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RECORDER, SALT LAKE COUNTY, UTAH

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FILED DISTRICT COURT
Third Judicial District

APR 17 2014

SALT LAKE COUNTY

By _____ Deputy Clerk

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT
IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

**KENNETH KEMP, KRISTY KEMP,
EDWARD L. BROWN and MARALINE
BROWN,**

Plaintiffs,

vs.

UTAH AND SALT LAKE CANAL COMPANY,

Defendant.

MEMORANDUM DECISION AND ORDER

CASE NO. 130905932

Judge Robert P. Faust

The above-entitled matter came before the Court for a one day trial on March 27, 2014. This expedited trial date was set by agreement between the parties, due to desiring a determination by the Court on the various issues involving the easement before spring water flows placed water into the canal.

Alison D. Bond represented Plaintiffs and Counterclaim Defendants, and Paul D. Veasy represented Defendant and Counterclaim Plaintiff.

Prior to trial, the parties agreed and stipulated to certain matters which the Court accepted and entered as a ruling in this matter.

The Court has made a determination Defendant Utah and Salt Lake Canal Company has an easement over Plaintiffs' real property. Pursuant to Defendant's agreement its easement is limited and confined to the width of 12 feet from the westerly or southerly top bank of the canal and 20 feet from the easterly or northerly top bank of the canal, pursuant to the Notice of Easement the Utah and Salt Lake Canal Company recorded on February 5, 2010 in Entry No. 10892664, in Book 9802, pages 174-278 in the official records of the Salt Lake County Recorder.

Further, the parties agreed the easement rights owned by Defendant Utah and Salt Lake Canal Company include the right to operate, clean, maintain and repair the canal, including raising and stabilizing the canal banks, and to modernize the canal by cementing it or by using some other water-saving method.

Further, the Court determined and ordered Defendant was entitled to go upon the Plaintiffs' property to effectuate such repairs and maintenance, including for any needed emergency repairs in anticipation of spring flows in the canal.

The agreement between the parties removes a portion of Plaintiffs' Second Cause of Action for Declaratory Relief that the 20 feet on the northerly bank exceeds the prescriptive easement rights belonging to Defendant.

At trial, Plaintiffs' Third Cause of Action for Invasion and Loss of Privacy and the Fourth Cause of Action for Trespass and Nuisance were dismissed by the Court after Plaintiff rested its case.

The remaining issue for the Court's determination is if Defendant's prescriptive easement rights entitle it to build a maintenance road over Plaintiffs' property along the north side of the canal or if this road would be a new and additional burden upon Plaintiffs' property and therefore not permitted under the easement owned by Defendant.

I. FINDINGS OF FACT

Parties

1. Plaintiffs Kenneth and Kristy Kemp ("Kemps"), are married and reside at 4180 South 5400 West, West Valley City, Salt Lake County, Utah.

2. Plaintiffs Edward L. and Marlene Brown (“Browns”), are married and reside at 4166 South 5400 West, West Valley City, Salt Lake County, Utah.

3. Kemps and Browns are neighbors with adjoining properties and a canal owned by Defendant is located on the south side of Plaintiffs’ property.

4. Defendant Utah and Salt Lake Canal Company is a Utah non-profit corporation doing business in Salt Lake County.

Background

The Canal Company

5. Since 1880, the Canal Company has been the owner of an approximately twenty-seven (27) mile irrigation canal located in Salt Lake County known as the Utah and Salt Lake Canal, including that portion of the canal which is adjacent to the properties owned by Kemps and Browns. See Exhibit 14, *Salt Lake City v. Salt Lake City Water and Electric Power Company, et al.*, Consolidated Case No. 2861 in the Third Judicial District Court, State of Utah (the “1901 Morse Decree”).

6. By no later than 1882, water was diverted into and flowed through the Utah and Salt Lake Canal from the Jordan River in Salt Lake County, under water rights owned by the Canal Company and its shareholders for the beneficial use on properties owned and controlled by the Canal Company and its shareholders. See Exhibit 14.

7. Since 1882, and for more than twenty (20) years continuously, Utah and Salt Lake Canal Company has owned, operated, used openly, visibly and notoriously and adversely to the Kemps and Browns and their predecessors-in-interest used the Utah and Salt Lake Canal to receive and transport its water.

8. The Canal Company is bound by written agreement dated May 27, 1992 with Salt Lake County to use its existing canals and rights-of-way to carry storm run-off and flood waters (“Storm Drainage Agreement”) as part of the county storm drainage and flood control system and subject to the provisions relating to such facilities under Utah Code Ann. § 17-8-5.5 and Salt Lake County Code of Ordinances § 17.08.040. See Exhibit 20.

Plaintiffs and Their Predecessor

9. On March 8 and 16, 1893, the Department of Interior conveyed public lands to the Utah territory to set aside for schools, including for “University Selections.” The public lands included the Plaintiffs’ current properties.

10. In 1896, Utah was admitted to statehood.

11. On September 24, 1901, the State of Utah issued a Patent to Edward Rushton, the predecessor owner of the Plaintiffs’ properties. The 1901 Patent states it is subject to any easement or right-of-way of the public, to use all such highways as may have been established according to law. The Patent was recorded on November 23, 1909, in Book 5-U of Deeds, pages 396-7 in the Salt Lake County Recorder’s office. See Exhibit 18.

12. In 1918, Edward Rushton and Caroline Rushton, his wife, conveyed via Warranty Deed to Edward F. Rushton 10 and 40 acres of the original 160 acres, which contained the properties currently owned by Plaintiffs. The 1918 Warranty Deed does not mention any easements or rights-of-way. See Exhibit 3.

13. In 1944 Edward F. Rushton divided his 40 acres and conveyed to Rulon D. and Lucile Rushton via Warranty Deed a smaller parcel containing the properties currently owned by Plaintiffs and

bounded on the southern end by the center of the Canal. The 1944 Warranty Deed does not mention any easements or rights-of-way for the Canal. See Exhibit 4.

14. In 1975 Rulon D. Rushton divided his property into two parcels and via Warranty Deeds deeded one parcel to Marion Rushton Johnson and the other parcel to Plaintiff Kristie Kemp (aka Kristie Kae Brown Kemp). The 1975 Johnson Warranty Deed identifies the southern property line as the center of the Canal and is silent as to any easements or rights-of-way. The 1975 Brown Kemp Warranty Deed identifies the southern property line as the center of the Canal and is silent as to any easements or rights-of-way. See Exhibits 5 & 6.

15. On May 23, 1988 and June 3, 1994, Plaintiffs Edward L. Brown and Marlene Brown became the owners of parcels of property located at 4166 South 5400 West, West Valley City, Utah, under a Warranty Deed and a Quit Claim Deed. As stated in the 1988 Warranty Deed, the Browns obtained ownership of the property subject to current general taxes, easements, restrictions and rights-of-way of record. The 1988 Warranty Deed was recorded on May 25, 1988, as Entry No. 4628502, in Book 6032, at pages 507-508 of the official records of the Salt Lake County Recorder. The 1994 Quit Claim Deed was recorded on June 16, 1994, as Entry No. 5852103, in Book 6963, at pages 1063-1064 of the official records of the Salt Lake County Recorder. See Exhibits 7 & 8.

16. The Browns' property is adjacent to and abuts the northern side of the Utah and Salt Lake Canal owned and operated by the Canal Company.

17. In 1989, Plaintiff Edward L. Brown ("Plaintiff Brown") constructed on the Browns' property a cement wall on the north canal bank running parallel to the canal. In 1992 or 1993, Plaintiff Brown constructed on the Browns' property a wall perpendicular to the cement wall. Then in either 1996

or 1997, Plaintiff Brown constructed on the Browns' property a chain link fence on the north canal bank commencing at the end of the cement wall and going west across the Browns' property (collectively hereafter "structures").

18. On or about April 23, 1976 Plaintiff Kristy Kemp became the owner of property located at 4180 South 5400 West, West Valley City, Utah, under a Warranty Deed signed May 6, 1975, which was recorded on April 23, 1976, as Entry No. 2807901, in Book 4178, at page 200 of the official records of the Salt Lake County Recorder. See Exhibit 6.

19. Under a May 18, 1976 Warranty Deed, the Kemps obtained ownership of the property "... thence South to the North line of the Utah and Salt Lake Canal Right of Way;" The May 18, 1976 Warranty Deed was recorded on May 18, 1976, as Entry No. 2815458, in Book 4202, at page 498 of the official records of the Salt Lake County Recorder.

20. On April 13, 1996, the Kemps executed a Warranty Deed to "Kenneth Ray Kemp and Kristy Kae Kemp, his wife, as joint tenants with full rights of survivorship." Under the April 13, 1996 Warranty Deed, the Kemps' property included ". . . thence South to the North line of the Utah & Salt Lake Canal right of way;" The April 13, 1996 Warranty Deed was recorded on April 24, 1996, as Entry No. 6339597, in Book 7383, at page 1343 of the official records of the Salt Lake County Recorder. See Exhibit 21.

21. On January 10, 2003, the Kemps executed a Warranty Deed to "Kristy K Kemp and Kenneth R Kemp". Under the legal description in Schedule A to the Warranty Deed, the Kemps obtained the property "... thence South to the North line of the Utah and Salt Lake Canal right of way;" The

January 10, 2003 Warranty Deed was recorded on January 15, 2003, as Entry No. 8495304, in Book 8721, at page 5180 of the official records of the Salt Lake County Recorder. See Exhibit 22.

22. The Kemps' property is adjacent to and abuts the northern side of the Utah and Salt Lake Canal owned and operated by the Canal Company.

23. In 1982, Plaintiff Brown constructed on Kemp's property a driveway approximately 20 feet from the north top edge of the canal channel. In 1994, Plaintiff Brown constructed on Kemps' property a metal gate/fence crossing the drive 113 feet west of 5400 West. In 1998, Plaintiff Brown constructed on Kemps' property a chain link fence from the metal gate down to the canal water (collectively hereinafter "structures").

Service/Maintenance Road

24. Since 1882 there is no evidence of the existence of a service or maintenance road for Defendant's use on the north bank between 5400 West and 5600 West. The Canal Company built and maintains a road along the southern bank of the canal between 5400 West and 5600 West.

25. The Canal Company never has had an operation and maintenance road along the northern bank of the canal through the Plaintiffs' properties since the service or maintenance road is and always has been on the south bank. Defendant continues to be able to use the southern bank maintenance road despite the use of the road as the County walking trail.

26. Within the last few months, Defendant has started work on the north banks of the canal between 5400 West and 5600 West, starting from 5600 West and going to the Plaintiffs' property lines. This work includes a preliminary maintenance road.

27. There is a weir on the north bank of the canal to the west of the Plaintiffs' properties and the Canal Company intends to install a new weir which can be accessed from 5600 West on the preliminary maintenance road, but Defendant wants the road to extend through Plaintiffs' properties so any cement trucks which may deliver cement for the new weir will not have to back up on the preliminary maintenance road. Defendant admitted a new weir would last up to thirty years and cement trucks would not be needed again, unless there was a need for a repair.

Salt Lake County – 2005 Flood Control Permit

28. On October 26, 2004, Salt Lake County Public Works Engineering sent a letter by certified mail to the Browns stating, among other things, that with construction of their cement wall they were in violation of Chapter 17.08 of the Salt Lake County Code of Ordinances. The letter states, in part:

A recent inspection by Salt Lake County Personnel indicates that a wall has been constructed which is causing interference with County Flood Control access and maintenance of the Utah & Salt Lake Irrigation Canal. The wall was improperly constructed and the footings are being undermined. Furthermore, a project has been proposed which will require raising the banks of the canal between 5400 West and 5600 West, in order to avoid future flooding.

You may apply for a Salt Lake County Flood Control Permit in order to install gates at the eastern and western ends of this wall so that the banks can be raised, or you may remove or relocate the wall to a point which is twenty feet back from the top of the canal bank. I have enclosed necessary application forms and documents for your use. Please contact Chris Springer at 468-2779 if you have any questions and to begin the application process.

See Exhibit 11.

29. In early 2005, the issue of the northern canal bank between 5400 West and 5600 West being stabilized and maintained, including raising the height of the northern canal bank, was discussed between the Canal Company and Plaintiffs.

30. On March 17, 2005, Salt Lake County approved a Flood Control Permit, Use of Right-of-Way, Right of Entry or Installation of Structures ("Flood Control Permit") entered into by the Browns, Salt Lake County and the Canal Company. See Exhibit 9. The Browns agreed to the terms of the Flood Control Permit.

31. The Flood Control Permit states on page one, "To install two gates for purpose of flood control access at east and west end of property on easements of north side of Utah S.L. Canal" and states on page two "Subject to Canal Company Requirements. Drawings of Gate installation required." See Exhibit 9.

32. Plaintiff Kenneth Kemp prepared the map on page 3 of the Flood Control Permit including his handwriting containing the words "existing drive" and "proposed new gate." See Exhibit 9. The measurements on the map are not in his handwriting. The map measurements state 18 feet at the top of the "existing drive" off of 5400 West, an existing gate (the metal gate) measuring 15 feet 8 inches, an existing 3 foot 2 inch gate and a proposed new gate measuring 15 feet 4 inches. See Exhibit 9.

33. Initially, Plaintiff Brown did not construct the proposed new gate. On December 10, 2013, the Salt Lake County District Attorney's office sent a letter to the Browns stating Salt Lake County's intent to revoke the Flood Control Permit on January 10, 2014, unless the Browns complete construction of the gates as described in the permit. See Exhibit 28.

34. In response to the December 10, 2013 letter, the Browns removed the perpendicular wall and two gates have now been installed allowing access over Plaintiffs' property.

Canal Company's Recorded Notice of Easement

35. On February 5, 2010, the Canal Company caused to be recorded a Notice of Easement reflecting what it believed its easement to be pursuant to Utah Code Ann. § 57-13a-102. The Notice of Easement was recorded as Entry No. 10892664, in Book 9802, Pages 174-278 of the official records of the Salt Lake County Recorder. See Exhibit 10.

36. As part of the Notice of Easement and at the location of the properties owned by the Kemps and Browns, it states:

A CANAL EASEMENT BEING 12 FEET PERPENDICULARLY
DISTANT FROM THE WESTERLY OR SOUTHERLY TOP BANK
OF THE CANAL AND PARALLEL TO AND 20 FEET
PERPENDICULARLY DISTANT FROM THE EASTERLY OR
NORTHERLY TOP BANK OF THE CANAL, THE OUTER LIMITS
OF WHICH BEING DESCRIBED AS FOLLOWS. . . .

See Exhibit 10.

Utah and Salt Lake Canal letter

37. On August 28, 2012, the Canal Company sent a letter to all property owners between 4800 West to 5600 West in West Valley City stating, in part, the Utah & Salt Lake Canal Company, in partnership with Salt Lake County, was planning to make improvements to the canal corridor from 4800 West to 5600 West which would include installation of a maintenance road along the north canal bank and clearing debris, fences, and structures from the bank, raising the elevation, and fortifying the bank and improvement of the south canal bank for use as a multi-purpose community trail. See Exhibit 12.

38. In response to the August 28, 2012 letter, the Kemps and Browns initially disputed the Canal Company's improvements to the north canal bank and refused to remove their structures which interfere with the Canal Company's use, operation and maintenance of the Utah and Salt Lake Canal. Currently, the only improvement being opposed is the building of a maintenance road on the north bank.

39. The Canal Company is of the opinion the condition of the north bank of the Canal Company between 5400 West and 5600 West is at risk of potential failure due to piping, which is water traveling through the dead roots of trees which act as conduits.

40. The banks of the canal require clearing, repair and monitoring to maintain a safe and reliable canal.

41. The Canal Company, as justification for its desire to relocate the operation and maintenance road to the north side of the canal is it would: (1) provide for vehicular access for maintenance, repair or reconstruction of the north embankment now and in the future, (2) provide a wider embankment top width and therefore decrease the potential for piping failures, and (3) allow the Canal Company to visually inspect by car the downslope side of the embankment during regular inspections.

42. On May 28, 2013, the Canal Company's counsel sent a letter to Plaintiff Kenneth Kemp and Plaintiff Brown stating, "that beginning next fall when water is taken out of the Canal, the Company and/or Salt Lake County will commence construction to raise the bank to contain storm augmented canal water and maintain the Canal integrity," and asked if any structures, fences or other impediments that were in the easement be removed before construction began. See Exhibit 26.

43. On September 6, 2013, Plaintiffs filed their lawsuit.

44. The new road proposed across Plaintiffs' properties will come within several feet of Plaintiffs' buildings and will take approximately half of Plaintiffs' backyard. See Exhibit 13.

II. CASE LAW

In addressing the asserted claim of Defendant that it is entitled to make a new road on Plaintiffs' properties along the north bank of the canal where a road has never existed, the Court sets forth the case law with emphasis added.

A.

First, *North Union Canal Co. v. Newell*, 550 P.2d 178, 179 (1976), held:

Whenever there is ownership of property subject to an easement there is a dichotomy of interests, both of which must be respected and kept in balance. On the one hand, it is to be realized that the owner of the fee title, because of his general ownership, should have the use and enjoyment of his property to the highest degree possible, not inconsistent with the easement. On the other, the owner of the easement should likewise have the right to use and enjoy his easement to the fullest extent possible not inconsistent with the rights of the fee owner.

In *Nyman v. Anchor Development, L.L.C.*, 73 P.3d 357, 362 (Utah 2003), the Utah Supreme Court held: "A prescriptive easement is created when the party claiming the prescriptive easement can prove that 'use of another's land was open, continuous, and adverse under a claim of right for a period of twenty years.'" *Orton v. Carter*, 970 P.2d 1254, 1258 (Utah 1988). Here, the term "*use*" *implies an inherent distinction in the property rights conferred by an easement, on the one hand, and outright ownership, on the other. "A prescriptive easement does not result in ownership, but allows only use of property belonging to another for a limited purpose."* *Marchant v. Park City*, 771 P.2d 677, 681 (Utah Ct. App. 1989), *aff'd*, 788 P.2d 520 (Utah 1990). Thus, we have previously observed that:

Whenever there is ownership of property subject to an easement there is a dichotomy of interests, both of which must be respected and kept in balance. On the one hand, it is to be realized that the owner of the fee title, because of his general ownership, should have the use and enjoyment of his property to the highest degree possible, not inconsistent with the easement. On the other, the owner of the easement should likewise have the right to use and enjoy his easement to the fullest extent possible not inconsistent with the rights of the fee owner.

North Union Canal Co. v. Newell, 550 P.2d 178, 179 (Utah 1976). *Maintaining such a balance between the rights of the fee title owner and a purported easement holder becomes impossible where the latter asserts a right to permanent exclusive occupancy of the fee title owner's land.*

B.

Second, the determination of the extent of easement rights has to be made through a determination of the use of the easement during the prescriptive time period. In *McBride v. McBride*, 581 P.2d 996, 997 (1978), the Court held:

It has long been the law of this jurisdiction, and elsewhere that *the extent of an easement acquired by prescription is measured and limited by the use made during the prescriptive period*. It is also generally accepted that the owner of the servient estate may use his property in any manner and for any purpose consistent with the rights of the owner of the dominant estate. On the other hand, while the owner of the dominant estate may enjoy to the fullest extent the rights conferred by his easement, *he may not alter its character so as to further burden or increase the restriction upon the servient estate*.

In *Big Cottonwood Tanner Ditch Co. v. Moyle*, 174 P.2d 148 (1946) the Supreme Court stated:

Under the common law in England the doctrine of acquiring a right by prescription presumed a grant, the title papers of which had been lost. To ascertain the terms of the grant, *the law looked to the nature of the use during the prescriptive period*.

While the principle is somewhat the same, *this taking away of the benefits should be distinguished from those cases in which the owner of the easement attempts to make changes thereon which will increase the burden on the land. The former takes away a benefit which accrues as an incident to the use of the easement; the latter imposes additional burdens.*

As stated previously in this opinion, *the extent of an easement acquired by prescription is measured and limited by the use made during the prescriptive period. Nielson v. Sandberg*, 105 Utah 93, 141 P.2d 696; *Robins v. Roberts*, 80 Utah 409, 15 P.2d 340; *Stephens Ranch & Live Stock Co. v. Union Pac. R. Co.*, 48 Utah 528, 161 P. 459; *Hannah v. Pogue*, 23 Cal.2d 849, 147 P.2d 572; 28C.J.S., Easements, § 95C.

Though the right to improve the ditches in the interests of water conservation is within the easement the irrigation company has across defendants' land it does not follow the company can exercise that right in any manner it sees fit.

The rights of the dominant owner are limited by the rights of the servient owner. Pioneer Irrigation District v. Smith, 48 Idaho 734, 285 P. 474. *Each owner must exercise his rights so as not unreasonably to interfere with the other.* In *Olcott v. Thompson*, 59 N.H. 154, 47 Am.Rep. 184, speaking of a prescriptive easement of an aqueduct privilege, the court said: *'There is no presumed grant of a right to exercise the easement in an unnecessary and unreasonable manner. The right of the easement owner and the right of the land-owner are not absolute, irrelative, and uncontrolled, but are so limited, each by the other, that there may be a due and reasonable enjoyment of both.* The forms and materials of the reservoir cover and water pipes are restricted, not by those heretofore used, but by the reasonable necessity of the case. The substance of the easement is shown by the usage; but the form of the cover is a question of reasonable necessity. *And in determining that question, the rights of the defendant, as the owner of the land, are to be considered, as well as the rights of the owners of the easement. He cannot compel them to adopt a form unreasonably inconvenient; and they cannot compel him to submit to the disfigurement of his grounds by a structure unreasonably unsightly and repulsive.'*

See *Bowman v. Bradley*, 127 Or. 45, 270 P. 919, and *Knudson v. Frost*, 56 Colo. 530, 139 P. 533. In *Jenkins v. Depoyster*, 299 Ky. 500, 186 S.W.2d 14, 15, the court, speaking of the easement the mineral rights owner had over the surface said:

"The right to construct and operate proper and necessary facilities for transportation is a part of the severed property. There is, of course, the correlative right of the owner of the

surface to use and deal with his estate in any legitimate manner not inconsistent with the rights acquired by the owner of the minerals. *The owners must have due regard for each other and should exercise that degree of care and use which a just consideration for the rights of the other demands.* * * *

“It is elementary that the use of an easement must be as reasonable and as little burdensome to the servient estate as the nature of the easement and its purpose will permit.” (Italics added.)

The servient owner is the owner of the fee and as such has all the rights of an owner of the fee subject only to the reasonable use of the easement. Nielson v. Sandberg, 105 Utah 93, 141 P.2d 696; Olcott v. Thompson, supra; Dyer v. Compere, 41 N.M. 716, 73 P.2d 1356; Pioneer Irr. District v. Smith, supra, 48 Idaho 734, 285 P. at page 475; Hotchkiss v. Young, 42 Or. 446, 71 P. 324; 17 Am.Jur. 993, Easements, § 96.

What is a reasonable manner for the company to improve a particular ditch is a question of fact to be decided after considering the location of the ditch, the type and use of the property through which it flows, the amount of water it carries, the relative cost of the possible methods of waterproofing and all other facts and circumstances bearing on the question.

C.

Third, the Court must determine as the fact finder if the improvements to be performed are unreasonable or if they materially alter the burden on the servient estate. Further, in doing so, the Court considers (1) the increased impact on the property resulting from the construction or other activity, (2) the locating of the road, and (3) “all other facts and circumstances bearing” on the issue.

III. DISCUSSION

Initially, Defendant claimed an easement in two ways, first through the 1866 Mining Act and, second, by a prescriptive easement. The Court ruled on March 19, 2014 Defendant has an easement across Plaintiffs' properties with a width of 20 feet from the top of the north bank and 12 feet from the top of the south bank at this location. Further, the Court determined Defendant's easement rights included the rights to repair, operate, clean or maintain the canal and modernize it with a cement liner or other type of water-saving liner. Furthermore, at the hearing on Summary Judgment, both parties agreed to the above easement and rights.

A. 1866 Mining Act

The Court does not need to make any determination regarding a 50 ft wide easement based upon the 1866 Mining Act and by local laws and customs, since an easement of this width has been effectively withdrawn by Defendant's agreement and also by Defendant voluntarily reducing it by Defendant's own Notice of Easement it filed and recorded limiting its easement width. Further, the 1866 Mining Act provides for the same rights of repair, access and maintenance of the canal which has already been determined in Defendant's favor. Also, the 1866 Mining Act would not establish or determine if Defendant's easement rights permit it to build a roadway across Plaintiffs' property because there is no written basis for such in the Mining Act. Further, since there is no other written easement agreement between the parties or their predecessors regarding an easement, the Court must make the determination of the extent of easement rights through a determination of the use of the easement during the prescriptive time period.

Prescriptive Easement

The Canal Company has continuously operated, maintained, cleaned, replaced and improved the Utah and Salt Lake Canal to receive its water which it provides to its shareholders by diverting water through the canal. The Canal Company has operated this canal without interruption since its inception in 1882. The Canal Company's use of the Utah and Salt Lake Canal on Plaintiffs' properties has been adverse, continuous for at least twenty years, and open and notorious. As mentioned above, Defendant Utah and Salt Lake Canal was awarded Judgment for an easement of 20 feet from the north bank and 12 feet from the top of the south bank of the canal between 5400 West and 5600 West, Salt Lake City, Utah, and its undisputed rights include the right to repair, operate, clean or maintain the canal and modernize it with a cement liner or other type of water-saving liner.

**Determination of easement rights by a determination of the
use of the easement during the prescriptive time period**

A prescriptive easement allows the owner of a canal the rights of lateral support and to use, maintain, clean and repair its canal, including access to do so along the banks of the canal. *Salt Lake City v. J.B. & R.E. Walker, Inc.*, 253 P.2d 365, 369 (Utah 1953). This access includes the right to go upon the land with animals, vehicles and machinery that may be reasonably necessary for such purpose and to use the adjacent soil for the purpose if the repairs cannot be made in any other way. *Id.* Further, Utah Code Ann. § 73-1-8 (2007), requires the Canal Company to maintain the Canal to prevent waste of water or damage to the property of others.

The parties do not dispute the north bank of the canal between 5400 West and 5600 West is in need of reconstruction. While Defendant is building up the north banks of the canal, it wants to build a maintenance or service road along the north bank. Defendant provides several reasons for wanting a

service road on the north bank which are: (1) provide for vehicular access for maintenance, repair or reconstruction of the north embankment now and in the future, (2) provide a wider embankment top width and therefore decrease the potential for piping failures, and (3) allow the Canal Company to visually inspect by car the downslope side of the embankment during regular inspections. See Findings No. 41.

Plaintiffs agree Defendants should not be and will not be restricted in exercising their easements rights as they always have done in repairing, maintaining and operating the canal, including using the road on the south side for inspections, maintenance and repairs. Further, Plaintiffs have installed gates in locations which were previously blocked by walls and fences, which gates now provide Defendants access across their properties with vehicles, machinery and equipment to build up the north bank and perform the repairs and maintenance of the canal from the north bank.

Plaintiffs object to Defendant's building a permanent service road where none has existed for 130 years. Plaintiffs maintain the service road would change the nature of the easement which has been established between the parties and increases the burden on their land.

To resolve this issue, the Court must determine the easement rights by a determination of the use of the easement during the prescriptive time period and consider (1) the increased impact on the property resulting from the road, its construction or other activity resulting therefrom, (2) the location of the road on the easement, and (3) "all other facts and circumstances bearing" on the issue.

The evidence presented at trial regarding the use of this easement during its prescriptive time period and from that time until the present time was that the Canal Company has never had a road on the north bank, but rather it established and located a service road on the south bank of the canal which it has used for needed repairs, operations, maintenance and observations of the canal on that side. Further, the

Canal Company has accessed the north bank by walking thereon and performed maintenance, including the removal of trees, bushes, etc. What is clear is that there has never been any type of road along or atop the north bank of the canal at this location. At trial, further evidence was given that at the present time for much of its entire length, a service road runs along the north bank of the canal and at other locations along the canal, the service road runs along the south bank of the canal, as it does in this location.

The Court determines the use of the easement by the Canal Company during the prescriptive time period includes the use of a road along the south bank at this location. The Court determines the use of the easement during the prescriptive time period did not establish use of a road of any kind on the north bank at this location and across Plaintiffs properties. Further, the Court determines the use of the easement during the prescriptive time period did not establish a right to change the location of its access, repair and maintenance road from the south bank where Defendant has always been doing its repairs and maintenance.

As the law states above, Plaintiffs should have the use and enjoyment of their property to the highest degree possible, not inconsistent with the easement and the Canal Company, as the owner of the easement should likewise have the right to use and enjoy its easement to the fullest extent possible not inconsistent with the rights of the Plaintiffs as fee owners.

Again as stated above, "It is elementary that the use of an easement must be as reasonable and *as little burdensome to the servient estate as the nature of the easement and its purpose will permit.*" The servient owner is the owner of the fee and as such has all the rights of an owner of the fee subject only to the reasonable use of the easement.

Plaintiffs are not limiting or restricting any reasonable use by Defendant of its easement rights to repair, operate, clean or maintain the canal, and with the installation of gates, Plaintiffs are clearly providing access on their property for Defendants to exercise its easement rights to repair, clean and maintain the canal with vehicles, equipment and machines to do any needed repairs on the canal, including the current reconstruction of the north bank.

Placing a road through Plaintiffs' property and taking as much as one-half of the backyard which is used and enjoyed by the Plaintiffs does increase the burden upon the land that was not established previously by use during the prescriptive easement time period, or for that matter any other time thereafter. Plaintiffs have no need or use for the service road and the road is clearly not needed for Defendant to exercise its clearly established easement rights. Placing a road at this location would in effect convert the Defendant's easement rights into fee ownership of that land upon which the road is located. As set forth above, "A prescriptive easement does not result in ownership, but allows only use of property belonging to another for a limited purpose."

The Court cannot "maintain a balance between the rights of the fee title owner and a purported easement holder which becomes impossible where the latter asserts a right to permanent exclusive occupancy of the fee title owner's land, which a road essentially does by its very nature as far as use is concerned."

However, Defendant's request to build a road that has never been in existence at this location does not permit Plaintiffs, as owner of the fee title, to use and enjoyment of his property to the highest degree possible, not inconsistent with the easement. The Court determines a new service road will limit

Plaintiffs' use and enjoyment of their property to the highest degree possible and would be inconsistent with Defendant's easement rights at this location.

Reasonable Necessity

The law further provides an easement owner may not exercise its rights in any manner it sees fit.

The Utah Supreme Court in *Big Cottonwood Tanner Ditch Co. v. Moyle*, 174 P.2d 148 (1946), stated:

“The rights of the dominant owner are limited by the rights of the servient owner. *Pioneer Irrigation District v. Smith*, 48 Idaho 734, 285 P. 474. *Each owner must exercise his rights so as not unreasonably to interfere with the other.* In *Olcott v. Thompson*, 59 N.H. 154, 47 Am.Rep. 184, speaking of a prescriptive easement of an aqueduct privilege, the court said: “*There is no presumed grant of a right to exercise the easement in an unnecessary and unreasonable manner.* The right of the easement owner and the right of the land-owner are not absolute, irrelative, and uncontrolled, but are so limited, each by the other, that there may be a due and reasonable enjoyment of both. The forms and materials of the reservoir cover and water pipes are restricted, not by those heretofore used, but by the *reasonable necessity of the case.* And in determining that question, the rights of the defendant, as the owner of the land, are to be considered, as well as the rights of the owners of the easement. *He cannot compel them to adopt a form unreasonably inconvenient; and they cannot compel him to submit to the disfigurement of his grounds by a structure unreasonably unsightly and repulsive.*”

At page 159 in *Big Cottonwood*, the Court stated:

What is a reasonable manner for the company to improve a particular ditch is a question of fact to be decided after considering the location of the ditch, the type and use of the property through which it flows, the amount of water it carries, the relative cost of the possible methods of waterproofing and all other facts and circumstances bearing on the question.

It may be that the cheapest method for the company to improve its ditch would be an unreasonable method because it would unnecessarily injure the servient owner and it may

be that the equities of the case require a slight less efficient means of conservation in order to prevent unnecessary injury to the land owners.

The Court, in view of all facts and circumstances bearing on the question, concludes a new road on the north bank is unreasonable in this case. There is no question Defendant has the right to and can access the canal for repairs and maintenance. However, in view of the stated explanations by Defendant in wanting to build a second service road on the north bank in this two block section of the canal instead of just continuing to use its south service road, is unreasonable, even if Defendant wanted to stop using the south service road and let pedestrians and bicyclists use the same.

In addressing the three reasons given for the new road of (1) provide for vehicular access for maintenance, repair or reconstruction of the north embankment now and in the future, Plaintiffs have made their property open for vehicle access for the maintenance and repair of the canal and for the reconstruction of the north embankment and there is no limitation or restriction upon Defendant in exercising its full easement rights. (2) As far as providing a wider embankment top width and therefore decreasing the potential for piping failures, this wider embankment can still be built as the north bank is reconstructed and the Canal Company can at that time fill in the root locations of removed trees with material that prevents piping, as it testified it does at other locations when large trees are removed from the canal bank. (3) As to inspecting the downslope of the north canal bank from a car as they drive along the top of the canal bank does not warrant taking plaintiffs' property to make a second service road at this same location. Defendant can continue to do observations of the downslope of the north bank as it has always done.

As to additional arguments raised at trial for a new road, Defendant asserts if it constructs a road on the north bank at this location, it will let Salt Lake County utilize the south road for a pedestrian and bicycle pathway. However, this rationale does not justify the increased burden upon Plaintiffs' property rights. Plaintiffs should not have to bear the loss of use of their backyards and other property so the general public can have a pedestrian and bicycle pathway through an agreement between the Canal Company and Salt Lake County. Other explanations of having a service road on the north side were when a cement weir which is located to the west of Plaintiffs' property needs to be replaced and repaired (which already has a road to it), the cement truck delivering the cement (which is needed for the repairs which last up to 30 years) would be able after delivery of the cement, drive forward across what is now Plaintiffs' backyards straight through to the next street, rather than having to back up on the road it used to get to the weir. Again, this rationale does not justify the increased burden upon Plaintiffs' property rights.

Plaintiffs' Structures

As to the Plaintiffs' structures, including construction of the cement wall and other structures between 1989 and 1997, Plaintiffs have not established 20 years of adverse use to enable Plaintiffs to claim the Canal Company's easement has been extinguished by prescription. Plaintiffs' structures were not adverse to the Canal Company but were rather permissive use. Use is not adverse if the land is used merely under a neighborly accommodation as was this case. *See Green v. Stansfield*, 886 P.2d 117, 120 (Utah Ct. App. 1994).

Regarding the claims of abandonment and extinguishment by prescription, Plaintiffs have failed to sustain their burden of proof to show by clear and convincing evidence of intent by the Canal Company

to abandon its easement because non-use, alone, is insufficient evidence of intent to abandon, especially when use of the northern bank for repairs and maintenance had not arisen until August 2004. Plaintiffs have also failed to establish that the Canal Company's easement has been extinguished by prescription.

Since some of Plaintiffs' structures on their properties may interfere with the Canal Company's repair, use, operation and maintenance, including the Company's having proper access to address the condition of the northern bank of the canal, storm water runoff and potential flooding, the structures may be removed if such removal is needed for the repair of the canal and the building up of its banks and not just removed because they happen to be in the easement zone.

III. CONCLUSIONS OF LAW

1. This Court has jurisdiction over this action pursuant to Utah Code Ann. § 78A-5-102(1) (2010).
2. Venue before this Court is proper pursuant to Utah Code Ann. § 78B-3-301(1)(b) (2008).
3. Under the February 5, 2010 recorded Notice of Easement, the Canal Company's easement for the easterly or northerly top bank of the canal is now 20 feet. The 20 foot easement on the north side of the top of the canal bank is for the purpose of ingress to and egress from the canal adjacent to the Kemps' and Browns' properties and their successors in interest and to operate, clean, maintain and repair the canal, including raising and stabilizing the banks, and to modernize the canal by cementing it or by using some other water-saving method.
4. Defendant's installation of a service road on the north bank would grant Defendant a right that Defendant has not established heretofore during the prescriptive easement period or any time thereafter and would result in occupancy of Plaintiffs' properties contrary to the rights of the parties.

5. A permanent service road would cause Plaintiffs' properties, or a portion of their properties, to become restricted and unusable in a manner which has not heretofore been done as established by the parties prescriptive easement use and would result in an increased burden to their estate. The road at this new location is not a reasonable necessity.

6. Defendant's easement right is restricted to access in a manner that is reasonable and causes no unnecessary damage or increased burdens to Plaintiffs' property.

7. Defendant may continue to repair, maintain and operate the canal from the southern bank service road between 5400 West and 5600 West as it has done historically for 130 years, and also access on or through Plaintiffs' properties on the northern bank for the same purposes.

8. Plaintiffs are granted Judgment on their First Cause of Action for Burden to the Land and for their Cause of Action for Declaratory Judgment.

9. The Canal Company is granted Judgment on its First Claim for Relief for Quiet Title, on its Second Claim for Relief for Declaratory Judgment, on its Third Claim for Relief for Prescriptive Easement.

10. The Flood Control Permit is subject to the easement of the Canal Company, requirements of the Canal Company, the terms of the Flood Control Permit, including use of Plaintiffs' properties for access using the existing road and required gates.

11. Each party should pay their own attorney fees and costs, as each side has prevailed on a portion of their respective claims and there is no contract or other statutory basis to award fees and costs in this matter.

ORDER

1. Plaintiffs' Complaint, including a portion of its First Cause of Action for Breach of Agreement but not for burden to land by the Canal Company, their Third Cause of Action for Invasion and Loss of Privacy, and their Fourth Cause of Action for Trespass and Nuisance are dismissed.

2. Defendant Utah and Salt Lake Canal Company has an easement over Plaintiffs' real property.

3. Defendant's easement width is 12 feet from the westerly or southerly top bank of the canal and 20 feet from the easterly or northerly top bank of the canal at this location, pursuant to the Notice of Easement the Utah and Salt Lake Canal Company recorded on February 5, 2010 in Entry No. 10892664, in Book 9802, pages 174-278 in the official records of Salt Lake County Recorder.

4. Defendant's easement rights include the right to operate, clean, maintain and repair the canal, including raising and stabilizing the banks, and to modernize the canal by cementing it or by using some other water-saving method.

5. Plaintiffs shall remove all structures installed by them on the Canal Company's 20 foot easement, including the cement wall on the north canal bank running parallel to the canal, the wall perpendicular to the cement wall, the chain link fence on the north canal bank commencing at the end of the cement wall and going west across the Browns' property, the metal fence crossing the existing drive on Kemps' property approximately 113 feet west of 5400 West and Plaintiffs shall remove the chain link fence on the Kemps' property from the metal gate down to the canal water if such removal is necessary for Defendants to perform their required repairs in building up the northern bank and in the future if the structures substantially interfere with Defendant's repair, operation and maintenance of the canal.

6. Without any liability to Defendant from Plaintiffs or from their successors in interest, if Plaintiffs fail to remove the structures after a request for removal, Defendant has the right to remove the following structures on the easement: chain link fences and/or brick/cement block walls placed upon and within the easement boundaries, only if the same is required to be removed in order for Defendant to perform its rights to operate, clean, maintain and repair the canal, including raising and stabilizing the canal banks, and to modernize the canal by cementing it or by using some other water-saving method. If the structures are not removed by Plaintiffs then the Canal Company may remove the structures and charge Plaintiffs for the reasonable costs of removal.


7. The construction of a new road upon the northerly bank for maintenance access is an additional burden upon Plaintiffs' property that has not been there previously or historically and is not a reasonable necessity, and as such it is prohibited and Defendant is enjoined from installing a service road across Plaintiffs' properties on the north bank of the canal between 5400 West and 5600 West, Salt Lake County, Utah.

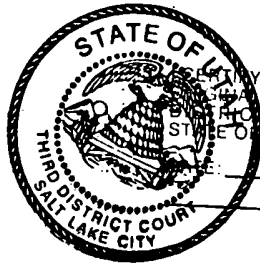
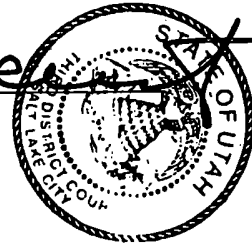
8. Plaintiffs and their successors in interest must provide free access to Defendant to its easement across their property and may not lock the gates on either end of the property unless Defendant is provided keys or given some other method of access to the property such as codes to coded locks.

9. Defendants may utilize motorized equipment and vehicles, backhoes, etc., through Plaintiffs' property for maintenance and repairs provided there is no other reasonable method or manner to accomplish the same.

10. Each side to pay their own attorney's fees and costs.

Dated this 17th day of April, 2014.


ROBERT P. FAUST
DISTRICT COURT JUDGE



STATE OF UTAH
THIRD DISTRICT COURT, SALT LAKE COUNTY

APR 12 2014

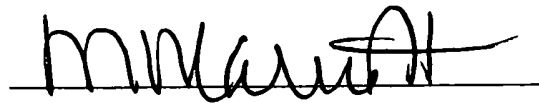
DEPUTY COURT CLERK

CERTIFICATE OF SERVICE

I hereby certify that I mailed/mailed a true and correct copy of the foregoing Memorandum Decision and Order, to the following, this 17th day of April, 2014:

Alison D. Bond
Attorney for Plaintiffs
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A handwritten signature in black ink, appearing to read "Paul D. Veasy", is written over a horizontal line.