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

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PROVO RESERVOIR COMPANY, a corporation,	:	
	Plaintiff,	: ANSWER OF DEFENDANT
-vs-		: PROVO BENCH CANAL
THE PROVO BENCH CANAL AND IRRIGATION COMPANY, et. al.		: AND IRRIGATION COMPANY.
	Defendants.	: NO. <u>2888</u>

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Comes now the defendant, Provo Bench Canal and Irrigation Company, and for answer to plaintiff's complaint herein admits, denies and alleges as follows:

I. Admits the 1st, 2nd, 3rd, 4th, 5th, 6th, 7th, 8th, 9th, 10th, 11th, 12th, 13th, 14th, 15th, 16, 17th, 18th, 19th, 20th, 21st, 22nd, 23rd, 24th, 25th, and 26th paragraphs of said complaint and the allegations therein contained.

II. Answering paragraph twenty-seven of said complaint this defendant denies each and every allegation therein contained.

III. For answer to the twenty-eighth and twenty-ninth paragraphs of said complaint this defendant alleges that it has no knowledge or information sufficient to form a belief as to the truthfulness of the allegations therein contained and therefore denies the same.

IV. Defendant denies each and every allegation contained in paragraphs twenty-nine, twenty-nine A, twenty-nine B, twenty-nine C, twenty-nine D and twenty-nine E of said complaint.

V. Answering paragraph thirty of said complaint this defendant alleges that it has no knowledge or information, except as contained in plaintiff's complaint herein, sufficient to form

a belief as to the truthfulness of said allegations contained in said paragraph and therefore denies the same.

VI. Answering paragraphs thirty-one, thirty-three and thirty-four of said complaint this defendant alleges that whatever right the plaintiff, with the defendants Timpanogas Irrigation Company, Wasatch Irrigation Company and Segoe Irrigation Company, may have by virtue <sup>of</sup> applications approved by the State Engineer of the State of Utah to store the flood waters of the said Provo River in reservoirs, constructed in Summit and Wasatch Counties, is the right to reservoir the said waters during the non-irrigating season of each and every year, and to release and use the water so stored during the irrigating season of each year upon lands bordering upon said Provo River, above the point of diversion of this defendant, and that said appropriations do not give to plaintiff herein the right to use the said waters so reservoired upon any other lands than as above specified, and that the said point of diversion of said waters so stored cannot be changed to permit the use of said waters upon lands below the lands of this defendant, without causing to this defendant and to its stockholders substantial loss and damage.

VII. For answer to the thirty-second paragraph of plaintiff's complaint herein, defendant alleges that it has no knowledge or information as to the quantity of water which the plaintiff herein has diverted or caused to be diverted from the Weber River water shed and into the channel of the Provo River, but this defendant alleges that whatever water the said plaintiff has so diverted or shall hereafter divert from said Weber River water shed, it has the right to convey from the point of said diversion into said Provo River, through said Provo River, with proper allowances made for loss in transit by seepage and evaporation, and to re-capture and divert the same at the head gate of its canals and into its irrigation system.

VIII. Answering paragraph thirty-five of plaintiff's

complaint, this defendant admits that it denies the right of the said plaintiff to the use of any of the waters of Provo River, until the said defendant shall have water adjudged to belong to it to the full extent of its appropriation, but denies that this defendant denies plaintiff's right to divert water from other sources and co-mingle the same with the waters of the Provo River, and re-capture and use the same, proper allowance therefor being made for evaporation and seepage in transit; ~~and~~ this defendant does not deny the right of the plaintiff to any use of the waters of the Provo River not inconsistent with its right hereinafter set forth, but denies that it, at any time, has diverted from said river and converted to its own use any water which belonged to, and was the property of the plaintiff herein, or that it is its purpose in the future to take and convert to its own use any water from said river to which it is not in law and in equity entitled.

IX. This defendant denies that it has been year after year, or at all, using the waters diverted by it from the said Provo River wastefully or in quantities largely in excess, or in excess at all, of that quantity of water necessary for the proper irrigation of the lands of its stockholders. This defendant denies each and every other allegation in said paragraph thirty-six contained.

X. Answering paragraph thirty-seven of said complaint this defendant admits that on the 6th day of May, 1899, in the Fourth Judicial District Court of the State of Utah in and for Wasatch County in the case of the Wasatch Irrigation Company, et. al., vs. Edward Fulton et. al., a decree was duly made and entered whereby all of the waters of said Provo River <sup>well</sup> decreed and distributed to and among the parties named in said decree according to their respective rights as determined therein; and that on the 7th day of September, A. D., 1905, in the Fourth Judicial District Court of the State of Utah, in and for the County of Utah, in the case of Provo City, et. al., vs. Telluride Transmission

Company, et. al., a decree was duly made and entered whereby all of the waters of said Provo River were and are decreed and ordered distributed to and among the persons therein named, according to their rights as determined in said decree. This defendant denies each and every other material allegation in said paragraph contained.

XI. Answering paragraphs thirty-eight and thirty-nine of said complaint this defendant denies specifically and generally each and every allegation therein contained, in so far as the same is applicable to this defendant.

XII. Denies specifically and generally each and every allegation in plaintiff's complaint contained not herein otherwise admitted.

Further answering plaintiff's complaining herein, and for further defense thereto, this defendant alleges:

I. That the Provo Bench Canal and Irrigation Company now is and at all times hereinafter mentioned was a corporation organized and existing under the laws of Utah.

II. That in the year 1865, the said Provo Bench Canal and Irrigation Company, and its predecessors in interest filed with the county clerk of Utah County a declaration of intention to appropriate sufficient water from Provo River to irrigate not less than 6500 acres of land lying westerly from the mouth of Provo Canyon and in Utah County.

III. That in the year 1862, or thereabout, the predecessors in interest of this defendant commenced the work of building an irrigation canal for the purpose of conveying water from the Provo River to and upon the lands mentioned in paragraph two hereof, and having its intake South ten degrees East about 2155 feet from the Northeast corner of Section twelve, Township Six, South, Range two East, Salt Lake Meridian. That from time to time the said canal was enlarged and extended until the year 1879, when it was completed to its present size and capacity, that is to say, when so completed the said canal had a carrying capacity of 140

cubic feet of water per second of time and extended from its intake for a distance of <sup>eight (8)</sup>~~eight~~ <sub>(2 1/2)</sub> miles, to its terminus.

IV. That from the time of the completion of said canal up to and including the present time the said defendant and its predecessors in interest have diverted from said Provo River, and conveyed through said canal, at all times possible during the irrigation season, of each and every year, water to the full extent of the capacity of its said canal; that there are lying below said canal and dependent upon it for irrigation, approximately Sixty-five hundred (6500) acres of land, which said land, until the construction of said canal, was arid and which, by the use of the water through the said canal, has been rendered productive of large agricultural and horticultural crops. That upon said lands there are now living approximately ~~six~~ hundred families with improved farms, upon which are substantial ~~homes~~ and orchards, which said families are employed in the cultivation and farming of said lands.

V. That there has been no time since the completion of the said canal to its present capacity when this defendant has been able to secure from said Provo River sufficient water, during the entire irrigation season, to fill its said canal and to properly irrigate the lands lying thereunder and dependent upon the waters diverted and conveyed through said canal for irrigation.

VI. That ever since the construction of said canal the said defendant has had, and now has, a beneficial use for water for irrigation and domestic purposes during the entire irrigation season to the full extent of the capacity of said canal and has, during each and every year from the time of the construction of said canal, used so much of the water of Provo River as it could obtain without depriving other appropriators, whose title to said waters is equal in standing with its own, of that quantity of the waters of said river to which they were and are entitled under their respective appropriations; that because of the scarcity of water in said river and because of the rights and necessities of said other appropriators, this defendant has been unable during each and every

year to secure from said river sufficient water during the irrigation season to fill its canal and meet the reasonable necessities of its stockholders. That as a result of said scarcity of water, and not otherwise there has constantly remained under said canal a substantial quantity of agricultural land of great value which the stockholders of the said defendant have been unable to cultivate because of the inability of said company to secure sufficient water therefor, which said lands if properly irrigated could be made to produce abundantly.

VII. That said Provo River in its course runs through what is commonly called Provo Valley in Wasatch County, State of Utah. That said valley is at a higher elevation than the lands irrigated under this defendant's canal, and within said Provo Valley there are large tracts of fertile and tillable land upon which for more than thirty years past large quantities of the waters of said Provo River have been turned during the irrigation season of each and every year. That the texture of the soil and the contour of the land is such, in said Provo Valley, that water applied upon the farming lands therein find their way in a large measure by seepage back again into the Provo River, and add materially to the flow of said river above the point of diversion of this defendant, thereby furnishing to this defendant a substantial part of its water, supplied at a time when the waters of said river are so low that this defendant cannot obtain therefrom the quantity of water to which it is entitled and which is necessary for the proper irrigation of the lands of its stockholders. That to change the point of diversion of any of the waters of said Provo River, heretofore used upon lands lying above the lands of this defendant, and to convey the same away from said valley and upon lands lower than the lands of this defendant would cause material and substantial injury to this defendant and to its stockholders.

VIII. That by virtue of the foregoing facts this defendant has appropriated and is entitled to the use of 140 cubic feet of water per second from Provo River through its said canal during the entire irrigation season of each and every year.

Provo Bench Canal and Irrigation Company defendant herein and hereinafter designated as defendant, by way of counter-claim against said plaintiff, alleges:

I. That the Provo Bench Canal and Irrigation Company is, and during the times hereinafter mentioned was, a corporation duly organized and existing under the laws of Utah, for the purpose of constructing and maintaining canals and conveying the water from Provo River to and upon the lands of what is known as Provo Bench, lying ~~to the north and west of~~ <sup>westerly from</sup> the mouth of Provo Canyon, and lands adjacent thereto, and to regulate and control the same for domestic and irrigation purposes.

II. That Provo River is a natural stream of water having its source in Wasatch and Summit Counties in the State of Utah, and with tributaries having their source in Utah County, and that from its said source the Provo River runs through what is known as Provo Canyon and empties into Utah Lake, in Utah County, Utah.

III. That in the year 1862, the said Provo Bench Canal and Irrigation Company, and its predecessors in interest, commenced the construction of an irrigating canal having its intake, and point of juncture with the Provo River, at a point South ten degrees East about 2155 feet from the Northeast corner of Section twelve, Township six south, range two east, Salt Lake Meridian, and running thence in a ~~South~~ <sup>from</sup> westerly direction ~~to the mouth of Provo Canyon~~ <sup>from</sup> the mouth of Provo Canyon; that from time to time the said defendant and its predecessors in interest continued to develop and enlarge said canal until the year 1879, when the said canal was finally completed to a carrying capacity to 140 cubic feet of water per second of time, which capacity said canal now has; and that thereupon the said Provo Bench Canal and Irrigation Company and its predecessors in interest, appropriated and have continued to appropriate and convey through said canal for domestic and irrigating purposes of its stockholders a continuous flow of water during the irrigation season of each and every year of 140 cubic feet of water per second of time,

from the said Provo River, whenever during said irrigating seasons there was sufficient unappropriated water in said river to furnish said quantity of water and have continuously put said water so appropriated to a beneficial use and have irrigated therewith and redeemed and reclaimed, to the extent that sufficient water therefor could be secured from the said source of supply, approximately 6500 acres of theretofore arid land, lying below said canal and dependent for irrigation upon the water conveyed therethrough.

IV. That at all times since the construction of said canal this defendant, because of the limited quantity of water in the said Provo river, and because of the appropriation of said water by other appropriators, than this defendant, of equal right, there has been a less quantity of water flowing in said river, and available for use by this defendant and it is co-tenant of equal right, than is necessary to properly irrigate the lands of the stockholders of this defendant, lying under said canal and dependent thereon for water for irrigation purposes.

V. That there is not now, and for many years last past has <sup>not</sup> been <sup>any</sup> ~~no~~ unappropriated water flowing in said Provo River, and there were no such unappropriated waters in the year 1908, or at any time since the year 1908. That if, on said date or at any time thereafter, there were flowing in said river waters in excess of the quantity necessary to meet the requirements of the other appropriators whose title thereto is of equal standing with this defendant, then, to the full extent of the requirements and necessity of this defendant and to the extent of the capacity of its said canal, said water in justice and as a matter of right is its property.

VI. That in plaintiff's complaint herein it is alleged that on April 16th, 1908, plaintiff's grantors made application to the State Engineer of the State of Utah for 150 second feet of the natural flow of the waters of said Provo river for irrigation purposes, to be diverted from said ~~river~~ river at plaintiff's head gate on the left bank of said river at a point south

Forty-eight degrees, Fifty-two minutes West, 1320 feet from the quarter section corner between sections Five and Six, Township Six South, Range Three East, Salt Lake Meridian, which said application was approved by <sup>the</sup> State Engineer on the 30th day of April, A. D. 1910. Which said quantity of water plaintiff alleges and threatens that it will appropriate and continue to appropriate from Provo River and this defendant alleges that unless enjoined from so doing by the order of this court said plaintiff will appropriate and continue to appropriate said quantity of water from said river to the great and irreparable damage of this defendant.

of the State of Utah

VII. That the State Engineer/had no jurisdiction to approve said application because there was then and is now no unappropriated water in said Provo River, the proposed source of supply, as all available waters of said river had theretofore been appropriated and used by prior appropriators as aforesaid, who were, and are entitled to the use thereof; and the proposed use of water by said plaintiff as contemplated by their said application will conflict with and ~~impair~~ the value of the existing rights of said prior appropriators and of this plaintiff to said waters which have heretofore been appropriated and used by them and in which they have had a ~~vest~~ right for more than twenty years.

VIII. That the said plaintiff claims to have acquired by purchase and to be the owner and entitled to the use of the following primary water right in said Provo River, to-wit:

The water right decreed to "The William Wright Estate", in civil action No. 957 in the above entitled Court, consisting of 200 minute feet of the waters of said Provo River for 100 hours each and every 14 days; and all the waters of what are known as "Enoch Spring", and the "Little Springs," except one tenth thereof, which said one-tenth plaintiff alleges belongs to the defendant, John W. Hoover.

All the waters of Round Valley Creek, not exceeding three and one-half second feet, except sufficient thereof to irrigate two acres of land which belong to the defendant John C. Whiting.

That the above mentioned water right, to the extent that the same has been used at all, has heretofore been used upon lands adjacent to said Provo River and lying above the intake of the canal of this defendant. That ~~because~~ the texture of the

soil and the contour of the lands upon which the said waters have heretofore been used for irrigation are such that a substantial part of the waters ~~which have been used for irrigation~~ so diverted and used has returned by seepage and otherwise to the ~~the~~ channel of said Provo River, above the point of diversion of this defendant, and has constituted a material proportion of the source of supply upon which this defendant has been dependent for its water. That defendant is informed and believes, and therefore alleges, that it is the intention of the said plaintiff, unless restrained and enjoined from so doing by an order of this court, to change the point of diversion of said water so claimed by it and to apply the same upon lands lying below the point of diversion ~~from~~ said Provo River by this defendant. That to so change the point of diversion of said waters would result in great and irreparable damage to this defendant.

IX. That this defendant is informed and believes, and upon said information and belief alleges, that for several years last past plaintiff herein has, during the irrigation season, by the use of dams and reservoirs constructed at or near the head waters of said river stored and reservoired the waters of said Provo River, thereby depriving this defendant of the water from said river to which it is entitled, and that in the future said plaintiff proposes, contrary to the rights of this defendant, to so store in its said reservoirs said waters, as aforesaid, to the great and irreparable injury and damage of this defendant.

WHEREFORE this defendant prays the judgment of this court:

I. That the said plaintiff take nothing by its said action. That this defendant ~~and~~ be decreed to be the owner and entitled to the use of a continuous flow of 140 cubic feet per second of time of the waters of Provo River during each and every irrigation season.

II. That it be decreed by this court that at the time of the filing and approving of the ~~defendant's~~ <sup>plaintiff's</sup> said application to

appropriate 150 cubic feet of water per second from Provo River there was no unappropriated water in said Provo River the proposed source of supply, and that the action of the said State Engineer of the State of Utah, in approving said application, is null and void.

III. For a decree of this court restraining and enjoining said plaintiff from changing the point of diversion of any waters to which it claims title and which have heretofore been used upon lands lying above the point of diversion of this defendant.

IV. That the said plaintiff be perpetually enjoined and restrained from any interference with the ~~plaintiff's~~ <sup>defendant's</sup> use of said water of said Provo River to the full extent of its appropriation.

V. For such other and further relief as to the court may seem meet and equitable, and for costs of suit.

Whiteston & Dolbo

William N. Ray

Attorneys for Defendant, Provo Bench Canal & Irrigation Company.

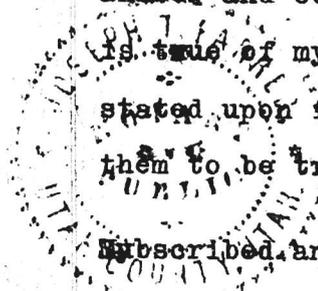
State of Utah, :  
                  : SS.  
County of Utah, :

John H. Stratton, being first duly sworn, deposes and says: I am an officer of the Provo Bench Canal & Irrigation Company, to-wit the President, thereof, and make this affidavit on its behalf, that I have read the foregoing answer and counter-claim, know the contents thereof, and the same is true of my own knowledge, except as to those matters therein stated upon information and belief, and as to those matters I believe them to be true.

John H. Stratton

Subscribed and sworn to before me this 30th day of March, 1914.

My commission expires July 27-1917 Joseph L. Parker  
NOTARY PUBLIC.



No. 2888

Fourth Dist. Court  
County of State of Utah

Pom Reservoir Co,  
vs.

Puro Beach Canal  
& Irrigation Co,

Answer of Puro  
Beach Canal and  
Irrigation Co.

Received Copy  
March 30<sup>th</sup> 1914  
Jacob Evans  
Atty for Pletj.

A. V. Robinson CLERK  
D. A. Boylston DEPUTY