IN THE FOURTH JUDICIAL DISTRICT COURT OF THE STATE OF UTAH,

IN AND FOR UTAH COUNTY.

PROVO RESERVOIR COMPANY, a corporation,	:	Civil No. 2888
Plaintiff,	:	
-vs-	:	FINDINGS OF FACT AND CONCLUSIONS OF LAW.
PROVO CITY, et-al., and SMITH DITCH COMPANY, a voluntary association - - - -,	:	
Defendants.	:	

The petition of A. L. Tanner, praying for an order of the above entitled Court directing T. F. Wentz, as commissioner of Provo River, to distribute certain waters of Provo River through the West Union Canal and into the Smith Ditch Company's Canal, and further praying for an order directing Don York, as secretary of Smith Ditch Company to schedule such waters for the use of A. L. Tanner, having come on regularly for hearing before the Court on the 12th day of June, 1936; M. R. Straw of Christenson, Straw & Christenson appearing for petitioner, and I. E. Brockbank of Brockbank & Pope appearing as attorney for defendant, Don York, and the said T. F. Wentz being present in open Court, and the Court having heard petitioner's evidence and being now fully advised in the premises, the Court now makes the following,

FINDINGS OF FACT

1. That T. F. Wentz is the duly appointed, qualified and acting commissioner of Provo River under the appointment of the Court in the above entitled cause, and that said T. F. Wentz now is, and at all times herein mentioned, has been, such commissioner and actively in charge of the distribution of water and water rights of the said river, and particularly in charge of the distribution of the water rights specifically mentioned and set out in these Findings.

2. That Don York is the secretary of a voluntary association of water users known as Smith Ditch Company, and at any and all times herein mentioned was, and now is, in charge of the duty of making distribution of any and all of the waters to the said

members of said voluntary association of water users known as the Smith Ditch Company, and of making schedules for distribution of water to Smith Ditch Company shareholders.

3. That your petitioner, A. L. Tanner, is one of the said voluntary association known as the Smith Ditch Company and is the owner of substantially 2-1/5 shares of said Smith Ditch.

4. That the said Smith Ditch diverts water from Provo River as a part of the diversion made by the West Union Canal Company, and said Smith Ditch and West Union Canal take their water from Provo River in Utah County, Utah, and that the distribution of water through the said West Union Canal and said Smith Ditch is immediately in charge of T. F. Wentz, as water commissioner of Provo River, under an appointment in the above entitled Court in the above entitled cause, and further the said T. F. Wentz, as such river commissioner, is charged with the distribution of water belonging to the said Smith Ditch Company through and from the said West Union Canal.

5. That in a certain civil action filed in the above entitled Court, to-wit, civil action No. 5118, entitled West Union Canal Company, a corporation, plaintiff, vs. Pauline Schemensky, et-al., a voluntary association, not incorporated, under the name and style of Smith Ditch Company, defendants, the said T. F. Wentz as commissioner of Provo River became charged with the duty of making distribution of the waters awarded in the said cause to the litigants therein, and to this petitioner as one of such litigants.

6. That the waters and water rights of the said Smith Ditch Company and the said West Union Canal Company were litigated in the above entitled cause, to-wit, Civil action No. 2888.

7. That the provision of the said decree rendered in said civilaction No. 5118 by the above entitled Court, is as follows, to-wit:

> "The water commissioner of Provo River shall take general supervision of the distribution of the waters covered by this decree to the persons entitled thereto."

8. That by the terms of the judgment rendered in the

above entitled cause, to-wit, civil action 2888, the above entitled Court reserves jurisdiction to make any and all necessary orders and directions to the commissioner respecting the distribution of waters awarded in said cause.

9. That in the said civil action 5118 hereinabove referred to, it was adjudged and decreed as follows:

> "The parties to this action shall have the right to use said canal system for carrying water not included in this decree, subject to the payment of a just proportion of the cost of maintenance as provided by law and subject to the prior right to use said canal system for carrying the water covered by this decree."

The said canal system so referred to was the canal known as the West Union Canal in combination with the Smith Ditch and the waters referred to as covered by this decree were the water rights of the defendants and of the said West Union Canal Company specifically set out in the judgment rendered in said cause.

10. That by the said decree in the said cause Civil action 5118, it was determined by the Court that said defendants associated as Smith Ditch Company and receiving their water from said West Union Canal at a point known as Carter Point, were entitled to the use of 4.26 second feet of water from May 10 to June 20; 3.88 second feet from June 20 to July 20; 3.39 second feet from July 20 to September 1; and 3.05 second feet from September 1 to May 10 of each year, and that said West Union Canal Company and members of the Smith Ditch Company who receive their water below Carter Point, or Lateral No. 1, were entitled to waters from the said West Union Canal in quantities as follows, to-wit: From May 10 to June 20, 27.67 second feet; from June 20 to July 20, 25.01 second feet; from July 20 to September 1, 22.61 second feet; and from September 1 to May 10, 22.95 second feet.

11. That the maximum flow of waters in said West Union Canal, as determined by the Court in said cause, was 31.93 second feet between the dates of May 10 and June 20; that said West Union Canal and said Smith Ditch have a capacity of 50 second feet.

12. That under the said judgment of the above entitled Court in said cause 5118, wherein this petitioner is a party, it was determined by the above entitled Court by reason of the provision of the said judgment hereinabove specifically set forth, that the parties to said cause might use any excess capacity in said canal for transferring through the same any waters not specifically covered by the said judgment.

13. That this petitioner on or about the 20th day of April, became the assignee of Caleb Tanner and Esthma Tanner of a certain flow right and right to the use of the waters of Provo River for the season of 1936 in quantities as follows: May 10 to June 20, .29 c.f.s.; June 20 to July 20, .26 c.f.s.; July 20 to September 1, .23 c.f.s.; September 1 to May 10, .21 c.f.s.; that on or about said 20th day of April, 1936, notice of said assignment was served upon T. F. Wentz as commissioner of Provo River by your petitioner, A. L. Tanner, and request made for the delivery to petitioner of said water rights so assigned to petitioner by the said Caleb Tanner and Esthma Tanner, and the said T. F. Wentz was requested to make diversion of said water rights so assigned to your petitioner from a point on said West Union Canal, known as Carter Point; said waters are equivalent to 3 shares of the stock of the Smith Ditch Company above diverted at Carter's Point, on the said ditch, and as a practical matter water rights in said canal system are so distributed.

14. That on or about the said 20th day of April, 1936, petitioner further made demand upon said Smith Ditch Company, Joshua Davis, its president, and Don York, its secretary, and upon T. F. Wentz as commissioner of Provo River, and upon the West Union Canal Company, in writing, for the delivery to him through the said West Union Canal of said water rights so assigned to him by the said Caleb Tanner and Esthma Tanner for the season of 1936, and that the said T. F. Wentz as commissioner of Provo River ~~wilfully and wrongfully refused, and still continues to~~ refused to make distri-

bution of the said assigned waters to petitioner, and that the said Smith Ditch Company, through its officers and agents, has stated that they will not regulate the same in said distribution system under their control and will not recognize the rights of this petitioner to carry the said waters through the said canal.

15. ~~That at all times herein mentioned there has been, and now is, waters in Provo River and in said canal sufficient to supply the maximum rights and demands of any and all persons whomsoever entitled to carry water through said canal, and~~ there ~~has been, and~~ now is, an excess capacity ~~of such rights~~, ~~and waters flowing in~~ said canal ~~which have been, and are being, wasted through the same and not applied to any beneficial uses;~~ that at all times herein mentioned there has been, and now is, waters in Provo River owned by the said Caleb and Esthma Tanner sufficient to supply the rights assigned to this petitioner as herein stated.

16. Petitioner further alleges that there has been no demand upon said T. F. Wentz as commissioner of Provo River by any other person or parties whatsoever to carry waters through the said canal in excess of the rights defined in said cause No. 5118 civil, hereinabove referred to, except the request and demand of petitioner, A. L. Tanner.

17. That petitioner requires the delivery of the said waters assigned to him by the said Caleb and Esthma Tanner for beneficial uses and for the purpose of irrigation of crops; that according to established customs and the necessity of conserving water, it is advisable that the said rights so assigned to this petitioner be distributed in rotation, combined with the other waters of the said Smith Ditch Company, and that such rotation may cause a necessary slight change in the time allottment of the flow rights of said Smith Ditch Company to its owners and users, but that said change is entirely practicable and petitioner agrees to pay all the reasonable charges and expenses connected therewith.

18. That it is entirely practicable to deliver the said water rights so assigned to this petitioner by the said Caleb Tanner and Esthma Tanner from the said point of diversion, to-wit, Carter Point, to the uses of this petitioner as a continuous flow.

The Court further finds that said waters when turned into the said Smith Ditch should be used by ~~other~~ users in the said Smith Ditch on a rotation basis and not as a steady flow.

From which said Findings of Fact, the Court now makes the following,

CONCLUSIONS OF LAW

1. That the petitioner, A. L. Tanner, as an owner in the said Smith Ditch Company, and as a party to said civil action No. 5118 in the above entitled Court, is entitled to use the excess capacity of the Smith Ditch and of the West Union Canal to carry through the same for the irrigation season of 1936, those particular waters assigned to him by Caleb Tanner and Esthma Tanner in quantities as follows: May 10 to June 20, 0.29 c.f.s.; June 20 to July 20, 0.26 c.f.s.; July 20 to September 1, 0.23 c.f.s.; September 1 to May 10, 0.21 c.f.s.; said waters being equivalent to 3 shares of stock in the Smith Ditch Company.

2. That A. L. Tanner, the petitioner herein, is entitled to an order of the above entitled Court directing T. F. Wentz as commissioner of Provo River to immediately turn into the said West Union Canal and therefrom into the said Smith Ditch for the use of A. L. Tanner, the said water rights in amounts hereinabove specifically set forth.

3. That the said A. L. Tanner is entitled to an order of the above entitled Court requiring Don York, as secretary of the Smith Ditch Company, to immediately schedule the said waters herein specifically referred to to the uses of A. L. Tanner on the rotation basis, and that said Don York as such secretary of the Smith Ditch Company is entitled to receive a reasonable compensation

therefor, being the reasonable costs involved in making a new schedule for distribution of the waters of the Smith Ditch Company to the owners thereof and including therein the waters herein directed to be turned to the uses of the said A. L. Tanner.

4. That unless the said A. L. Tanner and the said Don York are able to agree upon the reasonable charges to be made for re-scheduling the waters of the Smith Ditch Company to include the waters leased to the said A. L. Tanner, as herein found, then either party may refer such matter to this Court upon motion to have the Court determine what shall be a reasonable charge for such services.

5. That said A. L. Tanner shall further be subject to the payment of a just proportion of the cost of maintenance of the interests of the Smith Ditch Company above Carter Point as provided by law, and if said parties in interest are unable to agree then the matter may be referred to the above entitled Court on motion to determine what costs shall be paid, if any, by the said A. L. Tanner.

Dated this 13th day of June, A. D. 1936.

BY THE COURT:

Noel Turner

JUDGE

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