

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

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PROVO RESERVOIR COMPANY, a corporation)
Plaintiff.

-vs-

PROVO CITY et al.

Defendants.)

Amended
ANSWER
CROSS COMPLAINT
AND COUNTER CLAIM

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Comes now Timpanogos Canal Company

a corporation, one of the defendants in the above entitled action, and by leave of Court and consent of counsel for the plaintiff first had and obtained, makes the following answer to the plaintiff's complaint, to-wit::

FIRST:- This defendant admits the allegations contained in the paragraphs of the plaintiff's complaint numbered one to twenty-six, both inclusive, and also admits the allegations contained in paragraphs 28 and 29 (d) of said complaint.

SECOND:- Not having any knowledge or information sufficient to form a belief in respect thereto, this defendant on that ground, denies all the allegations contained in the paragraphs of said complaint numbered 27, 29 (a), 29 (b), 30, 31, 32, and 33.

THIRD:- Answering paragraph of said complaint numbered 29 (c), this defendant denies that it has, at any time consented to the change of the place of diversion of the water described in paragraph 29 (b) of said complaint, and denies that none of the defendants will be injured or damaged by the transfer of the water, as alleged in said paragraph.

FOURTH:- Denies each and every allegation contained

in the paragraph numbered 29(e) of said complaint.

FIFTH.- Denies that this defendant has, at any time, diverted from said river, or converted to its own use, *water* the right to the use of which belonged to, or was or is the property of the plaintiff, and denies that this defendant threatens to violate any rights of the plaintiff and denies that any acts of this defendant have or will work any injury to the plaintiff or its stockholders or lessees or destroy their crops or do them any damage whatever, and denies that any act or acts of this defendant, threatened or otherwise, have deprived or will deprive, the plaintiff or its stockholders or lessees of any right or interest they may have to the use of the water of said Provo River.

SIXTH.- Answering paragraph of said complaint numbered 36, this defendant denies that it has, at any time, used any water diverted by it, wastefully, or in any quantities in excess of that necessary and beneficial for the irrigation of the lands of this defendant's stockholders, and denies that any use of the waters of said Provo River, by his defendant, has deprived or is depriving the plaintiff, or any party to this suit, of any lawful right to the use of the waters of said river, and denies that any use of said water, by this defendant, was or is a violation of the rights of the plaintiff, or its stockholders or lessees, or has prevented the development of the country or been in violation of the public policy of this state.

SEVENTH.- Answering paragraph numbered 37 of said complaint his defendant admits the rendition and entry of the two decrees mentioned in said paragraph, and denies generally each and every other allegation contained in said 37th paragraph, not herein specifically admitted.

EIGHTH.- Answering the 39th paragraph of said complaint, this defendant denies generally each and every allegation contained therein.

COUNTER CLAIM AND CROSS COMPLAINT

Further answering the plaintiff's complaint and as a defense thereto, and by way of counter-claim against the plaintiff and cross complaint against each and all of the other defendants, this defendant alleges:

FIRST.-- Each and every allegation contained in the paragraph numbered one to twenty-six, both inclusive, of the plaintiff's complaint is adopted and alleged as a part of this counter-claim and cross complaint in like manner as though the same were set forth in full herein.

SECOND.--That more than thirty years ago, the grantors and predecessors in interest of this defendant, were the owners in severalty of about 1000 acres of land lying along and below the canal of this defendant as now constructed in Utah County, Utah, which lands then were and still are of a gravelly and porous character and without irrigation, said lands were and are unproductive, but when properly and sufficiently irrigated said lands have and do now produce abundant and valuable agricultural and horticultural crops and the said lands, by reason of their location near the city of Provo, and by reason of the water right appurtenant thereto, and hereinafter particularly described are of great value.

THIRD.-- That more than thirty years ago, the grantors and predecessors in interest of this defendant for the purpose of acquiring a right to the use of the waters of Provo River for the irrigation of said lands and for culinary, domestic and other purposes, by means of dams and other diverting works, placed in the natural channel of said Provo River, near the mouth of Provo Canyon, in Utah County, Utah and by means of

canals and ditches leading therefrom to the lands hereinabove mentioned, diverted and appropriated of the then unappropriated water of said river and applied to useful and beneficial purposes upon the lands above mentioned, the quantity of water hereinafter set forth and ever since the date of the first appropriation of said water, this defendant and its grantors and predecessors in interest have continued during each and every year except when wrongfully interfered with to divert and appropriate from the waters of said river and apply in irrigation of said lands and for culinary and domestic and other useful and beneficial purposes, the quantity of water hereinafter mentioned which quantity has been, during all of said time, and still is necessary and beneficial for said purposes, and the use thereof has been and now is economical and without waste and absolutely requisite to maintain the high state of cultivation to which said lands have been developed and to maintain and supply the homes and industries served with water from this defendant's canal.

FOURTH.-- That more than thirty years ago and long prior to the acquisition by the plaintiff or any of its grantors or predecessors in interest of any interest or right in or to the waters of said Provo River, this defendant's canal had been completed and at the date of said completion, said canal had and ever since has continued to have a carrying capacity equal to 39.65 second feet of water, and ever since the completion of said canal this defendant and its grantors and predecessors in interest have, during the high water stage of each and every year, diverted from said river through said canal and applied to necessary and beneficial uses the full carrying capacity of said canal, to-wit, 39.65 second feet of water, and have continued to divert said quantity of water from said river during each and every

year, except when wrongfully interfered with, so long as the flow in said Provo River, near and below the mouth of Provo Canyon, in Utah County, Utah, was sufficient to fill to their full carrying capacity as now constructed, the canals of the parties defendants in this suit, who take water from said river near or below the mouth of said Provo Canyon; and when the volume of said river near and below the mouth of said Provo Canyon has become reduced in volume to a quantity not sufficient to fill the canals of the defendants in this action taking water from said river near and below the mouth of said Provo Canyon, this defendant has diverted and applied to necessary and beneficial uses .0395 of all the water of said Provo River flowing near the mouth of Provo Canyon until the quantity flowing in said river at the point aforesaid, becomes reduced to a volume not exceeding 15,000 cubic feet per minute; whereupon during each season the defendant has diverted from the waters of said river, .0355 of all the waters of said river flowing near or below the mouth of Provo Canyon and has continued during each quantity until the volume of water flowing in said river at said year, except when wrongfully interfered with, to divert said point is reduced to a volume not exceeding 12,000 cubic feet per minute, whereupon, this defendant has diverted from the waters of during each year .0290 of all of the waters of said river said river flowing near or below the mouth of said Provo Canyon and has continued to, except when wrongfully interfered with, divert the last mentioned quantity so long as the waters of said river, near or below the point aforesaid, did not exceed 12,000 cubic feet per minute. That all of the water so diverted by this defendant has been diverted under a claim of right, and ownership based on the appropriation and use aforesaid, and has been conveyed and applied in a careful and economical manner and the use thereof has been necessary and beneficial and requisite to the proper irrigation and maintenance of the farms, orchards, homes and industries

owned by this defendant's stockholders and maintained on the lands served by this defendant's canal, but at no time while the quantity of water in said river measured at said point has been below 475 second feet has the proportion of said river so diverted and used by this defendant been adequate or sufficient to irrigate in a Beneficial manner during the irrigation season, all of the land under the canal of this defendant, notwithstanding the same has been conveyed and applied in a careful and economical manner and without waste or avoidable loss, and during each year since the beginning of the year 1902 while the waters of said river measured at the point last aforesaid were less than 475 second feet, portions of the lands under the canal of this defendant, and to the irrigation of which when available waters of said river had been applied, have been only partially irrigated, because of the recession of the waters in said river and the wrongful method of measurement and distribution hereinafter mentioned.

FIFTH.--This defendant further alleges that its rights to the use of the waters of Provo River and its proportionate share of the flow of said river diverted, appropriated and owned by this defendant, as hereinabove set forth, were acquired prior to the organization of the plaintiff; and the proportionate share of said river appropriated, owned and used by this defendant was and lawfully should continue to be controlled and determined by the flow of water in said river resulting from all the natural sources of supply, as well as from the inflow into said river through seepage, drainage and springs caused by and resulting from the diversion and use in irrigation by defendants in this action of the waters of said river upon lands above the mouth of Provo Canyon and particularly in the South Fork of Provo Canyon and in Wasatch and Summit Counties, that since the organization of the plaintiff in this action and particularly during the past four years, the plaintiff has wrongfully interfered with the flow of the water in said river by wrongfully impounding and storing it, and by wrongfully changing

the point of diversion and use of certain of the waters of said river claimed by the plaintiff and under the pretense of having furnished new sources of supply of water for said river at points in Summit and Wasatch Counties, has wrongfully diverted, in Utah County, near the mouth of Provo Canyon, large quantities of the natural flow of said river, to which this defendant, and other defendants in this action were entitled under the pretense of recapturing the water pretended to have been supplied from new sources. That the said wrongful and unlawful interference with the flow of the waters of said river by the plaintiff in this action, in addition to depriving this defendant and the other defendants of portions of the waters of said river, to which they were entitled, has also deprived this defendant and others of the means of determining the just and lawful quantities to which it is entitled, and has also caused this defendant and other defendants in Utah County, to suffer great inconvenience and incur heavy and burdensome costs and expenses in connection with the measurement, division and separation of the water claimed to have been transferred from one diversion point to another or turned into said river from new sources of supply by the plaintiff. That the acts of the plaintiff in wrongfully storing ~~the~~ ^{and} impounding the natural flow of said river, and wrongfully transferring water from one point of diversion to another and the pretended commingling with and re-capturing from the waters of said river of waters wrongfully claimed by the plaintiff have resulted in great and irreparable injury to this defendant. That the plaintiff threatens to continue such wrongful acts and will do so unless restrained therefrom by an order of this Court.

SIXTH.-- That on the 29th day of January, 1902, the District Court of the Fourth Judicial District of the State of Utah, in and for Utah County, in an action pending in said Court numbered 718, wherein Provo City et al. were plaintiffs and the West Union Canal Company et al. were defendants, a decree was duly made and entered under which the rights of the parties in said action in and to the waters of Provo River, as they then flowed at and below the mouth of Provo Canyon, were settled and determined, which decree has never been modified, vacated nor appealed from, and is now a valid and subsisting judgment -7- of said Court.

SEVENTH.-- That among other things the degree referred to in the next preceding paragraph provided in paragraph 15 thereof, as follows:

That all the rights, fixed, declared and decreed herein, are founded upon appropriation of water, necessary for some beneficial uses, and that all such rights, hereby fixed, declared and decreed, are subject to their exercise, to the conditions that they are required and necessary for some beneficial use, and that all such rights are expressly subject to the limitations and conditions that such waters are used for some beneficial purpose, and are used economically, without waste, and with due care, and are reasonably and fairly necessary for such use, and the quantity of the said waters of which the parties hereto are found to be the owners of the right to the use is subject to the limitation, that whenever the waters of said river, measured as hereinbefore provided, are not sufficient to fill the canals of all of the parties hereto as they are at present constructed, the quantity of water of which the court finds them respectively to be the owners of the right to the use does not exceed the carrying capacity of their respective canals as at present constructed, when in good order and repair, and said degree further provided in paragraph 16 thereof, as follows::

That for the proper distribution of said water so that each of the parties hereto may receive the proportion thereof decreed to each respectively and be secured in the rights herein decreed, this court will hereafter appoint a commissioner with full power and authority to measure, control, regulate, and distribute the said waters among said parties as herein decreed, and from time to time construct or cause to be constructed such dams, weirs and appliances as science and experience shall show are necessary to an equitable and economical distribution thereof, and it is further adjudged and decreed that this court shall, and does retain original jurisdiction of this cause for the purpose of, from time to time making such further orders, rules and regulations as are necessary for the regulation

control and distribution of said waters according to the terms of this decree, and for the purpose of compelling by further decree or otherwise the construction of such improvements, dams, weirs and appliances as may from time to time be found necessary or expedient for the proper carrying out of the terms of this decree and for the equitable and economical distribution of said waters, and for the further purpose of compelling the payment of such sums of money by either or any or all of the parties hereto for the costs and expenses of improvements and the distribution of said water, and the compensation of said commissioner, as may to the court seem just and equitable, and for the further purpose of carrying the terms and provisions of this decree into full force and effect.

EIGHTH.-- That notwithstanding the provisions of said decree last above referred to, each and all of the commissioners appointed by the court to carry into effect the terms of said decree have entirely and deliberately failed and neglected to apply the conditions contained in paragraph 15 of said decree, in the distribution of the waters of said river and have distributed the waters of said river in accordance with the schedules contained in paragraph 3-4-5 of said decree and in utter disregard of the requirements and necessities of the defendants interested in the said waters and in so doing said commissioners have distributed to Provo City, The West Union Canal Company, Smith Ditch Company and those defendants and their successors in interest named and referred to in said decree as residents of the River Bottoms large quantities of the waters of said river, not needed or required by them and which could not be and has not been applied to any beneficial use by said last named defendants and thereby the quantity of water in said river for distribution to the other parties to said decree, was materially reduced and the quantity distributed to this defendant was not
the true quantity to which, under

said decree this defendant was entitled to receive, whereas, if said commissioners had distributed the water of said river in accordance with the terms of paragraph 15 thereof, the proportion of said river owned by this defendant and for which it has a beneficial use would be materially increased, and the lands under the canal of this defendant which, by reason of said wrongful distribution by said commissioners have only been partially and inadequately irrigated could have been economically beneficially and adequately irrigated.

NINETH.-- That none of the lands under and irrigated from the canals of the defendants Provo City, West Union Canal Company, Smith Ditch Company and those defendants and their successors in interests named and referred to in said decree as residents of the River Bottoms require for the irrigation thereof when economically and beneficially applied in a careful manner, more than one second foot of water for each 45 acres of land from the beginning of the irrigation season up to the 20th day of June of each year; nor a quantity of water in excess to one second foot for each 55 acres, from June 20th, to July 20th, of each year; nor a quantity of water in excess to one second foot for each 60 acres of land from July 20th to the end of the irrigation season of each year and any water in excess of said quantities applied upon said lands is wasted and wholly unnecessary for the beneficial and economical irrigation thereof.

TENTH.--That if at the time of the entry of the decree above mentioned the defendants Provo City, West Union Canal Company, Smith Ditch and the defendants named and referred to in said decree as residents of the River Bottoms had a necessity for and could beneficially use the proportion of the water of said river awarded to them respectively in the 2nd, 3rd, 4th, and 5th paragraphs of said decree, said necessity ceased to exist more than seven years prior to the commencement of this suit, and under the laws of the State of Utah, the water in excess of the necessities when

economically and beneficially used of the said Provo City West Union Canal Company, Smith Ditch and those parties named and referred to as residents of the River Bottoms has been forfeited and abandoned by the defendants last above named, by reason of their failure to apply said excess to a beneficial use.

ELEVENTH.-- That on the 26th day of January, 1907, the District Court of the Fourth Judicial District of the State of Utah, in and for Utah County, in a cause therein pending wherein Provo City et al. were plaintiffs and the Telluride Power and Transmission Company et al. were defendants, duly made and entered a decree, which has never been modified, reversed or appeal from, and which is now a valid and subsisting judgment, whereby all of the waters of said river flowing at the mouth of Provo Canyon were divided into two classes designated as class "A", and class "B", respectively. That class "A" water under said decree consists of all the water of said river when the flow thereof has decreased to not more than 17,467 cubic feet per minute of time, measured at the mouth of Provo Canyon, and the several points of intake of the parties in said action taking waters from said river above the mouth of said canyon, and class "B" water under the terms of said decree consists of all the waters of said river in excess of 17,467 cubic feet, measured as aforesaid. That the plaintiff in this action is the grantee and successor in interest of the Blue Cliff Canal Company, a corporation, which Blue Cliff Canal Company was one of the defendants in the action in which the decree last aforesaid was rendered, and the plaintiff in this action asserts, claims and maintains, as the grantee and successor in interest of the said Blue Cliff Canal Company all of the rights in the waters of said river awarded and decreed to the said Blue Cliff Canal Company by the judgment in said

action. That the quantity of class "B" water awarded by said decree to the Blue Cliff Canal Company was 960/17,960ths of the waters of said river measured at the point designated in said decree and the plaintiff in this action, as the grantee and successor in interest of the said Blue Cliff Canal Company is estoppd, by virtue of said decree, from claiming or asserting any claim or right in and to the waters of Provo River measured at the point last aforesaid, in excess of the quantity of water awarded to the said Blue Cliff Canal Company by the terms of said decree.

TWELFTH.-- That the plaintiff and each of the other defendants herein, as this defendant is informed and believes and therefore alleges, asserts and sets up some claim or interest adverse to the ownership, title and rights of this defendants to the use of the waters of said Provo River, as claimed by the defendant herein, the exact nature or character of which claims this defendant is unable to state, and this defendant alleges that each and all of the said adverse claims of the plaintiff and the other defendants in this action are without right or foundation in law and are inferior to the rights of this defendant and the assertion of the same are a cloud upon this defendant's title and ownership and in and to the waters of said river, as in this counter-claim and cross complaint set forth.

WHEREFORE, this defendant prays judgment:.

That the plaintiff and each of the other defendants in this action be required to set forth each and every interest and claim made by them and each of them in and to the waters of said Provo River adverse to the rights of this defendant as hereinbefore set forth, and that said several adverse claims and interests be adjudicated and determined and declared to be without right or foundation as against the

right of this defendant; That the maximum necessities of the parties hereto claiming under said decree of Jan. 26, 1902 for beneficial purposes when economically used without waste and with due care be determined to the end that the provisions of paragraph 15 of said decree may be fairly applied in the measurement control and distribution of the waters of said river; that any water heretofore distributed by said Commissioners in excess of the maximum necessities of any party under said decree be determined to be the property of the other parties to said decree whose maximum necessities have not been supplied by such distribution in the relative proportions stated in said decree until maximum necessities of all of the parties to said decree are supplied; That the title, ownership and right to the use of the quantity of water from said river claimed by this defendant as herein set forth be quieted and confirmed by a decree of this Court as against the claims and pretended rights of each and all of the ~~and~~ other parties herein, and that the plaintiff and the other defendants herein be enjoined and restrained from, in any manner, interfering with the rights of this defendant/ⁱⁿand to the waters of said river, and that this defendant have such other and further relief as may be proper in the premises.

This defendant prays for general relief and for its costs herein expended.

Attorney for Defendant.

Timpanogos Canal Company

STATE OF UTAH, }
COUNTY OF UTAH. } SS.

David H. Jones, being first duly sworn upon his oath deposes and says; that he is an officer to-wit, president of Timpanogos Canal Company, one of the defendants in the above entitled action; that he has read the foregoing answer, counter-claim and cross complaint, and the statements therein made are true of his own knowledge, except as to matters therein stated on information and belief, and as to those matters, he believes them to be true.

David H. Jones

Subscribed and sworn to before me
this 21 day of August, 1916.

Graff C. Bagley
Notary Public.

My commission expires: aug 6 1918

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Provo Reunion
Company, a
corporation
vs. Plf.

Provo City et al
Def.

Amended
Answer, Cross
Complaint &
Counterclaim

DISTRICT COURT

UTAH COUNTY, UTAH

* FILED *

AUG 27 1916

E. J. Palmerman, Clerk

Vera Oles, Deputy