

Resume' Of

Meeting September 28, 1970 - 2:00 p.m., Wayne County Courthouse, Loa, Utah
Clair Bird, Capitol Reef Lodge & Capitol Reef National Monument

In Attendance: Kenward H. McKinney - Division of Water Rights
William McKiel - Counsel, Park Service
Franklin Wallace - Superintendent, Capitol Reef National Monument
Clair Bird - Capitol Reef Lodge
Tex Olsen - Counsel, Clair Bird

The meeting was opened with the statement that the proceedings were informal in nature and that their purpose was to endeavor to find an equitable solution to the apparent distribution problem which Mr. Bird was having in the ditch serving, in part, the Capitol Reef Lodge, owned by Mr. Bird. A very brief outline was given of the previous proceedings.

Mr. McKinney then gave an estimate of the cost of equipment and installation for a pump and pipeline to convey water from the Fremont River to the Capitol Reef Lodge property line. It was indicated that this estimate was based upon a flow of .34 sec.-ft., which Mr. Bird indicated had been delivered to him. It was also indicated that Mr. Bird's right was probably on the order of .15 sec.-ft. The costs on the estimate were probably high since if the flow of .15 sec.-ft. or even .2 sec.-ft. were acceptable, a smaller pump could be used which would necessitate only single phase power and a consequent reduction in the cost of the pump, motor and electrical equipment. It was also pointed out that the move-in/move-out charges for excavation equipment was based upon the equipment moving from and returning to Richfield and that if a backhoe could be obtained locally, this cost would be greatly reduced, if not eliminated.

The Park Service was then asked to again state their position. They stated that they would grant a special use permit, providing for an easement from the pumping plant to the Capitol Reef Lodge property line. The Park Service indicated that they were bound by certain regulations which prohibited them from contributing to the cost of a project which they did not own. They indicated that there was no possible way that they could contribute to the implementation of such a project, in either money, materials or labor. Since this was the position of the Park Service there was no reason to proceed further with discussion of a pumping plant.

Mr. Bird indicated that this winter a water treatment plant was to be installed at the lodge and it would be necessary to know whether the water was going to be supplied from the ditch or pumped from the river to the lodge. He then indicated that the treatment plant was being installed in compliance with regulations of the Utah State Health Department.

A discussion of the use of the ditch was then undertaken. It was explained that the Park Service did not use the ditch this year. They indicated that they had cleaned the ditch in the spring but had not done it since because they were not using the ditch. They indicated that they would probably use the ditch in the future but did not know just when. They indicated that they were not abandoning the ditch nor were they going to move the water elsewhere. They indicated that Mr. Bird was welcome to use the ditch at any and all times but that they were not going to clean the ditch until they used the ditch again. The question of carrier water was brought up but it was pointed out that this was no problem since in 1970 the Park Service was not using the water, moving the water or otherwise interfering with Mr. Bird's sole use of water in the ditch.

The question of ditch maintenance was then discussed. The Park Service indicated that in the recent past they had borne the full cost of ditch maintenance. Mr. Bird indicated that he had contributed to the maintenance of the ditch by repairing rodent damage. Mr. Bird indicated that because of Park Service regulations against certain practices of ditch maintenance, the cost of maintaining this ditch would be higher than normal. Specific reference was made to the animal and rodent problem. Mr. Olsen stated that perhaps in view of the ditch uses etc., which were pre-Park Service, normal ditch cleaning methods could be used. The Park Service indicated again that they were not going to do any more ditch maintenance until they used the ditch, but that Mr. Bird was welcome to clean the ditch. Mr. Bird indicated that if he cleaned the ditch it would be with herbicides or burning. It was pointed out by the Park Service that the use of herbicides and burning within the monument was prohibited. It was also pointed out that since the water in the ditch was used for culinary purposes there was a general federal regulation which would prohibit the use of herbicides. The Park Service was then asked if they recognized any

responsibility toward maintaining the ditch. They indicated that unless they were using the ditch they did not feel that they had any responsibility. Mr. Olsen then indicated that in the case Gunnison-Fayette Canal Company v. Roberts (2d) 153, 364 Pac. (2d) 103 (1961) it was ruled that the parties shall bear the expense of operation and maintenance of the ditch in proportion to the share of ownership of the water to which each is entitled. The Park Service indicated that they were not familiar with the case and until Mr. McKiel was able to check that specific reference and any other applicable cases, they were in no position to change their stated position.

Mr. Bird then indicated that he had a problem in that he was not able to get sufficient water through the ditch to supply water for the lodge. He indicated that if this condition were not remedied he would have to close the lodge early. Mr. Bird indicated that he did not have a measuring device on his diversion. It was suggested that Mr. Bird acquire a small measuring device, preferably a Parshall Flume, and install it on his diversion so that a measurement of the water he was diverting, might be made. Mr. Olsen then suggested that a V-notch or other type wier might be equally satisfactory.

At about this time Mr. Wallace indicated that he would clean the ditch once more. He stipulated that if the Park Service or Park Service personnel were interfered with or harrassed in any way by Mr. Bird, he would cease work immediately and would under no circumstances resume work. Mr. Olsen asked what contribution was desired or expected from Mr. Bird. Mr. Wallace indicated none. Mr. Bird was advised to refrain from interfering with the ditch cleaning in any way and if he had any comments to make regarding the work to get in touch with Mr. McKinney.

The meeting was adjourned after Mr. Olsen and Mr. NeKiel agreed to communicate with one another regarding the legal aspects and cases precedent which might be applicable to the current problem.

The following items were to be investigated or carried out by the indicated Parties:

1. Mr. McKinney was to ascertain the flow in the subject ditch in order to ascertain an equitable division of maintenance costs.
2. The Park Service would clean the ditch.
3. Mr. Bird was not to harrass or interfere with the Park Service or their employees during this cleaning.
4. Mr. Olsen and Mr. McKiel would be in contact regarding the legal aspects of the problem.
5. Mr. McKiel would advise Mr. McKinney by November 1st of the results of legal research.