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April 12, 2013

HAND DELIVERED

Mr. Kent L. Jones, P.E.  
Utah State Engineer  
Mr. Jared Manning, P.E.  
Assistant State Engineer  
Box 146300  
Salt Lake City, Utah 84114

**Re: Draft Beaver River Commissioner Instructions for Distributing Water on the Upper Beaver River ("Instructions")**

Dear Mr. Jones and Mr. Manning:

Kents Lake responded to the Draft Instructions on April 5, 2013, requesting that the Instructions not be issued and now provides further response and comment. Kents Lake seeks written clarification and direction from you as to how the Utah Division of Water Rights is conducting water distribution administrative proceedings regarding the Beaver River system in general and water storage under the 2005 Interim Distribution Order ("IDO"), and renews its request that the Instructions not be issued until the pending litigation is resolved.

The determination of water rights priorities and the validity and interpretation of the 1953 Agreement are issues now before the district court for determination. The Division is without legal authority to determine such matters.

By way of example, the Complaint filed by Rocky Ford specifically asks the court to determine the following two matters:

First: "Plaintiff prays for judgment against Defendant that it be allowed to rescind the [1953] Agreement and that said Agreement be terminated by and among the parties so that the priorities to the water rights may be clearly determined by the Utah State Engineer." Complaint, ¶ 91.

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Second: “Thus, Plaintiff is entitled to a decree from this court that establishes the following priorities:”

[Rocky Ford then describes in the Complaint the storage and direct flow water rights and requests that the priorities be so established by the Court] Complaint, ¶ 38.

Because these issues are in court, this is not a matter for the Division. Kents Lake respectfully requests that water be distributed at least for the 2013 irrigation season as it has been in recent years until the issues in litigation are first adjudicated.

Specifically with regards to the Instructions, Mr. Manning called John Mabey, attorney for Kents Lake, to clarify how he viewed the purpose of the meeting conducted April 1<sup>st</sup> with Kents Lake, Beaver City and Rocky Ford. It was explained that the instructions were proposed to address new circumstances that just arose which now require written instructions to the commissioner. We are told those new circumstances are that Rocky Ford has chosen to exercise direct flow water rights of up to 110 cfs taken below Minersville Reservoir. It was further explained that these rights may be available to Rocky Ford because a 1967 agreement is no longer in place and that the commissioner needs direction.

However, the discussions at the April 1<sup>st</sup> meeting and proposed Instructions go beyond the 110 cfs water right and raise broader issues and change substantially historic water storage and distribution and the IDO as outlined in our April 5<sup>th</sup> letter. We realize you want to provide instructions to the river commissioner regarding the distribution of Rocky Ford’s 110 cfs water right and how such distribution relates to the upper Beaver River system, and that you desire specific comments to the draft Instructions. We discussed the draft Instructions with Jerry Olds and he provided comments, many of which are incorporated in this letter. But for the reasons outlined below, it is premature to provide detailed comments.

It is not clear what all the impacts of the Instructions will be on the IDO and Kents Lake. It is not clear whether the IDO is under review, revision, implementation, or is to be withdrawn and replaced. Furthermore, the draft Instructions raise major issues that the Division cannot resolve through the Distribution section of the Division. Those issues must be resolved through adjudication or settlement with all affected water users, including the pending litigation brought by Rocky Ford against Kents Lake. Before Kents Lake can properly address all the issues raised by the Instructions and their impact on Kents Lake, Kents Lake requests that the Division of Water Rights provide further information and background regarding the Instructions by responding in writing to the following:

1. With regards to the Instructions section entitled “Three Creeks Reservoir Water Rights,”
  - a. Identify by water right number all the water rights the Division now believes are included by “all direct flow rights below Patterson Dam” in paragraph 1.a.

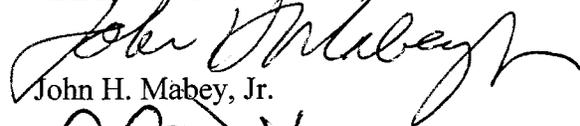
- b. How will the Division determine when all such identified rights “are satisfied?”
  - c. In drafting these Instructions, has the Division taken into account the historic and recent interpretations, practices and customs of the Division of Water Rights regional office in Cedar City and the Beaver River Commissioners?
  - d. In drafting these Instructions, how is the Division taking into account paragraphs 3 and 4 of the 1953 Agreement which gives the Three Creeks Reservoir storage rights priority over Rocky Ford storage rights in Minersville Reservoir?
  - e. Identify by water right number all the water rights the Division believes are part of the direct flow water rights above Minersville Reservoir which amount to 40 cfs.
  - f. Under paragraph 1.a., identify by number which specific Rocky Ford direct flow water rights must be satisfied “when the inflow to Minersville Reservoir is equal to or greater than the outflow, up to 110 cfs.” Based on Division records, when historically and prospectively do you anticipate the specific Rocky Ford direct flow water right(s) were or would ever be satisfied? Does the Division intend to propose any limitations on Rocky Ford with respect to storage and releases in Minersville, or are storage and releases in Minersville under Rocky Ford water rights left solely to the discretion of Rocky Ford?
  - g. Under paragraph 1.b., first line, which specific water rights are referred to as “these rights?” Please explain the reasoning, justification and meaning of the sentence: “Since the underlying rights have a priority of 1890, the amount of storage that may occur under these rights is in the same proportion as other 1890 direct flow rights above Patterson Dam.”
  - h. With regards to paragraph 2, why were paragraphs a. and b. inserted? What provides the justification for the limitations described in a. and b?
  - i. With regards to paragraphs 2.c., what reasons support this restriction for the 325 acre-feet of Twin Lakes storage? The 127 cfs restriction is not consistent with how the Division and river commissioner have administered the Twin Lakes storage water right. Using the 127 cfs restriction makes the Twin Lakes right the last priority in the 1890 group.
  - j. With regards to paragraph 3.b., please explain more fully what is being proposed and why.
  - k. What is meant throughout the Instructions by the terms “storage period” versus “period of diversion to storage?”
  - l. Why is statement 4.a. necessary?
  - m. With regards to 4.b., when does the Division consider Minersville Reservoir full, and how is the Division taking into account the 1953 Agreement?
2. In administering the IDO, how is the Division now taking into account paragraphs 3 and 4 of the 1953 Agreement which gives the Three Creeks Reservoir storage rights priority over Rocky Ford storage rights in Minersville Reservoir?
  3. Please provide a copy and explanation of the 1967 agreement.
  4. How was it determined and who determined the validity of the 1967 agreement.

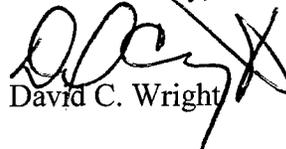
5. Copies of any written or electronic correspondence between the Division and any person regarding the 1967 agreement.
6. Copies of any draft agreements intended to possibly replace the 1967 agreement.
7. When and how the Division was informed by Rocky Ford that it intended to exercise water rights now available because the 1967 agreement was not valid.
8. Copies of the Beaver River water distribution system maps and water rights maps used or reviewed by the Division in administering water distribution on the Beaver River.
9. What is the Division's present position concerning the 1953 Memorandum Agreement between Rocky Ford and Kents Lake, which 1953 Agreement is one of the principal bases for the IDO?
10. Please explain the reasons for providing the two pages of tables with the Instructions? Who prepared the tables? What are the tables demonstrating?
11. Regarding the page labeled "Three Creeks and Kent's Lake Storage (30 years of data)," please explain all the assumptions made and used to create the tables. Which exact data for "30 years of data" were used for each column of the tables? Please provide the data used.
12. Why was not a table created for the 1,193 ac-ft stored in Three Creeks?
13. Do the tables take into consideration the water that was actually being stored in the reservoirs? How does the total stream flow measured at the mouth of the Beaver River account for any storage taking place above the measuring device?
14. Why were not similar tables prepared for storage rights in Minersville Reservoir?
15. How does the Division plan to address and include in the accounting for water distribution and administration the large winter stream flows below Minersville Reservoir?

Until answers to the above items and the background information requested are provided, Kents Lake cannot adequately evaluate the potential impacts to Kents Lake's water rights and provide additional comments to the Instructions. Significant issues are at stake on the Beaver River system which must be addressed in an open process that allows sufficient opportunity to respond to water distribution decisions and actions that are determining Kents Lake's rights.

The issues that the Division is attempting to resolve are so important and have far reaching implications they should not be dealt with "as just distribution matters". The issues need to be resolved in a defined administrative or judicial procedure and once they are resolved the water distributed accordingly.

**MABEY WRIGHT & JAMES, PLLC**

  
John H. Mabey, Jr.

  
David C. Wright

Kent L. Jones  
Re: 2005 Interim Distribution  
Order – Beaver River  
4/12/2013  
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cc: Kents Lake Res. Co.  
Beaver City  
Justin Wayment  
Kurt Vest