

**BEAR RIVER COMMISSION
LIBRARY COPY
USGS-3-9**

WALLACE N. JIBSON

REPORT NO. 9

REPORT OF LEGAL COMMITTEE

to

BEAR RIVER COMPACT COMMISSION

November 21, 1950

REPORT
of
LEGAL COMMITTEE
BEAR RIVER COMPACT

November 21, 1950

REPORT OF LEGAL COMMITTEE

BEAR RIVER COMPACT

At meeting No. 2 of the Compact Commission held at Preston, Idaho on December 13 and 14, 1948, the Legal Committee was assigned the task of preparing an analysis of existing water rights on Bear River and of cooperating with the Engineering Committee in a study of the question as to whether the scope of the compact should be enlarged to include the main stem of the river from Cutler Reservoir to Great Salt Lake and the Malad River. This report covers only the legal aspects of the topics mentioned. Also included are comments on the legal effect of a compact on existing water rights and on legal aspects of the revised draft of the Bear River Compact.

I

ANALYSIS OF EXISTING WATER RIGHTS

Our analysis of existing water rights on Bear River will consist of (A) a general discussion of the extent and nature of existing rights, (B) a brief reference to the laws under which the rights were acquired, and (C) a resume of the law pertaining to water rights on interstate streams.

A. Substantially all of the water rights on Bear River are evidenced by court decrees, water applications, or water users' claims in pending suits for adjudication of water rights. The major rights in Cache and Box Elder counties in Utah are decreed in the case of the Utah Power & Light Company v. Richmond Irrigation Company filed in the District Court of Cache County. The decree is commonly known as the

"Kimball Decree". In Idaho, the rights are decreed in the Federal Court case of Utah Power & Light Company v. The Last Chance Canal Company (the "Dietrich Decree") and in the State District Court case entitled Preston-Montpelier Irrigation Company v. Dingle Irrigation Co. et al. The Dietrich Decree covers that part of the river and its tributaries from the Utah-Idaho boundary line to the Stewart Dam and the State District Court decree covers that part of the river and tributaries from Stewart Dam to the Idaho-Wyoming boundary. The Wyoming water rights are tabulated in a document entitled "Tabulation of Adjudicated Water Rights of the State of Wyoming - Water Division Number Four" on file in the Office of the State Engineer.

It should be noted that two tabulations of water rights for water division No. 4 have been published; one on December 31, 1926 and one on July 1, 1944. In the 1944 tabulation there are listed a number of permits with priorities earlier than 1926 which were not listed in 1926, for the irrigation of an aggregate of 6570.23 acres of land. There are changes of priorities for 2425.77 acres of land, the changes in each instance being to an earlier priority date. The discrepancies and changes are not explained in the tabulation. Water rights for 1138.5 acres with priorities subsequent to 1926 are included in the later tabulation.

Water rights in Rich and Summit Counties, Utah, are in the process of being adjudicated under the state statute. Claims of water users have been filed and the State Engineer is preparing the proposed determination of rights for submission to the court. The decrees will be binding only upon water users diverting water in Rich and Summit counties, Utah.

The main-stem rights and water rights on Smiths Fork are tabulated

in Part III of the report of the Compact Commission, March 1948, entitled, "Water Rights - Main Stem of Bear River and Smiths Fork".

Consideration has been given to present or potential conflicts of existing rights of the individual water users and the states at the various points where the Bear River crosses state boundary lines.

Proceeding from the head of the river to its mouth, each crossing will be discussed in order. The first crossing is high on the headwaters. The few diversions in Summit County, Utah, are largely for the irrigation of meadows and grain in Utah and on Hilliard Flat in Wyoming. There are several interstate canals in this section of the river and in the distribution of water, the state line has been disregarded. There is a potential conflict between Utah and Wyoming over the diversion of water in Utah for use in Wyoming. There are interstate canals which divert water in Utah for use in Wyoming for which there are no water rights of record in the State Engineer's office in Utah. The priorities of water rights in this section of the river are in process of being determined in Summit County, Utah, which determination will be binding only upon appropriators in that county. The water rights in Wyoming are included in the publications entitled, "Tabulations of Adjudicated Water Rights - Water Division Number Four".

The next crossing of a state boundary line occurs in the vicinity of Woodruff, Utah, where the river passes from Wyoming into Utah. A few miles below Randolph, Utah, the river turns back from Utah into Wyoming. The water use is largely for the irrigation of meadow land on both sides of the state lines. The land requirements, irrigation practices, and the basic water law is the same in both states. In many

instances, individual water users own lands in both states which are irrigated from interstate canals. In the cases of two of the larger canals, the Chapman and the Francis Lee, water is diverted in Wyoming for use in Wyoming and Utah. There is no decree of record in either state for the land in Utah.

The river crosses the Wyoming-Idaho boundary line near Border and flows westerly around the north end of Bear Lake and thence in a loop to the north for a long distance through Idaho. Many water rights on Smiths Fork, on the main stem of the river near the mouth of Smiths Fork, and on Hilliard Flat in Wyoming are junior to rights in the Idaho section. It is contended by water users in Idaho that increased use of water above the Idaho-Wyoming boundary line has unlawfully diminished the water supply for their prior rights. These conflicts are responsible to a great extent for the present compact negotiations.

The last crossing of a state boundary line occurs in Cache Valley where the river flows from Idaho into Utah. The water rights in the Idaho section from the Stewart Dam to the Utah line are adjudicated in the "Dietrich Decree" and the rights in Cache and Box Elder counties, Utah, are covered by the "Kimball Decree". Some of the larger rights, including the Utah Power & Light Company storage right in Bear Lake, are adjudicated in both states. Storage water made available by facilities constructed by the power company is used in both states. There are no conflicts in existing rights between Utah and Idaho in this section of the river which have come to the attention of the committee.

The only large storage facility on Bear River is Bear Lake which has been converted into a storage reservoir by the construction of a

feeder canal from Bear River, the installation of a pumping plant at the North end of the lake and the construction of an outlet canal from the lake to Bear River. The rights to divert water from Bear River for storage in Bear Lake are decreed to the Utah Power & Light Company by the Dietrich and Kimball decrees and permit the diversion for storage of 5500 second-feet of water during the period from January 1 to December 31 of each year. The water is used for generating electric energy at the power company's various plants on Bear River and most of the summer flow from storage is used for irrigation in Idaho and in Cache and Box Elder counties, Utah, through contracts with mutual irrigation companies and the Utah-Idaho Sugar Company.

The decrees establishing the right of the Utah Power & Light Company to divert water from Bear River and tributaries for storage in Bear Lake were entered in cases in which only water users in Cache and Box Elder counties, Utah, and in Idaho were joined as defendants. Water users in Wyoming and in Rich and Summit counties in Utah were not parties to the suits and are, therefore, not bound by the decrees. It is apparent that the nature and extent of the storage rights in Bear Lake must be considered for the purposes of the compact before any conclusion can be reached as to whether there is water available for storage above Bear Lake.

An agreement among the compacting states as to the extent of the existing storage rights in Bear Lake and elsewhere appears to be a necessary step in the negotiation of a compact from the standpoint of both administration of existing rights and the future development of the water resources of the Bear River.

It will be noted from a study of the tabulation of water rights that the priorities of many direct diversion rights above Bear Lake are earlier than the storage rights in Bear Lake. The suggestion has been made at meetings of the Compact Commission that the right should be granted to water users above Bear Lake to store a part of the water they are now diverting for direct use. This suggestion presents a legal question as to the right of the water users to change the nature of use from direct flow to storage. Under the Utah law, if such a change were permitted it would bring the date of priority of the right to the extent it is changed down to the date the application for change of point of diversion and nature of use is filed. This would, of course, make any storage rights above Bear Lake subordinate to the Bear Lake storage right, unless the compact otherwise provides. In Wyoming and Idaho no change from direct flow to storage is permitted. Any compact would have to expressly provide for changes of nature of use of water to permit storage above Bear Lake in the event an agreement is made by the Compact Commission for the storage above Bear Lake of water which is now subject to direct flow rights.

2111
10/10
40-100
with
about
40
Storage

B. When most of the water rights on Bear River were acquired, Idaho, Utah and Wyoming were under a territorial form of government. The United States was the sovereign and by the Act of July 26, 1866 (14 Stat. 251) acknowledged and confirmed the law of appropriation of water which existed by local customs, laws and the decisions of courts in all three territories. In each of the constitutions of the three states, the vested rights which had been acquired during territorial days were expressly or tacitly confirmed. The Idaho and Wyoming

constitutions, by express provision, adopted the appropriation doctrine.

Article 15, Section 3 of the Idaho Constitution provides:

"Priority of appropriation shall give the better right
as between those using water . . ."

The Wyoming Constitution, in Article VIII, Section 3, provides:

"Priority of appropriation for beneficial uses shall
give the better right."

Statutes have been enacted in both Idaho and Wyoming to carry out the constitutional provisions. The Constitution of Utah in Article XVII, recognizes and confirms all existing rights to the use of water. The appropriation doctrine is expressly adopted in Utah by statute. See Section 100-3-21, Utah Code Annotated, 1943. Thus, in all three states during territorial days, and after statehood, rights to the use of water were acquired and enjoyed under the appropriation doctrine.

C. As observed above, the water rights in Bear River have, for the most part, been decreed, or are in the process of being decreed in the state courts. There is no substantial uncertainty within any state as to the status of the water rights therein. The difficult problem arises in controversies between water users in one state as against water users in another state. Numerous cases have been decided by the Supreme Courts of the various states, and by the Supreme Court of the United States involving interstate waters. In suits brought by water users in one state, which has adopted the doctrine of appropriation, against water users in another state which has a similar law, the Supreme Courts of Idaho and Wyoming and the United States Circuit Court of Appeals in a case arising in Utah, have applied the law of appropriation. *Willey v. Decker*, 11 Wyo. 496; 73 P. 210; *Taylor v. Hulett*,

15 Idaho 265, 97 P. 37; Albion-Idaho Land Company v. Naf Irrigation Company, 97 Fed. 2d. 439.

The case of Taylor v. Hulett, supra, involved a dispute over the water of Spring Creek which arises in Wyoming and flows into Idaho. The plaintiff diverted water in Idaho and the defendant made a diversion in Wyoming. The court considered the question as to what law to apply to the diversions. It said:

"Streams rise in one state and flow into another, irrespective of boundary lines, and still the rules and doctrines of priority of appropriation and use are the same in most of the arid states. This is particularly true with respect to this case. Here the riparian doctrine of the common law has been abrogated in both Idaho and Wyoming, and the rule of 'first in time is first in right' is recognized and enforced, in both states. Drake v. Earhart, 2 Idaho, 750, 23 Pac. 541; Moyer v. Preston 6 Wyo. 308, 44 Pac. 845, 71 Am. St. Rep. 914; Fram Investment Co. v. Carpenter, 9 Wyo. 110, 61 Pac. 258, 50 L.R.A. 747, 87 Am. St. Rep. 918; Willey v. Decker, supra. The relative rights, therefore, of appropriators of the water of an interstate stream are the same, whether the appropriations are all in the same state, or some in one state and the balance in another state."

In the case of Conant v. Deep Creek Irrigation Company (Utah), 66 P. 188, the Supreme Court of Utah said that the law of appropriation determined the relative rights of water users on an interstate stream.

The Supreme Court of the United States has taken original jurisdiction of a number of cases between states involving the waters of interstate streams. A leading case involving two states which have, by their constitutions, adopted the appropriation doctrine, is Wyoming v. Colorado, 259 U.S.419. The Court held that the doctrine of appropriation recognized by both states was the basis for the determination of the rights of each state in the waters of the Laramie River. The following quotation

from the opinion is believed to be particularly applicable to the Bear River question:

"In neither state was the right to appropriate water from this interstate stream denied. On the contrary, it was permitted and recognized in both. The rule was the same on both sides of the line. Some of the appropriations were made as much as fifty years ago and many as much as twenty-five. In the circumstances we have stated, why should not appropriations from this stream be respected, as between the two states, according to their several priorities, as would be done if the stream lay wholly within either state? By what principle of right or equity may either state proceed in disregard of prior appropriations in the other?"

* * * * *

"We conclude that Colorado's objections to the doctrine of appropriation as a basis of decision are not well taken, and that it furnished the only basis which is consonant with the principles of right and equity applicable to such a controversy as this is. The cardinal rule of the doctrine is that priority of appropriation gives superiority of right. Each of these states applies and enforces this rule in her own territory, and it is the one to which intending appropriators naturally would turn for guidance. The principle on which it proceeds is not less applicable to interstate streams and controversies than to others. Both states pronounce the rule just and reasonable as applied to the natural conditions in that region; and to prevent any departure from it, the people of both incorporated it into their constitutions. It originated in the customs and usages of the people before either state came into existence, and the courts of both hold that their constitutional provisions are to be taken as recognizing the prior usage rather than as creating a new rule. These considerations persuade us that its application to such a controversy as is here presented cannot be other than eminently just and equitable to all concerned."

ONE STATE
RECOGNIZES
ANOTHER STATES
PRIORITIES

The latest decision of the Supreme Court of the United States adjudicating the rights of states in the waters of an interstate stream is *Nebraska v. Wyoming*, 325 U.S. 589 decided in 1945. The Court discussed at some length previous opinions involving the question of the division of interstate waters among states and referred to the portion of the

decision in Wyoming v. Colorado, quoted above. It then said:

"Since Colorado, Wyoming, and Nebraska are appropriation States, that principle would seem to be equally applicable here.

That does not mean that there must be a literal application of the priority rule. We stated in Colorado v. Kansas, 320 U.S. 383, 88 L ed 116, 64 S Ct 176, supra, that in determining whether one State is 'using, or threatening to use, more than its equitable share of the benefits of a stream, all the factors which create equities in favor of one State, or the other, must be weighed as of the date when the controversy is mooted'. 320 U.S. p. 394. The case did not involve a controversy between two appropriation States. But if an allocation between appropriation States is to be just and equitable, strict adherence to the priority rule may not be possible. For example, the economy of a region may have been established on the basis of junior appropriations. So far as possible those established uses should be protected though strict application of the priority rule might jeopardize them. Apportionment calls for the exercise of an informed judgment on a consideration of many factors. Priority of appropriation is the guiding principle. But physical and climatic conditions, the consumptive use of water in the several sections of the river, the character and rate of return flows, the extent of established uses, the availability of storage water, the practical effect of wasteful uses on downstream areas, the damage to upstream areas as compared to the benefits to downstream areas if a limitation is imposed on the former - these are all relevant factors. They are merely an illustrative, not an exhaustive catalogue. They indicate the nature of the problem of apportionment and the delicate adjustment of interests which must be made."

STATE ENTITLED TO EQUITABLE SHARE

The three states involved in these negotiations having thus adopted and observed the "appropriation doctrine" it is the view of this committee that the Commission should be guided by such principle subject to consideration of the factors mentioned in the above quotation from the case of Nebraska and Wyoming.

II

ENLARGEMENT OF THE SCOPE OF THE COMPACT

Questions of law in connection with the enlargement of the scope of the compact to include the main stem of Bear River from Cutler Reservoir to Great Salt Lake and the Malad River have been carefully considered by the committee. In view of the fact that all water rights on a single river system are inter-related, it is desirable from the standpoint of administration and determination of existing rights to include in a compact the entire river system. It is recommended, therefore, by the legal committee that the compact cover the entire Bear River system.

III

LEGAL EFFECT OF A COMPACT

The question has been raised in meetings of the Compact Commission as to the effect of an Interstate Compact upon existing water rights, particularly those evidenced by existing decrees. Article I, section 10 of the Constitution of the United States provides:

"No State shall, without the consent of Congress ...
enter into an agreement or compact with another state ..."

To be effective compacts must be ratified by the legislatures of the affected states and consented to by express act of Congress. State statutes in conflict with the provisions of a compact would be superseded thereby. A compact for division of the water of a river would, if ratified by the affected States and consented to by Congress, be the law of the river. It could not be rescinded or modified without the consent of the signatory States and Congress.

An interstate compact is binding upon the citizens of states which are parties thereto and others who obtain rights through such states. The law in this regard was established more than a century ago in the case of Poole v. Fleeger, 11 Pet. 185 9 L ed 680. The Supreme Court of the United States held that a compact between sister states operates with the same effect as a treaty between sovereign nations, and state boundaries established by compact are binding upon the citizens of the affected states. In the case of Hinderlider v. La Plata River and Cherry Creek Ditch Company, 304 U.S. 92, 82 L ed 1202, decided in 1938, the Supreme Court applied the rule of Poole v. Fleeger to water rights and held that the apportionment of water by a compact between Colorado and New Mexico is binding upon the citizens of each state and all water claimants even as to water rights granted before the states entered into the compact.

A decree which awards to its citizens or to other water claimants rights to the use of the water of an interstate stream, even though entered before a compact was made, is subject to the provisions of such compact. In legal theory a decree cannot award water rights in excess of the state's equitable share of the water of the affected interstate stream and therefore a compact cannot be successfully attacked as taking vested water rights without due process of law though such rights may be impaired by the compact. Hinderlider v. La Plata River and Cherry Creek Ditch Company supra.

The cases cited above clearly establish that a compact for division of the waters of the Bear River would be binding upon all users of water therefrom without regard to the dates of initiation of their rights or

whether such rights are evidenced by court decrees. In the event of a conflict between existing decrees and the compact, the latter would prevail.

IV

COMMENTS ON LEGAL ASPECTS OF THE PROPOSED COMPACT

It has been suggested that a compact covering the points concerning which the Commission is interested may be drafted upon one of two theories, either

- (a) Considering the river as a unit to be managed and controlled by a commission irrespective of state lines with distribution of water upon the basis of priority of rights; or
- (b) Dividing the territory into sections, as has been suggested by the draftsmen of the tentative draft compact and providing for its management by a commission which would have certain express supervisory powers with respect to the actual enforcement of the compact by the officers of the respective states pursuant to the terms and conditions expressed therein.

With respect to the compact as it is now drafted, this committee does not believe that it has the right to comment upon anything other than the form and legal sufficiency of the compact. The division of the water, the ultimate question of storage rights, and other similar factual matters should be considered and ultimately determined by the Compact Commission. We do, however, wish to point out certain apparent deficiencies

in the present proposed draft which should be considered:

1. On page 9 provision is made for the appointment by each state of a member of the Commission. A commission of three, therefore, would operate as the governing body within the limits of the compact. It is suggested that this might create some difficulty due to the differences in the situation of Upper Utah and Lower Utah. If Upper Utah selects the commissioner he may be inclined to follow the views of his area and Wyoming. If the commissioner should be appointed from Lower Utah he may be inclined to follow the views of his area and Idaho. This would tend to create a conflict. If three commissioners are to be appointed perhaps a provision should be included which would prevent the appointment of a resident of either the Upper or Lower Utah areas. As an alternative, it would probably be better to have two commissioners from each state and one appointed by the President of the United States, with authority to vote in the case of a tie.
2. On page 10 of the proposed compact it is provided that the Compact Commission shall have the power to formulate rules of procedure, rules and regulations, and to perform any and all other acts necessary to carry out the provisions of the compact, but there does not appear in the compact any express power given to the Commission to enforce these rules and regulations.
3. There is reference in the proposed compact to the duty of water.

This subject has many factual and legal aspects. It is thought that the Compact Commission after a thorough study of the facts should submit any specific legal questions to this committee for study.

4. There is need of clarifying Article VII as revised December 9, 1948. As presently worded there is doubt as to whether rights of any value are granted for out-of-state diversion or storage of waters. There are several possible constructions of such expressions as "compliance with the laws of an upper signatory state", "subject to the rights of the upper state", and "to the extent of its reasonable needs."
5. The change of the use of water from the natural flow during the irrigation season to storage rights has heretofore been discussed in this report. It is a legal matter which must be considered carefully in any new draft of compact.
6. The compact might be clarified by more definitely prescribing the method of raising funds for the Commission in its operations. This may be done in several ways but it is thought some plan could be evolved for the levying of assessments against water users to pay part or all of the expenses of the Commission.
7. Article XIV provides that nothing in the compact shall be construed to limit or prevent any state from maintaining any action, legal or equitable, in any Federal Court of the United States for the protection of any right under the compact. It is suggested that this be enlarged to include any person or corporation adversely affected.

8. Ordinarily compacts provide for a testing period. None is provided in the proposed draft and it is suggested that such be included in any compact ultimately adopted.

The foregoing are not intended to preclude additional comments and studies on various other phases of the compact but are suggestions of various points which might be strengthened in a later draft.

V

CONCLUSIONS

Most compacts on interstate streams simply confirm existing water rights and apportion the unappropriated water upon a percentage or an acre-foot basis. The negotiators of the Bear River Compact are confronted with unusual difficulties because a study of existing water rights on Bear River indicates that except possibly on the lower reaches of the river the dependable water supply is fully appropriated. In fact, in some sections of the river the water supply is insufficient to satisfy decreed rights. There are a few actual and several potential conflicts between water users in one state and water users in another state which can be settled only by some limitations upon water rights as decreed. If all adjudicated flow rights in Wyoming and Upper Utah are satisfied it will, in some years deprive earlier rights in Idaho and Lower Utah of water. If rights as decreed in Idaho and Utah are fully satisfied there can be no new storage in the river above Bear Lake. As pointed out in this report the decrees are binding only upon the parties thereto and are not binding upon water users in other states.

As hereinabove stated it is the conclusion of the legal committee that in drafting the compact the Commission should be guided by the

appropriation doctrine subject to the factors mentioned in the quotation from the opinion of the Supreme Court of the United States in the case of Nebraska v. Wyoming on page 10 of this report.

/s/ E. J. Skeen

/s/ A. L. Merrill

/s/ Clinton D. Vernon

/s/ Norman Gray
Legal Committee