

#8

BEAR RIVER COMMISSION

Minutes of Annual Meeting held in the Governor's Board
Room of the State Capitol Building, Salt Lake City, Utah
April 17, 1961

The Annual Meeting of the Bear River Commission convened in the Governor's Board Room of the State Capitol Building, Salt Lake City, Utah, on Monday, April 17, 1961, at 10:00 a.m. Chairman E. O. Larson presided:

Commissioners present:

IDAHO

Fred M. Cooper, Grace, Idaho
Melvin Lauridsen, Montpelier, Idaho

WYOMING

J. W. Myers, Evanston, Wyoming
S. Reed Dayton, Cokeville, Wyoming
Earl Lloyd, Cheyenne, Wyoming

UTAH

Jay R. Bingham, Bountiful, Utah
L. B. Johnson, Randolph, Utah
A. V. Smoot, Corinne, Utah

UNITED STATES

E. O. Larson, Chairman and U. S. Representative

Alternate Commissioners and Advisers present:

IDAHO

Wesley W. Hubbard, Grace, Idaho

WYOMING

H. T. Person, Cheyenne, Wyoming
David P. Miller, Rock Springs, Wyoming

UTAH

L. B. Caine, Logan, Utah
Orson A. Christensen, Brigham City, Utah
E. J. Skeen, Salt Lake City, Utah (Legal Adviser)
Donald C. Norseth, Salt Lake City, Utah (representing Wayne D. Criddle,
State Engineer)

Others present:

Wesley W. Hubbard, Last Chance Canal, Grace, Idaho
Rufus R. Smith, Last Chance Canal, Grace, Idaho
Elwin Sessions, Sulphur Creek Enlargement, Evanston, Wyoming
P. W. Spaulding, Sulphur Creek Enlargement, Evanston, Wyoming
George W. Howard, Sulphur Creek Enlargement, Evanston, Wyoming
Joseph E. Barker, Upper Bear River and Mill Creek Water Users,
Evanston, Wyoming
Carl Lynn, Upper Bear River & Mill Creek Water Users, Evanston, Wyo.
Arden Pope, Sage, Wyoming (Beckwith Quinn Canal Co.)
Marvin Bollschweiler, Water Commissioner Dist. #4, Evanston, Wyoming
Wesley T. Maughan, Randolph, Utah
Ford T. Scalley, Utah-Idaho Sugar Co., Garland, Utah
Mark M. Gardner, Upper Bear River & Mill Creek Water Users, Salt Lake
City, Utah
Wallace N. Jibson, Assistant Secretary, Bear River Commission,
Logan, Utah
Glenn C. Andersen, U. S. Geological Survey, Logan, Utah

CHAIRMAN: Called meeting to order at 10:00 a.m.

APPROVAL OF MINUTES OF REGULAR MEETING
HELD NOVEMBER 28, 1960

COM. COOPER: I move that we dispense with the reading of the Minutes of the November 28, 1960, meeting, and that they be accepted and filed.

COM. LLOYD: Seconded the Motion. Motion carried.

REPORT OF CHAIRMAN

CHAIRMAN: I do not believe I have any report to make. I will call on the Assistant Secretary to make his report.

REPORT OF ASSISTANT SECRETARY

MR. JIBSON: I would like to introduce Glenn Andersen of our office, who is in charge of getting the streamflow records into the Washington office for publication, usually a year or so later than we get them out in our Commission report.

I will hand out copies of our Third Annual Report, which we just received from the printers. We have enough on hand so that there is at least one each this morning for all Commissioners.

Extra copies of the minutes are also here and now available as they have been approved by the Commission.

My report will be quite brief. We hope that the forecast is on the pessimistic side, but ~~we~~ if correct, have a situation in the Bear River Basin which will look something like this: April to September runoff on Bear River above diversions will be about 53 percent of the 15-year average and 74 percent of last year.

This is the supply that we can expect above Evanston and above practically all diversions. As we move down the river, the situation grows worse, and the supply to the Woodruff-Randolph area is forecast at only 26 percent of the 15-year average, and about 57 percent of last year. The picture on Smiths Fork is somewhat better with April to September forecast about the same as last year which was in the 70 percent range of normal.

Streamflow at Bear Lake inlet (Stewart Dam) will be in the range of 40 - 45 percent of the 15-year average which is a slight increase over last year. The lake elevation is now at 5,914.90 feet with a usable content of 814,000 acre-feet. This shows a gain of about 40,000 acre-feet since October 1st of last year which is a very small amount leaving total content of about 200,000 acre-feet less than on the corresponding date last year. The inlet canal is diverting into the lake all available water and is discharging between 100 and 125 cfs at the present time.

(Mr. Jibson referred to page 21 of the Annual Report, just distributed, showing hydrographs of the 1959 lake surface and the 1960 lake surface.)

The right side of the graph shows the elevation in feet, and the left side shows the contents in thousands of acre-feet. On the right at 5,915 feet elevation, if you extend a line from that mark to the middle of April, you will note the comparison as of today on Bear Lake. This is almost 3 feet lower than on the corresponding date last year. If we assume that there will be a somewhat comparable runoff (to 1960) into the lake in the next month or two and a comparable demand on the lake after it has reached its peak, we will reach the Irrigation Reserve about the first part of July this year. This will be the first time that we have been down to the Reserve since the Compact became operative in 1958. It also shows the trend in the past two seasons and this season--for the lake to lose more water each year.

Cache Valley flow is expected to range from 43 percent to 69 percent of this 15-year average. Precipitation in Cache Valley was spotty this year and in general, 10 to 15 percent below last year's runoff for the area below Soda Springs in Cache Valley.

This is about the picture, unless we get a decided upswing in precipitation in the next month or two. Practically all the runoff (above Bear Lake) is now being diverted by canals to build up the water table and moisten the soil. The section in Wyoming above Woodruff-Randolph is diverting only in the Chapman Canal. They have been filling the Neponset Reservoir which last week was practically at the spillway, and they probably will continue to divert in this canal after the reservoir is filled.

It is obvious that during this season's operation we need more than ever the cooperation of the water users and the State officials. The task of local commissioners will be very difficult - more so than in the past. They deserve our support and the support of State officials under whom they work. And I am sure that when problems develop this year, State officials will give their support to the water commissioners quickly and without reservation.

Stream Gaging

At the last Commission meeting we requested approval to discontinue the gaging station on Twin Creek at Sage, Wyoming and to replace it with a 5-year station near the mouth of Rock Creek. The new station was installed in March, and has been in operation since March 21st. We will continue operation of the Twin Creek station for a short time to get an overlapping record for correlative purposes with Rock Creek, so that we can extend the latter record back in case it is needed for reservoir development or for other streamflow purposes.

New Applications

We have received applications for appropriation from the three State Engineers, but have not yet had time to go into them in much detail.

(Mr. Jibson distributed summaries of water applications and read and discussed each from the list, copy attached.)

This comprises all of the applications to date which previously have not been reported to the Commission. This concludes my report.

COM. COOPER: With respect to the application of Eldon B. Bingham on Five-Mile Creek, is that a tributary of the Bear River?

MR. JIBSON: Yes. I believe there is always some flow in Five-Mile Creek.

COM. JOHNSON: Has there been any action taken by the State Engineers' offices on any of these applications?

MR. JIBSON: In a few cases they have filled in the blank spaces on the summary sheet showing approval or disapproval of applications, but except for three or four Idaho applications, I do not have that information. The first three listed for Idaho are not marked, and the others have been approved.

The Chairman called on Mr. E. J. Skeen to comment on how far the Commission might go in respect to the applications.

MR. SKEEN: The provision in the Compact pertaining to this is found in Article 10:

"Applications for appropriation, for change of point of diversion, place and nature of use, and for exchange of Bear River water shall be considered and acted upon in accordance with the law of the State in which the point of diversion is located, but no such application shall be approved if the effect thereof will be to deprive any water user in another State of water to which he is entitled. The official of each State in charge of water administration shall, upon the filing of an application affecting Bear River water, transmit a copy thereof to the Commission."

There is nothing, of course, in the Compact which would give the Compact veto power on the action of the State Engineer. The Compact, when approved, becomes the law of the State, and the State Engineer is bound by this provision of the Compact.

I think, however, that it should be the attitude of the Commission to consider the possible effect of an application and, in a proper case, make recommendation to the State Engineer, or communicate with him, suggesting that the application may violate the water right of some water user below. That would be the extent, I think. Also there is nothing in the Compact which would prevent the Compact Commission from making a formal protest. However, there is nothing in the Compact spelling that out.

Rich COM. JOHNSON: The applications of the Bureau of Land Management amount to a total of 78.5 acre-feet, and they are all tributary to some of the driest area in Cache County. It would seem to me that all we could do would be to advise the State Engineer's office to see what it does there in that area. They are pressed very hard there in their grazing, but I think that we have reached the proper point and would be glad to call it to the attention of the State Engineer.

MR. L. B. CAINE: Is there that much water in Five-Mile Creek now that they could take 3 cfs out?

MR. JIBSON: There was 1.5 to 2 cfs the last time I saw it; I do not have any records, however.

MR. CAINE: There is water being pumped out above the dam now, and I cannot see where that Creek is near 3 cfs.

COM. COOPER: I think you are right, and that is the reason I challenged it. I would recommend that there be a little investigation made there before that is granted by the State Engineer.

MR. JIBSON: This is an application which has been approved.

COM. MYERS: The Commission could still take it to court.

COM. COOPER: I would recommend that there be some investigation made by the State Engineer before the final stamp of approval is given. What do you think about it Mr. Caine?

MR. CAINE: I have never seen that much water in that creek. I worked on getting the dam in that area, and I do not think the creek ever did carry that much. It was running about normal before the dam was put in, they tell us, and I never thought there was more than 1.5 cfs there.

COM. LLOYD: Would not that be covered by their administration? If the water was not there, they would not get it.

COM. SMOOT: Does this affect any user down below?

MR. JIBSON: The date of filing is February 17, 1961 and this probably would be the date of priority, so the relative priority against other users on Five-Mile Creek (or below) automatically would be taken care of, as well as the question of the amount of water in the creek.

REPORT OF SECRETARY-TREASURER

COM. BINGHAM: I will call on Mr. J. C. Busby to make this report.

(Mr. Busby distributed printed copies of the Financial Statement, which are printed here and made a part of the Minutes).

COM. JOHNSON: I want to commend Mr. Busby on this report.

COM. COOPER: I move that we receive and file the Financial Report.

COM. SMOOT: Seconded the motion. Motion carried.

STOCK WATER PONDS

COM. JOHNSON: How shall we handle the question of stock water ponds? Shall we make recommendations to the State Engineers?

COM. BINGHAM: Any individual could call this to the attention of the State Engineer, or, if you thought it would be worth while, you could have it called to his attention through the Commission.

COM. JOHNSON: I should like to recommend to the State Engineers that they examine very carefully, before granting approval, such amounts of water in dry areas.

COM. SMOOT: I feel that we are just kind of "spinning our wheels" considering these as we have done in the past. If we do not have any veto power but are left as individuals to file recommendations, they would probably never be filed; and, I think unless the State Engineers involved in making the decisions could meet with the Commission, at the time we make this consideration, and indicate to the Commission the problems and their thinking on them, so we can act as a Commission on this, then it is worthless to take up the time of the Commission. I would recommend that we ask the State Engineers to meet with us at the time we consider these applications, so that we could make a recommendation at that time.

COM. JOHNSON: I think Mr. Porter has always held that this is largely a distributive Compact, but we would like to inject some recommendation on management of the water in the basin. If we did not write a Compact that covers more than distribution of water that we find in the stem of the river, we have failed in what we set out to do. A modification of the compact with regard to the 20 acre-feet is all we could hope for; but, how are we to get it?

COM. SMOOT: I have confidence in our engineers and their department at this time. As far as I know, they do a pretty good job of considering what effect these applications would have on the other users, especially with regard to underground water. But it looks to me like we sit here and discuss these problems without knowing the attitude of the State Engineers, and we do not have much to go on. I do not think we can do much as individuals or be effective if we do not work together with the State Engineers in Commission meetings and make recommendations at that time.

CHAIRMAN: With regard to the group of Bureau of Land Management applications under discussion now, the question is, will the State Engineer of Utah consider these and see whether they need the amount applied for or not?

BEAR RIVER COMMISSION
STATEMENT OF INCOME AND EXPENDITURES
FOR THE PERIOD JULY 1, 1960 TO MAR. 31, 1961

	<u>Cash</u> <u>On Hand</u>	<u>Approved</u> <u>Budget</u>	<u>Assessments</u> <u>Outstanding</u>	<u>Total</u> <u>Revenue</u>
<u>INCOME:</u>				
Cash Balance 7/1-60	\$2,006.00	\$ - - - -	\$ - - - -	\$2,006.00
State of Wyoming	- - - -	8,700.00	- - - -	8,700.00
State of Idaho	- - - -	8,700.00	- - - -	8,700.00
State of Utah	- - - -	8,700.00	- - - -	8,700.00
TOTAL INCOME TO 3/10-61	\$2,006.00	\$26,100.00	None	\$28,106.00

DEDUCT OPERATING EXPENSE

<u>EXPENDED THROUGH U.S.G.S.</u>	<u>Approved</u> <u>Budget</u> <u>(Adjusted)</u>	<u>Unexpended</u> <u>Balance</u>	<u>Total</u> <u>Expenditure</u>
Stream Gaging	\$15,050.00	\$ 7,323.00	\$ 7,727.00
Personal Service	6,840.00	4,263.00	2,577.00
Travel	1,200.00	977.00	223.00
Fiscal Charge - U.S.G.S.	350.00	145.00	205.00
Miscellaneous	100.00	93.00	7.00
Washington Office Charge	710.00	354.00	356.00
General Office	300.00	230.00	70.00
Sub-Total	<u>24,550.00</u>	<u>13,385.00</u>	<u>11,165.00</u>

EXPENDED THROUGH COMMISSION:

General Office Expense	100.00	53.25	46.75
Printing Annual Report, etc.	700.00	700.00	- - -
Treasurer Bond & Audit	400.00	150.00	250.00
Transcription of Minutes	150.00	115.00	35.00
Miscellaneous	200.00	200.00	- - -
Sub-Total	<u>1,550.00</u>	<u>1,218.25</u>	<u>331.75</u>

OTHER EXPENDITURES:

Legal Consultant	<u>300.00</u>	<u>- -</u>	<u>300.00</u>
Total Disbursements	\$26,400.00	\$14,603.25	11,796.75

UNEXPENDED CASH BALANCE AS OF MARCH 31, 1961 \$16,309.25

MR. DONALD NORSETH: We have taken no action on any of these particular applications. They are being processed and studied, so I cannot answer your question as to whether they need 5, 10 or 20 acre-feet.

CHAIRMAN: Do you investigate to find out?

MR. NORSETH: No, we do not. Not as to the number of stock, for instance. We look at it from the water standpoint, and the effect on the other users.

MR. JIBSON: It seems to me that if this Commission desires to protest any application, it needs merely to be put in the form of a motion, and the protest can be prepared and filed.

COM. JOHNSON: The whole objective is to keep the water of the river for beneficial use. If this could be carried out as a Commission protest against such amounts of water, I should be glad to make the motion.

COM. MYERS: It seems to me we have gone over this several times before. Unless the State Engineer of Utah is overstepping himself and allowing this water where it will interfere with some prior right, I do not see what we have to protest. It says right in the Compact "20 acre-feet" and if we protest that, we are only protesting against the Compact. We do not have any basis. We might ask the State Engineer, as a courtesy, to investigate as to how this is allocated.

MR. SKEEN: With respect to that 20 acre-feet, the Compact simply provides that it will not be charged against the upstream storage allocation, but any application would be approved subject to prior rights, and these 20 acre-feet filings would be approved subject to existing rights, and they would have a priority as of now and without question. If there is any interference, whether the State Engineer approves them or not, they would be subject to being shut off to prior rights. I think a lot of the worry may be dissipated--this 20 acre-feet provision just relates to the charge against allocations of the upper States. The compact specifically provides that the appropriation be subject to existing rights in the state.

COM. JOHNSON: I think it would be very unwise to permit the Bureau of Land Management these applications in the amount of water they request.

COM. COOPER: I move that we hold the approval of these applications in abeyance until further investigation is made.

COM. JOHNSON: Seconded the motion.

COM. BINGHAM: Could the State Engineer be asked to give careful consideration to these and the implication on other users? I think he may welcome having that information as he comes to these applications.

COM. COOPER: I would like to withdraw my motion, and make another one. I move that the Chairman be directed to write a letter to the Utah State Engineer requesting that his office make an examination of the applications Nos. 32418 - 32424 from the Bureau of Land Management, prior to their approval, to determine the effect that they will have on other users henceforth, and make a report on the results of the examination.

COM. LAURIDSEN: Seconded the motion. Motion carried

The meeting recessed for lunch, and reconvened at 1:00 p.m.

UNFINISHED BUSINESS

MR. E. J. SKEEN: Mr. Jibson sent a few legal questions to me for consideration, and opinion, and before answering them I took occasion to pick up the old minutes of our deliberations and examine them on these various subjects that were raised in the questions.

The first question Mr. Jibson asked me was by letter dated January 4, 1961, and I have incorporated his question, as he asked it, in my letter answering him. The letters were short, and I shall be glad to read the question and then my answer, and then, if I can, answer any questions raised.

Mr. Skeen then read to the Commission his letter dated January 23, 1961, addressed to Mr. Jibson, and a copy of the letter is spread on the Minutes below:

Dear Mr. Jibson:

In your letter to me dated January 4, 1961 you call my attention to the following part of the transcript of the minutes of the regular Bear River Commission meeting held in Salt Lake City on November 28, 1960:

"MR. JIBSON: A question has arisen relative to administration of water rights in the Hilliard West Side Canal which diverts water in Utah for use in Wyoming. Wyoming Book of Adjudication recognizes this right for a total of 32.57 cfs based on 1 cfs per 70 acres. Proposed adjudication in Utah would grant 56.50 cfs on about the same total acreage. The Compact specifies that this interstate right shall be administered by Wyoming but does not specify which State's appropriation shall be followed.

"Other interstate rights in the same category are Hilliard-East Fork Canal in which rights are recognized and confirmed in the Compact; Lannon Canal in which equal total rights are recognized in both States but with slightly different dates of priority; and Lone Mountain Ditch in which rights are adjudicated only in Utah.

"A legal determination by this Commission would appear to be in order.

Article IX B of the Bear River Compact provides:

"B. All interstate rights shall be administered by the State in which the point of diversion is located and during times of water emergency, such rights shall be filled from the allocations specified in Article IV hereof for the Section in which the point of diversion is located, with the exception that the diversion of Water into the Hilliard East Fork Canal, Lannon Canal, Lone Mountain Ditch, and Hilliard West Side Canal shall be under the administration of Wyoming. During times of water emergency these canals and the Lone Mountain Ditch shall be supplied from the allocation specified in Article IV for the Upper Wyoming Section Diversions."

The word "administered" as used in the above quotation has a broad meaning. It includes the appropriation, distribution and adjudication of water rights. All such activities are, under the water laws of the three compacting states, included in the administration of water rights. The compact expressly provides that interstate rights shall be administered by the state in which the point of diversion is located. This is a general provision with respect to appropriation, distribution and adjudication of water rights which are interstate in nature, subject to only one exception; namely that the diversion of water into the Hilliard East Fork Canal, Larnon Canal, Lone Mountain Ditch and Hilliard West Side Canal shall be under the administration of Wyoming.

It is my opinion that such matters as the appropriation of water and the adjudication of water rights for conveyance in the Hilliard West Side Canal and the other canals mentioned in the paragraph of the compact quoted above are under the administration of the state in which the point of diversion is located (Utah) and the only activity delegated to Wyoming by the compact is that of supervising and controlling the diversion of water into the canals. Such diversion would be measured by the appropriations approved by the State Engineer of Utah and the adjudication under the Utah Statute.

I am advised that the Utah adjudication of water rights for the conveyance of water in the interstate canals we are considering is merely in its "proposed determination" stage and until it becomes final there will be no conflict. In the event of a conflict the Utah adjudication will control. Water should be distributed in accordance with the Utah proposed determination until such time as a final decree is entered.

Respectfully,

E. J. Skeen

MR. SKEEN: That opinion is based on the fact that in the Western States, the language "Administration of Water Rights" includes all the elements I have mentioned, and I think there can be little doubt but that we must follow the law in this Compact, and the law of Utah would control in respect to this allocation. It would give the Wyoming people more than they are entitled to under your own adjudication, but as I say, the law of the State at the point of diversion must control. They are diverted in Utah and adjudicated in Utah under our adjudication in our courts. Certainly the Compact does not change the basic law in that respect. The use of the word "administration" makes it clear that it includes that element of administration of water rights.

Mr. Skeen then read another letter dated January 23, 1961 copy of which follows:

Dear Mr. Jibson:

Reference is made to your letter dated January 4, 1961, relating to Article VII, paragraph D of the Bear River Compact which provides:

"D. In the event lands or other taxable facilities are acquired by a signatory State in another signatory State for the use and benefit of the former, the users of the water made available by such facilities,

as a condition precedent to the use thereof, shall pay to the political subdivisions of the State in which such facilities are located, each and every year during which such rights are enjoyed for such purposes a sum of money equivalent to the average of the amount of taxes annually levied and assessed against the land and improvements thereon during the ten years preceding the acquisition of such land. Said payments shall be in full reimbursement for the loss of taxes in such political subdivision of the State."

It is pointed out that plans are progressing for a Bureau of Reclamation project to be constructed principally in Idaho for the benefit of Users in Idaho and Utah.

You request my opinion on the following questions:

1. Will users in Utah who receive water developed by the project be obligated to reimburse the Counties in Idaho in which the facilities are located for the loss in taxes?
2. If so, may this obligation be assessed proportionally to the derived benefits as an included project cost (acre-feet used in Utah as proportion of total acre-feet developed, or similar criteria)?
3. If obligated proportionally, are Idaho users required to reimburse the subdivision for remaining loss in taxes? (This question, perhaps, is not contingent on Article VII D of the Compact.)

These are answered in the order stated:

Question 1. It will be noted that paragraph D of Article VII required payment of a sum of money equivalent to loss of taxes in situations where a "signatory state" acquires land or other taxable facilities in "another signatory state" for the use and benefit of the former.

Reclamation projects of the kind you describe are constructed by the United States. If past practice is followed water rights will be acquired by the United States and title to the land needed for diversion, storage and distribution systems will be taken in the name of the United States. The United States will undoubtedly proceed under paragraph A of Article VII which insofar as pertinent provides:

"A. No State shall deny the right of the United States of America. . . . to construct or to participate in the construction and use of diversion works and storage reservoirs with appurtenant works, canals and conduits in one State for use of water in another State, either directly or by exchange."

Paragraph D would in my opinion have no application to the question presented. It applies only if a state acquires land in another state for a water project.

Questions 2 and 3 are based upon an affirmative answer to question 1 and therefore need not be answered.

Several bills have been introduced in Congress in past years to compensate states and counties for loss of taxes when land is taken for reclamation works, but thus far no such bill has been enacted.

Respectfully,

E. J. Skeen

I have a letter from Mr. Jibson, dated January 4, 1961, which says:

"The Bear River Commission, at its regular meeting held on November 28, 1960, discussed at length a problem introduced by the proposed Whitney Reservoir. In this case it is the desire of the sponsors, and the Wyoming State Engineer, to build a reservoir of a capacity of 5,000 acre-feet, allocating from the Compact storage allocation 4,200 acre-feet. The Utah State Engineer has raised the question that the construction of storage capacity in excess of Compact allocation is not desirable from an administrative standpoint, and has raised the question as to the position of the Compact in this matter.

By official motion, the Commission asked that you review the terms of the Compact relating to the problem of constructing storage capacity in excess of the Compact allocation, and confer with the State Engineers regarding administrative problems, particularly the costs of assuring Compact compliance."

I was anticipating that Mr. Carter from Idaho would be here so that I could confer with him before giving an opinion on this question. I have discussed it with Mr. Lloyd and with representatives of the Utah State Engineer's office. I would prefer that I be permitted to discuss the problem with the Idaho State Engineer before rendering and filing an official opinion on this question.

COM. MYERS: We are very anxious to get that construction under way. How long do you suppose it would take you to discuss this with Mr. Carter?

MR. SKEEN: I could probably call him on the telephone and I can then give you my opinion on it. I have done my part of the work, and I can state, informally, that from a legal standpoint I have definitely concluded that the Compact grants the right to store in the Upper Divisions, the 35,500 acre-feet only, and that there is no limitation whatever in the Compact on the size of the reservoir in which that quantity of water may be stored. I think that the problems you wished me to discuss with the State Engineers are administrative and a matter of cost, and maybe that can be discussed by the Commission here and you can take some action on the administrative features. Perhaps someone from Idaho could represent the State Engineer in the discussion.

COM. MYERS: I am perfectly agreeable to wait any reasonable length of time but we do not want to let this hang fire because it has been too long already.

MR. SKEEN: If it is all right with the Commission, I will undertake to file an opinion with the Assistant Secretary and the Chairman, and furnish each member of the Commission with a copy of it within a week.

(Mr. Skeen then read another letter, dated April 17, 1961 which incorporated requests for an opinion from Mr. Skeen. The letter is spread on the minutes below:)

Dear Mr. Jibson:

You have called my attention to a diversion of water in the Upper Wyoming Section which encroaches upon water rights in the Lower Utah Section based on the relative dates of priority. But you say that the Bear River Compact is not being violated because the aggregate of the diversions in the Upper Wyoming Section is far less than 49.3 percent of the divertible flow in the Upper Division. Inquiry is made as to whether this situation would justify action of the Bear River Commission to prevent the encroachment.

My answer is in the negative. The Compact provides specifically that rights to direct flow water shall be administered in each signatory state under state law subject to certain limitations imposed in each division. The encroachment referred to in your letter is in the Upper Division and the limitations which are controlling appear in Article IV, under the heading, "Upper Division". It is provided that a water emergency shall be deemed to exist when the divertible flow in the Upper Division is less than 1250 second feet. If at the time of the "encroachment" you speak of, the divertible flow was less than 1250 second feet the divertible flow is by compact allocated for diversion according to percentages in the various sections of the Upper Division set out in the Article. The Compact Commission has authority to take action only if there is a violation of the percentage allocations. An individual violation of the rights of another appropriator must be handled under state law by the State Engineer of the state where the violation occurs.

Article IV B is consistent with this conclusion because it states that the Commission shall have authority, on its own motion, to take action to prevent an encroachment only if "there are diversions which violate this compact and which encroach upon the water rights in a lower state". The element of "violation of the compact" is lacking in the situation you mention in the Upper Division if the Upper Wyoming Section is diverting less than 49.3 percent of the divertible flow in the division. The Commission, therefore, has no authority to act.

Respectfully,

E. J. Skeen

Mr. Skeen asked for any questions on the opinions he had given.

COM. JOHNSON: Do we understand that this 1250 cfs is the only thing in the Compact that sets the point of interstate control?

MR. SKEEN: Yes. That is the situation in the Upper Division where we have made the breakdown between the divisions and sections and established a definite basis for control. In the Lower Division we do not have such an arrangement providing that there would be an emergency existing when there would be an encroachment on

the water rights of the lower States. In the Lower Division the situation would be different, but in the Upper Division we established these controls and they are the only thing, as between States, that could be looked to, to enforce the Compact. If one appropriator takes more than is there within the section it is up to that section or State to handle the problem.

COM. JOHNSON: Then, over the storage period, any diversion, say in Wyoming, that did not exceed 49 percent could be diverted at any time without action?

MR. SKEEN: Yes. The Commission could only take action where there is a violation of the Compact.

When the flow is over 1250 cfs there is no control. When it falls below that then these percentages control. This applies to direct flow. Storage water is in a different category in another section.

MR. JIBSON: When they are storing water under the storage provisions of the Compact, would you say that the percentage figures have no application?

MR. SKEEN: These percentage figures are applicable only to direct flow of water. Storage water is treated under the section which grants a right to storage, "Such additional storage rights shall be subordinate to, and shall not be exercised when the effect thereof will be to impair or interfere with (1) existing direct flow rights for consumptive use in any river division, and (2) existing storage rights above Stewart Dam..."

These are the only limitations to the storage right.

MR. JIBSON: What are the relative priorities between States on new storage water?

MR. SKEEN: A provision of the Compact clearly states there is no priority established as between States to that storage water. There is no priority on that. The only priorities are those set out in the Compact itself, and the thing that made any storage possible was the provision that it would not be subordinate to Bear Lake storage.

COM. JOHNSON: Then, if and when there is a series of reservoirs built, some filling program would have to be made by agreement over and above the Compact?

MR. SKEEN: I am sure that would have to be done so that it would not encroach on direct-flow rights. The only restriction would be that they are all on equal priority. That is not really a restriction, it is a very important and statutory provision.

COM. LLOYD: Then storage water does set aside State laws?

MR. SKEEN: In regard to this block of storage water, the priorities would be the same under the Compact. However, it certainly does not affect the direct-flow rights. As far as priority of application for this storage is concerned, it is my opinion that that is not important as between States anyway. It is on an equal basis. Within the State I would say the State law controls, one against the other.

It does become very involved, and will need a lot of thought to reach a final conclusion, particularly on this Woodruff Narrows Project with the diversion in Wyoming, and coming out of Utah's allocation. It will be a question as to which State law controls the priorities.

COM. MYERS: The Whitney Reservoir application was on file some time before the Narrows. Does that give them any priority in filing?

MR. SKEEN: As far as priorities are concerned, within the State I think the State law will have to control, but as between States I would say there is no priority of one State over the other. That is an unusual situation, because we have got to go to the State of Wyoming to apply for water to put into Woodruff Narrows Reservoir to irrigate lands in both Wyoming and Utah. Careful study will be needed.

COM. BINGHAM: It might be helpful inasmuch as we are facing a dry season and we do not want any trouble, to hear what would be your version of how to handle a situation where someone wanted to file under some of the provisions of the Compact that would apply in an emergency?

MR. SKEEN: Referring to Article III of the Compact--that sets out the nature of the Bear River Commission and what are its functions and powers and authorities etc. You will notice that under Article III (d) the Commission is given authority "to enforce this Compact and its orders made hereunder by suit or other appropriate action". The preceding paragraph gives powers of the Commission to "sue and be sued as a legal entity in any court of record of a signatory State, and in any court of the United States having jurisdiction of such action...". I think, if there is a violation of the Compact, under this language the Commission has authority and should first try to avoid further trouble by action short of bringing suit, but if necessary the Commission has authority to take drastic legal action. Certainly I think if something comes up requiring the attention of this Commission, it should take the matter up with the administrator of the stream where the violation occurred and try to prevent further violation of the Compact. I think it is the duty of the Commission to act by legal proceeding to prevent further violation. Otherwise, the Compact is no good. It has plenty of authority granted to take any action necessary to carry out its terms, and if it is going to serve its purpose, the Commission will have to act accordingly.

COM. BINGHAM: I was thinking of the provision where an individual water user may petition where that applies to the interstate tributaries.

MR. SKEEN: That applies to the Lower Division, and that is the first action by an individual to invoke the authority of the Commission.

COM. JOHNSON: If there could be no violation percentage wise until the 1250 cfs has been declared an emergency, after that point can we say that there is an emergency on the river and the percentages take over? Up to that point, the percentages have nothing to do with it?

MR. SKEEN: Under this Upper Division Section automatically a water emergency exists when the water flow drops under 1250 cfs.

MR. JIBSON: At the present time there is a water emergency existing in both divisions. Both division flows are below the criteria for initiating a water emergency. So we are keeping abreast today of the record of the diversions in the various State sections and will continue to do so. If regulation is required, it could be put into effect without declaration of an emergency.

MR. SKEEN: If the water is handled this year as provided by the Compact, it will have to follow these percentages, and you only have flexibility within your various Sections, by rotation and other means to secure maximum use. But, if you do anything about making the percentages flexible, the only thing you can do is by common consent. There is nothing in the Compact that would permit any change in these percentages. However, it may be during the coming summer it would be advisable in the upper river to work out some rotation system along the whole upper reach of the river.

COM. COOPER: Any attempt to change these percentages would be in violation of the Compact?

MR. SKEEN: You cannot change these percentages without complete change of the Compact, and approval by the United States.

MR. JIBSON: In connection with the Lower Wyoming Section of the Upper Division, today I doubt if they are getting 9.6 percent, but from a practical standpoint, they do not particularly want the water out just yet. If they did, Utah would have to regulate somewhat now to get that amount down to them. The same situation has arisen in the previous two years but has lasted only a short time. We realize that as return flows build up (from Utah), they will have more supply and at a later date than Utah. The Beckwith-Quinn Dam and the Pixley Dam irrigators will want their 10 percent a few weeks from now; but as of today, it is probably to their benefit to have it diverted above them in Utah.

MR. MILLER: We are diverting very little water at the present time. We have nothing to give. If an emergency were declared what benefit would it be at this time?

MR. JIBSON: None, unless it would be between Lower Utah and your (Wyoming) section below Utah. If you are under your 49.3 percent, there is nothing you can give.

MR. SKEEN: Quoted Article IV (e) of the Compact: "If for any reason the aggregate of all diversions in a river section of the Upper Division does not equal the allocation of water thereto, the unused portion of such allocation shall be available for use in the other river sections in the Upper Division in the following order: (1) In the other river section of the same State in which the unused allocation occurs; and (2) In the river sections of the other State. No permanent right of use shall be established by the distribution of water pursuant to this paragraph e."

MR. POPE: If this emergency is put into effect, if the water dropped to 1000 cfs for example, and each canal gets a certain amount of 1000 cfs, it takes 3 or 4 days to divert each canal's water, and by the time we get to the lower section in the Upper Division the river has dropped below that amount, and we get no water. Is

there any way we could get our share of that water? The Upper Sections of Wyoming and Utah get their share, and there is no water left.

MR. JIBSON: Your statement is correct. We have encountered it in all three years of operation, and I do not have a ready solution. It is impractical to put on the number of men who can serve as Water Commissioners to cover that entire river section in a day in order to keep abreast of allocations and regulate accordingly. It is especially evident in dry years when the supply is dropping so rapidly that we cannot currently keep abreast of the divertible flow, let alone follow through with the regulation that is necessary.

Two years ago, on the day when the divertible flow dropped below 1250 cfs, we immediately instituted a program of regulation in the Upper Wyoming Section. The water commissioner very effectively regulated for two or three days, but then the drop in supply caught up with us and within a week there was not enough water in the river to maintain interstate regulation. It was much the same last year. Although we see some benefit in Utah, the real benefit to your section would not be effective until about the 4th of July, when you are ready to dry up for haying operation. We cannot estimate what will happen ahead of time and try to move. If we move when the available flow is above 1250 cfs, we are in violation of the Compact, and we have been very reluctant to ask for regulation before that point was reached.

COM. COOPER: In 1889, the U. S. Geological Survey Engineer sent in a report that the Bear River in the Northeast part of Utah was very over-appropriated. So here we are dealing with an unorthodox situation. We have been over-appropriated in the Bear River for years.

MR. JIBSON: Although perhaps we do not see as much benefit between States as would be desirable in the Upper Division, we did know when the Compact was formulated, that this was not the real trouble spot. If you will recall, many of the first versions of the Compact came out without any division of direct flow in the Upper Division. We have found that, indirectly, it is doing a considerable amount of good (Upper Division) because it is bringing about regulation within your State section, and I am sure it has brought about a much more equitable distribution within your State than before.

This situation did not come to us as any particular surprise. As your storage is developed in the Upper Division--as Woodruff Narrows is developed--we will see the distribution of water and the beneficial use of water are going to improve considerably.

UNFINISHED BUSINESS

COM. JOHNSON: How have we disposed of these applications on West Fork?

MR. LAMBERT: (for Utah State Engineer) We have not actually taken any action yet. We have been waiting for some time for an opinion from the Attorney General concerning a point there that was raised by one of the applications. We have received that opinion now, and I suppose we have to go ahead now and take some type of action. The trouble is, we have got about 20 to 30 places we have to take action within the next few days, so it is difficult to say when it will be

finally completed. It is now up to the State Engineer to make a ruling on these applications in the Summit County and in the Rich County areas. In our adjudication work we have now got a pretty good record of everything that is up in there. It is quite a bit different than they thought when the Compact was formulated. We have a large number of factors to consider, and are not going to make our decision off the cuff. We will study it very thoroughly and hope it will have a proper foundation for whatever action, legal or otherwise, each side is to take.

COM. JOHNSON: What is the real controversial question? Is it the amount stored on West Fork, or is it the whole picture that the Hatch Brothers presented to us?

MR. LAMBERT: We must consider the whole before we take any one segment of it. There is, of course, the one reservoir on the West Fork-that is the larger one-but we cannot look at that in any different way than we do the whole picture. On the Upper Bear, both in Rich and Summit counties, until we can get that whole picture, we do not want to make any premature rulings on that.

COM. JOHNSON: Commissioner Myers expressed some concern on the delay.

MR. LAMBERT: You will have a decision long before the end of this year. Perhaps within 30 days.

I think the Whitney Reservoir is for Wyoming use, and we worked through Wyoming on that, and as far as I am concerned, as soon as Wyoming and Utah can get together I can see no reason for any further delay on that.

COM. COOPER: I would like to mention the fact that the Attorney for the Idaho Commission in printing this Compact, Mr. A. L. Merrill of Pocatello, Idaho, passed away on February 15th of this year. I move that tribute be paid to Mr. Merrill for his efforts in printing the Compact, and that this be spread on the Minutes.

COM. BINGHAM: Seconded the motion. Motion carried.

COM. LLOYD: I move that tribute be paid, and spread on the Minutes, in regard to Mr. L. C. Bishop, former Wyoming State Engineer, who has passed away.

COM. BINGHAM: Seconded the motion. Motion carried.

The meeting adjourned at 2:10 p.m.

Applic Number	Date of Filing	Name	Source	Use	Location	Amount	Presented to Commission
32410	10-12-60	Parnell Johnson	<u>STATE OF UTAH</u> Underground	Irrig. Dom. Stock	S31 T13N R6E Rich	0.1 cfs	4-17-61
32412	10-18-60	Lorraine S. Howard	Underground	Irrig. Dom	S20 T13N R6E Rich	0.015 cfs	4-17-61
32418	10-19-60	Bur. of L.M.	Underground	Stock	S12 T10N R6E Rich	4.7 Ac-ft	4-17-61
32419	10-19-60	Bur. of L.M.	Sage Hollow	Stock	S 1 T 9N R6E Rich	20 Ac-ft	4-17-61
32420	10-19-60	Bur. of L.M.	Broad Hollow	Stock	S22 T 9N R6E Rich	15 Ac-ft	4-17-61
32421	10-19-60	Bur. of L.M.	Little Long Hill	Stock	S 5 T 9N R7E Rich	9.2 Ac-ft	4-17-61
32422	10-19-60	Bur. of L.M.	Unnamed Wash	Stock	S30 T10N R7E Rich	14.2 Ac-ft	4-17-61
32423	10-19-60	Bur. of L.M.	South Big Creek #2	Stock	S14 T10N R6E Rich	20 Ac-ft	4-17-61
32424	10-19-60	Bur. of L.M.	Underground	Stock	S 5 T 9N R8E Rich	0.10 cfs	4-17-61
32478	11-14-60	Henry A. Summers, Jr.	Underground	Irrig. Dom. Stock	S15 T 9N R1E Cache	0.019 cfs	4-17-61
32481	11-16-60	B. W. Godfrey	Underground	Irrig. Dom.	S34 T14N R2E Cache	0.2 cfs	4-17-61
32500	11-25-60	Orville C. Gray	Underground	Irrig. Dom. Stock	S14 T 8N R2W Box Eld.	0.10 cfs	4-17-61
32536	12-15-60	H. B. Pickering, Jr.	Underground	Irrig. Dom. Stock	S 1 T 9N R2W Box Eld.	2.5 cfs	4-17-61
32538	12-12-60	Joseph N. Cook	Underground	Irrig.	S20 T13N R5E Rich	2 cfs	4-17-61
32565	12-28-60	W. Emerson Cox	Underground	Stock	S28 T10N R7E Rich	0.015 cfs	4-17-61
32588	1-9-61	Virginia J. Rasmussen	Underground	Dom.	S20 T13N R6E Rich	0.015 cfs	4-17-61
32589	1-7-61	Tremonton City	Underground	Municipal	S32 T12N R3W Box Eld.	4.0 cfs	4-17-61
32603	1-16-61	J. P. Christensen	Drain	Irrig.	S12 T12N R3W Box Eld.	2.0 cfs	4-17-61
32611	1-18-61	Miriam P. Mason	Underground	Irrig. Dom.	S12 T11N R3W Box Eld.	0.015 cfs	4-17-61
32617	1-19-61	Carter Cornia	Underground	Irrig. Stock	S32 T 9N R7E Rich	3 cfs	4-17-61
32625	1-20-61	Deseret L. & L.	Bear River	Stock	S14 T 8N R7E Rich	18.6 Ac-ft	4-17-61
32633	1-24-61	Deseret L. & L.	Runoff & Bear River	Stock	S25 T16N R121 W Uinta	19.7 Ac-ft	4-17-61
32652	1-28-61	Nielsen Oil Co., Inc.	Underground	Irrig. Dom.	S 9 T11N R1E Cache	0.35 cfs	4-17-61
32659	1-31-61	Forrest Pritchett	Underground	Stock	S22 T12N R1E Cache	0.015 cfs	4-17-61
32680	2-4-61	Lon Savage	Underground	Irrig. Industrial	S 5 T10N R1E Cache	0.25 cfs	4-17-61
32683	2-7-61	Robert M. Reese	Underground	Irrig. Stock	S34 T 9N R2W Box Eld.	0.5 cfs	4-17-61
32684	2-7-61	J. C. Stauffer	Underground	Irrig. Stock	S27 T 9N R2W Box Eld.	0.5 cfs	4-17-61
32690	2-8-61	Buford Swanson, Jr.	Underground	Irrig. Stock	S 4 T10N R1E Cache	0.25 cfs	4-17-61
32705	2-13-61	David Wm. England	Underground	Dom.	S19 T13N R6E Rich	0.10 cfs	4-17-61
32745	2-21-61	O. J. Falsley	Underground	Irrig. Dom. Sto.	S12 T12N R1E Cache	0.015 cfs	4-17-61
32754	2-23-61	Preston C. Allen	Underground	Irrig. Dom. Stock	S32 T11N R1E Cache	0.10 cfs	4-17-61
32779	2-23-61	R. M. Bone	Underground	Irrig. Dom. Stock	S 2 T11N R3W Box Eld.	0.10 cfs	4-17-61
32827	3-14-61	LeGrand Johnson	Underground	Irrig. Dom.	S 4 T11N R1E Cache	2.5 cfs	4-17-61
32842	3-16-61	Charles J. Wood	Underground	Irrig. Dom. Stock	S 4 T11N R3W Box Eld.	0.5 cfs	4-17-61
32846	3-17-61	Dueard Balls	Underground	Irrig.	S 3 T12N R1E Cache	0.25 cfs	4-17-61
32881	3-27-61	N. Field Irrig. Co.	Underground	Irrig.	S31 T13N R6E Rich	3 cfs	4-17-61
32883	3-29-61	Logan City	Underground	Municipal	S35 T12N R1E Cache	5 cfs	4-17-61
32884	3-29-61	Logan City	Underground	Municipal	S34 T12N R1E Cache	5 cfs	4-17-61
32885	3-29-61	Logan City	Underground	Municipal	S27 T12N R1E Cache	5 cfs	4-17-61

Applic Number	Date of Filing	Name	Source	Use	Location	Amount	Presented to Commission
<u>STATE OF UTAH (CONT.)</u>							
2886	3-29-61	Logan City	Underground	Municipal	S27 T12N R1E Cache	5 cfs	4-17-61
2900	3-31-61	Cache Co. School	Underground	Irrig.	S 5 T10N R1E Cache	0.75 cfs	4-17-61
2901	3-31-61	Cache Co. School	Underground	Irrig.	S 5 T11N R1E Cache	0.50 cfs	4-17-61
2902	4-1-61	North Logan Town	Spring	Irrig.	S23 T12N R1E Cache	0.50 cfs	4-17-61
<u>STATE OF IDAHO</u>							
	1-19-61	P. LaVell Koller	Underground	Irrig.	S24 T16S R38E Franklin	4.4 cfs	4-17-61
	1-26-61	S. Joel Peterson	Underground	Irrig.	S21 T14S R38E Franklin	2.0 cfs	4-17-61
	2-10-61	Eugene C. Saxton	Underground	Irrig.	S22 T13S R46E Bear Lake	1.6 cfs	4-17-61
37462	2-14-61	Leonard A. Povey	Underground	Irrig.	S22 T14S R38E Franklin	3.73 cfs	4-17-61
37508	2-17-61	Eldon B. Bingham	Five-Mile Creek	Irrig.	S20 T15S R39E Franklin	3.0 cfs	4-17-61
37559	3-9-61	H. N. Williams	Underground	Irrig.	S 8 T16S R38E Franklin	1.74 cfs	4-17-61
37568	3-14-61	Mack D. Hymas	Underground	Irrig.	S30 T13S R40E Franklin	5.0 cfs	4-17-61
<u>STATE OF WYOMING</u>							
185/200	3-7-61	Jamison & Briggs	Betty's Spring	Stock	S11 T14N R120 W Uinta	—	4-17-61
186/200	3-7-61	Jamison & Briggs	Jamison Spring	Irrig. Stock	S12 T14N R120W Uinta	.056 cfs	4-17-61
U.W. 2-4-52	2-8-61	J. Harry Hansen	Underground	Irrig.	S14 T14N R121W Uinta	248 Ac.	4-17-61
U.W. 2-5-52	2-8-61	Lewis R. Martin	Underground	Irrig.	S16 T13N R119W Uinta	361 Ac.	4-17-61
U.W. 2-4-53	2-16-61	Everett Dayton	Underground	Irrig.	T58 T25N R118W Lincoln		4-17-61
U.W. 2-5-53	2-16-61	Everett Dayton	Underground	Irrig.	Lot 29 Tr 50 T25N R118W Lincoln	40 Acs.	4-17-61
U.W. 2-4-55	3-6-61	J. N. & Edith Igo	Underground	Irrig.	S28 T25N R119W Lincoln	312 Ac.	4-17-61
U.W. 2-3-57	3-23-61	Etcheverry Brothers	Underground	Irrig.	S 1 T26N R120W Lincoln	371 Ac.	4-17-61