. *Colorado,* 206 U. S. 46, 85-95, 51 L. Ed. 956, 970-974.

Winters v. *United States,* 207 U. S. 564, 52 L. Ed. 340.

Bean v. *Morris,* 221 U. S. 485, 55 L. Ed. 821.

Wyoming v. *Colorado,* 259 U. S. 419, 460-465, 66 L. Ed. 999, 1011-1014.

California Oregon Power Co. v. *Beaver Portland Cement Co.,* 295 U. S. 142, 79 L. Ed. 1356.

United States v. *Hanson,* (C. C. A. 9th Circ.) 167 Fed. 881.

Burley v. *U. S.,* (C. C. A. 9th Circ.) 179 Fed. 1.

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At this late date it would seem unnecessary to discuss this point extensively. The following quotations from *California-Oregon Power Company* v. *Beaver Portland Cement Co.,* 295 U. S. 142, pp. 155 to 156, 79 L. Ed. 1356, at 1360, constitute a recent construction by this court of the acts of 1866 and 1870 as well as of the Act of 1877.

"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, 6 P. 442, 3 Am. St. Rep. 788; *Jacob* v. *Lorenz,* 98 Cal. 332, 335, 336, 33 P. 119.

"If the acts of 1866 and 1870 did not constitute an entire abandonment of the common-law rule of running waters insofar as the public lands and subsequent grantees thereof were concerned they foreshadowed the more positive declarations of the Desert Land Act of (March 3) 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.' Chap. 107, 19 Stat., at L. 377, U. S. C. Tit. 43, Sec. 321."

There can be no question but that under Congressional legislation as it now exists, the waters flowing in non-navigable streams of any state may be appropriated provided the law of that state so permits. This is true whether or not the waters flow upon the public domain and whether or not public lands are riparian to those waters. It is immaterial whether water rights that are acquired from such streams are acquired by virtue of the federal legislation above referred to or by virtue of the state laws; In either case the appropriation is good against the United States. If this court were to decree that these unappropriated waters are now under the absolute ownership of the United States, as prayed by the United States in its proposed petition in intervention, this court would in effect be denying the privileges given by the Acts of

Congress. At least while this Act of Congress remains in force these waters are subject to appropriation and are therefore not absolutely owned by the United States. The question as to what would be the situation of the waters if this legislation were repealed is entirely beside the point. A possible conflict might then exist between the claim of the states that these waters are open to appropriation and a claim which might then be made on behalf of the United States. Until such repeal however, the question is moot.

Point VII.

The only right which the United States can assert to waters in non-navigable streams, is the right to appropriate for use of land owners in whom the beneficial right rests.

It is well settled from the acts of Congress and decisions above quoted that the only authority which the United States has to construct works and appropriate and divert water, is for the benefit of arid land of the public domain. Incidentally it may also supply water for privately owned land along with public lands. See *Burley* v. *United States*, (C. C. A. 9th Circ.) 179 Fed. 1.

No authority need be cited for the proposition that these public lands are held by the United States not in its governmental capacity but for the purpose of ultimately disposing of them to settlers and homesteaders who will make use of them by development in private hands. The situation with respect to the portion of the federal projects is best stated in the decision of this court in *Ickes* v. *Fox*, 300 U. S. 82, 81 L. Ed. 525, we quote from pp. 94 to 96 of 300 U. S.:

> "Although the government diverted, stored and distributed the water, the contention of petitioner that

thereby ownership of the water or water-rights became vested in the United States is not well founded. Appropriation was made not for the use of the government, but, under the Reclamation Act, for the use of the landowners; and by the terms of the law and of the contract already referred to, the water-rights became the property of the landowners, wholly distinct from the property right of the government in the irrigation works. Compare *Murphy* v. *Kerr,* (D. C.) 296 F. 536, 544, 545. The government was and remained simply a carrier and distributor of the water, (ibid), with the right to receive the sums stipulated in the contracts as reimbursement for the cost of construction and annual charges for operation and maintenance of the works. As security therefor, it was provided that the government should have a lien upon the lands and the water-rights appurtenant thereto, — a provision which in itself imports that the water-rights belong to another than the lienor, that is to say, to the land owner.

"The federal government, as owner of the public domain, had the power to dispose of the land and water composing it together or separately; and by the Desert Land Act of (March 3,) 1877 (Chap. 107, 19 Stat. at L. 377, 43 U. S. C. A. #321), if not before, Congress had severed the land and waters constituting the public domain and established the rule that for the future the lands should be patented separately. Acquisition of the government title to a parcel of land was not to carry with it a water-right; but all non-navigable waters were reserved for the use of the public under the laws of the various arid-land states. *California Power Co.* v. *Beaver Portland Cement Co.,* 295 U. S. 142, 162, 79 L. Ed. 1356, 1363, 55 S. Ct. 725. And in those states generally, including the State of Washington, it long has been established law that the right to the use of water can be acquired only by prior appropriation for a beneficial use; and that such right when

> thus obtained is a property right, which, when acquired for irrigation, becomes, by state law and here by express provision of the Reclamation Act as well, part and parcel of the land upon which it is applied."

From the above citation it clearly appears that the United States has no beneficial interest in the water appropriated and diverted in the Reclamation projects. The rights are fundamentally those of the land owners to whose lands the water-rights are appurtenant. Since these lands are privately owned within the states, there is no basis for any suggestion that the United States has the right to operate the projects independent of state control.

Point VIII.

An interpretation should not be put upon the Federal legislation which would bring about conflict between the State and Federal Governments. The result of independent administration of Reclamation projects would be confusion and conflict.

A well settled rule of construction is that if possible an interpretation will be given to an Act of Congress which will not cause confusion, conflict or disorder, but rather one which will create an orderly, harmonious and peaceful administration. It will not be presumed that Congress intended to place the Federal authorities in opposition to State authorities, or to cause confusion in the administration of the river, but rather the opposite presumption will be entertained.

The difficulties inherent in the creation of an independent agency with power to disregard state administration and to divert water independent of control by state authorities

are obvious. Under present federal and state legislation there are certain to be private appropriators taking water under state authority for the irrigation of privately owned lands, as is the situation with reference to the North Platte and Platte Rivers in the instant suit. State regulation is essential in order to settle conflicts of interests between these appropriators; and such state regulation exists in Nebraska, Wyoming and Colorado as well as in most western states having irrigation in any volume. The conflicts in interest are illustrated by this suit; and this suit further illustrates the difficulties which arise when three authorities, independent of each other, all attempt to regulate waters. The only solution of these difficulties is by an action in court.

If there were still a fourth authority, independent of Nebraska, Wyoming and Colorado, the difficulties would increase in geometric ratio. If the Secretary of the Interior were established as a separate independent agent with power to dam up the stream, store the water, and divert large quantities independent of regulation, there would necessarily result a great amount of conflict between the Secretary and either or all three. However genuine the good faith between them, differences of interpretation and differences of point of view would cause frequent disagreements. Moreover, it would be difficult to establish the dates of priority, which is the fundamental fact necessarily to be determined and made definite as a basis of orderly administration of the waters of a river which is subject to the law of prior appropriation. Nebraska, Wyoming and Colorado for over forty years, have followed the principle that adjudications of water rights should be made by an authority having quasi-judicial powers, and through proceedings which are in a certain sense in rem, so that the

whole world is in a position to come in and be heard in opposition. Congress has made no provision with respect to adjudication of water rights for Reclamation Act projects. Instead, we believe that Congress has, in the legislation above quoted, made definite provision that the Secretary of the Interior is required to get the water rights established through proceedings before the state authorities. It seems clear that, in the interests of orderly administration, Congress has required the Secretary to place himself in the same position as any other appropriator.

Point IX.

The contentions now urged by the United States have been directly before this court in eight separate instances. In each case this court has decided those contentions contrary to the claims now made by the United States. An end should finally be placed to these demands and the states should be allowed to administer the non-navigable waters within their borders in peace and without the frequent harassments incident to these repeated efforts.

Under the following cases, the United States, as a party, has asserted its claim to ownership and control of waters of the Western states upon lands which at one time had been a part of the public domain:

United States v. *Rio Grande Dam & Irrigation Co.*, 174 U. S. 690, 43 L. Ed. 1136.
Kansas v. *Colorado,* 206 U. S. 46, 51 L. ed. 956.
Wyoming v. *Colorado,* 259 U. S. 419, 66 L. Ed. 999.

In *Ickes* v. *Fox,* 300 U. S. 82, 81 L. Ed. 525, the Attorney General of the United States on behalf of the Secretary of the Interior, made the same assertion.

In the following cases to which the United States was not a party, this court has likewise held that the United States could not assert ownership over the unappropriated waters nor could the United States assert control independent of state control over the projects originating under the Reclamation Act.

Gutierres v. *Albuquerque Land & Irr. Co.,* 188 U. S. 545, 47 L. Ed. 588.

Nebraska v. *Wyoming,* 295 U. S. 40, 79 L. Ed. 1289.

California-Oregon Power Co. v. *Beaver Portland Cement Co.,* 295 U. S. 142, 79 L. Ed. 1356.

It is unnecessary again to discuss the precise holdings in each of the above cases. They are discussed supra, in relation to the various points in this brief.

However, they constitute an imposing array of authorities, each of them contrary to the present contentions of the United States. It would seem that there should be an end finally to the presentation of these questions and that the motion of the United States should be disposed of in such form and with such definiteness that it need not again come before this court, at least unless and until there should be a change in the Federal legislation.

CONCLUSION

The complainant, State of Nebraska, in conclusion respectfully urges: (1) that there is no basis in the record already made in this case, nor in any other means or manner, for the contention that the State of Nebraska is refusing to defend the priority of waters diverted in the Reclamation projects for use in Nebraska; the contrary is the fact as appears from the record itself. (2) Nebraska further contends that these Reclamation projects must be operated in accordance with the laws of the state in which they

are located and under the supervision of those states respectively. (3) Nebraska further contends that, so far as authorized by state laws, the unappropriated waters in the western states including Nebraska, are subject to appropriation by private individuals or public authorities for beneficial use.

If the above three contentions of the State of Nebraska are sustained by this court, there is no possible reason for permitting intervention by the United States. It is immaterial for present purposes whether the state control over Federal Reclamation projects arises by virtue of Congressional legislation or state laws. In either case the result will be the same so far as concerns the right of the United States to intervene. If Congress should change this legislation in any material respect a justiciable controversy might arise because of the conflict which might then exist between Nebraska's claim to sovereignty over its non-navigable waters and any claim which Congress might assert to Federal Sovereignty over those waters. Until Congressional legislation of this character is enacted no such controversies exist; and it would be a useless waste of this court's time and of the effort of counsel to attempt to discuss the outcome of such a conflict. It is obvious that it cannot now be known whether any such Congressional legislation would be enacted and if so what form it would take.

A similar situation exists with reference to the claim of the United States to ownership of the unappropriated waters of the North Platte River. We believe that the present Congressional legislation as interpreted by many decisions of this court, make those unappropriated waters subject to appropriation by private individuals and public authorities alike, subject to state laws. If the previous decisions of this court are adhered to, any ownership which

the United States might have in those waters is subject to those rights of appropriation, and it constitutes only a bare, naked legal right without practical consequences at least in this litigation. It does not matter whether the right of appropriation is derived from the Constitution and Statutes of the State of Nebraska, or from the Congressional legislation, or from both; in any event, that right exists and that right is all that is involved in this case. The United States has a right on an equal basis with any other appropriator to make those appropriations and no party to this litigation is questioning that right.

Since we believe that the three points raised by the United States as basis for ground for its right to intervene, must be decided contrary to the contentions of the United States, we most respectfully submit that this court should deny leave to the United States to intervene.

We most respectfully further submit that if this court should feel that there is any possible ground of merit in the contentions of the United States, its motion for leave to intervene should be set for argument and should not be allowed unless and until counsel for Nebraska and for the other two states involved, have had an opportunity to be heard in this court.

Respectfully submitted,

R. C. HUNTER,
Attorney General of the
State of Nebraska,
PAUL F. GOOD,
Special Counsel,
Solicitors for Complainant,
State of Nebraska.

APPENDIX

Certified excerpt from record before the Hon. M. J. Doherty, Special Master in this cause, appointed by this Court:

(1260) JUDGE ROSE: If the Court please, there is a matter that came up yesterday that I think calls for a clarification of the position of the State of Nebraska.

At the outset of this hearing, Your Honor asked the counsel of the three states to make a statement of the principle of law deemed to be applicable under the general outline of the case. At that time Wyoming made its statement and counsel for Nebraska made their statement, but in the statement made by counsel for Nebraska I do not recall that there was any mention made of these claimed out-of-priority diversions in Wyoming of water to be used in the State of Nebraska. If there was any mention made, it was not emphasized. Now, this feature of the case has been brought prominently into the case by the testimony, yesterday, of Mr. Meeker and I think the position of the State of Nebraska with reference to it ought to be clarified.

Mr. Meeker testified with reference to these Interstate canals, the Interstate canal, the Fort Laramie canal, the Mitchell canal and the French ditch. He said that all of these divert water in Wyoming. He said that as to the (1261) Interstate canal the water was primarily used in Nebraska. As to the Fort Laramie canal he testified that there was about 50 per cent of it used in Nebraska and 50 per cent in Wyoming. As to the Mitchell canal he said it is all used in Nebraska, and as to the French canal the larger part of it. He also testified that this water is used in the western part of Nebraska, most of it in Scotts Bluff and

Morrill counties, and that if it were not used under what they claim to be out-of-priority diversions, it would be available for the use of senior appropriators east of these two counties.

Now, it seems to us that under the circumstances this case has sort of resolved itself, to a major extent, into a controversy between certain appropriators in Nebraska and certain other appropriators in Nebraska. It seems to us to be obvious that Wyoming cannot be charged with alleged out-of-priority diversions made in Wyoming of water used in the State of Nebraska and we think that we are entitled to know what the position of Nebraska is and we think they should state into the record what their position is with reference to these out-of-priority diversions and out-of-priority storage which, according to the testimony, amounts to 60,919 acre feet.

MR. GOOD: That is not a correct reflection of the testimony so far on that.

(1262) JUDGE ROSE: That is our understanding of the testimony—That is for the year 1934.

MR. GOOD: For the year 1934 that is shown as 49,000 feet, but go ahead.

JUDGE ROSE: It is a very substantial amount. I think our figures are correct. We have examined this record.

Now, specifically, we think Nebraska should state what its contention is, whether it intends to charge to Wyoming, as out-of-priority diversions, the water that is diverted in Wyoming but is used in Nebraska for the benefit of Nebraska—diverted for the benefit of Nebraska; and spe-

cifically whether it now contends and intends to contend that, under Nebraska law and particularly in view of the last decision of the Nebraska court in the Mitchell case, the water officials in Nebraska have the right either to prevent further the diversion of these waters in Wyoming —prevent Wyoming from the diversion of these waters in Wyoming to be used in Nebraska, or whether if waters are diverted, Nebraska contends that the Nebraska irrigation officials have the right when the water reaches Nebraska to return it to the stream and control it in Nebraska and to make uses of the water for the benefit, we will say, of senior appropriators down stream from these western counties, different from the uses for which it was originally diverted. We think that Nebraska, at this time, should (1263) make its position clear on those points.

MR. GOOD: In that connection I would like to state that the testimony which we are producing is exactly responsive to our bill of complaint and the bill of complaint speaks for itself.

I would like to state further that this request on the part of Wyoming comes somewhat late in the proceedings in view of the fact that precisely this same type of testimony with reference to what happened in the year 1935 was produced in the July hearing, some four or five months ago. This precise line of testimony was in connection with these same canals.

As to any further statement in connection with this we would like to reserve our statement until we have studied Judge Rose's request.

JUDGE ROSE: We propose, if the Court please, to renew this request not later than Monday morning because it is vitally important to Wyoming.

In other words here is the question: Is Wyoming going to be called upon to defend its own rights only,—that is the claims that Wyoming appropriators make to waters of this stream appropriated and used in Wyoming, or is it going to be called upon to defend such of Nebraska irrigators using the waters of these interstate diversions, diverting in these (1264) interstate canals in Wyoming and used in Nebraska, against a suit filed against them and the State of Wyoming, and actually against them by the State of Nebraska.

MR. GOOD: I cannot say for sure how much time I may need for an answer, on the spur of the moment, in view of the fact that this same type of evidence was before the State of Wyoming last July.

JUDGE ROSE: That is all the more reason why the position should be stated.

MR. GOOD: Well, if Wyoming wanted to know, I don't know why they shouldn't have asked at that time, rather than waiting at this point in the second session.

However, we would like to study this request of Wyoming and make a somewhat careful analysis of what they request.

JUDGE ROSE: The real significance of that testimony was brought out yesterday in the conclusions reached by the witness Mr. Meeker, now on the stand. And I want to repeat that we shall renew this request Monday morning

on the part of the counsel of the State of Nebraska and renew it throughout the hearing until it is answered.

THE MASTER: There is no objection in any event to Nebraska taking some time if it chooses to study the scope of the request and formulate its position.

I might say that the same question did arise in my (1265) mind as I was listening to this testimony and I was left uncertain as to just how far the State of Nebraska intended to go in basing claims upon diversions in Wyoming, which, I suppose, are controlled by Wyoming but the benefit of which accrues to Nebraska users; so I do think that at some proper time, within a reasonable time, Mr. Good, it might clarify the matter if you would state your position.

MR. GOOD: I have very clearly in mind what our purpose is, but I think it would be a matter of accuracy if I had an opportunity to set that down in writing first.

THE MASTER: Well, it will be satisfactory that you take a reasonable time to do that, I am sure.

(1291) MR. GOOD: I have, in opening this session, a statement to make and I will give a copy to the reporters here so they don't need to take it down, but I will read it because I think it is important.

In connection with Wyoming's request made at the opening of the session of November 14th, Nebraska has the following statement to make:

We believe that the fundamental basis for the solution of all of the problems raised in this case is the principle

of priority of appropriation. On this principle the constitutional and statutory provisions in all three states, Colorado, Wyoming and Nebraska, are in exact agreement. Nebraska insists upon this principle and demands its application to the administration of the North Platte and Platte rivers and tributaries regardless of state lines.

With specific reference to the question relating to the diversions and storage of water made out of priority by the United States Bureau of Reclamation, we believe that there can (1292) be no question of Wyoming's responsibility for them. As held by this Court in the opinion and ruling upon Wyoming's motion to dismiss the bill herein, the Bureau of Reclamation is a Wyoming appropriator, for which the State of Wyoming is responsible. All rights, both as to storage and direct flow diversions of water in reservoirs and canals operated by the Bureau of Reclamation on the North Platte River, whether in Nebraska or Wyoming, are adjudicated and allowed by the Wyoming Board of Control, and the practical control of their operation is unquestionably in the hands of the Wyoming state authorities. Both the Interstate and Fort Laramie Canals serve a substantial acreage of Wyoming lands with waters, both natural flow and storage; and a substantial portion of the storage made in each season in the Pathfinder and Guernsey Reservoirs is released for and used upon Wyoming's lands. To that extent the acts complained of are for the direct benefit of Wyoming, and the fact that incidentally, and in the process of benefitting Wyoming lands, water is made available for some Nebraska lands cannot excuse Wyoming's acts.

This is especially so in view of the fact that such water as is thus taken out of priority and made available for

Nebraska lands is taken contrary to the Constitution and Statutes of the State of Nebraska, which Nebraska officials are sworn to defend and support. It is an interference with Nebraska's sovereignty when her officials are prevented, by (1293) the act of Wyoming and the Bureau of Reclamation, from enforcing Nebraska law in Nebraska.

Thus Nebraska is seriously damaged, even when the out-of-priority water is applied to Nebraska lands. While the monetary damage to Nebraska as a whole is not the same as it is where out-of-priority water is retained in Wyoming, yet the resulting situation is to that extent a breakdown of Nebraska law enforcement. Any efficient administration and policing of the waters of the state must depend upon the fairness and equality with which the laws are administered, and, where a junior appropriator, whether in Wyoming or Nebraska, is allowed to take water without regard to the rights or needs of a senior appropriator, the result is a disrespect both for the law and for the officers enforcing that law, and thereby the task of those officers becomes increasingly more difficult through the absence of willing obedience to the law.

Nebraska insists that the rule of priority shall be respected both in Wyoming and Nebraska. In the case of the Mitchell canal, Nebraska was able to take care of the problem by her own courts and administrative officials, after extensive and expensive litigation. Where resort to this court is the only method, Nebraska asks through the medium of this suit, that this court make possible the orderly administration of the waters of the river by an interstate administration on the principle of priority of appropriation. The enforcement of (1294) this principle is for the protection of all Nebraska appropriators, in their

priority rights, and the Reclamation projects, while junior to some, are senior to others. We ask the court to protect these projects against encroachments by others which are junior to them. We further ask the court to protect them, in accordance with the principle of priority of appropriation, against diversions by senior canals of an amount of water which is in excess of the amount of the appropriations of those senior canals.

With reference to the matters raised by Judge Rose as to the effect of the decision of the Nebraska Supreme Court in the Mitchell case, we believe in the first place, that he has misquoted that decision. There is no holding therein that Nebraska can go into Wyoming for the purpose of controlling the headgates of a canal diverting in Wyoming. It is held that Nebraska can, if practicable, control the water in the canal after it gets into Nebraska.

That principle can have no application to the situation of the Interstate and Fort Laramie canals, since their distance from the river at the points where they respectively cross the state line, is such that it will be impossible as a practical matter for the water to be put back in the river, especially for it to be put back at a point where it could be used by the western-most senior Nebraska appropriators. Nebraska seeks to protect its senior canals in all Nebraska, (1295) and not merely in counties east of Morrill county as stated by Judge Rose.

A reference to Exhibit 97 shows that, while the Mitchell canal is less than a mile distant from the river where it crosses the state line, the Interstate canal is more than six miles and the Fort Laramie canal twelve miles from the river at the points where they respectively enter the state.

The practical impossibility of applying the Mitchell rule to the situation of these two canals is apparent.

Another distinction between the Mitchell case and the situation of the Nebraska appropriators under the Reclamation canals is that the Mitchell District is a Nebraska corporation subject to Nebraska law, while the storage in the Pathfinder and Guernsey reservoirs and the diversions in the Interstate and Fort Laramie canals have been and are now entirely under the control of the United States Bureau of Reclamation, a Federal agency operating for storage and diversion of waters under Wyoming law. Nebraska citizens and corporations have no control over such storage and diversions and, therefore, no responsibility therefor.

With reference to the Mitchell canal, the State of Nebraska does not charge Wyoming with anything damaging Nebraska since the Nebraska court decision of September, 1935, giving Nebraska control of that canal. However, the necessity for those legal proceedings grew out of the refusal of (1296) Wyoming to cooperate with Nebraska, in spite of the repeated requests of Nebraska officers. We complain of Wyoming's acts as to the Mitchell canal to and including the year 1935.

Concluding this statement, Nebraska states that Wyoming does not need to defend the priority rights of any canal or ditch in Nebraska since Nebraska does not attack any such priorities. Wyoming is, however, called upon to defend its past conduct and its threatened future actions in permitting appropriators operating in Wyoming to store or divert water from the North Platte River out of the order of priority.

Nebraska will also ask that in its decree this court should protect Nebraska appropriators under all canals diverting in Wyoming, in the rights to which their priorities entitle them, against future violations of the principle of priority by the State of Wyoming, and by Wyoming appropriators whether from the stream or under such canals.

MR. HOWELL: This statement will appear in the record?

MR. GOOD: Yes, I have given a copy of it to the reporters so they can set it out exactly as I have read it.

Nothing further that you care to state?

JUDGE ROSE: No.

State of Nebraska, }
} ss.
Scotts Bluff County }

Arthur H. Bass, being first duly sworn, upon oath deposes and says that he is one of the reporters duly employed and authorized by the Hon. M. J. Doherty, Special Master, and by all the parties to the suit in the United States Supreme Court wherein the State of Nebraska is Complainant, and the State of Wyoming defendant and the State of Colorado impleaded defendant; that as a part of his duties he has taken in shorthand and transcribed in typewriting the testimony and proceedings before Hon. M. J. Doherty, Special Master; that annexed hereto is a true and correct copy of pages 1260 to 1265, inclusive, of said record as taken by me in shorthand at the hearing before the Special Master in said cause on November 14, 1936, and pages 1291 to 1296, inclusive, of said record as taken by me in shorthand before the Special Master in said cause on November 16, 1936, in both instances as transcribed by me from my shorthand notes.

ARTHUR H. BASS

Subscribed in my presence and sworn to before me this 11th day of April, 1938.

H. F. THIES
Notary Public

(SEAL)

I, the undersigned, M. J. Doherty, the duly appointed Special Master in the above entitled cause, do hereby certify that the above and foregoing portions of the record in said cause, as certified by the affidavit of Arthur H. Bass, shorthand reporter, is a true and correct copy of the portions of the official record in said cause as the same is in my possession and will be certified to this court in my report as Special Master.

M. J. DOHERTY,
Special Master.