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April 15, 2013

Jared Manning  
Assistant State Engineer  
Division of Water Rights  
1594 West North Temple, Suite 220  
P. O. Box 146300  
Salt Lake City, UT 84114-6300  
*SENT VIA EMAIL AND USPS FIRST CLASS*

Re: *Rocky Ford Irrigation Company and 2013 distribution of Beaver River*

Dear Mr. Manning,

Per your request, I am sending this letter on behalf of my client Rocky Ford Irrigation Company (RFIC). It is my understanding that you requested input from RFIC no later than today, April 15, 2013, regarding the above matter and any others discussed at the April 1<sup>st</sup>, 2012 meeting between you, RFIC, Kents Lake Reservoir Company (KLRC). I am also in receipt of a letter dated April 5, 2013, written by John Mabey and David Wright, legal counsel for KLRC. My overall purpose in writing is to provide your requested comments – for the most part, I don't believe RFIC needs to specifically respond to the argumentative and conclusory allegations made by legal counsel for KLRC in its April 5<sup>th</sup> letter, as the matter is in litigation (but I specifically reserve the right to do so in the future, if you request).

We appreciate the work that you have done in reviewing and preparing to implement the Beaver River Interim Distribution Order (Interim Order) and the opportunity you have provided to further comment on implementation of the Interim Order this year following our April 1 meeting. Though there are some items that we disagree with in the Interim Order, RFIC generally agrees with the Interim Order and recognizes your desire to distribute the Beaver River in accordance with the Interim Order this year. We further understand that we will be provided with an opportunity to comment on the Interim Order following the 2013 irrigation season.

Rocky Ford's primary concern with past distribution is that the Interim Order has never been administered properly since its issuance in 2005. No records exist to show that proper measurement and accounting has occurred. In fact the lack of measuring devices and records accounting for the daily or even weekly regulation of storage is evidence the Interim Order has not been administered properly, which KLRC seemingly admits in its letter dated April 5<sup>th</sup>, 2013 sent to your office.

The Interim Order issued in 2005 was titled the 2005 "Interim" Distribution Order. The Interim Distribution Order was issued March 1, 2005 by then State Engineer Jerry Olds with the comment that "*although this order is adopted on an interim basis, it will remain in effect until*

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*another Distribution Order from the State Engineer supersedes it. The implementation and operation of this order will be reviewed and comments taken after the close of the 2005 irrigation season.*” Interim, by definition, means “temporary or provisional arrangement.” In a letter from then Assistant State Engineer Lee Sim, also dated March 1, 2005, Mr. Sim also states that the Interim Order was being implemented on an *interim* basis so there could be a review after the 2005 irrigation season and a determination if additional changes are needed.

Based on the records of the State Engineer’s office, a review never occurred and no opportunity for comments by water users on the system was allowed following the 2005 irrigation season or any time thereafter, and no amended or final distribution order has ever been issued. Rather, from our review of the annual Distribution Reports the distribution of storage in the Upper Beaver River continued “status quo” as KLRC has recently indicated they prefer. Rocky Ford sees nothing in the Interim Order that states distribution will continue “status quo.” By the simple definition of “interim”, the order is still subject to comment and modification.

We have reviewed the “Draft Beaver River Commissioner Instructions for Distributing Water on the Upper Beaver River,” distributed in our meeting on April 1, 2013. Rocky Ford, unlike counsel for KLRC, makes the following hopefully “constructive” observations and comments to the draft instructions (referenced by numbered item in accordance with the draft).

1. **1,193 ac-ft** transferred from direct flow rights (storage period: April 1 to October 31)
  - a. These rights may only be exercised if Minersville Reservoir contains 7,500 AF of storage and all direct flow rights below Patterson Dam are satisfied. Direct flow water rights above Minersville amount to 40 cfs. Rocky Ford’s direct flow right are satisfied to the extent that the inflow to Minersville Reservoir is equal to or greater than the outflow, up to 110 cfs. (Note: RFIC owns two additional direct flow rights, BRD award 96g for 150 cfs and award 96h for 120 cfs, both with senior priorities to the 1,193 ac-ft of direct flow rights transferred to storage. These should also be included in the above tally).
    - i. Three Creeks Reservoir may begin to store water under these rights when the flow is between 54 cfs and 127 cfs, subject to 1a above. 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.
    - ii. When the flow exceeds 127 cfs then all 1890 direct flow rights above Patterson Dam are satisfied and Three Creeks Reservoir may store a maximum of 42 cfs, up to a total of 1,193 ac-ft.
    - iii. Diversion into storage under these rights is added to the measured flow of the USGS Gage at Beaver for purposes of distribution.
2. **325 ac-ft** transferred from Twin Lakes (storage period: April 1 to June 30)

- a. When the flow is between 54 and 127 cfs, this right may be exercised with other 1890 water rights at KLRC's discretion to store excess water available in Merchant Creek, up to 325 ac-ft in Three Creeks Reservoir.
    - i. The flow of Merchant Creek must be measured to determine if there are 325 ac-ft available in Merchant Creek for storage to ensure there is no expansion of the original Twin Lakes water right.
  - b. Once this right is filled, Three Creeks Reservoir must be held at a constant level unless or until other Three Creeks Reservoir storage rights are active.
3. **830 ac-ft** decreed storage transferred from Kents Lake (storage period: April 1 to June 30) *(RFIC has re-ordered the points under item 3)*
- a. Under this right Three Creeks Reservoir may store water when the flow at the USGS gage, including water from section 1 above, is above 161 cfs, up to 830 ac-ft. *(Note: it seems a little tenuous for the State Engineer to ignore the 164 cfs limitation stated in the Amended Decree. It may be unclear how the judge determined this value but it still is a specific decreed flow limitation).*
  - b. Diversion under this right is limited to the amount of water measured on the South Fork below the Kents Lake diversion. A straight line method may be used to calculate flow between actual measurements.
  - c. This right is equal in priority to and may be exercised simultaneously with the 830 ac-ft decreed Kents Lake storage.

### **Kents Lake Water Right**

1. **830 ac-ft** decreed storage (storage diversion period: April 1 to June 30)
  - a. The 830 AF in Upper Kents Lake and 300 AF in Middle Kents Lake are included under the Certificate of Beneficial Use for change application a17161 (77-407) issued February 17, 1999. No other water right exists for conservation pool storage in Kents Lake Reservoirs. Beaver City and KLRC are limited to the diversion of no more than 830 AF under their respective water rights 77-4, 77-407 and 77-1815 for storage in Kents Lake Reservoirs from April 1<sup>st</sup> to June 30<sup>th</sup>.
    - i. For the 2013 irrigation season, RFIC requests that no more than 830 AF of water be diverted from the South Fork of the Beaver River for storage in any of the Kents Lake Reservoirs.
    - ii. To properly administer these water rights, there must be either an accurate measuring device located on the feeder canal above the reservoirs, or there must be accurate water elevation measuring devices in both Middle and Upper Kents Lake Reservoirs with reservoir capacity curves, and an accurate measuring device below Kents Lake to measure releases from Kents Lake.

RFIC disagrees with some aspects of the Interim Order, but recognizes it will operate as outlined this year with an opportunity to address these and other issues of the Interim Order after we've operated under it during the 2013 irrigation season. Additionally, RFIC wishes to make the following points:

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- The 1953 agreement does not subordinate any RFIC water rights, storage or direct flow rights, to KLRC. KLRC emphasizes that the 1953 agreement has been in place for 60 years. However, it undisputedly has not been followed since its inception. More importantly, contrary to the 1931 decree, which supersedes the 1953 agreement, KLRC has stored water in its reservoir without properly functioning measuring devices.
- Storage of the 1,193 AF of direct flow rights changed to storage are not only subject to the direct flow rights below Patterson but are also subject to storage rights in Minersville Reservoir which also have senior priorities to the change applications.
- With the conservation pools in Kents Lake Reservoirs, there is potentially more water being diverted for storage than there are water rights. The 380 AF of water to fill and maintain the conservation pools must come out of KLRC and Beaver City's storage right under the Certificate of Beneficial Use for 77-407(a17161), and the June 1977 and January 1992 agreements between the Utah Division of Wildlife Resources and Kents Lake Reservoir Company. No other water rights exist.

Again, RFIC greatly appreciates the State Engineers involvement in implementing proper administration of the Interim Distribution Order as it should have been in 2005. We have also appreciated the time you have spent making yourself available to us as you have KLRC's counsel and consultant to discuss the many complex issues on the Beaver River.

As was discussed in the April 1, 2013 meeting we look forward to having access to the River Commissioner's measurements and accounting records via the Division's website as soon as possible. We also look forward to the implementation of a much needed tracking or accounting system so that proper water right administration occurs under the Interim Order.

Sincerely,



Ben Ruesch, Esq.

cc: client; Mabey Wright & James, PLLC (counsel for KLRC); Barnett Intermountain Water Consulting;