

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

Provo Reservoir Company,
A Corporation, Plaintiff,

#2888 Civil

VS

Petition for order to Show
Cause.

Provo City, et al.

Defendants.

The petition of Caleb Tanner respectfully shows to the Court;

1. That on or about the 4th day of Aug. 1909, one Jens C. Jensen made and entered into a certain contract and agreement with the Provo Reservoir Company, a corporation, plaintiff herein, a copy of which said contract is hereto attached and marked Exhibit "A".

2. That subsequent to the execution of the said contract Exhibit "A" said Jens C. Jensen did and performed all things required of him to be performed thereunder and on or about the 29th day of Nov. 1918, said Provo Reservoir Company made, executed and delivered to said Jens C. Jensen a certain deed for water right a copy of which is hereto attached and marked exhibit "B".

3. That on or about the 22nd day of Sept. 1911, said Jens C. Jensen made and entered into a certain contract and agreement with the said Provo Reservoir Company a copy of which is attached hereto and marked exhibit "C".

4. That subsequent to the execution of said contract marked Exhibit C said Jens C. Jensen did and performed any and all things required by him to be performed thereunder and on or about the 29th day of Nov. 1919 said Provo Reservoir Company made executed and delivered to the said Jens C. Jensen a certain deed for water right copy of which is attached hereto and marked Exhibit "D".

5. That on or about the 28th day of Dec. 1912, the Provo Reservoir Company, a corporation, made, executed and delivered to the said Jens C. Jensen a certain deed for water right copy of which is attached hereto and marked Exhibit "E".

6. That that particular contract hereinreferred to as Exhibit "A" was recorded in the office of the County Recorder of Utah County, Utah in Book 108 of Mortgages at page 305 thereof on or about the 16th day of Aug. 1909.

7. That that particular contract herein set out as exhibit "C" was recorded in the office of said Co. Recorder of Utah County, Utah in Book 126 of Mortgages at page 490 thereof on or about the 25th day of Sept. 1911.

8. That the said Preambles and Resolutions of said Provo Reservoir company referred to in said deeds for the year 1909 contains the following provision, to wit;

"Whereas Provo Reservoir Company a corporation is the owner of certain water rights and applications to appropriate waters for certain purposes described in its articles of Incorporation and intends to secure other water rights and interests in addition thereto, which appropriations, rights and interest it proposes to utilize for the purpose of furnishing a more adequate supply of water with which to irrigate the lands described in the applications to appropriate water for irrigation etc. above referred to, together with other lands that are capable of irrigation with waters from Provo River known as the Provo River System; and whereas in order to hold said water rights and applications to appropriate water, it is by law required that the waters applied for and thereby covered be utilized for the irrigation of the lands described in the said applications therefor; and whereas in some of the applications for said appropriations large areas of land upon which it is intended to use said waters are described; and whereas persons and parties, other than this corporation, own the land described and upon which it is intended to use said waters, it becomes necessary in order to apply said water upon said lands, that this company as the owner and holder of said water rights and the owners of said lands upon which it is to be used, enter into agreements and stipulations specifying the terms and conditions upon which said land owners will purchase and utilize said waters; "

9. Said preambles and Resolutions for the year 1909 following that part hereinbefore quoted, further contains the following;

"Therefore be it resolved that this Company by and through its President is hereby authorized and empowered on behalf of and as the act and deed of this corporation to enter into contracts in writing with such of the owners of the lands described in said applications and the owners of such lands as may be irrigated from such system as will subscribe for water rights and any of the rights or applications now owned and held by this company and any other rights appropriations or interests which said company may hereafter acquire to waters for said system".

10. The said preambles and resolutions for the year 1909 further contains the following provision;

"In order to convey the waters from the several points of diversion named in said applications and from the points where the Company has or may acquire rights the Company shall build a substantial canal system, consisting of reservoirs earthen and concrete canals concrete and other substantial flumes tunnels and wood or steel pipes for the purpose of storing and conveying said waters to a point located

near the center of Section 12, Tp 6 South of Range 2 East of Salt Lake Meridian, to be known as the point of general delivery."

"The company agrees that when the said contract price for any of the said water rights and the water rates hereinbefore provided for shall have been fully paid and the conditions by the consumer covenanted to be performed, have been complied with, it will execute to and in favor of said consumer, his heirs and assigns, a deed, conveying to him, or them, the said water right, together with such prorata interest in said system as his interest in said water rights shall represent; and thereafter as to him, the annual rates for maintenance and repair of the system hereinbefore provided for, shall cease, and he shall become an owner in fee simple of an undivided interest in said system to the extent of the ratio which the number of acres and class of right purchased or acquired by him shall at such time or at any subsequent time bear to the entire number of acres and class supplied with water from said system".

"The company reserves the control, management operation and regulation of the said system until January 1st, 1920, after which time such control, etc. shall be exercised by those interested in proportion to their respective interests."

11. That the preambles and Resolutions of said Provo Reservoir company for the year 1911 referred to in exhibit "D", contains a provision identical with that part of the Preamble and Resolutions for the year 1909 as set out in paragraph 8 hereof;

12. That the Preambles and Resolutions of said Provo Reservoir Company for the year 1911 so referred to in said deed copy of which is attached and marked Exhibit "D", contains the following further provisions:

Wherefore be it resolved that this company by and through its President and Vice President, thereunto hereby authorized, enter into contracts in writing with such of the owners of the lands described in said applications and the owners of such other lands as may be irrigated from said system as will subscribe for water rights under any of the rights, or applications now owned and held by this company and any other rights appropriations or interests which said company may hereafter acquire, to waters for said system."

"The company agrees that when the said contract price for any of the said water rights and the water rates hereinbefore provided for shall have been fully paid and the conditions by the consumer covenanted to be performed have been complied with, it will execute to and in favor of said consumer, his heirs and assigns a deed conveying to him or them, such prorata interest in said system as his (or their) interest in said water rights shall represent; and he (or they) shall become owner or owners in fee simple of an undivided interest in said system to the extent and the ratio which the number of acres and class of right purchased or acquired by him (or them) shall at such time or any subsequent time bear to the entire number of acres supplied with water from said system. Provided; that if such payment ~~is~~ made and such deed be issued prior to the 1st day of January, 1920, it shall not become operative absolutely until after said date, and the annual rates for Maintenance and repair of the system hereinbefore provided for shall continue until the said 1st day of January, A.D. 1920."

"The company reserves the full and complete control, management operation and regulation of the said system until January 1st 1920, after which time such control etc. shall be exercised jointly by the Company and those interested in proportion to their respective interests."

13. That pursuant to the said preambles and resolutions of the said Provo Reservoir Company for the years 1909 and 1911 said Provo Reservoir Company constructed an irrigation system consisting of canals, reservoirs, flumes, tunnels and pipes for the purpose of conveying

the waters by it so deeded to the said Jens C. Jensen and other holders of similar contracts and deeds to the point of general delivery mentioned in said Preambles and Resolutions, to wit:

" To a point near the center of Sec. 12, Township 6 South, Range 2 East of the Salt Lake Base & Meridian in Utah County, Utah".

And said Provo Reservoir Company further constructed a canal extending from a point in Provo Canyon known as Heiselt's in Utah County, Utah, down said Provo Canyon on the southerly side thereof to the mouth of said canyon, thence West across Provo River and on to the Bench on the westerly side of said Provo River near the mouth of said canyon to a point approximately the center of Sec. 12, Tp 6 South of Range 2 East of Salt Lake Base and Meridian, said point being the point of general delivery referred to in the said Preambles and Resolutions of the said Provo Reservoir Company for the years 1909 and 1911; that said Provo Reservoir Company entered upon the duty of making delivery of the waters represented by the said deeds at the center of said section 12 for the use and benefit of said Jens C. Jensen and of persons owning water rights in said system under similar contracts and conveyances;

14. That on or about the 1st day of Jan. 1920, the said Provo Reservoir Company relinquished the control of the said irrigation system so by it constructed to a committee constituted by the users of the waters of said system, which said Committee was known as the Board of Control; that said Board of Control continued until about July 2, 1924 to distribute the waters of said irrigation system so constructed by said Provo Reservoir Company during the irrigation season of said year.

15. That about the second day of July, 1924, certain of the holders of deeds of said Provo Reservoir Company similar to the deeds so made to the said Jens C. Jensen copies of which are attached hereto and the said Provo Reservoir Company organized a corporation known as Provo Reservoir Water Users Company, defendant herein, and said corporation since its organization has attempted and assumes to distribute and now attempts to distribute the waters of said irrigation system and said Provo Reservoir Company and said Provo Reservoir Water Users Company now assume to direct F. F. Wents as River Commissioner hereinafter referred to

in the distribution of all of the waters in the said Provo River Irrigation system and the said L. H. Wentz as such commissioner now assumes said Provo Reservoir Company and said Provo Reservoir Waters Users Company have the right to direct the distribution of the waters so granted to the said Jens C. Jensen by the said Provo Reservoir Company in the said deeds copies of which are attached hereto; that said Provo Reservoir Company has heretofore disclaimed any right or duty in connection with the distribution of said waters; that neither said Jens C. Jensen nor this petitioner has assigned to the said Provo Reservoir Water Users Company the said water rights represented by the said deeds, copies of which are attached hereto; neither has the said Jens C. Jensen or this petitioner in any manner authorized said Provo ^{Reservoir} Water Users Company to distribute said waters represented by the said deeds; that said Provo Reservoir Water Users Company has no property in the said irrigation system of the said Provo Reservoir Company or in the said canal so constructed as in paragraph 13 hereof alleged except such interest as have been transferred to it by the owners of water rights in the said Provo Reservoir Company's irrigation system and such rights as have been conveyed to it by the said Provo Reservoir Company.

16. That on or about the 3rd day of Mar. 1925 by his good and sufficient deeds made executed and delivered to petitioner the said Jens C. Jensen grantee in exhibits "B", "D" and "E" duly and regularly sold and transferred to this petitioner all right, title and interest in and to the said waters and water rights, together with all other rights represented by said deeds so made to the said Jens C. Jensen, and that the petitioner at all times since the said 3rd day of Mar, 1925, has been and now is the owner of said water rights and entitled to the use thereof and is the owner of and entitled to the use of any and all privileges in connection therewith.

17. That petitioner has not conveyed to said Provo Reservoir Water Users Company the said water rights so by said Jens C. Jensen deeded and transferred to petitioner but petitioner is now and at all times since the said 3rd day of Mar. 1925, has been the owner thereof and at all times since the said 3rd day of Mar, 1925, has been and now is an owner and tenant in said irrigation system so made and constructed by

the said Provo Reservoir Company as hereinabove stated, and at all times since the said 3rd day of Mar. 1925, petitioner has been an owner and tenant in the said canal constructed in said Provo Canyon as in paragraph 13 alleged, and petitioner is now a tenant in common in said canal so constructed as herein before alleged and stated;

18. That under the said contracts and deeds copies of which are attached hereto petitioner became and now is a tenant in common in the said canal and irrigation system and has a right to convey therein the waters represented by said deeds, copies of which are attached hereto, from the said Provo River down said canal to the said point of general delivery mentioned in the said preambles and Resolutions hereinabove referred to, to wit:

"To a point near the center of section 12, T⁴p 6 South of Range 2 East S.L.M. in Utah County, Utah."

And petitioner as such tenant in common has a right to the use of any unused capacity in the said canal to such point of general delivery.

19. That petitioner has heretofore rented to water users taking water from said canal at about the center of said section 12, T⁴p 6 S., Range 2 East, S.L.M. the twenty and one third acres of water represented by the said deeds copies of which are hereto attached, for the irrigation season of 1926; that the lands upon which said rented water is to be used are barren and unproductive without irrigation but with irrigation produce abundant crops; that the said waters represented by the said deeds have been rented for use through a certain canal branching from said main canal known as the Iona lateral of said system to the following named persons, to each the number of acres as stated to wit: M.B. Cutler, 3 acres; J.D. Gatenby 5 acres; Wm. Burr 6 acres; and R. Wells 6 1-3 acres; that said persons so renting said water are dependent after the high water period on the use of said rented waters for the irrigation of their said lands; that at all times after the high water season which is now over for the year 1926, there is and there now is an unused capacity in the said canal particularly described in paragraph 13 hereof, sufficient to convey to petitioners said lessees the said 20 1-3 acres of water from the intake on the said canal at or near the place called Heiselts in Provo Canyon, Utah County, Utah, to the said point of general delivery at the center of

said section 12 and to the intake of the said Iona Lateral.

20. That petitioner is now the owner of the rights to the use of the water represented by the deeds copies of which are hereto attached and is the owner of capacity in said canal and the right to flow the said waters through the same to the said point of general delivery.

21. That petitioner as such owner now is and he and his predecessor in interest have been subject to the requirements of law and the said contracts copies of which are attached hereto with reference to the payment of a pro rata of the cost of distribution of the said waters represented by the said deeds and petitioner offers to pay any just prorate of the costs and expense of the distribution of said waters through the said canal.

22. That the final decree and judgment awarded in the above entitled action, Civil 2888 in the above entitled Court, awarded 2.52 sec. ft. of water of said Provo River to one John D. Nixon; that plaintiff is the assignee of the said 2.52 sec. ft. of waters of said River; that the said water is transferred water as defined in subdivision "A" of paragraph 87 of said final decree; that petitioner as the owner thereof has the right to divert said 2.52 sec. ft. over the Olmstead dam in Provo Canyon aforesaid and from Provo River at a point near the mouth of Provo Canyon; that substantially .2 of a second foot of water will supply petitioners said lessees of the said 20 1-3 acres of water for the year 1926.

23. That the Court, in the said Civil action 2888, has heretofore appointed one E. W. Wentz as water commissioner for the purpose of distributing the waters awarded by the said decree in said cause rendered; that the said Court has reserved jurisdiction in said action for the purpose of administering the distribution of the waters of said Provo River through and by the said commissioner; that the waters represented by the deeds copies of which are attached were and are waters awarded under the said final judgment and decree rendered in said civil action 2888.

24. That petitioner has heretofore demanded of said E. W. Wentz as such Commissioner, the delivery from said Provo River into the said main canal herein in paragraph 13 described, of the said 20 1-3 acres

of primary water granted by the said deeds copies of which are hereto attached, for the use of petitioner's lessees of said water for the irrigation season of 1926; that said T.F. Wentz has failed, neglected and refused to turn said waters into the said canals for the use of petitioner's said lessees through the said Iona lateral, and the said T.F. Wentz as such commissioner, wrongfully and without right, and contrary to his duty in the premises, now refuses to turn said 20 and 1-3 acres of primary water right, or any part thereof, or any water whatsoever into the said canal for the use of petitioner's said lessees, and said T.F. Wentz Commissioner alleges and states that Provo Reservoir Company a corporation and Provo Reservoir Water Users Company, a corporation and R.J. Murdock of Secretary thereof claim a right to dictate the disposition and distribution of said waters and petitioner alleges that neither of said corporations nor said R.J. Murdock has the right to direct the use or disposition of said waters in any particular whatsoever.

25. That petitioner has heretofore requested the said T.F. Wentz as such Commissioner to turn from Provo River and into the said main canal of the said Provo Reservoir Company's Provo River Irrigation system in paragraph 13 hereof described, .2 of one second foot of the 2.52 sec. ft. of water awarded in paragraph 82 of said final decree of the Court in this action for the use and benefit of petitioner's said lessees of the said 20 and 1-3 acres of water for the irrigation season of 1926, but that the said T.F. Wentz has failed, neglected and refused to comply with such request; petitioner further alleges that .2 of one sec. ft. of water will supply petitioner's said lessees of said 20 and 1-3 acres of water in said Iona lateral.

26. That petitioner has no exact knowledge as to the exact number of acres of primary water right which the said Provo Reservoir Company has heretofore disposed of through the said main canal herein described and has no method of acquiring such information; petitioner cannot state with accuracy what proportion of the waters of said canal petitioner is entitled to the use of by reason of his ownership of said 20 and 1-3 acres of primary water right but alleges on information and belief

that said T.F. Wentz as Commissioner has such information and that Provo Reservoir Company and Provo Reservoir Water Users Company have such information; petitioner alleges that he is the owner and entitled to the use of such proportion of the waters of the said main canal as flow therein to supply similar rights as the said 20 and 1-3 acres of primary right bears to the total number of such units flowing in said canal.

Wherefor petitioner prays that the above entitled Court make an enter an order herein directing the said T.F. Wentz as such Commissioner to divert from Provo River and into the main canal of Provo Reservoir Companys Provo River Irrigation System, the 20 1-3 acres of primary water right owned by plaintiff, and to divert the said 20 and 1-3 acres from the said main canal into the said Iona Lateral for the use and benefit of petitioners said lessees of said water rights for the balance of the irrigation season of 1926, and in the alternative to divert of the waters of Provo River of the 2.52 sc. ft. of water owned by petitioner, .2 of one sc. ft. into the said main canal, and therefrom into the said Iona Lateral for the use and benefit of of petitioners said lessees for the balance of the irrigation season of 1926; that such order require the said T.F. Wentz, if he shall fail therein, to be and appear before the above entitled Court on a day certain and then and there show cause if any he may have, why he has not complied with such order of the Court; and if said T.F. Wentz shall fail therein and shall appear on said day to so show cause that he be then directed and required to make such diversion of the 20 and 1-3 acres as herein prayed or in the alternative that he be required to make a diversion of the said .2 of one sc. ft. as herein prayed, of the 2.52 sc. ft. right owned by the plaintiff as herein set forth;

petitioner further prays that hearing on said order to show cause be shortened as to the time of hearing and notice thereof; that the Court make such order as to it shall seem proper as to parties to be served with notice of the filing of this petition and of the hearing thereof.

STATE OF UTAH)

COUNTY OF UTAH) SS

Caleb Tanner being first duly sworn deposes and says that he is the petitioner named in the above and foregoing petition; that he has read the same and knows the contents thereof and that the same is true of his own knowledge except as to matters and things therein stated on information and belief and as to such matters he believes it to be true.

Caleb Tanner

Subscribed and sworn to before me this

16th day of June, 1926.

M. R. Straw

Notary public.
Residing Provo Utah

My commission expires Mar. 8, 1929.

