

14743

IN DISTRICT COURT, THIRD JUDICIAL DISTRICT, SALT LAKE COUNTY, UTAH.

SALT LAKE CITY, a municipal corporation,  
Plaintiff,  
vs.  
PROGRESS COMPANY, a corporation,  
Defendant.

Copy received July 23, 1914.  
Wm. R. [unclear]  
attys for defendant.  
COMPLAINT.

For a cause of action against defendant plaintiff says:

1. That plaintiff is now and at all times hereinafter mentioned was a municipal corporation organized and existing under the laws of Utah, to wit, a city of the first class;
2. That defendant is now and at all times herein mentioned was a corporation organized and existing under the laws of Utah;
3. That said Salt Lake City has a population of about 100,000 people and is growing rapidly;
4. That said City is now and at all times hereinafter mentioned was the owner of a water system maintained and conducted and used by said City for the purpose of supplying the people of said city and said city with water for domestic, culinary and sprinkling purposes and for fire, sewer and sanitary purposes and other public purposes;
5. That Big Cottonwood Creek is a stream of potable water which emerges from a Canyon on the west slope of the Wasatch Mountains, about ten miles southeasterly from Salt Lake City, in Salt Lake County, Utah; that said Salt Lake City in the year 1905 built at great expense and owns and since then owned and maintained a reservoir in said creek near the mouth of Big Cottonwood Canyon and a conduit extending from said reservoir to Salt Lake City and connecting with the reservoir water mains and water system of said city, which conducts water from said Big Cottonwood reservoir to

said city for the public uses aforesaid;

6. That said city obtains 50% of its total water supply from said reservoir in Big Cottonwood Canyon; that said reservoir is supplied with water by means of said Big Cottonwood Creek and tributaries thereto and derives no water from any other source; that said reservoir is situated in the east half of Section 25, Township 2 South, Range 1 East, in Salt Lake County, Utah;

7. That the flow of said Big Cottonwood Creek varies at different seasons and in different years; that said variation extends from 10 or 20 second feet or less in winter time up to about 350 second feet in late spring and early summer;

8. That there are now and for many years last past, to wit, for more than twenty years last past, have been at least nineteen ditches and canals taking water from said creek for the use and sustenance of the people and lands under said ditches; that some of said ditches are ancient ditches built when Salt Lake Valley was being first settled and others of said ditches are surplus ditches;

That all the waters of said creek, both primary water and surplus water, were fully and completely taken and appropriated by said ditches <sup>in said city</sup> long prior to the year 1907, and all the waters of said creek, both primary and surplus, were taken, appropriated and used by said lands and ditches for the irrigation of the lands under said ditches and for the domestic and culinary uses of the people living under said ditches;

9. That from ancient times the owners of said canals and ditches in dividing and apportioning said creek reckoned and apportioned the waters thereof in terms of sixtieths; that is, the entire flow of said creek was deemed to consist of sixty parts and to each ditch was given a certain number of sixtieths or fractions of a sixtieth;

10. That continuously for more than forty years prior to the year 1907 the Hill Ditch, the Big Ditch and the Lower Canal had all taken and used water both primary and surplus from said creek at all seasons for the irrigation of lands beneath said ditches and for the domestic and culinary uses of the people living below said ditches and for the watering of all kinds of cattle and stock;

11. That said three ditches each appropriated, took and used and owned the following amounts of water from said creek, to-wit:

During the irrigation season, which is from about April 1st until October 1st of each year, and when the flow of said creek is more than 120 cubic feet per second and does not exceed 351-1/2 cubic feet per second:

Lower Canal	- - - - -	5.12	sixtieths
Big Ditch	- - - - -	10.23	"
Hill Ditch	- - - - -	1.21	"

And when the flow of said water in said creek in the irrigation season does not exceed 120 second feet:

Lower Canal	- - - - -	5.8	sixtieths
Big Ditch	- - - - -	17.1	"
Hill Ditch	- - - - -	2.13	"

And during the non-irrigation season, that is, from October 1st to April 1st of each year when the flow of said creek is 50 second feet or less:

Lower Canal	- - - - -	5.34	sixtieths
Big Ditch	- - - - -	15.75	"
Hill Ditch	- - - - -	1.96	"

That the Big Ditch Irrigation Company is and for many years has been a corporation, to-wit, an irrigation company owning and operating the said Big Ditch;

That the Big Cottonwood Lower Canal Company is and for many years has been a corporation, to wit, an irrigation company, owning and operating the said Lower Canal;

That the Hill Ditch at all times herein mentioned was owned and operated by numerous persons jointly;

12. That in June 1906, Salt Lake City made separate contracts with said Big Ditch Irrigation Company, said Big Cottonwood Lower Canal Company and the said owners of the Hill Ditch, wherein and whereby it exchanged canal waters from Utah Lake with each of said ditches for the waters of Big Cottonwood Creek with agreements therein permitting said City to take said Big Cottonwood water out of said ditches and to divert it into said city conduit; that in addition to the above waters in said Big Cottonwood Creek said City also owned and had the right to take into its conduit by appropriation made for that purpose and allowed by the State Engineer on October 21, 1908, forty-eight and 8/100 second feet of surplus water during the non-irrigation season;

13. That in February, 1907, said Progress Company the defendant herein, brought an action against Salt Lake City and each and every other owner of or claimant of water in said Big Cottonwood Creek in the District Court of Salt Lake County, State of Utah, to have all the various water rights and claims to water rights determined and adjudicated; that said city and all said owners of water appeared in said action and made answer and issue therein; that said action was tried in 1908; that on the 13th day of April, 1914, said court duly made and gave judgment in said action;

That in addition to the waters of the Big Ditch, the Lower Canal and the Hill Ditch <sup>and said appropriation</sup> said City also then owned and still owns the right to store, conserve and use in its conduit 120 second feet of surplus water in reservoirs at the head of and near the head of Big Cottonwood Canyon known as Twin Lake Gulch reservoir, and

Lake Mary, Lake Martha, Lake Phoebe and Dog Lake reservoirs, and to flow the same down said Big Cottonwood Creek into its reservoir at the mouth of said Canyon and take the same into said conduit to said city;

That said city answered in said action and therein set up and claimed all its said rights above described in and to the waters of said creek and said reservoirs at the head of said creek;

14. That said court having tried said action and having heard and considered the evidence therein on April 13, 1914, duly made, gave and filed its findings of facts, conclusions of law and decree in said action;

15. That in and by said findings, conclusions and decree said court covered, considered and disposed of and adjudicated all the waters, water rights, equities and interests in said Big Cottonwood Creek and tributaries thereto and reservoirs at the head of said creek;

That in said findings said court finds that long prior to the commencement of said action all the waters of said creek except possibly some water therein in periods of extremely high flow had been appropriated by the parties to said action and their predecessors;

That said court in said action and in said decree further found, adjudged and decreed that Salt Lake City by and under its contracts of exchange with said Big Ditch Company, said Lower Canal Company and said Hill Ditch owners, owned, held and had the right to take and divert into its conduit and conduct to Salt Lake City all the water set forth and described in paragraphs Nos. 11 and 12 <sup>and 13</sup> hereof; save and except a limitation was placed upon the amount of Hill Ditch water said conduit could take in this manner; that said city was not allowed or given the right to take into its conduit any part of the waters of said creek arising in the bed of

said creek below the Big Ditch Dam;

That said court in said action and decree further adjudged and decreed that said Salt Lake City owned and was entitled to have and to take into its said conduit and conduct to said City 48.8 second feet of the surplus waters of said Big Cottonwood Creek whenever in the non-irrigation<sup>season</sup>/of each year there is water in said creek in excess of the waters awarded to other parties by said decree; said right being the said appropriation of said city allowed by the State Engineer of Utah October 21, 1908.

14. That on or about September 15, 1909, while said action was pending and before said action was decided, the defendant herein made and filed with the State Engineer of Utah an application, No. 2692, to appropriate 100 second feet of water from said Big Cottonwood Creek for power purposes, wherein and whereby it asked said State Engineer to give it authority and permission to divert and take from said Creek at a point 874.5 North and 1056 feet East from the center of Section 25, Township 2 South, Range 1 East, Salt Lake Base and Meridian, in Salt Lake County, Utah, one hundred second feet of water from January 1st to December 1st of each year and to conduct the same by means of a pipe sixty inches in diameter a distance of 7700 feet to a point 320 feet below said point of diversion and there to use said water on water wheels to develop power and to return said water to said creek after said use at a point 66 feet east of section 23, same township and range in said Salt Lake County;

15. That said Engineer in February and March, 1910, published notice of said application, which publication was completed March 21, 1910, and said Salt Lake City within thirty days therefrom, to wit, on April 20, 1910, filed its protest against said application with said State Engineer;

That thereafter, towit, on October 23, 1911, said State Engineer denied said protest and allowed said application;

That within sixty days after said State Engineer allowed said application, towit, on December 21, 1911, said Salt Lake City began this action and notified said State Engineer of the same immediately thereafter;

16. That the point at which said defendant intends and seeks to appropriate said water and describes in his application is above the intake of the said city conduit and the point at which it discharges said water upon its wheels is below the intake of said city conduit, and said application, if allowed, would permit the defendant to take all the water in said creek during a greater portion of the year and leave plaintiff's conduit dry and useless and rob the people of said city of water;

That there was no surplus water or any water at said point for said defendant to take or appropriate at the time said application was made and filed or at any time since then;

That the rights of said city to take the waters of said Big Ditch, said Lower Canal and said Hill Ditch, and the said 48.8 second feet of surplus water by it appropriated and the waters by it appropriated for storage and use in said reservoirs at the head of said creek which rights are all set forth, described and confirmed in said judgment above mentioned, are all prior to and paramount to the alleged appropriation of defendant, and said rights leave nothing in said creek at said point for defendant to take or appropriate.

WHEREFORE plaintiff prays that the order of said State Engineer allowing said application of said defendant be revoked and annulled, and that it be adjudged and decreed that said applicant take nothing and that said city is the owner of all the rights it herein sets forth and for costs and all proper relief.

H. H. Brown  
of Counsel.

H. J. Anderson, Hans Kasper  
& W. B. Johnson  
Attorneys for Plaintiff.

STATE OF UTAH, )  
County of Salt Lake. ) SS.

H. J. Dininny being duly sworn, says: That he is an officer of Salt Lake City, the plaintiff in the above entitled action, towit, its City Attorney; that he has read the foregoing complaint, and knows the contents thereof, and the same is true of his own knowledge, except as to matters therein stated on information and belief, and as to those matters he believes it to be true.

H. J. Dininny

Subscribed and sworn to before me this  
23<sup>rd</sup> day of July, 1914.

W. T. Smith  
Notary Public.

My commission expires

Dec 22<sup>nd</sup> 1917