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RECEIVED

JUL 16 2014

WATER RIGHTS
SALT LAKE

Re: *Piute Reservoir Carry Over Water Credit*

Dear Jared,

Piute has asked that I respond to your inquiry regarding Piute's claim of credit for excess releases from its reservoir or from the make of the river between Piute dam and Vermillion dam during the 2012 and 2013 water years.¹ Sevier Bridge opposes the credit. Piute has been furnished a copy of its position paper. We agree with much that has been advanced. We think some of the conclusions are not supportable. Before discussing the claimed credits for the two years, we offer these observations about relevant facts and law.

1. The 1936 Decree. The general adjudication decree was largely the product of agreements between the many users. It remains viable and important.

2. The 1938 agreement. This was also the product of negotiation and compromise and remains vital and important. It relaxed some of the rigidity of the original decree and facilitated better management of the river in general and in particular the storage rights in Piute and Sevier Bridge. It employed a two-year management approach that created a win-win for both the upper and lower river.

3. Finding a Solution. Piute favors finding a solution that will avoid injury to one or a windfall to the other. It believes that can best be achieved by a good faith effort by the water users, the water commissioners and the state engineer.

¹ As a preface I note some simple well known facts. The dividing line between the upper and lower Sevier is the Vermillion dam located east of Richfield. The dam does not represent a storage facility, but is in place for regulatory purposes. The water that goes over the dam is storage water allocated between Sevier Bridge Reservoir and Piute Reservoir. In a perfect world, the waters allowed to pass over Vermillion dam would in the first instance achieve the exact storage entitlements of the two reservoirs. In the real world, that level of exactitude is not possible.

4. The 1943 Dispute. In 1943 a dispute arose over some 13,226 acre feet that had arrived at Sevier Bridge but had not been allocated. Both parties asserted an interest in the water. The dispute came to the trial court and was ruled upon by Judge Hoyt in what is now known as the “Hoyt Decree.” The court ruled that Piute had no claim to the water in question. Hoyt made additional rulings discussed hereafter.

5. The Supreme Court Decision. The matter advanced to the Utah Supreme Court which issued a decision in *Watson v. Deseret Irrigation Company*, 169 P2d 793 (Utah 1946). The decision is badly fractured. Four of the five justices participated. Chief Justice Larsen wrote the “prevailing opinion” which noted “The majority of the court thinks the [Hoyt] decree should be affirmed.” 169 P2d at 799. Justice Wade wrote separately (concurring in the result). Justice Wolfe wrote separately concurring in part and dissenting in part. Justice McDonough concurred with the views expressed by Justice Wolfe.

6. Dicta. The Various opinions contained a great deal of dicta – In the law “dicta” includes the opinions and comments of the justices not determinative nor essential to the outcome of the case. The dicta in this case reveal the conflicting views of the justices, but is otherwise of limited relevance.

7. The determining factor. The factor on which all justices agreed and which controlled the outcome and the ownerships of the water in dispute, was stated in each opinion:

Chief Justice **Larsen** stated: “The [1938] agreement recognizes no credit rights in Piute for water forming above Piute dam and which bypasses the dam *when the reservoir is full . . .*” *Id.* at 797. [Emphasis added.]

Justice **Wade’s** opinion states: “Any water which ran by its dam at a time *when the reservoir was full*, and which it could not otherwise use at that time, was water to which it did not acquire any right to store because it did not have the capacity to place such water to a beneficial use.” *Id.* at 300. [Emphasis added.]

And finally, Justice **Wolfe**, with Justice **McDonough** concurring, wrote: “I also agree that Piute could not get credit for any of the 13, 226 acre feet during the succeeding year because *its dam was entirely filled up to its allowable storage capacity at the time the said 13,226 acre feet were stored* in the Sevier Reservoir. . . .” *Id.* at 801. [Emphasis added.]

8. Wrongful Accusation. Sevier Bridge accuses Piute of attempting to create an “at pleasure” storage right in Sevier Bridge contrary to the supreme court ruling in 1946. The accusation is without foundation. Piute did not claim a general storage rights in Sevier Bridge Reservoir in the 1946 appeal, and does not claim one now. The language quoted by Sevier Bridge was not a supreme court ruling, but a two-prong agreement of the parties to which the court made reference in the prevailing opinion.

Here's the court's language:

“The parties are agreed that Piute has no general storage rights in Sevier Reservoir; that is, it cannot of its own volition run its waters down to Sevier Reservoir and store them there, and then at its pleasure in future years withhold from the flow of the river at Piute Reservoir water which should flow down to Sevier. They also agree that Piute is not to be held to have lost its rights to all water which passes the Piute dam.” *Id.* at 796.

9. The 1938 Agreement was not Replaced. “Sevier Bridge advances the position that paragraph 2 of the 1938 agreement is “not directly applicable” (bottom page 6), and in essence, has been replaced by paragraph 2 of the Hoyt Decree. The position is not legally sound. The 1938 agreement and the Decree remain viable and must be read in a light that renders them compatible with each other. *It would not have been the prerogative of the district court to re-write the agreement or to replace it.* The apparent motivation for the Sevier Bridge claim is to limit the definition of “miscalculation” to an arithmetic error in adding and subtracting what Piute has delivered to Sevier Bridge and what is still owed. Such a narrow reading is foreign to the 1936 decree, the 1938 amendment, the overall thrust of the Hoyt Decree and the discussion by the various supreme court justices. Uniformly, it has been understood that “miscalculation” relates to **estimating** and **projecting** the water that will be produced by the entire water shed above Piute, less the competing uses above Piute, and after that the accretions that will enter the river between Piute and Vermillion Dams.

10. The Difficulty of Estimating and Projecting. The Upper River Commissioner has the task of responding to the request for delivery of water from 12 separate and independent water companies in Sevier Valley that receive water from the Sevier River above Vermillion dam.² He is obliged to respond in a manner that gives the users in these companies their full water right without excessive water being released from Piute Reservoir. Early in the year, the commissioner must monitor the snow gauges at various stations in the upper drainage; review the sometimes fluctuating run-off projections issued by the USDA; factor in the projected direct flow from tributaries between Piute and Vermillion – notably Clear Creek, Monroe Creek, Bullion Creek, Beaver Creek, Cottonwood Creek and Manning Creek — evaluate potential return flow from the many and varied users above Vermillion; as well as respond to unexpected storms or dry spells, while taking into account the 24 to 36 hour lag time before released reservoir water will reach the users. Based upon the above, and whatever else may impact the water available, the Upper River Commissioner must **estimate** and **project** the water that will ultimately reach Piute and, after that, the “make of the river” between the two dams throughout the water year, guarding against excessive releases from Piute and ensuring that no water goes over Vermillion and down to Sevier Bridge except that to which Sevier Bridge is entitled. It is a formidable task.

² The companies are Piute, Sevier Valley, South Bend, Monroe, Richfield, Brooklyn, Elsinore, Annabella, Joseph, Issacson, Wells and Vermillion.

11. Need for Added Flexibility. The 1938 agreement provided major help by expanding the period for releasing Piute water and allowing for adjustment in the following year, but even this is not enough if rigidly applied. In the late 1960's, the parties discussed the concept of employing a "regulatory stream" to help with this almost impossible task and to provide added flexibility. The parties failed to reach an agreement, but there was no dispute about the challenge or the need.³ Regarding the proposed regulating stream and the difficult challenge, the Lower River Commission later observed:

"The reader familiar with irrigation systems in the western United States will sense the inherent difficulty in administering Section A in the Sevier River Basin. When Water is being delivered to a sequential series of diversions, the fluctuation in the deliveries increase drastically from one end of a system to the other. These conditions were evident in Section A prior to the so-called "Regulating Stream." The regulating stream was not intended as a water right, but rather *a device to compensate for the deviations in flow beyond the ability to determine through measurement or manage through careful flow regulation.*"⁴

12. The Role of the River Commissioners. Paragraph 2(a) of the 1938 agreement begins with the language: "The River Commissioner or Commissioners, under the direction of the State Engineer of the State of Utah, shall on or after January 1st of each year release from Piute Reservoir for transmission to Sevier Bridge Reservoir. . . ." Subparagraph (a) and subparagraph (b) go on to describe the manner in which the storage rights will be managed in future years including the provision that allows Piute credit exercisable during the following water year. The credit is based upon excess water delivered to Sevier Bridge over Vermillion dam. The point is this: The responsibility rests with the River Commissioners, and the somewhat harsh comments directed against Piute officials in the Sevier Bridge position paper appear misguided.

13. Negative Inducement from Excessive Rigidity. The obvious vision underlying the 1938 agreement was to create a formula that would encourage early releases of water from Piute without threat of ultimate loss. The two-year management plan avoided putting Piute in peril from having released too much water at Piute Dam or over estimating the make of the river above Vermillion. *The greater the exactitude and rigidity in the Sevier Bridge position, the greater the resistance by Piute users toward early releases or releases, at any time, which are close to the margin.* While Piute users understand that the decision making power rests with the River Commissioners, under the direction of the State Engineer, self preservation would prompt Piute users to encourage delayed releases.

14. Injury and Windfalls. At the end of the day it is necessary to confront the issue of who sustains the injury when the Upper River Commissioner has miscalculated –

³ The "devil was in the details," and the negotiations finally wore out.

⁴ An Analysis of Water Rights in the Sevier River Basin Part 1., Zone A, Section A by Wynn R. Walker Consulting Engineer, Irrigation Hydrology Company, and W. Roger Walker, Lower Sevier River Commissioner, Submitted to Consolidated Sevier Bridge Reservoir Company, Delta, Utah 84624.

i.e., under or overestimated the waters flowing from the upper watershed in to Piute, or accretions to the river between Piute and Vermillion. If the River Commissioner has been excessively conservative in his estimates, then such would almost always be readily apparent by the 1st of September and additional water could be sent to Sevier Bridge.⁵ On the other hand, if the Commissioner has over estimated and in reliance thereon made excessive releases, *it can never be called back*. The genius of the 1938 agreement is that the adjustments necessary to achieve parity were designed to be made in the following water year. Absent that, overestimates by the Upper River Commissioner would always work to the injury of Piute and result in a windfall to Sevier Bridge. That is not a defensible result.

15. Importance of the “Following Year.” In its position paper, Sevier Bridge attributes to the supreme court a determination that when excessive releases have been made from Piute Reservoir, or over Vermillion dam, they are lost unless Piute can recapture the water in its own reservoir during the same year. (See paragraph #3 on page 5). While there is some dicta in the divergent opinions that may support or oppose this position, it is not the holding of the case; and it is both unrealistic and contrary to the language of the Hoyt Decree. Paragraph 3 of the Decree provides:

“[A]ny credit to which it [Piute] may be entitled must be taken in the storage year next following the storage year in which said waters flow into the Sevier Bridge Reservoir; and for the purpose of this decree and as the term is used in the agreement a storage year is defined to be as commencing October 1st and concluding September 30th of the following year.”

16. The Water Year and the Overlap. As stated in the provision last quoted from the Hoyt Decree, and dating at least to the general adjudication decree in 1936, it has been uniformly understood that the water year runs from October 1st to October 1st. That is the time for assessing what has occurred and making necessary adjustments. Even during those years when one or both reservoirs fill in the Spring, the duties of the River Commissioners do not end. The Upper River Commissioner continues to monitor and manage the river and the releases and discharges from both Piute and over Vermillion until October 1. Piute recognizes that when Sevier Bridge fills, any holdover credits will be extinguished. Moreover, it recognizes that when Piute is full it can accrue no credits for waters that passes over Vermillion Dam. But when both reservoirs have unused capacity, then the River Commissioner’s decisions to release water at Piute or allow water to flow over Vermillion dam will directly impact the storage rights of both reservoirs during the following year. If the two-year management approach, contemplated by the 1938 agreement, is allowed to work, the measuring systems are in place and the computation of appropriate credit can be readily accomplished subject only to determining the appropriate shrinkage. Such an approach works in favor of fairness and against injury and/or a windfall.

⁵ While I do not claim expertise, I assume transportation losses in September may be as favorable as in April or May. Temperatures have moderated, stream beds are saturated and vegetation is “down-loading” for winter. In any event appropriate shrinkage figures could be ascertained.

Piute's Claim of Credit for 2012

On April 1st 2012, both reservoirs were essentially full. The annual report shows Sevier Bridge as holding 236,145 acre feet. Piute is shown as having 67,040 acre feet.⁶ Because both reservoirs were full, any credit for preceding releases or accretions would have been wiped out. Moreover, throughout the month of April, Piute remained full and could not have stored excess water on site. As noted above all four supreme court justices that participated in the 1946 decision agreed that a full Piute Reservoir precluded accumulation of credit.

However, on May 1, the respective levels of the two reservoirs dropped below their respective capacities: Sevier Bridge stood at 226,500 and Piute stood at 66,275. The levels of both consistently dropped thereafter. All water that went over Vermillion after that date became storage water. Accordingly, Piute has recalculated its claimed credit for the year 2012 beginning May 1, rather than April 1.

From May 1, through September 30, 2012 the accretion to the river that went over Vermillion dam total 4,497 acre feet. (See page 67, 2012 Annual Report). That represents 6% of the 71,349 acre feet that went over Vermillion dam between January 1 and September 30 of that year. The Sevier Bridge position paper calls it "sloppy regulation." While that may be a bit unfair to the River Commissioner, it begs the question. The water was not lost. It became part of the storage in Sevier Bridge Reservoir, *but it did not derive from Piute's "own volition."* Rather, it was a product of mother nature and the Upper River Commissioner's extremely difficult task of trying to hit a precise target influenced by a great number of variables beyond his control and as fluid as the water itself. When the accretion figure is adjusted by the shrinkage factor, the net credit claimed by Piute is 3,966 acre feet.⁷ Sevier Bridge did not call for water at anytime over the course of the 2012 water year, but received over Vermillion dam a total of 71,349 acre feet. There is no known injury to Sevier Bridge from receiving the extra 3,966 acre feet before October 1, as opposed to receiving it after January 1, when the release process at Piute Reservoir started anew. There would be substantial injury to Piute if it were denied the credit.

Piute's Credit Claim for 2013

Piute's claim for the year 2013 begins with the 2012 credit of 3,966 acre feet. On April 1, the Lower River Commissioner called for release of 7,004 acre feet. After deducting the claimed credit, the net amount Piute owed Sevier Bridge would have been 3,038 acre feet. Between April 1, and October 1 Piute delivered to Sevier Bridge over Vermillion dam 9,775 acre feet. After applying the shrink at 11.8% the net received by Sevier Bridge was 8,622 acre feet. Piute's obligation, as computed above, was 3,038 acre feet. When that amount is deducted from

⁶ Both reservoirs have dams that can fill to the 80 foot contour, however, Piute lacks easements on some land in the upper reaches of the reservoir. Accordingly, in 1943 it was treated as being full at the 76 foot contour which equates to a capacity of 66,785 acre feet.

⁷ The shrinkage factor commonly employed is 11.8%.

the amount actually delivered, the result is a net credit to Piute of 5,584 acre feet. This figure would be Piute's starting balance for the 2014 water year.

Piute has supplied me with the Lower River Commissioners 2014 request for delivery of 15,545 acre feet. Apparently, he has given Piute credit for the exchange water and for its holdover water in Deseret Irrigation Company. The only offset which Piute now advances is the credit balance of 5,584 acre feet as of last October 1. That would leave Piute owing 9,961 acre feet of the requested amount. I am advised that something approaching 6,000 acre feet has now been delivered, and that delivery is continuing.

I make this further explanation about some things that contributed to the miscalculations that resulted in excessive discharge at Vermillion. The Upper River Commissioner acknowledges significant difficulty, particularly during the 2013 water year. A number of summer storms arose quickly, not only in the valleys, but in some tributaries significantly augmenting flow and *reducing the need for water already released from Piute*. The lag time of 24 to 36 hours between release from Piute and actual use became a crucial factor. The only possible user of the added flow became Vermillion Irrigation whose point of diversion is at Vermillion dam. But its users, like users anywhere else, could not absorb the dramatic fluctuations that occurred. In this circumstance, the only realistic solution open to the Upper River Commissioner was to allow the water to go down stream and become part of Sevier Bridge Storage. It would be a gross error to assert that this occurred at Piute's "own volition." We can debate about the effectiveness of the River Commissioners' management during this season, but there is no debate about the water passing over Vermillion and becoming storage water benefitting Sevier Bridge. The only way to achieve parity is to give Piute a corresponding credit. That is what the 1938 agreement was designed to accomplish.

Conclusion

Piute is of the view that the storage entitlements of the two reservoirs can best be served if the River Commissioners have sufficient latitude to adjust to the many variables which are not only beyond their control, but beyond their ability to project with the level of exactness that some may favor. Rigidity in management forces an attitude of protectionism, and in the long run works against the mutual interests of both the upper and lower users. The concept of the regulatory stream was a good idea, but it appears to have become bogged down in the details. Perhaps we could find a way to make it work with great simplicity. We think the parties attempted to do that in the 1938 agreement, but even that was rigidified to some extent in the fight over the 1943 water. Finally, it is clear to us that we are going to be neighbors for a long time. We now have measuring stations throughout the entire river system that allow us to respond to the unforeseen and to make appropriate adjustments on an ongoing basis. We think that makes sense. After all parties have had an opportunity to review Piute's position stated herein, we will be pleased to meet or do whatever will move us to the next step toward a fair resolution.

Very truly yours,

A handwritten signature in black ink, appearing to read 'Kay L. McIff', with a large, sweeping flourish extending to the right.

Kay L. McIff
Attorney for Piute Irrigation Company

KLM/gj

cc: Piute Irrigation Company