

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT, IN AND  
FOR UTAH COUNTY, STATE OF UTAH

PROVO RESERVOIR COMPANY,  
a corporation

Plaintiff,

-vs-

PROVO CITY, et al, WASATCH IRRIG-  
ATION COMPANY, a corporation, and  
THOMAS MOULTON, JOHN F. OHLWILER,  
WADKIN BRIRLEY, and T. F. WENTZ,  
Water Commissioner,

Defendants.

No. 2888 CIVIL

FINDINGS AND ORDER

The above matter having come on to be heard on the 18th day of April, 1934, by the court on the petition filed by the plaintiff and the answer filed by the defendant, Wasatch Irrigation Company, a corporation, Thomas Moulton, John F. Ohlwiler, Wadkin Brirley, defendants, and T. F. Wentz, Commissioner, on an order to show cause issued by said court on the 17th day of April, A. D. 1934, directing said defendants to appear and show cause if any they had, why they should not be punished for contempt of court, and upon the further order directing said T. F. Wentz as water commissioner in the above entitled cause to appear and show cause why he should not be ordered and directed to distribute and divert certain waters to said plaintiff, as provided for in the decree in said cause, and said plaintiff having appeared by its attorneys Watkins and Holbrook and A. L. Booth, and said defendants and each of them having appeared in person except Wadkin Brirley, and by their attorney L. C. Montgomery, and the said water commissioner appearing in person and evidence having been offered in behalf of said plaintiff and in behalf of said defendants, and the matter having been argued by the respective counsel and the court having fully

considered the matter now makes and enters its FINDINGS OF FACT.

1. That on the 2nd day of May, 1921, the plaintiff in this cause No. 2888 Civil, obtained a decree of this court in said cause of action against the above named defendants wherein it was ordered, adjudged and decree among other things and matters that the Provo River system is sub-divided into divisions namely: the Provo Division and Wasatch division, and that the rights to the use of the water into the Provo Division were divided according to dates of appropriation and as stipulated by the parties in said cause, and such sub-divisions were designated as Classes A, B, C, D, E, F, G, H, I, J; and that in Paragraph 39 of said decree, the plaintiff and one of the defendants above named, Sego Irrigation Company, had awarded and decreed to them as a Class "C" water right certain rights in and to the waters tributary to the Weber River situated in Summit County, Utah, all of which is more particularly set forth in said decree as follows, to-wit:-

CLASS "C" RIGHTS

-39-

Provo Reservoir Company:  
Sego Irrigation Company:

The water of the Provo Reservoir Company and the Sego Irrigation Company, under application to the State Engineer of the State of Utah, number 944, bearing date of June 12, 1906, are herein denominated Class "C", and the quantities of water to which the said parties are awarded is as follows:

(a) Provo Reservoir Company:

The plaintiff the Provo Reservoir Company as a successor in interest of the Timpanogas Irrigation Company, under application to the State Engineer of the State of Utah, number 944 bearing date of June 12, 1906, for 7500 acre feet of water from

Shingle Creek, and Beaver Creek a tributary of the Weber River hereinbefore referred to is entitled to 26/28 of said water and water right, and is entitled to complete said appropriation and make final proof thereof;

And, pending the time designated by the said State Engineer for the completion of said appropriation as the same may have been or may hereafter be extended, as long as said application is in good standing in said State Engineer's office, the said plaintiff is entitled to the said water or such portion thereof as may be available from year to year and time to time under said application;

And, upon and after the completion of said appropriation the said plaintiff is entitled to said water or such portion thereof as may be available from year to year and time to time under the terms of the certificate of completion of appropriation issued by the said State Engineer;

Provided, however, that the priority and quantity of this appropriation is conditioned upon compliance with the terms of the application upon which said appropriation is based, to-wit: Application No. 944 filed in the office of the State Engineer of Utah, and the same is subject to the provisions of the laws of the State of Utah governing the issuance of certificates of completion of appropriation by said State Engineer.

(b) **Sego Irrigation Company:**

The defendant the Sego Irrigation Company, as a successor in interest of the Timpanogus Irrigation Company, under application to the State Engineer of the State of Utah, number 944, bearing date of June 12, 1906, for 7500 acre feet of water from Shingle Creek, and Beaver Creek a tributary of the Weber River, hereinbefore referred to, is entitled to 2/28 of said water and water right, and is entitled to complete said appropriation and make final proof thereof;

And, pending the time designated by the said State Engineer for the completion of said appropriation as the same may have been or may hereafter be extended, as long as said application is in good standing in said State Engineer's office, the said defendant is entitled to the said water or such portion thereof as may be available from year to year and time to time under said application;

And, upon and after the completion of said appropriation, the said defendant is entitled to said water or such portion thereof as may be available from year to year and time to time under the terms of the certificate of completion of appropriation issued by the said State Engineer;

Provided, however, that the priority and quantity of this appropriation is conditioned upon compliance with the terms of the application upon which said appropriation is based, to-wit: Application No. 944 filed in the office of the State Engineer of Utah, and the same is subject to the provisions of the laws of

the State of Utah governing the issuance of certificates of completion of appropriation by said State Engineer.

2. That after the entry of said decree, May 2, 1921, and specifically on or about the 13th day of February, 19\_\_, the said Sego Irrigation Company above named, sold, assigned, transferred and conveyed to the plaintiff all its right, title and interest in and to the said Class "C" water rights set forth in said decree, and said plaintiff is now the successor in interest and owner of said rights under the application mentioned in said decree, and as decreed by said Court to the said Sego Irrigation Company and to said plaintiff.

3. That on or about the 1st day of March, 1933, the plaintiff filed in the State Engineer's office of the State of Utah an application for change of point of diversion and place of use of the waters applied for in application No. 944, from said Shingle Creek; that point of diversion is at point on said Shingle Creek and is described as follows, to-wit:-

South 85° 41' East 1888 ft. from the Northwest  
Corner of Section 35, Township 2 South, Range 7  
East, Salt Lake Base and Meridian, in Summit  
County, Utah

that thereafter, to-wit, on the 21st day of June, 1933, said application known as A-1222 was granted and approved by said State Engineer.

4. That on or about March 15, 1933, the said plaintiff filed an application with the State Engineer of the State of Utah, to segregate 5,000 acre feet from said application No. 944, said segregated application being number 944-B; that said application to segregate has been approved by the State Engineer; that said plaintiff has proceeded to construct the necessary diversion works and canals called for in said application No. 944, and in the subsequent applications for change of point of

diversion and place of use and said application to segregate; that plaintiff has beneficially used and appropriated the waters described in said segregated application No. 944-B, and in accordance with the terms of said application, and that said application is now in good standing in the State Engineer's office of the State of Utah.

5. That Class "C" water rights which plaintiff is awarded the right to the use of in said decree and also as successor in interest to said Sege Irrigation Company, a corporation, are waters from the Weber River water shed, and that the stream known as Shingle Creek is located in Summit County, Utah, and is by the terms of said decree and findings of the court in Cause No. 2888 Civil, found to be and adjudicated to be waters described as a part of the Weber River water shed, and that plaintiff's Applications Nos. 944 and 944-B are filed upon and are to be diverted from said Shingle Creek as a part of the said Weber River water system and located in said Weber River water shed as defined in said decree heretofore referred to; that plaintiff by the terms of said decree was awarded the right to divert said waters from said Shingle Creek as a part of the waters of the Weber River water shed and was awarded the right to comingle said waters with the waters of Provo River and by pass said waters on the channel of said Provo River to the point of diversion of its main canal in said river in Provo Canyon known as Heiselts dam, and there divert said waters through said canal on the lands of water users under contract with plaintiff, in Utah and Salt Lake Counties.

6. That Paragraph 125 of said decree provides as follows:-

\*It is further ordered, adjudged and decreed, that each and all of the parties to this action, and their successors in interest, whether heirs, executors, administrators, successors or assigns, and they, and each of their agents, servants, and employees, and all persons acting for them, or in their interest, are forever enjoined and restrained from in any manner, or at all, interfering one with the other in the full free and unrestricted use of the quantity of the waters of said river awarded to them, and from in any manner, or at all interfering with the distribution of such waters, by the commissioner.

7. That said Wasatch Irrigation Company is a corporation organized under the laws of the State of Utah, as a mutual irrigation company, operating in Wasatch County, State of Utah, and that the other defendants named in the title hereof are officers, agents, servants, and employees of the said Wasatch Irrigation Company. That said Company was one of the principal defendants in Cause No. 2888 Civil, in which action the said orders and decrees were made, the plaintiff herein being the plaintiff in said action. That said decree has never been revised or modified, and is now in full force and effect.

8. That T. F. Wentz is the duly constituted and acting commissioner appointed by the above named court to superintend and direct and control the diversion of the waters of said Provo River as they are awarded to the various parties defendant in said cause of action.

9. That on or about the 12th day of April, 1934, and for several days prior thereto, there was, and at the present time there is, being diverted by said plaintiff from said Shingle Creek, a tributary of said Weber River, more than 15 second feet of water into the said Provo River and there comingled with the waters of said river for the purpose of being diverted by said plaintiff at Heiselts dam on said Provo River for its use and benefit as provided for in said decree and in said applications.

10. That on or about the said 12th day of April, 1934, and at divers times since said date, the said above named defendant, Wasatch Irrigation Company and its officers, agents, servants, and employees, in willful disregard of the said decree and injunction and in willful contempt of the same and wrongfully and in willful disregard of the rights of said plaintiff herein under said decree, have by means of their diverting works situated on said River in Wasatch County, diverted and conveyed the said waters adjudged to and decreed by said Court to be the waters of said plaintiff, to and into the diverting works and canal of said defendant corporation, and to the stockholders of the same to be used by them upon their said lands in Wasatch County. That by so doing, said defendants have deprived the plaintiff of the use of said waters as awarded to the plaintiff by said decree and to the use thereof to which the plaintiff is entitled by virtue of said decree.

11. That said water commissioner, T. F. Wentz, has failed to have diverted to the said plaintiff the said waters, notwithstanding the plaintiff has requested that as the officer of said court in charge of the distribution of said waters that he cause that the same be by passed by the said defendant's diversion works in said river and allowed to be carried along said river to plaintiff's canal and diversion works in Provo Canyon known as Heiselts dam; and that unless ordered by said court the said T. F. Wentz will continue to refuse and neglect to have said waters diverted and distributed to said plaintiff as provided for in said decree and as herein alleged.

12. That the plaintiff has at divers times since the beginning of the wrongful acts by the defendants aforesaid, protested against their diversion of the said waters to and into the canal of said defendants, but notwithstanding the protests of the said plaintiff said defendants have willfully continued **in** the wrongful acts aforesaid.

13. That the said water users under the irrigation system of the plaintiff are without water to irrigate their lands and crops and that by reason of the extreme drought which now prevails, and the shortage of water for irrigation purposes, an acute emergency exists with said water users, and with said plaintiff, and that their crops will be utterly wasted and destroyed for lack of water unless they are given immediate and summary relief in the protection of their rights; that, but for the acts of the said defendants heretofore alleged, the said plaintiff, by reason of its rights as set forth in said decree, would now have water to distribute to said water users to save their crops from being destroyed.

14. That by reason of the provisions of water Applications Nos. 944 and 944-B, and the provisions of said decree, said plaintiff is entitled to divert all of the waters of said Shingle Creek into said Provo River up to the limits of said applications, and to be used by said plaintiff as heretofore alleged up to and including May 1st from and after October 1st of each year; that from and after May 1st to October 1st of each year it is entitled to divert and use for its benefit as alleged herein all of the water of said creek up to the limits so specified in said applications, except that appropriated by water users in the Weber River water system having a prior

right thereto; that by reason of the urgent need for irrigation water by the water users under plaintiff's irrigation system at the present time, it was necessary that the time be shortened in which said defendants be allowed to show cause why they should not be punished for contempt in violating the provisions of said decree, and also that the time be shortened for said water commissioner to appear before said court for the purpose of showing cause to said court why he should not immediately cause to be diverted and distributed to said plaintiff, the said water belonging to said plaintiff as provided for in the said decree, and as heretofore set forth.

15. That the said defendants, Wasatch Irrigation Company, Thomas Moulton, John F. Ohlwiler, and Wadkin Brirley as officers, agents, servants, and employees and persons acting for and in behalf of said Wasatch Irrigation Company, have willfully violated the terms of said decree respecting the rights of the said plaintiff in and to the waters decreed to said plaintiff as waters from the said Weber River water shed; but that said conduct has not been contumacious or deliberately intended to be contemptuous with respect to the decree and orders of said court.

From the foregoing findings of fact, the court now makes and enters the following:

CONCLUSIONS OF LAW

1. That by reason of the provisions of the decree made and entered in Cause No. 2888 Civil, the said defendants are estopped, barred, and precluded from setting up and claiming that the waters of Shingle Creek as described in the foregoing findings, are a portion of the waters of the Provo River water

system, and that they are estopped and precluded from claiming said waters or any part thereof as having been appropriated by them and as a part of the water rights awarded to them by said decree in Cause No. 2888.

2. That plaintiff is entitled to a judgment and order of this court adjudging said defendants guilty of contempt of said court, for interfering with the rights decreed to said plaintiff in said Cause No. 2888.

3. That the plaintiff is entitled to a judgment of this court ordering and directing said T. F. Wentz as commissioner of this court in this cause to divert and distribute all of the said waters decreed in said decree to plaintiff and as found herein to be the waters of Shingle Creek, a tributary of Weber River, less the loss from seepage and evaporation occurring in transit, according to the percentage provided for in said decree, after the said waters have been comingled with the waters of Provo River, to the said plaintiff into its canal at Heiselt dam in Provo Canyon.

4. That plaintiff is entitled to an order and judgment for its costs herein expended.

#### ORDER AND JUDGMENT

Now, therefore, upon motion of counsel for plaintiff and pursuant to the foregoing findings of fact and conclusions of law, it is hereby ORDERED, ADJUDGED AND DECREED, that the said defendants, Wasatch Irrigation Company, Thomas Moulton, John F. Ohlwiler, and Wadkin Brierley are guilty of contempt for violating the decree of said court respecting the rights of said plaintiff as found in said findings, but said contempt was not contumacious or malicious and therefore no penalty is to be imposed upon said defendants.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED, that said defendants are estopped, barred and precluded from asserting or claiming any right in and to the waters of Shingle Creek in Summit County, Utah, a tributary of Weber River, which are run into and comingled with the waters of said Provo River, and which have heretofore been found to be the water rights of the said plaintiff as awarded to it in said decree, Cause No. 2888, and as specified in its applications in the State Engineer's office, Nos. 944 and 944-B.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED, that the said Water Commissioner, T. F. Wentz, be and he is hereby directed and ordered to by pass along said <sup>Provo</sup> river and to divert and distribute to said plaintiff at its Heiselt dam in Provo Canyon, Utah, the waters of the said Shingle Creek which said plaintiff has been awarded and decreed herein and described as waters from Shingle Creek of the Weber River water shed, and particularly those rights awarded to it by virtue of Applications Nos. 944 and 944-B on file in the State Engineer's office of the State of Utah.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED, that plaintiff have and recover its costs in the sum of \$ \_\_\_\_\_, herein expended.

Dated this 19<sup>th</sup> day of April, A. D. 1934.

BY THE COURT:

Walter M. Larson  
JUDGE