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December 27, 2013

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DEC 27 2013 KH
WATER RIGHTS
SALT LAKE

Subject: *PRWUA Comments on Draft Weber River Water Right Operations Order*

Dear Mr. Jones:

We have reviewed the Historical Operation of the Weber River System in Relation to the 1938 Power Agreement (Draft 10/17/2013), circulated by your office and relating to the distribution of Weber River water (the "Draft Order"). We appreciate the great effort that has gone into this project. As you are aware, the water rights governing distribution of Weber River water are complex and not generally well understood. This process has provided all parties involved with a welcome opportunity to familiarize ourselves with the basic concepts that have been in place for over 70 years.

During this process, Provo River Water Users Association (the "Association"), has worked closely with the United States Bureau of Reclamation, Provo Area Office ("Reclamation"). Reclamation and the Association are generally in close alignment regarding the interpretation of the various water rights and contracts that govern the distribution of Weber River water. Reclamation has submitted comments to your office on or before the date hereof. We appreciate Reclamation's careful and detailed approach, and we generally agree with their description and interpretation of the water rights and applicable contracts. We will not attempt to duplicate Reclamation's detailed letter here.

The Association's principal objective through this entire process has been to reach an understanding among the affected parties that the allocation and distribution of Weber River water should be administered in the future in largely the same manner as it has been in the past.

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It was the departure from this traditional administration during the 2012-2013 water year that led to the difficulties underlying this review process. We are therefore greatly encouraged that the Draft Order recognizes and documents the traditional administration of the applicable water rights and contracts, and recommends that these traditional practices be continued in the future. We think the validation by your office that those before us “got it right” is hugely important and will greatly reduce the potential for disputes going forward. We are in complete agreement with this aspect of the Draft Order.

With this background, we wish to add the following observations and points of emphasis regarding both the Draft Order and Reclamation’s comments:

1. **Theoretical Underpinnings of Water Allocations.**

We think it is of critical importance to clearly set forth the theoretical basis on which water is diverted to the Association. This issue is skirted to some degree in the Draft Order. To set the stage for this discussion, we outline below the various “blocks” of water under consideration:

- A. Pre-1903 Rights. These are rights to the winter flow of the Weber River that predate the 1903 Power Water Rights.
- B. 1903 Power Water Rights. These are rights to the winter flow of the Weber River up to 365 cfs, as measured at Gateway. These rights are owned by Pacificorp, and are the subject of the 1938 Power Contract among the predecessor of Pacificorp, Reclamation, the Association and Weber River Water Users Association.
- C. Intervening Water Rights. These are rights to the flow of the Weber River junior to the Pre-1903 Rights and the 1903 Power Water Rights, but senior to the Project Water Rights.
- D. Project Water Rights. These are (primarily) Water Rights Nos. 35-8739 (A9568) (Echo), and 35-8737 (A9569)(Deer Creek), in the name of Reclamation.

There has been much discussion about the meaning of the 1938 Power Contract and the allocation of “Power Water” between the Association and the Weber Association. It is the view of the Association that the two federal projects DO NOT utilize Pacificorp’s 1903 Power Water Rights. To do so would require a change application, which we all know does not exist. Instead, the Power Contract should be viewed as an agreement by Pacificorp to forego its use of the Power Water, in exchange for the compensation provided in the agreement, and to allow the federal projects to utilize their respective Project Water Rights in lieu of Pacificorp’s use of Power Water Rights, and in priority ahead of the Intervening Water Rights. The Intervening Water

Rights should not benefit from the compensation provided to Pacificorp, as long as they are fully protected, which they are. Accordingly, the hierarchy of diversion should be:

- First,* Pre-1903 Rights;
- Second,* Project Water Rights, to the extent of the 1903 Power Water Rights, divided equally¹ between the Association and the Weber Association in accordance with the Power Contract;
- Third:* Intervening Water Rights; and
- Fourth:* Balance of the Project Water Rights.

We agree with Reclamation that all diversions by the Association and the Weber Association should be accounted for under the Project Water Rights, including those made possible through the Power Contract.

2. Allocation of Project Water Between PRP and WRP.

We agree with the historical recognition of the priority of A9568 (Echo), over A9569 (Deer Creek). However, if administered in a purely chronological sequence, this hierarchy would result in an inefficient and wasteful allocation of water. This is due to the physical constraints of the Weber-Provo Canal, which in theory is limited to 1,000 cfs, and in practice to something less than 1,000 cfs. If Echo were allowed to fill during the spring run-off before any water was diverted to Deer Creek through the WPC, by the time diversion to the WPC began the WPC could not take the full allotment, and water would flow unused, past a full Echo Reservoir, to the Great Salt Lake.

Instead, the Order should memorialize the principal that Project Water should be diverted to the WPC (a) as early as possible, and (b) in the greatest flow possible. The importance of this guiding principal cannot be overemphasized, and must be part of the final Order. Notwithstanding the “legal” priority of the WRP, the “practical” priority that has traditionally been followed is critically important to maximizing the efficiency of the two projects. Of course, this “practical priority” is subject to the ongoing determination by the River Commissioner that the WPR will receive both (i) its 50% of the Power Water, and (ii) sufficient water to fill Echo, once, on paper. This determination by the River Commissioner is based on a number of factors, including snowpack, snowpack moisture content, soil moisture content, weather forecasts, inflows from Chalk Creek and Beaver Creek, and other factors. While this ongoing determination is admittedly somewhat of an art, it is a critical part of the River Commissioner’s role. It is important that this guiding principal be clearly stated in the Order.

Recognizing the practical reality that not all of the Association’s 50% of the water made available under the Power Contract can be physically diverted when it is available, the Power

¹ It should be noted that the 50/50 split of “Power Water” applies equally in dry years as in wet years. Stated another way, the Association is entitled to its 50% of the Power Water whether or not Echo fills.

Contract allows for the temporary storage in Echo of the Association's half of this water, and the ability to "trade" that water until July 1. After July 1, any Association water remaining in Echo becomes WRP water. This is another reason it is important to divert water to Deer Creek early. It makes no sense to require water to bypass the diversion and be stored in Echo if it cannot be traded back prior to July 1. This trade can be effectuated, in wet years, through the diversion at the WPC of WRP's surplus flows, and in dry years through the diversion of senior rights, in exchange for the Weber Association's release of "Association" water from Echo to satisfy such senior rights.

3. Diurnal Flows.

The issue of diurnal flows is really just an extension of the principal described in paragraph 2 above. Generally, the *only* water that should be required to bypass the WPC diversion at Oakley is water necessary² to satisfy senior rights. As to Power Water, this means only pre-1903 rights, and as to surplus Project Water, this means pre-1924 rights. As Reclamation has pointed out, this should be a fairly constant amount. Amounts above this constant should be allowed to be diverted, subject to the limitations described above (Echo's right to fill, and right to 50% of the Power Water), whether such extra flows are the result of diurnal fluctuations or other factors.

4. Extra Allotment.

In wet years, when both Echo and Deer Creek are able to fill, the Association's repayment contract with Reclamation gives the Association the right to receive an extra allotment of Weber River water, up to the full water right of 136,500 acre-feet. Reclamation and the Association have a theoretical disagreement over the scope of Reclamation's discretion regarding the approval of requests by the Association for extra allotment water. This disagreement is theoretical in the sense that the Association's requests for extra allotment water have historically never been denied. Therefore, the factors upon which a future denial might be based have never been discussed or agreed upon. The Association would therefore strongly recommend that the final Order not include reference to Reclamation's discretionary authority to approve or disapprove the allocation of extra allotment water. Any future disagreement between the Association and Reclamation in this regard is a purely contractual matter that should not be resolved by the State Engineer.

² We have stated before that releases should be based on actual use, if such use is less than paper rights. Again, it is not wise to short Deer Creek just to let water flow unused to the Great Salt Lake, and the storage of such unused prior right water in Echo violates the "divert early" principal detailed in paragraph 2.

5. **Smith and Morehouse.**

Reclamation has addressed the issue of how Smith and Morehouse reservoir is intended to fill, given its very junior water rights. Reclamation made reference to discussions with WBWCD regarding how to fill Smith and Morehouse without harming the Weber Basin Project. We suspect this reference was in error. The question is, how to fill Smith and Morehouse without harming the *WRP* and the *PRP*. We don't know the answer to that question. Accordingly, we would recommend that the final Order not include, at this time, allocation procedures for filling Smith and Morehouse. Perhaps a supplemental Order could be issued when this matter can be resolved to the full satisfaction of all of the parties.

6. **Dispute Resolution.**

The events of the past year highlight the need for a process to address and resolve disputes in real time. It does no good to resolve disputes after the fact, when the water is already "under the bridge," so to speak. Please refer to our earlier comments submitted in August for our suggestions regarding a timely dispute resolution process.

7. **Content and Style of Order.**

It is our general impression that the Draft Order is long on history, and somewhat short on direction and guidance. We think the Order needs to strike more of a balance between a historical document and a practical guide for the River Commissioner. While it is not possible or desirable to address every possible scenario, in general the River Commissioner should be able to consult the Order for guidance on how to allocate water at any given time, and how to account for that water. Thought should be given during the redraft to adding practical direction whenever possible, such as the principal outlined in paragraph 2 above to the effect that there should be a bias toward early diversions.

We are greatly appreciative of this effort. We welcome any questions you may have as you finalize the Distribution Order and try to synthesize all of the various comments you receive. Please feel free to contact me (801-321-4850) or Keith Denos or Jeff Budge (801-796-8770) if you have any questions.

Sincerely,


Christopher E. Bramhall,
General Counsel

cc: G. Keith Denos, General Manager