

No. 10452

IN THE

**Second Judicial District Court**

of the State of Nevada, in and for  
Washoe County

THE GERLACH LIVE STOCK COM-  
PANY, a corporation,

Plaintiff,

-vs-

J. N. FISKE,

Defendant.

FINDINGS OF FACT, CONCLUSIONS  
OF LAW, AND FINAL DECREE.

Specimen of the within by copy admitted

March 14 1912

C. B. Powell

Attorney for Plaintiff

Filed this 14th day of March 1912

W. R. [Signature]

Clerk

By [Signature] Deputy

CHENEY, DOWNER, PRICE & HAWKINS  
BEND, NEVADA

PLAINTIFF

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IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA,  
IN AND FOR THE COUNTY OF WASHOE.

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THE GERLACH LIVE STOCK COMPANY,  
a corporation,

Plaintiff,

-vs-

NO. 10,452.

C. W. FISKE,

Defendant.

FINDINGS OF FACT, CONCLUSIONS OF LAW  
AND  
FINAL DECREE.

. . .

The above entitled action came on to be and was tried in the above entitled Court upon the 1st., 2d., 3d. and 4th of June, 1915, upon the entire record herein. Plaintiff appeared by its attorneys Cheney, Downer, Price & Hawkins, and defendant appeared by his attorneys F. B. Hart and A. E. Painter. Evidence, orally and documentary, was offered and received on behalf of the respective parties in support of the allegations in the pleadings and the issues made thereby. The action was thereafter and on to-wit June 4, 1915, submitted to the Court for decision.

The Court having considered the entire record and the evidence offered and received, and being now fully advised in the premises, doth find:-

1. That each, every and all of the material allegations in plaintiff's amended complaint are true; that none of the material allegations set up in defendant's amended answer and counter-claim are true.

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PRICE AND HAWKINS  
ATTORNEYS

2. That the climate where said lands, alleged in the pleadings to be owned or possessed by the plaintiff and the defendant respectively, are situated, is dry and arid; that it is necessary to irrigate said lands in order to produce or raise crops thereon, and without irrigation said lands will not produce crops, and are practically valueless.

3. That during the month of September, 1911, defendant entered under the homestead statute of the United States the lands in defendant's answer and counter-claim described, but made no attempt to irrigate or water any of said lands until during the year 1912 when, by means of a ditch or ditches, defendant applied some water to a portion of said lands on the west side of Squaw Valley Creek; that defendant did not, until during the year 1914, attempt to irrigate any of said lands situated on the east side of said Squaw Valley Creek.

That the "certain bodies of water" referred to in defendant's amended answer and counter-claim alleged by defendant to have been by him discovered and developed and being the source from which defendant claimed the right to the use of water for the irrigation of his said lands, and from which defendant used water as alleged in the amended complaint, were and each of same was, at all the time referred to in the amended complaint and in the amended answer and counter-claim, and now are, and for more than twenty years prior to the institution of this action had been, springs from which water flowed, and the water therefrom was, is and at all times mentioned in plaintiff's amended complaint and in defendant's amended answer and counter-claim has been tributary to Squaw Valley Creek, and such water, and all thereof or therefrom, has been for more than twenty years prior to the institution of this action and since about the year 1888 diverted by plaintiff by

means of dams, ditches and canals, and applied by plaintiff to beneficial purposes, to-wit the irrigation of lands owned or in the possession of plaintiff, and for watering stock of plaintiff and for domestic uses.

4. That since about the year 1888, and each and every year thereafter down to and including the year 1914, except as interfered with by defendant and another as set forth in plaintiff's amended complaint, the plaintiff, by means of dams, ditches and canals, constructed and maintained by plaintiff, diverted from Squaw Valley Creek all the waters flowing in said Squaw Valley Creek during irrigation season and conducted said water so diverted during each and every year, to, upon and over the lands of plaintiff as described in plaintiff's amended complaint, and used all of said waters so diverted in the irrigation of said lands and for watering stock thereon and for domestic uses; that all of said waters so flowing in said Squaw Valley Creek during irrigation season are necessary and required by plaintiff for the proper irrigation of plaintiff's said lands and the crops growing and to be grown thereon, and for watering plaintiff's stock thereon and for plaintiff's domestic uses, as alleged in the amended complaint.

That the said "certain bodies of water" referred to in defendant's amended answer and counter-claim, are all situated on or near the banks of said Squaw Valley Creek and above the diverting dam of plaintiff, which is and since 1888 has been situated and maintained across Squaw Valley Creek at a point near the NE $\frac{1}{4}$  of Section 30, T. 34 N., R. 22 E., M. D. M.; that the water from said "certain bodies of water", referred to in defendant's amended answer and counter-claim, are situated upon both sides of Squaw Valley Creek and the water flowing therefrom has, when unobstructed, for more than twenty years prior to the institution of this action.

flowed into and become a part of the waters flowing in Squaw Valley Creek above the diverting dam of plaintiff and said "certain bodies of water" are now and for more than twenty years prior to the institution of this action have been and constitute a part of the permanent source of supply of water flowing in said Squaw Valley Creek.

That said Squaw Valley Creek is a natural water course and the water therein flows in a general southeasterly direction through and across the lands claimed by and in the possession of defendant under and by virtue of said homestead entry made during the year 1911; that said Squaw Valley Creek, where it flows across the said lands claimed by defendant, is situated in a narrow canon and where said springs or said "certain bodies of water", referred to by defendant, are situated, the sides or walls of said canon are steep and at places abrupt, the slope of the ground from both sides of the walls of said canon being toward said Squaw Valley Creek, and all the waters from all of said springs or said "certain bodies of water" referred to by defendant as having been developed and discovered by him, flow into and constitute a part of the waters of said Squaw Valley Creek at a place or point above said diverting dam of plaintiff Company.

That the water claimed by defendant to have been developed by him, situated in the NW $\frac{1}{4}$  and the SE $\frac{1}{4}$  of section 19, and the water claimed by defendant situated in the SW $\frac{1}{4}$  of said section 19, all in T. 34 N. R. 22 E., M. D. M., are natural sources of supply of the waters of Squaw Valley Creek, which said springs were cleaned out and developed by plaintiff and used by plaintiff as early as the year 1880, and said waters have been used continuously and each year since 1880 by plaintiff by means of plaintiff's dams, ditches and canals for the irrigation of plaintiff's lands and for watering stock and for domestic purposes, except when interfered with by defendant.

5. That defendant, subsequent to the year 1911 and prior to the institution of this action, by means of dams, ditches and other devices, took and diverted away from said Squaw Valley Creek and away from plaintiff and plaintiff's lands a portion of the waters of said springs and deprived plaintiff of the use of a portion of the waters of Squaw Valley Creek, which plaintiff had theretofore and since the year 1888 been diverting and using for beneficial purposes as hereinabove found. That the diversion and use of said waters from said sources situated in the NW $\frac{1}{4}$  and the SW $\frac{1}{4}$  and the SE $\frac{1}{4}$  of section 19, T. 34 N. R. 22 E., M. D. N., so claimed by plaintiff, by defendant has prevented and deprived and would prevent and deprive plaintiff of the use of the waters, and would prevent the said waters from flowing into said Squaw Valley Creek, as said waters were wont or accustomed to flow prior to the construction of said dams, ditches or other devices by said defendant. That defendant continues to maintain said dams, ditches and other devices for the diversion of said waters and threatens to divert by means thereof all the waters from said sources situated in the SW $\frac{1}{4}$  and the SE $\frac{1}{4}$  of section 19, and a part of the waters so situated in the NW $\frac{1}{4}$  of said section 19, thereby depriving plaintiff of the use of said waters.

6. That if defendant is permitted to so divert and use any of the waters from said natural water courses, hereinabove described and situated in the NW $\frac{1}{4}$  and the SW $\frac{1}{4}$  and the SE $\frac{1}{4}$  of section 19, during irrigation season, plaintiff herein, who had diverted and applied to beneficial use all of such water for more than twenty years prior to the entry by defendant of said lands under his said homestead entry, said plaintiff will be deprived of the right to the use of such waters, and its property rights thereby invaded, impaired and to a certain extent destroyed.

7. That the operations by defendant, as set forth in the amended answer and counter-claim, wherein defendant claims to have developed water, have not added any additional quantity of water to said Squaw Valley Creek, but, on the contrary, defendant by his acts, as alleged and proven, has diverted and used water, being and constituting a part of said Squaw Valley Creek, the natural supply for plaintiff, at times when there was not sufficient water in said Squaw Valley Creek and its tributaries to supply the need of plaintiff.

8. That defendant in September, 1914, by his two applications, Serial Nos. 3033 and 3102, applied to the State Engineer for a permit to appropriate part of the waters of said natural water sources, to-wit, the springs in the NW $\frac{1}{4}$  and the SW $\frac{1}{4}$  and the SE $\frac{1}{4}$  of section 19, T. 34 N. R. 22 E., M. D. M.; that plaintiff has filed its protests with the State Engineer against the granting of both and each of said applications; that no hearing on said applications or protests, or either of them, has been had by the State Engineer of the State of Nevada.

9. That subsequent to the issuance of the temporary injunction in this action, plaintiff attempted to enter upon the homestead entry of defendant for the purpose of changing the dams, ditches and other devices made and constructed by defendant, whereby the waters of said springs, hereinabove referred to, was diverted away from Squaw Valley Creek, in order that all the water flowing from said natural water sources, to-wit, the springs above referred to, would flow, as it was wont or accustomed to flow prior to the work done by defendant, into Squaw Valley Creek above plaintiff's diverting dam, hereinabove referred to; that defendant ordered and directed plaintiff's agents and employees to desist and refrain from in any way interfering with or doing any work upon said dams, ditches and other devices so constructed

and maintained by defendant, thereby defendant prevented plaintiff from securing the beneficial use of the water from said springs constituting a part of the source of Squaw Valley Creek.

#### CONCLUSIONS OF LAW.

1. That plaintiff is entitled to a decree establishing its right to the use of all the waters of said Squaw Valley Creek and its tributaries, including said springs, referred to by defendant in his amended answer and counter-claim as "certain bodies of water", and situated in the NW $\frac{1}{4}$  and the SW $\frac{1}{4}$  and the SE $\frac{1}{4}$  of section 19, T. 34 N. R. 22 E., M. D. N., and to a permanent injunction in reference thereto, as prayed for in its amended complaint.

2. That the changing, altering or interfering with the flow of water from said springs and all and each of said springs situated in the NW $\frac{1}{4}$  and the SW $\frac{1}{4}$  and the SE $\frac{1}{4}$  of said section 19, or diverting, interfering with or using water, or any of the waters, of said springs or said "certain bodies of water", above referred to, or any of the tributaries or any sources of supply of Squaw Valley Creek, so as to in any way or manner prevent or obstruct the flow of the water of said springs, or any thereof, into said Squaw Valley Creek and down said Creek to or against plaintiff's said dam and into plaintiff's said irrigating canal or ditch, or so as to in any way or manner divert or take said water, or any of said water, away from plaintiff or away from the said lands of plaintiff, or to hinder or interfere with the free and full use of the waters of said Squaw Valley Creek and said springs hereinabove referred to and described or any of the tributaries or sources of supply of said Squaw Valley Creek above plaintiff's said diverting dam, for the irrigation of plaintiff's said lands and for stock and domestic purposes during irrigation

season, is an invasion, infringement and violation of plaintiff's rights to the use of the waters, and all of the waters, of said Squaw Valley Creek and its tributaries, including said springs in the NW $\frac{1}{4}$  and the SW $\frac{1}{4}$  and the SE $\frac{1}{4}$  of section 19, T. 34 N. R. 22 E., M. D. M.

3. That as between plaintiff and said defendant, plaintiff is the prior appropriator of all the waters of said Squaw Valley Creek and its tributaries, including said springs and all and each of them, hereinabove referred to, being situated in the NW $\frac{1}{4}$  and the SW $\frac{1}{4}$  and the SE $\frac{1}{4}$  of said section 19, and as such prior appropriator is entitled to have all the waters of said Squaw Valley Creek and its tributaries, including said springs, above referred to, flow as said waters were accustomed or wont to flow prior to any interference therewith by defendant, and down to and against the dam of plaintiff and into the ditch of plaintiff, herein mentioned.

4. That plaintiff is entitled, by its servants, agents *at necessary and reasonable times and in a feasible manner,* or employees, to enter upon the lands in the possession of defendant, as hereinabove found, *of constructing and maintaining as heretofore* ~~and to clean out, construct and make~~ such dams or ditches as may be necessary for the purpose of causing to flow into the channel of said Squaw Valley Creek all the waters of all and each of said springs or said "certain bodies of water", referred to in defendant's amended answer and counter-claim, situated in the NW $\frac{1}{4}$  and the SW $\frac{1}{4}$  and the SE $\frac{1}{4}$  of section 19, T. 34 N. R. 22 E., M. D. M., and to clean out ~~and~~ *such ditches, canals and* straighten the channel of said Squaw Valley Creek in order that *and may continue as heretofore to flow* the water flowing therein may flow down to or against plaintiff's said dam and into plaintiff's said canal, situated in and leading from said Squaw Valley Creek as hereinabove found, with as little waste and loss as practicable.

FINAL DECREE.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED by the Court:-

1. That plaintiff is the prior appropriator and entitled to the use of all the water flowing in said Squaw Valley Creek and its tributaries and all the water flowing from said springs or said "certain bodies of water" referred to by defendant in his amended answer and counter-claim and situated in the NW $\frac{1}{4}$  and the SW $\frac{1}{4}$  and the SE $\frac{1}{4}$  of section 19, T. 34 N. R. 22 E., M. D. M.; during irrigation season, for the irrigation of plaintiff's said lands and the crops growing thereon and to be grown thereon and for watering of plaintiff's stock and for domestic uses; and that all the waters of said Squaw Valley Creek and its tributaries, including said springs above referred to, are necessary and required for the proper irrigation of plaintiff's said lands and the crops growing and to be grown thereon and for watering plaintiff's stock and for plaintiff's domestic uses; that the claim, or any claim, of said defendant to divert or use by means of any dam, ditch, canal or other device, the said water, or any of the waters, of said Squaw Valley Creek or its tributaries, including said springs or said "certain bodies of water", referred to by defendant in his amended answer and counter-claim, and situated in the NW $\frac{1}{4}$  and the SW $\frac{1}{4}$  and the SE $\frac{1}{4}$  of section 19, T. 34 N. R. 22 E., M. D. M., during irrigation season, is invalid, null and void as against plaintiff herein.

2. That the changing, altering or interfering with the flow of the waters, or any of the waters, of said Squaw Valley Creek, or any natural source of supply of said Squaw Valley Creek, including said springs or said "certain bodies of water" referred to by defendant in his amended answer and counter-claim and sit-

nated in the NW $\frac{1}{4}$  and the SW $\frac{1}{4}$  and the SE $\frac{1}{4}$  of section 19, T. 34 N. R. 22 E., M. D. M., above plaintiff's diverting dam, or diverting, using or interfering with the waters of said Squaw Valley Creek or any of the tributaries thereof, or any of the natural sources of supply thereof, including said springs above mentioned and referred to, so as to in any way or manner prevent or obstruct the flow thereof down to or against plaintiff's said dam and into plaintiff's said irrigating ditch or canal, or so as to in any way or manner, divert or take away from plaintiff, or from the said lands of plaintiff, any of said water, or to hinder or interfere with the free and full use of the waters and all the waters of said Squaw Valley Creek and its tributaries, including said springs above referred to, by said plaintiff for the irrigation of its said lands and for watering stock and domestic purposes, or disturbing, changing, molesting or interfering with, or in any manner using, any of the natural or artificial channels through which the water from said springs may flow into said Squaw Valley Creek, or the channel of said Squaw Valley Creek above plaintiff's dam, herein mentioned, so as to in any way or manner prevent or impede the flow of the waters of said Squaw Valley Creek or said springs, or either of them, from flowing down to or against plaintiff's dam and into plaintiff's said ditch or canal, is an invasion, infringement and violation of plaintiff's right to the use of all the waters of said Squaw Valley Creek and its tributaries, permanent sources of supply, including said springs above referred to, during irrigation season; that plaintiff is entitled to have all the waters of said Squaw Valley Creek and all said natural sources of supply thereof, including said springs herein mentioned, flow as said waters were accustomed or wont to flow prior to any interference therewith by defendant, and defendant has no right to divert, use or interfere with said

waters or any of said waters, so as to prevent said waters and all of said waters from flowing down to or against the dam and into the ditch or canal of plaintiff herein mentioned.

3. That defendant herein, his agents, servants and employees, grantees or assigns, and all persons acting by, through or under said defendant, hereby are, and each of them hereby is, perpetually enjoined and restrained from in any way or manner changing, altering or interfering with the flow of the waters, or any of the waters of said Squaw Valley Creek, or any natural source of supply of said Squaw Valley Creek, including said springs or said "certain bodies of water", referred to by defendant in his amended answer and counter-claim, and situated in the NW $\frac{1}{4}$  and the SW $\frac{1}{4}$  and the SE $\frac{1}{4}$  of section 19, T. 34 N. R. 22 E., M. D. M., above plaintiff's diverting dam, or diverting, using or interfering with the waters of said Squaw Valley Creek or any of the tributaries thereof, or any of the natural sources of supply thereof, including said springs, above mentioned and referred to, so as to in any way or manner prevent or obstruct the flow thereof down to or against plaintiff's said dam and into plaintiff's said irrigating ditch or canal, or so as to in any way or manner, divert or take away from plaintiff or from said lands of plaintiff, any of said waters, or to hinder or interfere with the free and full use of the waters and all the waters of said Squaw Valley Creek and its tributaries, including said springs above referred to, by said plaintiff for the irrigation of its said lands and for watering stock and domestic purposes, or disturbing, changing, molesting or interfering with or in any manner using any of the natural or artificial channels through which the water from said springs may flow into said Squaw Valley Creek or the channel of said Squaw Valley Creek above plaintiff's dam, herein mentioned, so as to in any way or manner prevent or

impede the flow of the waters of said Squaw Valley Creek or said springs, or either thereof, from flowing down to or against plaintiff's dam and into plaintiff's said ditch or canal, herein mentioned, during irrigation season.

*RCS.*  
4. That plaintiff is entitled by its agents, servants *at necessary and reasonable times and in a peaceable manner,* or employees, to enter upon the lands in the possession of defendant, as hereinabove found, for the purpose *of constructing and maintaining as heretofore* ~~and to clean out, straighten and raise~~ such dams, ditches or canals as may be necessary for the purpose of causing to flow into the channel of said Squaw Valley Creek all the waters of all and each of said springs or said "certain bodies of water", referred to in defendant's amended answer and counter-claim situated in the NW $\frac{1}{4}$  and the SW $\frac{1}{4}$  and the SE $\frac{1}{4}$  of section 19, T. 34 N. R. 22 E., M. D. M., and to *such ditches, canals and* clean out ~~and straighten~~ the channel of said Squaw Valley Creek *and may continue as heretofore to flow* in order that the water flowing therein may flow down to or against plaintiff's said dam and into the plaintiff's said canal situated in and leading from said Squaw Valley Creek, as hereinabove found, with as little waste and loss as practicable.

*RCS.*  
5. That plaintiff and its surety on the undertaking heretofore given and filed herein, upon the granting of the restraining order and upon the granting and issuing of the temporary injunction pendente lite, be and each of them hereby are released and discharged from any and all liability through or by reason of the issuing or granting of said restraining order and said temporary injunction.

6. That plaintiff is entitled to, and that it does have and recover of and from said defendant, all of plaintiff's costs and disbursements in this action incurred, ~~which are adjudged and determined~~ and herein taxed at \$ 564.30 *RCS.*

Done in open court this 17<sup>th</sup> day of June, 1915.

*[Signature]*  
District Judge.