

Deep Creek

IN THE DISTRICT COURT OF UTAH COUNTY

STATE OF UTAH

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ELMER HUBER and ROY HUBER, :
 :
 Plaintiffs, :
 :
 vs. : Civil No. 3067
 :
 DEEP CREEK IRRIGATION COMPANY, a corpora- : FINDINGS OF FACT & CONCLUSIONS OF LAW
 tion, OLLIE W. JUSTICE, ORLAND COOK, DARVALL :
 COOK and BEN COOK, :
 :
 Defendants. :
 :
 MOSEBY IRRIGATION COMPANY, :
 :
 Intervenor. :

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This matter, having come on regularly for trial before the above entitled court, commencing on or about the 3rd day of August, 1954, and the parties having been personally present and having been represented by their respective attorneys, and the court having heard and considered the evidence adduced and being fully advised in the premises now makes these Findings of Fact and Conclusions of Law:

FINDINGS OF FACT

1. That the plaintiffs and the individual defendants are all residents of Uintah County, Utah; that the defendant corporation is a Utah corporation, and that the intervenor corporation is a Utah corporation.
2. That Deep Creek is a natural water course situated in Uintah County, Utah; that it has its origin many miles upstream from the lands of any of the parties hereto, and there are numerous users of water therefrom who are not parties to this suit; that the stream runs generally from the north to the south; that at a point upstream from the lands of all of the parties hereto the upper users claim rights under a court decree and under diligence rights to divert water from Deep Creek, and that for many years last past the upstream users have diverted from Deep Creek, and at a point upstream from the lands of all of the parties hereto a man named Parry for many years last past has and now does

maintain a relatively tight dam in Deep Creek, which diverts the water therefrom at all times except during high water.

3. That the lands of all of the parties hereto are close to the stream channel and part of the water applied to said lands will return to the stream, and be available for the next user downstream; that the plaintiffs' lands are located downstream from the lands of all the other parties, and that from the upstream diversion of defendant Ollie W. Justice to the point of diversion used by the plaintiffs there is a distance of several miles.

4. That the rights of all of the parties hereto are based on applications filed in the Office of the State Engineer; that the plaintiffs rely upon rights under Certificate of Appropriation No. 1477 (plaintiffs Exhibit D) for 6.28 c.f.s. of water, which certificate was originally issued to Maroni Gerber of Springville, Utah, (plaintiffs' predecessor in interest); that the certificate provides for the use of water from April 1st to November 1st of each year to irrigate 377 acres of land described therein; that it fixes the burden or duty of water as three acre feet of water per acre of land per annum, and makes the water appropriated thereunder a primary water right for 180.49 acres of the 377 acres, and an auxiliary right for the remainder of 196.51 acres. The date of priority is January 10, 1908, and the certificate was issued July 12, 1926.

5. That a priority date of January 10, 1908, is earlier than the priority date of the water rights of any of the other parties to this suit; that the defendant Ollie W. Justice filed an application to appropriate water on June 16, 1922; that his rights thereunder lapsed on November 10, 1932, and were reinstated on May 28, 1940; that the order of reinstatement provided for a restoration of a priority date as of September 30, 1922; that no appeal or proceeding to review the action of the State Engineer was ever filed by Ollie W. Justice during the period from November 10, 1932, to May 28, 1940, and that the said Ollie W. Justice had notice of the State Engineer's action; that the District Court here makes no determination of the effect of said order of reinstatement as to the priority of Ollie W. Justice, because in view of other findings and conclusions by the court, this becomes immaterial.

6. That all of the other defendants named have applications pending in the Office of the State Engineer or certificates issued subsequently to the appropriation date set in the certificate through which plaintiffs' rights are evidenced.

7. That the application upon which plaintiffs' Certificate No. 1477 was issued was received in the Office of the State Engineer on January 10, 1909; that the application was approved on the 31st day of July, 1909; that the fourteen year period fixed by statute for proof of appropriation would have expired on the 31st day of July, 1923. The court finds that the water covered by Certificate No. 1477 has been placed to actual beneficial use at least as early as the spring of 1922, and that within said fourteen year period all of the diverting works had been constructed and completed; that proof of appropriation was filed within the fourteen year period; that there is presumption of regularity of all proceedings in the Office of the State Engineer after a certificate of appropriation issues; that the certificate did issue; that where the statements made in the proof filed are sufficient to establish the essential and basic facts of diversion and application of water to beneficial use, the returning of said application to the applicant by the State Engineer beyond the fourteen year period for additions and corrections would not make the completion of the diversion, the application to beneficial use, and the filing of proof insufficient, and the evidence is inadequate to rebut the prima facie presumption of regularity.

8. That at all times from at least 1922 to date plaintiffs and their predecessors in interest have utilized the water appropriated under Application 1477; that there has been no showing of any abandonment or forfeiture of water, but to the contrary the evidence affirmatively shows that such water which has arrived at the point of diversion of the plaintiffs and their predecessors has always been put to beneficial use since at least 1922.

9. That there is evidence that the defendants have from time to time interfered with the flow of water to the plaintiffs' point of diversion at times when the quantity of water present in the stream (Deep Creek) was adequate to

meet the plaintiffs' or their predecessors' rights, but that there has never been a period of open, notorious and interrupted adverse usage, but that each and every year plaintiffs and their predecessors have broken the dams of the various defendants and taken their water; that in the early 1930's there was an oral agreement made between plaintiffs and defendants to the effect that the priority of the plaintiffs would be recognized and plaintiffs would be permitted to take the water until such time as the stream receded to a point where it would not reach the plaintiffs, and that when it would not reach the plaintiffs the defendants could use the water; that there has been some disagreement over the years as to when the water would not reach the plaintiffs, but until recent years the plaintiffs' prior right to the use of the water has been recognized by the other parties hereto, and the court finds that there has not been an abandonment or forfeiture of the water by the plaintiffs or their predecessors, nor have any of the defendants had a seven year period of uninterrupted adverse use.

10. The lands of the plaintiffs are arid; that without irrigation they are not able to produce good crops; that with irrigation the lands can be cultivated and crops can be raised thereon; and that the application of water to the lands of the plaintiffs is a beneficial use of said water.

11. That Moroni Gerber by deed conveyed $\frac{287}{377}$ ths of the water covered by certificate No. 1477 as follows: A $\frac{1}{2}$ interest in $\frac{287}{377}$ ths of the water to Elmer Huber, one of the plaintiffs herein; $\frac{1}{4}$ of the $\frac{287}{377}$ ths to Frank Huber, who is not a party hereto, and the $\frac{1}{4}$ of the $\frac{287}{377}$ ths to Roy Huber, who is also a party defendant; that by a warranty deed (Entry 34693, Records of Uintah County) Elmer Huber and Frank Huber and their wives conveyed to Roy Huber the $\frac{1}{4}$ of the $\frac{1}{4}$ of Section 14 and the $\frac{1}{2}$ of the $\frac{1}{4}$ of Section 15, together with all water rights appurtenant thereto; that also by warranty deed (Entry 34694, Records of Uintah County) Roy Huber and Frank Huber and their wives conveyed to Elmer Huber, a party hereto, the $\frac{1}{4}$ of the $\frac{1}{4}$ of Section 14 and the $\frac{1}{2}$ of the $\frac{1}{4}$ of Section 15, together with appurtenances and in particular "a water right for that portion of the acreage included within the above described parcel which is embraced within

the lands described in that Certificate of Appropriation No. 1477, Application No. 1713, which provides for 6.28 c.f.s. of the flow of Deep Creek for irrigating a total of 377 acres * * *."

There are two quarter sections which were described in Gerber's Certificate of Appropriation No. 1477, to which the Deep Creek waters became appurtenant, but which Frank Huber neither owned nor conveyed. The court finds from plaintiffs' exhibit AA that the water right obtained by plaintiffs' exhibit D, being Certificate No. 1477 was appurtenant to the entire area of the two 40 acre tracts mentioned above. The evidence shows a patent to all of the lands in Sections 14 and 15 to Moroni Gerber and the water attached as an appurtenance to these lands on July 3, 1919, when the patent was issued and the water ripened into a fully appurtenant right on July 12, 1926, the date of the issuance of the Certificate of Appropriation.

12. The court finds that the two 40 acre tracts mentioned above were deeded to Emile Aurilla Gerber, and that the deed carried with it the water right for said two tracts as an appurtenance; that on June 24, 1929, when Moroni Gerber quitclaimed 287/377ths of the water, the quitclaim was ineffectual to convey that portion of the water which was appurtenant to the two 40 acre tracts in question, because he had already conveyed that right to deed to Emile Aurilla Gerber. Thereafter John K. Bullock, a successor in interest to Emile Aurilla Gerber, conveyed one of the 40 acre tracts to Roy Huber and the other 40 acre tract to Elmer Huber, and the water appurtenant thereto passed to Roy Huber and to Elmer Huber as an appurtenance.

13. There is a small tract of approximately ten acres in the SW $\frac{1}{4}$ of the SE $\frac{1}{4}$ of Section 10, which is shown in blue on plaintiffs' exhibit AA, which is not owned by any party to this action; that the deed from Moroni Gerber and the subsequent deeds to Roy and Elmer Huber have vested in them 287/377ths of Certificate No. 1477, except the approximately ten acre tract mentioned in this paragraph, and Roy and Elmer Huber are, therefore, now the owners of 277/377ths of Certificate No. 1477.

14. That because of the close proximity of the lands of all of the parties to the channel of Deep Creek there is an unusual quantity of return flow which reaches the stream channel after water is applied to the adjacent land; that there are few springs or tributaries to the channel from the point where the first defendant Ollie W. Justice diverts his water downstream to the point of diversion of the plaintiffs, and that less water reaches the plaintiffs if the water is first diverted and applied to the lands of the defendants, and plaintiffs are left to depend upon the return flow to the stream; that plaintiffs would always get more water if the water were left in the channel to run unobstructed to the plaintiffs' point of diversion.

15. That the defendant Ollie W. Justice has three points of diversion and no more, which he may lawfully use under this application; that he has only earth fill diverting works, and has no measuring devices of any kind, and that there is no provision for clear passage through his lands of the plaintiffs' water; that the defendants Cook have earth fill diverting works and have no measuring devices nor provision for clear passage of the water through their lands of the waters belonging to the plaintiffs; that the plaintiffs have in the past suffered from repeated interference with their flow by the defendants, and that they will be subjected to future interference unless the court by its decree enjoins such further interference with plaintiffs' right.

16. That when the flow of water in Deep Creek is so far depleted that it will not, even though the flow is to no extent interfered with, reach the plaintiffs' point of diversion, and flow from the point of diversion to any of the waters, but should be permitted to divert the waters in accordance with their respective rights.

17. That the court has the discretionary power, under the provisions of 73-4-18, U.C.A. 1953, to order a general adjudication of the waters of Deep Creek; that there has never been a general determination of the rights to use water from Deep Creek; that fewer than ten users are involved in this action, and the court has jurisdiction to require that the State Engineer proceed to make a general adjudication; that there are various problems not presented to the court herein and on which the court can not now make a determination. The use of the

water course by Mosby Irrigation Company, intervenor, constitutes a major source of difficulty; that there must be a determination made of channel losses, of charges for carrying the water, of provision for passing Mosby Irrigation Company water through the dams of the other parties hereto, the installation of adequate measuring devices and diversion works to replace the mud, dirt, and willow dams, a determination of the quantity of water necessary to reach the plaintiffs' fields and other similar problems. The court further finds that in the exercise of its discretion that a general adjudication of the waters of Deep Creek should be ordered in accordance with the provisions of Chapter 4, Title 73, U.C.A. 1953.

18. That in view of the fact that this suit has by order of this court been turned into a general adjudication of the water rights on Deep Creek, the court finds that any decree entered herein should, under the statutes of the State of Utah, be made interlocutory in nature.

From the foregoing Findings of Fact, the court concludes:

CONCLUSIONS OF LAW

1. That plaintiffs are the owners of 277/377ths of Application 1477 for 6.28 cubic feet of water per second, all as is more particularly described in that certificate; that plaintiffs' rights are prior to any of the rights of any of the defendants, and plaintiffs' rights should be so adjudged and decreed.

2. That the defendants, and each of them, should be enjoined from interfering with the flow of waters of Deep Creek at any time when the flow of Deep Creek is less than 277/377ths of 6.28 c.f.s., or 4.61 c.f.s., measured at the plaintiffs' point of diversion; and that defendants should be so enjoined at all times, except during the season of the year when the flow in Deep Creek recedes to a point where all of the water as left unobstructed and allowed to run free would not run in sufficient quantity to reach the plaintiffs' field, and at that time, and only at that time, may the defendants interfere with the flow of Deep Creek in any manner between April 1st and November 1st when the flow at plaintiffs' point of diversion is less than 4.61 c.f.s.

3. That the defendants have attempted to collaterally attack Certificate of Appropriation No. 1477. The court concludes that said certificate is

not subject to collateral attack on the basis of any of the grounds urged by any of the defendants.

4. The court makes no determination as to whether the priority date of any of the defendants' rights have lapsed or in any way been lost.

5. That all of the parties should install suitable diverting works and measuring devices at their respective points of diversion to permit the quantity of water diverted to be measured and to provide for the passage of water down the channel when their rights do not entitle them to divert all of the water.

6. That the plaintiffs should recover their costs incurred herein.

Dated this 12th day of September, 1955.

Paul H. Venzford
Judge

Recorded in Civil Judgment
Record 9 Page 255-256-257-258
Chas. J. Pope Clerk.
E. J. Brown Deputy Clerk.

FILED
DISTRICT COURT
UINTAH COUNTY, UTAH
SEP 15 1955

Chas. J. Pope Clerk

434