

IN THE DISTRICT COURT OF SANPETE COUNTY, STATE OF UTAH.

FILED

FEB 21 1951
G. L. Fildsted Clerk
SEVENTH JUDICIAL DISTRICT COURT
SANPETE COUNTY, UTAH
E. Emma S. Nielsen Deputy

INDIANOLA IRRIGATION COMPANY,
a corporation,

Plaintiff,

vs.

JUSTUS O. SEELY,

Defendant.

Civil Case No. 4023

FINDINGS OF FACTS AND
CONCLUSIONS OF LAW

This case was tried before the court, sitting without a jury, on June 6, 7, and 8, 1950, upon the complaint of the plaintiff, the amended answer and counterclaim of the defendant, and the reply thereto of the plaintiff; the plaintiff being represented by Messrs. A. W. Jensen and Udell R. Jensen, its attorneys, and the defendant by Dilworth Woolley, his attorney; the trial was concluded on June 8, 1950, and, after argument by respective counsel, the cause was submitted to the court for its decision; and the court being fully advised in the premises, now from the evidence finds the following facts:

I.
Findings of Facts:

1. That the plaintiff is and ever since the month of June, A. D. 1918, has been a mutual irrigation company, organized and existing under and by virtue of the laws of the state of Utah, with its principal place of business at Indianola in Sanpete county, Utah; that said corporation exists for the sole and only purpose of managing, regulating, controlling and distributing certain of the waters of Thistle Creek and its tributaries, including but not limited to Clear Creek and Rock Creek, any any other water rights which it may own, to and among its stockholders in proportion to their respective rights to the use thereof for domestic, stock watering and irrigation purposes; that said corporation has two classes of stock, namely, Class A stock which represents one acre of primary water right for each share of stock, and Class B stock which represents one acre of secondary water right for each share of stock; that Article 19 of the articles of incorporation of the said corporation provides, with respect to said water rights, as follows:

"The Board of Directors shall cause the waters and

by this corporation to be distributed and divided to and among its stockholders at the rate and in the proportion of stock held by each person in the following manner, to-wit: from and after the first day of March to and including the 15th day of June of each and every year, all the waters owned by this corporation shall be divided among and distributed to the stockholders of this corporation, both Class A and Class B stock, equally, pro-rata, and in proportion to the amount of stock held by each person, from and after the 15th day of June, to and including the first day of March following, during each and every year, the owners of Class A stock of this corporation shall be entitled, as a first right, to an amount of water equal to 1/40 of a second foot of water for every share of class A stock of this corporation, held by him, or if there shall not be sufficient water owned by this corporation to fully supply said amount, then such water as may be available shall be divided and distributed to the holders of said Class A stock pro-rata and in proportion to the amount of said Class A stock held by each person, and if, after all class A stock shall first have been fully supplied with the amount of water above stated, there shall at any time be a surplus of water over and above what shall fully supply all of the Class A stock, as above stated, then such surplus water shall be divided among and distributed to the holders of Class B stock, pro-rata and in proportion to the amount of Class B stock held by each person."

2. That the defendant is and for several years last past has been a stockholder of the plaintiff corporation, owning 307 shares ³⁰² of its Class A stock and 100 shares of its Class B stock; and as such he has been and is entitled to have distributed to him ^{his} pro rata share of the waters of Thistle Creek and its tributaries and other waters of said corporation; the same to be distributed to him by the water master of the plaintiff corporation and under the general direction and supervision of its board of directors of said corporation.

3. That on September 28, A. D. 1894, in the First Judicial District court of Utah Territory sitting in and for Utah County, in an action therein pending, being case No. 5217, entitled Edward Simmons and others, plaintiffs, versus William H. Seeley and others, defendants, a judgment and decree was made and entered in which the rights then existing to the use of the waters of Thistle Creek and its tributaries in Sanpete county were adjudicated and determined, a copy of which decree is as follows:

"An order having been made and entered by this court on the ___ day of July, 1894, referring the above entitled cause to General R. Thurman, Esq., as a special Master in Chancery, with instructions and power to take the testimony therein, and make his findings of fact and conclusions of law thereon, and report the same to the court; and it now here appearing to the court that said Master in Chancery has, after due notice to the parties to said cause, and their

appearance before him, heard all the testimony offered by the respective parties, and has made and reported to this court his findings of fact and conclusions of law therein, which are now on file in this court; Now, in accordance with such findings of fact and conclusions of law, it is here, on motion of counsel for said parties, ORDERED, ADJUDGED AND DECREED, that the plaintiffs Edward Simons, Adelbert Simons, Charles Wightman, Henry Gardner, William Collett, Ole Larson, Niels Larson, August Hjorth, and the defendant James Pant, Indian, are the owners of and entitled to the use of all the waters of Thistle Creek, and one fourth of all the waters of Clear Creek and Rock Creek, for a period of five days, from six o'clock A. M. on the 25th day of June, until six o'clock A. M. on the 30th day of June, and for a period of five days, from six o'clock A. M. of the 10th day of July, until six o'clock A. M. of the 15th day of July of each and every year and in addition thereto, that the said plaintiffs and the defendant James Pant, Indian, are during all of the remaining portions of each and every year, from the 1st day of March until the 15th day of June, the owners of and entitled to the use of water sufficient to irrigate five acres of land, to be taken from what is known as the Hyrum Seeley Ditch, to be distributed to the plaintiffs by the defendants; and also sufficient water from what is known as Panawats Ditch to be distributed to plaintiffs by defendants, which, together with the waste water of said Panawats Ditch, will irrigate seven acres of land; and in addition thereto, during the whole of each and every year, all of the waters flowing in the stream known as Panawats Slough, and in Gardner's Dam, and wherever said waters in Panawats Slough and Gardner's Dam, together with water for five acres, to be taken from the Hyrum Seeley Ditch, and the water for said seven acres, to be taken from the said Panawats Ditch, are less in quantity than one half of the waters of Thistle Creek, and one fourth of the waters of Rock Creek and Clear Creek, then plaintiffs are also entitled to such quantity of water from said creeks, as will, together with said Panawats Slough and Gardner Dam, and water for twelve acres, equal one half of the waters of said Thistle Creek, and one fourth of the waters of Rock Creek and Clear Creek.

"And it is here and now ORDERED, ADJUDGED AND DECREED that the said defendants, and each of them and their agents and servants and each of them be, and they are, and each of them is forever enjoined from in any manner interfering with or depriving the said plaintiffs or any of them or the defendant James Pant, (Indian) of the use of any of the waters so adjudged to belong to them.

"And it is further ADJUDGED AND DECREED that the defendants William H. Seely, Hyrum Seeley, Joseph W. Seeley, Andrew Matson, P. N. Peterson, Martin Henry Peterson, Henry Spencer, O. W. Anderson, Elias Gardner, Gunder Peterson, J. W. Tidwell, J. M. Tanner, Hannah Skitz, John Mauve, Joseph, Nephi Lehi, Panawats, Terangup, Morup, Kapitz, and James Cnup, are the owners of and entitled to the use of all of the waters of Thistle Creek, Clear Creek, and Rock Creek, for a period of ten days, from six o'clock A. M. of the 15th day of June until six o'clock A. M. on the 25th day of June, and for the period of ten days from six o'clock A. M. on the 30th day of June, until six o'clock A. M. on the 10th day of July, of each and every year; and in addition thereto, that the said defendants are, during all the rest of each and every year after the 15th day of July, down to the 1st day of March of the following year, the owners of and entitled to the use of all of the waters of Thistle Creek, Clear Creek and Rock Creek, subject to the rights of the plaintiffs as hereinbefore defined.

"And it is here and now ORDERED, ADJUDGED AND DECREED that the said plaintiffs and each of them, and the defendant James Pant, Indian, and their agents and servants, and each of them, is forever enjoined from in any manner interfering with or

depriving said defendants or any of them, of the use of any of the waters so adjudged and decreed to belong to said defendants. Dated this 28th day of Sept. A. D. 1894.

H. C. Smith
Presiding Judge

Attest:
Geo. Havercamp
Deputy Clerk
First Judicial District Court.

4. That the predecessors in interest and in title of the plaintiff corporation and of all of the stockholders thereof and of this defendant were parties defendant to the above entitled action; and that the water rights which are mentioned and described in said decree and which are adjudicated therein to the defendants therein include and embrace all of the water rights now controlled by the plaintiff corporation, except the right to the use of about 3 c. f. s. which is brought over into Thistle Creek by the plaintiff from the Price River water-shed.

5. That the defendant is and for several years last past has been and at all times hereinafter mentioned he and his predecessors in interest have been the owners and in the possession of the following described tracts of land in Sanpete county, Utah:

The N 1/2 of the NE 1/4, the SW 1/4 of the NE 1/4, the N 1/2 of the SE 1/4 and the NE 1/4 of the SW 1/4 of Section 3, Township 12 South, Range 4 East, Salt Lake Meridian, containing 360 acres, more or less;

Also the following described tracts adjoining the same in Utah county, Utah:

6. That the said lands are so situated with reference to Thistle Creek that it is not possible to irrigate them with waters diverted therefrom; but that part of said lands is so situated with respect to Clear Creek and Rock Creek that the same can be irrigated and at all times herein mentioned the same has been irrigated with waters diverted from the said streams, and by means of such irrigation said lands have been made to produce valuable crops of grain, alfalfa, meadow hay and grass pasturage, which cannot be produced thereon without irrigation.

7. That the defendant is the owner and for several

years last past has been and at all times hereinafter mentioned he and his predecessors in interest have been the owners and in the possession of the following described tracts of land in Sanpete county, Utah:

All of the south half of the south half of Section 5, Township 12 South, Range 4 East, Salt Lake Meridian, containing 160 acres; subject to rights of way for railroad, county road, and state highway.

8. That said lands are so situated that they can be irrigated with waters diverted from Thistle Creek as well as with the combined waters of Thistle, Clear and Rock creeks; and that at all times hereinafter mentioned they have been irrigated with waters diverted from Thistle Creek; and that when irrigated they produce valuable crops of grain, alfalfa, meadow hay and grass pasturage, which they will not produce without irrigation,

of
9. That the lands irrigated in Section 3 above described and in Utah county, about 85 acres are in cultivation and under irrigation from Clear Creek and Rock Creek, of which approximately 45 acres are meadow hay and grass pasturage and the rest in grain and alfalfa; and that during each and every year since the year 1878 and before and down to the time of the commencement of this action defendant and his predecessors in interest have irrigated the said lands with waters which they have diverted from Clear Creek and Rock Creek; and that during the trial of this action the parties hereto in open court made and entered into the following stipulation with respect to the use of the waters of Clear Creek and Rock Creek on the lands of the defendant in Section 3 above described and in Utah county, Utah, which stipulation was taken down by the court reporter:

"That the use of the waters have been and shall continue to be as follows at area.

"In the season, in the majority of the years, or the average year is from April 1st until the water has decreased until it is required to go on turns, the use of the water will be according to the owner of the property as he wishes. When the water has fallen in quantity to a place where it is low and has to be put on turns, that the Indianola Irrigation Company has in the past and will in the future distribute the water in turns, that varies in the dry years from April down to June 15th. Sometimes as early as April 1st and some times no turns are put on until June 15th or after. When the water has fallen low enough so that

the irrigation company has to put the water in turns, 80 shares of class B water has been charged against that ground or that place that Justus Seely is operating.

"And after June 15th all the waters of Rock Creek and Clear Creek are permitted to comingle with the waters of Thistle Creek and are then run to Indianola Valley and allocated to the stockholders in turns according to their shares. From the period of June 25 to June 30, inclusive, all of the waters to which Indianola Irrigation Company has rights, to-wit, 3/4ths of the flow of Rock Creek and Clear creek, will be used (by the defendant) on said lands in Section 3, Township 12 South, Range 4 East, Salt Lake Meridian, and his adjoining lands in Utah county; and there has been charged against it (such use) in the past and there will continue to be charged against such use 55 shares of the Class A rights of Justus C. Seely.

"During the period of 10 days from 6 a. m. June 30th until 6 a. m. on the 10th day of July all of the waters of Clear Creek and Rock Creek are permitted to flow down the channel and comingle with the waters of Thistle Creek to be distributed to the users of water as allocated to them to their shares in the Indianola Irrigation Company.

"During the period above stated the same situation will prevail as from June 5th to June 25th, to-wit, all ~~of~~ the water ~~of~~ the irrigation company has a right to distribute on Rock Creek and Clear Creek, to-wit, 3/4ths of their flow, will be used by the owner, Justus C. Seely, of that property, and will be charged to or against 55 shares of Class A right.

"The Indianola Irrigation Company and the water masters in the years past have permitted the waters of Clear Creek and Rock Creek to flow over a meadow (on said lands) containing between 5 and 12 acres, which meadow is adjacent to Thistle Creek, and will continue to permit the same to flow, except that in very dry years when they have required such waters to flow down the channels into Thistle Creek without running over said meadow."

10. That except as stated in the stipulation above set forth, the defendant Justus C. Seely has no right to the use of the waters of Clear Creek and Rock Creek on his said lands in Section 3 or his adjacent lands in Utah county.

11. That the lands in Section 5 above described are all irrigated with waters diverted from Thistle Creek and are so situated with relation to Panawats Slough and Panawats Ditch that the return flow from the waters applied to said lands contributes to the waters thereof and become a part of the waters decreed to the plaintiffs in ~~the~~ 1878 in the action above mentioned; the meadows of the defendant ~~and~~ and of other parties, who are not parties to this action, who own lands to the south and west of this defendant's meadows forming a reservoir which tends to augment and equalize the flow and supply of water in the Panawats Slough and Panawats Ditch.

12. That ever since the year 1878, ~~and~~ before, the

the predecessors in interest of this defendant, and this defendant, have irrigated said lands of this defendant during the irrigation season of each and every year with waters which have been diverted by them and him from Thistle Creek, and by means of such irrigation have produced thereon valuable crops of grain, alfalfa, meadow hay and grass pasturage, which cannot be produced thereon without irrigation; that about 120 acres of the defendant's said lands are and during all of said time have been in meadow and grass pasture, which crops require the application of water at more frequent intervals than do grain and alfalfa, and that by means of such diversion and use the predecessors in interest of this defendant, acquired and this defendant is now the owner, as against any adverse claims thereto of the plaintiff Indianola Irrigation Company, except the right of said corporation to distribute the same through ditches heretofore used therefor, of the waters herein-after described, which use is in addition to the right of the defendant to the use of the waters of of the Indianola Irrigation Company by virtue of his ownership of said shares of stock in the said corporation.

13. That the flow of Thistle Creek and its tributaries varies from year to year and from month ^{to month} throughout the irrigation season; that the irrigation season, or the period when the waters of said stream are used for irrigation purposes, commences about March first and ends about November first; that there are what are called high water seasons and low water seasons upon said streams, the high water season being the period from March 1st to June 15th, and the low water season being from June 15th to the end of the irrigation season; that during the high water season the combined flow of said streams is usually in excess of the amount required to irrigate all the lands under irrigation therefrom in Thistle Valley and in the canyon immediately below that valley, which are the lands irrigated by the water rights decreed to the plaintiffs in the action in which the decree was rendered in 1894 which is set forth in paragraph 3 of these findings, such rights being

hereinafter referred to as the Canyon Rights.

14. That for the irrigation of his lands in Sections 34 and 35, Township 11 South, Range 4 East, Salt Lake Meridian, adjacent to his said lands in Section 3 above described, the defendant and his predecessors in interest have at all times above mentioned used the waters of Clear Creek and Rock Creek, there being no other source of supply of water for said lands, and have used all of the flow of said streams during the low water season, and being chargeable therefor in recent years against defendant's shares of stock in the Indianola Irrigation Company, as heretofore set forth in the stipulation above set out in these findings; and that except as in these findings set forth the defendant Justus C. Seely has no right to the use of the waters of Clear Creek or Rock Creek.

15. That for the irrigation of his said lands in Section 5, being the $N\frac{1}{2}NE\frac{1}{4}$, the $SW\frac{1}{4}NE\frac{1}{4}$, $N\frac{1}{2}SE\frac{1}{4}$ and $NE\frac{1}{4}SW\frac{1}{4}$ thereof, all in Township 12 South, Range 4 East, Salt Lake Meridian, and in addition to his rights which are represented by his shares of stock in the Indianola Irrigation Company, the defendant and his predecessors in interest have, during all of the times herein mentioned, and during the periods from June 25th at 6 a. m. to June 30th at 6 a. m., and from July 10th at 6 a. m. to July 15th at 6 a. m., when the combined flow of Panawats Slough and the Gardner Dam and the 7 acres in the Panawats Ditch and the 5 acres in the Hyrum Seely ditch equalled or exceeded $\frac{1}{2}$ the flow of Thistle Creek plus $\frac{1}{4}$ the flow of Clear Creek and Rock Creek, used the waters of Thistle Creek which are allocated to the Canyon Users in the decree of 1894, in the following manner: The Canyon waters have been diverted from Thistle Creek through three certain ditches, known respectively as the Meeting House ditch, the Middle ditch, and the South ditch, which ditches are also used by the stockholders of the plaintiff corporation, about $\frac{1}{3}$ of $\frac{1}{2}$ of Thistle Creek and the same proportion of $\frac{1}{4}$ of Rock ~~and~~ Creek and Clear Creek being

carried in each ditch; that the waters carried through the Meeting House ditch and the Middle ditch have been used upon the said lands of this defendant, those in the South ditch on the lands of other persons not parties to this action; that until the flow of said streams each year has receded to a point where the waters thereof and of the Panawats Slough, measured at the lower end of the slough through a weir, are insufficient to supply the rights of the Canyon users set out in the decree of 1894, above set forth, it has been the custom and practice of the Indianola Irrigation Company since its incorporation in 1918, and it was the custom and practice of its predecessors in interest, to cause the waters of the Canyon users to flow through the said ditches, over the meadows and pastures of this defendant and of the other persons not parties to this action, and thence into the Panawats Slough and down^{to}/the Canyon users; and that as the waters have receded, so that it has become necessary that the water be turned down the main channel of Thistle Creek to supply the rights of the Canyon users, the Canyon waters have first been turned out of the South ditch, next out of the Middle ditch and lastly out of the Meeting House ditch; that the defendant and his predecessors in interest have at all times herein mentioned so used the waters of Thistle Creek upon his said meadow and pasture lands in Section 5, in addition to the waters thereof to the use of which he is entitled by reason of his ownership of shares of stock in the Indianola Irrigation Company; that the use thereof is necessary for the production of wild hay and grass on said lands and is a beneficial use; that without the use of such additional waters on said lands defendant's predecessors would have been unable and defendant would be unable to produce meadow hay and grass pasturage on said lands; and that for the use of the Canyon waters as herein set forth the defendant has not been charged and is not chargeable as against his rights which are represented by his shares of stock in the Indianola Irrigation Company.

16. That the defendant as against any adverse claims now made by the plaintiff thereto, except its right to distribute the same as it has done heretofore, is entitled to the right to the use of such additional waters as set forth in paragraph 15 of these findings; and that if his right to the use thereof in the manner aforesaid should be interfered with or denied to him, his meadows and pastures will dry up and his wild hay and grass growing thereon will die and the lands will become comparatively worthless, and the defendant will have no plain, speedy or adequate remedy at law for the injuries which he will thereby sustain.

17. That the plaintiff claims the right to allocate some of the Canyon waters to the defendant against his shares of stock in the plaintiff corporation and threatens to do so and unless restrained by the decree of this court will do so; that such claim of the plaintiff is without right; that the plaintiff Indianola Irrigation Company has no right to the use of the Canyon waters, nor does it have the right to charge the use thereof against the defendant's stock; but the plaintiff is in duty bound, under the decree of 1894, to see to it that the Canyon water is delivered to the weir as in said decree provided, and has the right to shut off the waters from the ditches whenever it shall become necessary to do so in order to make up the Canyon rights at the weir in Panawats Slough.

18. The court further finds that it is not true that the defendant has at any time wrongfully, wilfully or unlawfully and in violation of the rights of the plaintiff taken or used any of the waters of said creeks or of any of them when the same have not been allocated to him; that it is not true that he has threatened and that if he is not enjoined by the decree of this court that he will take or interfere with any of the waters of the said streams in violation of any of the rights of this plaintiff; and it is not true that the plaintiff has been injured by any act of the defendant, as alleged in its complaint, in 1892.

sum of \$5000.00, or in any sum whatever, or at all.

19. The court further finds that it is true that on the 8th day of May, 1920, in an action pending in this court, being case No. 1405, in which Indianola Irrigation Company, and others, were plaintiffs, and R. H. Spencer, and others, were defendants, and in which the predecessor in interest of this defendant was a party, a decree was made and entered affecting the water rights of the parties thereto in and to Thistle Creek, Clear Creek and Rock Creek, which were decreed to the defendants in the case No. 3217, Civil, in Utah County, Territory of Utah, in which the decree of 1894 was entered; that a copy of said decree in Case No. 1406 is set forth in paragraph 3 of the plaintiff's reply in this action; but that the said decree by its own terms relates only to the water rights which were decreed to the defendants in case No. 3217, in which the decree of 1894 was entered, and does not relate to the rights now claimed by the defendant in this action to the use of the Canyon waters as herein above set forth; and that the rights now claimed by the defendant in this action to the use of the Canyon waters have not been adjudicated in said case No. 1406.

II.

CONCLUSIONS OF LAW

As conclusions of law from the foregoing facts the court finds:

1. That the plaintiff is entitled to no judgment or decree against the defendant for the matters and things alleged in its complaint; and that the defendant is entitled to a judgment against the plaintiff on the complaint of no cause of action.

2. That the defendant is entitled to a judgment against the plaintiff on his counterclaim declaring that, so far as the

plaintiff is concerned, the defendant is entitled and has the right to have the waters of the Canyon users, being the successors in interest of the plaintiffs in case No. 5217, in Utah county, Utah, entitled Edward Simmons, and others, plaintiffs, against William H. Seeley, and others, defendants, in which a decree was entered on September 28, 1894, a copy of which is set out in the findings of facts herein, flow over his lands described as the south half of the south half of Section 5, Township 12 South, Range 4 East, Salt Lake Meridian, for the irrigation of the meadows and pastures thereon, at the same times and in the same manner as such waters have been used thereon ever since the year 1878, without charge therefor as against the rights which defendant has to the waters of Thistle Creek, Clear Creek and Rock Creek which are represented by his shares of stock in the Indianola Irrigation Company, a corporation, as follows:

From the beginning of the irrigation season in each year, which usually begins about the first day of March, and during the periods from June 25th at 6 a. m. to June 30th at 6 a. m., and from July 10th at 6 a. m. to July 15th at 6 a. m., when the combined flow of the waters of Panawats slough and at Gardner's dam and the 7 acres in the Panawats ditch and the 5 acres in the Myrum Seely ditch equal or exceed $1/2$ of the flow of Thistle Creek plus $1/4$ of the flow of Clear Creek and Rock Creek, the canyon waters are to be diverted from Thistle Creek through three certain ditches, known respectively as the Meeting House ditch, the Middle ditch and the South ditch, which ditches are also used by the stockholders of the plaintiff corporation, about $1/3$ of $1/2$ of Thistle Creek and the same proportion of $1/4$ th of Rock Creek and Clear Creek being carried in each ditch; that the waters of the Meeting House Ditch and of the Middle Ditch are to be permitted to flow over said lands of this defendant each year until the flow of said streams recedes to a point where the combined flow of said streams and of Panawats slough, measured at the lower end of said slough

through a weir, are insufficient to supply the rights of the canyon users as set forth in the decree of 1894, above mentioned; and that as the waters recede so that it becomes necessary to turn the waters of Thistle Creek down the main channel to supply the Canyon rights the said waters shall first be shut off from the South Ditch, next out of the Middle Ditch, and lastly out of the Meeting House Ditch.

3. That the defendant is entitled to a decree of this court enjoining the plaintiff, its servants, agents, officers and employees from denying to the defendant the right to the use of the canyon waters in the manner above set forth, and from charging the use thereof by the defendant against the rights which he has to the use of the waters of Thistle Creek, Clear Creek and Rock creek which rights are represented by his shares of stock in the plaintiff corporation.

4. That neither party to this action is entitled to any judgment for its costs herein against the other.

Let judgment be entered accordingly.

Done at Manti City, Sanpete County, State of Utah,
this 5th day of February, A. D. 1951.

BY THE COURT:



Judge.