

MEMORANDUM

TO: Jerry Olds, State Engineer
Lee Sim, Assistant State Engineer B Distribution

FROM: Kerry Carpenter, Southwestern Region Engineer

DATE: 9 June 2003 / Revised 24 February 2004

RE: Kents Lake/Three Creeks Storage and Beaver River Distribution

GENERAL BACKGROUND

This memorandum is offered in attempt to provide some context from which to respond to the letter received (by fax) from the officers of the Rocky Ford Irrigation Company, 20 May 2003. The letter was accompanied by a copy of a Memorandum Agreement (the Agreement) between Rocky Ford Irrigation Company (Rocky Ford) and Kents Lake Reservoir Company (Kents Lake) dated 02 April 1953. I trust that we all understand that these two companies geographically occupy the two extreme ends of the Beaver River system with Kents Lake at the upper end and Rocky Ford at the bottom. The letter specifically asked for an interpretation of the Agreement's provisions as to when Kents Lake is allowed to store water in their reservoirs on Beaver Mountain. More specifically, the letter is addressed to Jerry and asks "...your office to interpret this issue for us at the State level and not at our local office in Cedar City." We can each draw our own conclusions as to the basis for that provision.

LEGAL BACKGROUND

The rights of the two parties to the Agreement are first formalized in the Beaver River Decree (W.L. Hardly *et al.* v. Beaver County Irrigation *et al.*, Civil No. 625, Judge LeRoy H. Cox, 13 November 1931; hereafter BRD):

Award 2 is to Kents Lake and provided for the storage of up to 1,660 acre-feet of water annually in four reservoirs on the "South Fork" of the Beaver River (Upper Kents, Middle Kents, Lower Kents and Deer Lake), said water to be released to supplement the natural flow of the Beaver River for supplemental irrigation in the area of Beaver City. A priority date of 1890 is affixed for this award.

Award 96 to Rocky Ford provided for the direct diversion of up to 9.67 cfs for irrigation in the Minersville / Milford areas of the Escalante Valley with a priority of 1870. The BRD described at 96(f) a pending application for storage in the Minersville / Rocky Ford Reservoir. Rights for storage were certificated at a later date by the issuance of Certificate of Appropriation No. 2388 on 02 June 1941 (Application to Appropriate A1215, Priority of 25 February 1907).

The BRD divides the system into two parts at the Patterson Dam. The rights below the Patterson Dam have no call on rights above the dam, regardless of priority. Kents Lake is above Patterson Dam, Rocky Ford is below. Paragraph V of the Beaver River Decree states:

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That no water shall be stored in the so-called Kents Lake Reservoirs by the Kents Lake Reservoir Company or by Beaver City¹, to whom said storage right is awarded herein under Award No. 2, except between April 1st and June 30th of each year, and then only when the aggregate quantity of the water flowing in the Beaver River at the present government gauging station at the mouth of the Beaver Canyon is in excess of 161.31 c.f.s.²

Subsequent to the BRD, Kents Lake filed two applications pertaining to its storage rights:

1. Change Application A1413 (22 April 1938), proposing to change 830 acre-feet of storage (~~1/2~~^{1/2} of the 1,660 in Award 2, BRD) to a new reservoir known as the Three Creeks Reservoir.³
2. Application to Appropriate A13420 (08 March 1940) to appropriate an additional 1,193 acre-feet of storage right in the Three Creeks Reservoir.⁴

These two filings, upon approval by the State Engineer, resulted in further litigation⁵ which went to the Supreme Court⁶ and was concluded with an Amended Decree⁶ from Judge Will L. Hoyt dated 08 November 1943. The Findings of Fact and Conclusions of Law⁶ from this case replicated portions of the BRD pertaining to the rights of the parties (and Award 97 to the Minersville Reservoir and Irrigation Co.). In essence, the court affirmed the State Engineer's approvals and ruled that the changed⁶ portion of Award 2 would retain its priority vis a vis other rights, including the limitations set forth in Paragraph V of the BRD, but also with a provision

¹Of the 1,660 acre-feet awarded to Kents Lake, it is recognized that Beaver City owns a right to 200 acre-feet of the total. This portion is currently under Water Right No. 77-4.

²The mentioned flow of 161.31 cfs is approximately the total of all 1870, 1890 and 1903 priority rights (known locally as A and B rights⁶) above the Patterson Dam. Generally, no right below the dam is entitled to any water from above the dam until these rights have been satisfied. Rights below the dam historically relied on return flows⁶, lower tributaries, and high water flows.

³See File No. 77-177

⁴See File No. 77-37

⁵Rocky Ford Irrigation Company and Telluride Power Co. v. Kents Lake Reservoir Company and T. H. Humphries, State Engineer.

⁶Rocky Ford Irrigation Co. v. Kents Lake Reservoir Co.; 104 Utah 202, 135 P.2d 108 (1943); subsequent history 104 Utah 216, 140 P.2d 638 (1943)

that storage at the Three Creeks site would be limited to the quantity of water concurrently available at the historic point of diversion on the South Fork.

As regards the new appropriation, A. . . the 1193 acre feet of water shall be inferior and subject to all water rights existing in and to the waters of the Beaver River and its tributaries at the time that such application was filed. . . .⁷

The court did not offer any specific guidance regarding decisions as to when Kents Lake could store water under their new appropriation. Given the junior status of the appropriation¹⁸⁹⁰ set forth, it appears that this should only occur when all prior rights on the Beaver are satisfied, including those below the Patterson Dam and especially those of Rocky Ford, et al.⁸

THE AGREEMENT

To the best of my knowledge, the next pertinent legal document regarding this issue is the Agreement now before us for interpretation. I speculate that the Agreement arose from efforts of the parties B and perhaps with some involvement of the State Engineer and/or the appointed Distribution Commissioner B to resolve the issues of distribution and storage left unanswered by the Supreme Court decision and resultant District Court Amended Decree. In this regard, I would point out a couple of items I believe to be pertinent:

1. The fifth AWhereasB in the Agreement indicates that A. . . practical administration of storage. . . .B is the ultimate aim of the Agreement.
2. Numbered paragraph 1 (page 2) suggests that water to be diverted for storage in Three Creeks under the 1940-priority appropriation would be taken in lieu of certain A. . . direct flow rights in the Beaver River.B As I understand the arrangements, Kents Lake stockholders would waive distribution of certain rights from the river in exchange for the right to store an equivalent flow in Three Creeks. The referenced A. . . appropriate change applications designed to secure the right to store under said [direct flow] rights. . . .B were filed and certificated for the major water users.⁹ The total A direct flowB thus storable in

⁷ Amended Decree, ¶5.

⁸ Although its not at issue in the current discussions, we should all recognize that the groundwater rights in the Minersville/Milford area are also dependent on the A excessB flows in the Beaver River. Very few of them would be senior to the Three Creeks appropriation (1940), but there are some. Overflow at Rocky Ford constitutes a part of the supply upon which those earliest rights would rely.

⁹ Second South Bench Reservoir & Irrigation Co. B 77-181 (a2752), Cert. No. a448, 8.0 cfs / 226.16 AF; Mammoth Canal & Irrigation Co. B 77-182 (a2753), Cert. No. a449, 12.0 cfs / 339.24 AF; Harris-Willis (cont'd)

Three Creeks would be 42.20 cfs and **1,193.00 AF, a figure identical to the quantity proposed under Application to Appropriate 77-37 (A13420)**, in addition to the 830 AF under the previously decreed right (77-177 (a1413) / Award 2, BRD), thus yielding a total of **2,023 AF of storage, a figure nearly identical to the asserted reservoir capacity of 2,029.23 AF in the pertinent water right documents.**

3. Numbered paragraph 3 gives the Kents Lake stockholders the option to either take their rights as direct flow (at the mouth of Beaver Canyon) or to store them in Three Creeks. As noted above, prior to the transfer of the Twin Lakes storage into Three Creeks, the total of all storage rights in Three Creeks would have been 2,023 AF, just a bit below the reservoir capacity of approximately 2,029 AF.
4. Numbered paragraph 4 of the Agreement seems to be the real ~~Am~~ ~~eaty~~ part of the deal and is not easily absorbed in a single reading. In essence, this paragraph appears to propose a division of the waters of Beaver River something like this:
 - a. Kents Lake gets its decreed storage in Three Creeks under the terms of the BRD and "Amended Decree" until it has stored 830 AF or filled its reservoir;
 - b. Once Kents Lake has stored to the limits of its decreed right, it will not store any more water in Three Creeks under the decreed right until Rocky Ford has filled its reservoir to a stored amount of 20,120.3 acre-feet;
 - c. However, Kents Lake may continue to store under its ~~changed~~ direct flow rights~~;~~ subject to the limitations of those rights;
 - d. Thereafter, Kents Lake and Rocky Ford will divide the available flows on a ratio of 15 AF (Kents Lake) to 85 AF (Rocky Ford);
 - e. ~~K~~ents Lake agrees that after it has filled its reservoir once during a season, that it has no right as against Rocky Ford to refill.~~;~~
5. With the later addition of the 325 AF from Twin Lakes (currently under 77-408, 1662, 1818, all portions of Award 3(b), BRD), the decreed storage in Three Creeks was increased to 1,155 AF. In addition, Kents Lake could store up to 1,193.0 AF (at a rate not to exceed 42.20 cfs) under their ~~changed~~ direct flow rights,~~;~~ and the total storage right is increased to 2,348 AF, an amount in excess of the reservoir capacity.

(Footnote ¹⁶⁹⁰ ~~9~~ cont'd) Irrigation Co. B ¹⁶⁹⁰ 77-183 (a2754), Cert. No. 452, 13.0 cfs / 367.51 AF; Harris-Willis Irrigation Co. B ¹⁶⁹⁰ 77-184 (a2755), Cert. No. 451, 8.09 cfs / 228.71 AF; Willis Canal & Irrigation Co. - ¹⁶⁹⁰ 77-185 (a2764), Cert. No. a450, 1.11 cfs / 31.38 AF; totaling: 42.20 cfs / 1,193.00 AF. By later Change Application 77-408 (a10425), an additional 325 AF of storage was changed from the ~~T~~win Lakes Reservoir~~;~~ to Three Creeks (currently under Water Rights No. 77-408, 1662 and 1818).

Although the ~~A~~ Twin Lakes - Three Creeks~~B~~ change came subsequent to the Agreement and was not contemplated by the Agreement, the net result appears to be that Kents Lake could then theoretically fill Three Creeks under a combination of decreed rights and a portion of its several changed direct flow rights and still take some portion of the direct flow rights as direct flow.

6. Numbered paragraph 7 of the Agreement seems to be one point on which the water users are specifically asking for the State Engineer's interpretation. Frankly, I think the matter is abundantly clear ~~B~~ especially as compared to the questions raised by the rest of the Agreement.

RESPONSE TO INQUIRY

The Rocky Ford inquiry contains these questions to which I suggest the following answers:

Q: [Is] the flow that was changed from direct flow to storage supposed to be added to the flow in the Beaver River to determine when the flow reaches 161.31 CFS at the measuring gauge in the mouth of Beaver Canyon[?]

A: Yes. According to numbered paragraph 7 of the Agreement¹⁰, after April 1 (when storage may begin under Kents Lake's decreed rights) any flow of water stored in lieu of direct flow rights by Kents Lake's stockholders would reduce the amount of flow required before storage is allowed under the decreed rights of Kents Lake. (Probably more to the point for the interests of Rocky Ford, et al., this would also mean that a lesser measured flow is necessary to determine that all rights above the Patterson Dam are being satisfied and "excess" water should be available in the Beaver River for the rights below the dam.)

Q: [W]hen does the right to store water begin according to the different water classes of A - B - and C water and can they only store water when the combined flow in Beaver River and the water being diverted for storage equals the 161.31 CFS or can they store water before it reaches the 161.31 CFS?

A: First, the use of ~~AA~~, B and C~~B~~ tends to cloud the issue because not everyone agrees as to what those designations mean. It makes for a clearer answer to use the priority dates used in the Beaver River Decree, i.e., 1870, 1890, 1903, etc.

¹⁰For what it may be worth, I note that the State Engineer was not party to the Agreement. Although he did approve the several change applications which contributed to implementation of the Agreement, unless there were Memorandum Decisions which incorporated the Agreement into the State Engineer's approvals, interpretation of the contract to resolve a dispute between the parties would likely be reserved to the parties or to the District Court.

For the ~~“decreed”~~ storage under Water Right 77-177, the Kents Lake storage transferred from the South Fork to Three Creeks (830 AF), storage is limited by the Beaver River Decree, the subsequent Supreme Court decision, the District Court’s “Amended Decree” and the 1953 Agreement to:

- a. The period of April 1 through June 30, and
- b. The quantity of water available on the South Fork but not being diverted into storage, and
- c. Periods when the flow at the Beaver River gauge at the mouth of the canyon is equal to or greater than 161.31 cfs minus any flows being stored in lieu of direct flow rights.

For the “~~decreed~~” storage under Water Rights 77-408, 1662, 1818, the “Twin Lakes” water transferred to Three Creeks(325 AF), this storage does not appear to be limited except by the period of storage (April 1 – June 30).

Example: On April 15, the flow at the gauge is greater than 161.31 cfs and Kents Lake is diverting 20 cfs of direct flow into storage at Three Creeks. Kents Lake can continue to store in Three Creeks until the flow at the gauge drops below 141.31 cfs (161.31 - 20). At that point, they can no longer store under their ~~“decreed”~~ right transferred from South Fork, but can continue to store under the Twin Lakes “~~decreed~~” right and the direct flow right(s) up to the limits of those rights.

For the ~~“direct flow”~~ rights which have been changed for storage, water can only be stored in Three Creeks:

- a. During the irrigation season (April 1 through October 31) and
- b. When the flow at the Beaver River gauge at the mouth of the canyon is high enough that the water could be delivered as ~~“direct flow.”~~

Example: The flow at the gauge on July 15 is such that only 1870-priority rights are being delivered. An 1890-priority direct flow right (such as 77-182 in the name of the Mammoth Canal & Irrigation Company) could not be diverted into storage even though the necessary change application was filed and certificated to allow storage in Three Creeks (which it was).

Of course, that is the interpretation of the ~~“A. . . local office in Cedar City”~~ and not what they want to hear. Please feel free to conduct your own research of the issues and come to your own conclusions.