

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

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PROVO RESERVOIS COMPANY, a :  
corporation, :  
Plaintiff, : No. 2888 Civil.  
-vs- : AFFIDAVIT AND PETITION  
PROVO CITY, et al, WASATCH : FOR ORDER TO  
IRRIGATION COMPANY, a cor- : SHOW CAUSE.  
poration, and THOMAS MOULTON, :  
JOHN F. OHLWILER, WADKIN :  
BRIRELY, and T. F. WENTZ, :  
Commissioner, :  
Defendants. :

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STATE OF UTAH :  
COUNTY OF UTAH : SS.

THOMAS MOULTON, W. J. CORDNER and MYRON C.  
NEWELL, each being duly sworn on his oath, for himself and  
not one for the other, deposes and says: That the affiants  
are officers of the Wasatch Irrigation Company, a corpor-  
ation, Provo Bench Canal & Irrigation Company, a corporation,  
and the Timpanogus Canal Company, a corporation; that is to  
say, the affiant Thomas Moulton is President of the Wasatch  
Irrigation Company, a corporation, one of the above named  
defendants; the affiant W. J. Cordner is President of the  
Provo Bench Canal & Irrigation Company, a corporation, one  
of the defendants herein; and the affiant Myron C. Newell,  
is President of the Timpanogus Canal Company, one of the  
defendants herein; and said affiants make this affidavit  
for and on behalf of each and all of the above named de-  
fendants, and for and on behalf of each and all of the de-  
fendants in said cause, and respectfully represent and show  
to the court as follows:

I.

That on or about the seventeenth day of April, A. D. 1934, an affidavit and petition for an order to show cause was filed in the above entitled court by one R. J. Murdock, as Secretary, for an on behalf of the Provo Reservoir Company, a corporation, plaintiff herein.

II.

That on the same date that said petition was filed, to-wit, April 17, 1934, an order was signed by the Honorable Abe W. Turner, one of the judges of the above entitled court, ordering the defendants Provo City, et al, Wasatch Irrigation Company, a corporation, Thomas Moulton, John F. Ohlwiler, Wadkin Brirely, and T. F. Wentz, as Water Commissioner, to appear before the above entitled court on the eighteenth day of April, A. D. 1934, at the hour of eleven o'clock A. M. and there to show cause, if any they had, why an order should not be entered adjudging and decreeing the said Thomas Moulton, John F. Ohlwiler, Wadkin Brirely, as officers of the Wasatch Irrigation Company, a corporation, and T. F. Wentz, as Water Commissioner, guilty of contempt for violating the decree of the above entitled court heretofore made, by using and distributing waters to the defendant, Wasatch Irrigation Company, which belonged to the plaintiff herein.

III.

That pursuant to said order, the defendant Wasatch Irrigation Company, appeared before the court on the eighteenth day of April, A. D. 1934; that thereafter, the court made and entered the following order and judgment, which said order and judgment was filed in the above entitled court on the twentieth day of April, A. D. 1934.

"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 Briely 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, Civil, 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 Provo river and to divert and distribute to said plaintiff at its Heiselt dam in Provo Canyon, Utah, the waters of the said Shingel 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 19th day of April, A. D. 1934.

BY THE COURT:

MARTIN M. LARSON, Judge. "

IV.

That in making and entering said order, the court acted without, beyond and in excess of its jurisdiction, and said order, as to these defendants, is in contravention of and contrary to the decree of the court in this cause, for the following reasons, namely:

(a) That none of the above named defendants, except Wasatch Irrigation Company, have had any notice whatsoever of said petition, and said order and judgment; and that none of said defendants, except said Wasatch Irrigation Company, had any knowledge whatsoever of said order until long after the same was signed and filed; and that none of these defendants, except the Wasatch Irrigation Company, were before the court at the time said order was made, notwithstanding, that by said order each and all of these defendants are deprived of

substantial rights in and to the waters of Provo River, and particularly in and to the waters of Shingle Creek, referred to in said order.

(b) That said order and judgment is based upon the allegations contained in the affidavit and petition of the plaintiff, hereinabove referred to, and particularly upon the following allegations of said petition:

¶1. That on the 2nd day of May, 1921, the plaintiff in Cause No. 2888 Civil, in the above entitled action filed and pending in the Fourth District Court of the State of Utah, and for Utah County, obtained a decree of said Court in said cause of action against the above named defendants, wherein it was ordered, adjudged and decreed among other things and matters, as follows:

'That under this decree the Provo River System is sub-divided into divisions, namely: the Provo Division and the Wasatch division. The Provo division includes all that area below and including what is known as and commonly called the Wright Ranch, which is near the head of Provo Canyon in Wasatch County, State of Utah. The Wasatch division includes all that area above what is known as and commonly called the Wright Ranch', and 'the rights to the use of water into the Provo division are herein subdivided according to dates; and as stipulated by the parties herein, and such subdivisions are designated 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.

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

5. That said Class "C" water rights which plaintiff is now the owner of as heretofore alleged, are waters from the Weber River water shed; that by the terms of the decree in Cause No. 2888 Civil, heretofore referred to, plaintiff is entitled to divert said waters from said Shingle Creek into the Provo River, and combine said waters with the waters of Provo River and bypass said waters along the said river to the point of its diversion of its main canal on said river in Provo Canyon, known as Heiselts Dam, and

there divert said waters through said canal to the lands of water users under contract with plaintiff, in Utah and Salt Lake Counties.

8. That by said decree all of the waters of Provo River and its tributaries, together with certain of the waters of Shingle Creek and Beaver Creek situated in Summit County, were awarded to the plaintiff by said decree or were by said decree adjudicated or awarded to the said defendant having the right to the use thereof.

10. That on or about the 12th day of April, 1954, 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.

15. 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 the said Shingle Creek into said Provo River, 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 except approximately 52 second feet thereof; that by reason of the urgent need for irrigation water by the water users under plaintiff's irrigation system at the present time, it is 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."

(c) That each and all of said allegations contained in said paragraphs, except the allegations contained in paragraph one of said petition, are false, and there is no foundation either in law or in fact whatsoever upon which to base said allegations, in that:

1. That by the allegations contained in the aforesaid paragraphs, the plaintiff alleges that the Class "C" water rights which were decreed to it under and by virtue of the decree in the above entitled cause are waters which flow from the Weber River water shed, in what is designated in said decree as "Shingle Creek", and in this connection, ~~the~~ defendants allege that there are no waters which flow into Shingle Creek which arise, or have their source, in the Weber river water shed; but, on the contrary, all

of the waters which flow into Shingle Creek have their source in and upon the Provo river water shed; that is to say, Shingle Creek is not now, and never has been, a tributary of the Weber river, but has always been and is now a tributary of the Provo river; that all of the waters of said Shingle Creek flow in a natural channel down from the head of said Shingle Creek into Provo river; and said waters have always been applied to a beneficial use by the defendants and to those entitled to the use of water in said Provo river and its tributaries.

2. That in making and entering said order, the court erroneously and wrongfully assumed that the "Shingle Creek" referred to in said order, is a tributary of the Weber river, whereas, in truth and in fact, as heretofore alleged, Shingle Creek is a tributary of the Provo river, and no waters have been diverted from Shingle Creek, on the Provo river water shed, into Beaver Creek, a tributary of the Weber river, except by means of an artificial, as opposed to a natural, channel, which has been constructed between Shingle Creek, on the Provo river water shed, and Beaver Creek, on the Weber river water shed, all of which affirmatively appears from the decree in this cause, and from the evidence in this cause, upon which said decree is based; and the plaintiff, neither under the decree in this cause, nor under or by virtue of its applications No. 944 and 944-B in the State Engineer's office of the State of Utah, obtained any rights to the use of any water in said Shingle Creek, either because said Shingle Creek is a tributary of Weber river, or because said Creek is a tributary of the Provo river, but any rights to said waters obtained by plaintiff were obtained because plaintiff has applied said waters to a beneficial use, and not for the reason that said waters arise on the Weber river water shed, or upon the Provo river water shed, yet, the court, under and pursuant to its judgment and order hereinabove referred to, attempted to give to the plaintiff the waters in Shingle Creek, hereinabove referred to, because said Creek is a tributary

of Weber river, and not a tributary of Provo river; and the affiants allege that the court, in so doing, misconstrued the provisions of the decree in this cause, as well as the plaintiff's and the defendants' rights under said decree; and affiants further allege that the effect of the court's order and judgment, hereinabove referred to, has been and is to take a large quantity of water, to-wit, from thirty-five to forty five second feet, from the waters of the Provo river water shed, particularly the waters from said Shingle Creek, on said water shed, and cause the same to be diverted into Beaver Creek, a tributary of the Weber river water shed; that is to say, the effect of the court's order has been and is not to give the plaintiff any additional water in Provo river, over and above what it was otherwise entitled to, but has been and is to take from the defendants, who are water users in the Provo river, and its tributaries, approximately thirty-five to forty-five second feet of water, and divert the same to the waterusers of the Weber river and its tributaries.

V.

That while it is alleged in paragraph ten of the plaintiff's petition, which said paragraph is hereinabove set forth in full, that on or about the 12th day of April, 1934, and for several days prior thereto, the plaintiff was diverting from the aforesaid Shingle Creek, more than fifteen second feet of water into the Provo river, and there comingling the same with the waters of said Provo river, in truth and in fact, the waters of Shingle Creek, as heretofore alleged, flow naturally from Shingle Creek into Provo river.

VI.

That it affirmatively appears from paragraph one of plaintiff's petition, which said paragraph is hereinabove specifically set forth, that the plaintiff's rights to any waters under and by virtue of the decree in this cause, are what are known and designated in said decree as Class "C" rights; that is to say, the plaintiff has no right whatever in or to any

waters flowing from Shingle Creek, except at such times when the aggregate flow of the Provo river is sufficient to supply the rights of these defendants, to the 1st, 2nd, 3rd, 4th, 5th, 6th, 7th, 8th, 9th, 10th, 11th, 12th, 13th, 14th, 15th, 16th, and 18th, Classes of the Wasatch division, and Classes "A" and "B" of the Provo division, which said divisions and owners are particularly described and defined in the decree in this cause; that at the time said petition of the plaintiff was filed, and the order based upon said petition entered, there was not sufficient water flowing in Provo river together with its tributary, Shingle Creek, to supply the owners of Classes 1st to 16th, both inclusive, and 18th, of the Wasatch division, and Classes "A" and "B" of the Provo division.

#### VII.

That at no time during the irrigation season of 1934 have these defendants, who are all owners of Classes 1st to 16th both inclusive, and 18th, of the Wasatch division, and Classes "A" and "B" of the Provo division, in and to the waters of Shingle Creek, been able to obtain more than fifty percent of the water which they are entitled to, under and by virtue of the decree in this cause, because there has not been sufficient water in said river to supply said rights, and, yet, notwithstanding this, the order hereinabove referred to did take from these defendants, who are the owners of Classes 1st to 16th, both inclusive, and 18th of the Wasatch division, and Classes "A" and "B" of the Provo division, rights, under and by virtue of said decree and gave to the plaintiff, who is only the owner of a Class "C" right, under and by virtue of said decree, from thirty-five to forty second feet of water which belongs to these defendants, and in which the plaintiff has no right, title, or interest whatsoever.

#### VIII.

That while it is alleged in paragraph fifteen of plaintiff's petition, which said paragraph is hereinabove specifically set forth, that by reason of water applications of the plaintiff, Nos. 944 and 944-B, in the State Engineer's office

of the State of Utah, and the provisions of the decree in this cause, plaintiff is entitled to the waters of Shingle Creek up to and including May 1st, and from and after October 1st, of each year, and that from and after May 1st, to October 1st, of each year it is entitled to the waters of Shingle Creek, except approximately fifty-two second feet, in truth and in fact, said applications of the plaintiff do not give, or purport to give, to the plaintiff any right to any waters in Shingle Creek at any time, except waters remaining after the rights to said waters held by these defendants are fully satisfied; that is to say, said applications do not give, or purport to give, to the plaintiff any right to any waters in Shingle Creek, except a right which is designated in the decree in this cause as a Class "C" right, whereas, these defendants' rights to the waters of Shingle Creek are what are known and designated in said decree as 1st, 2nd, 3rd, 4th, 5th, 6th, 7th, 8th, 9th, 10th, 11th, 12th, 13th, 14th, 15th, 16th, and 18th, of the Wasatch division, and Class "A" and Class "B" rights of the Provo division; and it nowhere appears in the plaintiff's petition that the Class "A" rights and the Class "B" rights have been satisfied, or that there was sufficient water in said Shingle Creek to satisfy these rights; and in this connection, the affiants further allege that at the time said petition was filed, there was not a sufficient volume of water flowing in said Shingle Creek, together with the other waters of Provo river, to satisfy or supply the rights which are classified in the decree in said cause as 1st, 2nd, 3rd, 4th, 5th, 6th, 7th, 8th, 9th, 10th, 11th, 12th, 13th, 14th, 15th, 16th, and 18thth rights of the Wasatch division, and Class "A" and Class "B" rights of the Provo division, and that this was well known to the plaintiff, at the time said petition was filed.

IX.

That it is provided in the decree in this cause that the court, for the purpose of effecting a proper distribution of the waters of Provo river and its tributaries, and for the

accurate and equitable diversion and distribution of said waters among the parties entitled thereto, and for the purpose of carrying into effect said decree, shall appoint a commissioner, with full power and authority to measure, control, regulate and distribute the waters, under said decree, among the parties entitled thereto; that pursuant to said decree, this court duly appointed T. F. Wentz, as Water Commissioner, under said decree, and said T. F. Wentz, is now the duly appointed, qualified and acting Water Commissioner under said decree; and that ever since the date of rendering the judgment and decree in this cause, to-wit, May 2, 1921, to and including the irrigation season of 1934, a Commissioner has been appointed by this court, and said Commissioner has been engaged in the distribution of the waters of Provo river; that said Commissioner has, at all times since said date, distributed the waters of Provo river in accordance with said decree, and during each and every year said Commissioner has distributed to these defendants, and to all other parties in said cause, the waters of Provo river, and its tributaries, including all of the waters of Shingle Creek, to the parties entitled thereto under said decree, in the Classes 1st, to 16th, both inclusive, and 18th, of the Wasatch division, and Classes "A" and "B" of the Provo division, and at no time, or at all, has said Commissioner distributed to the plaintiff any waters of Shingle Creek, except only during the high water, or flood, season, and as a Class "C" right, which said right, as hereinabove alleged, is secondary and subordinate to 1st to 16th both inclusive, and 18th rights of the Wasatch division, and Classes "A" and "B" rights of the Provo division; and said distribution of said waters has always been acquiesced in and approved by the plaintiff and its predecessors in interest, and, at no time, has any complaint been made to said Commissioner, or objection of any kind, or nature whatsoever, respecting the manner of distribution of said waters.

X.

That each and all of the defendants, ever since the entering of the decree in this cause, have applied to a beneficial use, the waters of the Provo river and its tributaries, including Shingle Creek, and have, at all times, claimed and possessed said rights for a period of twenty five years, without protest, claim, or objection of any kind whatsoever, on the part of the plaintiff, or its successors in interest.

XI.

That under and pursuant to the court's order and judgment hereinabove referred to, the plaintiff is asserting and claiming a right to all of the waters of the aforesaid Shingle Creek in Summit County, Utah, which have heretofore run into and been comingled with the waters of Provo river, and that all of said waters were found to belong to the plaintiff under the decree in this cause, and under and by virtue of its applications in the State Engineer's office, Nos. 944 and 944-B; and since the signing and filing of said order, the Commissioner, T. F. Wentz, has been distributing all of said waters to the plaintiff herein, when in truth and in fact, the plaintiff has no right in or to any waters of Shingle Creek, save and except what is designated in the decree in this cause, as Class "C" rights, and that during all of the times that the plaintiff has been receiving said waters, none of the Class 1st to 16th, both inclusive and 18th rights of the Wasatch division, and Classes "A" and "B" rights of the Provo division, have been satisfied during said time only to approximately fifty percent.

XII.

That the Commissioner, T. F. Wentz, hereinabove referred to, will, unless the order hereinabove referred to be vacated, and set aside, continue wrongfully, and contrary to the decree in this cause, divert the waters of Shingle Creek, which belong to the defendants herein, from said Shingle Creek on the Provo river water shed to the users of water on the Weber river water shed, thereby causing these defendants great and irreparable

injury.

XIII.

That an assessment should be levied upon each and all of the parties in this cause, which is Cause No. 2888 Civil, in proportion to their rights under the decree in said cause, sufficient in amount to pay the expenses of the defendants, incurred in the institution of this proceeding.

XIV.

That the defendants herein have no plain, speedy, or adequate remedy at law, for the wrong herein complained of, and that the rights in the premises cannot be enforced, except through the equitable interposition of the court.

WHEREFORE, THESE DEFENDANTS PRAY:

1. That the court make and enter an order citing the plaintiff, Provo Reservoir Company, a corporation, to appear before this court at a time and place designated in said order, there~~to~~ to show cause, if any it has, why the order of the court made and entered April 20, 1934, <sup>in the above entitled cause,</sup> should not be vacated and set aside,

2. That an order be entered adjudging and decreeing that the said Shingle Creek is a tributary of the Provo river and not a tributary of the Weber river, and that said Commissioner, T. F. Wentz, be ordered and directed to distribute the waters of Shingle Creek to the defendants herein, as provided in the decree in this cause, which said decree was dated May 2, 1921.

3. That pursuant to the decree in this cause, the court levy an assessment upon each and all of the parties to this action, in proportion to their rights under said decree, sufficient in amount to pay the expenses of the institution of this proceeding.

4. That the defendants have such other and further

relief as to the court shall seem meet and equitable in the premises.

*C. W. Hamilton*  
*My order*  
*Myron C. Truitt*

SUBSCRIBED and sworn to before me this 8<sup>th</sup> day of  
October, A. D. 1934.

*Melba Bachman*  
Notary Public



Residing at Provo, Utah  
My commission expires Mar. 1, 1937