

M E M O R A N D U M

TO: Ronnie Roberts, Beaver River Distribution Commissioner
FROM: Kerry Carpenter, Southwestern Region
DATE: 25 August 1994
RE: General procedure for distribution of rights in a common source and having equal priority

The statute which addresses the captioned issue is located in Title 73 of Utah Code Annotated 1953 at section 73-3-21. This section, entitled "Priorities Between Appropriators", states:

Appropriators shall have priority among themselves according to the dates of their respective appropriations, so that each appropriator shall be entitled to receive his whole supply before any subsequent appropriator shall have any right. . . .

While this statute does not directly address the division of water among appropriators of equal priority, it clearly states that any earlier right must be fully satisfied before a later right receives any water.

At section 73-5-3, entitled "Control by engineer of division and distribution under judgements", the law states:

The state engineer and his duly authorized assistants shall carry into effect the judgements of the courts in relation to the division, distribution or use of water under the provisions of this title. The state engineer shall divide, or cause to be divided, the water within any district created under the provisions of the title among the several appropriators entitled thereto in accordance with the right of each respectively. . . .

Thus, the State Engineer or his appointed assistants (such as yourself), are charged to distribute water in accordance with court decrees. As part of that authority, unless the court decree specifies an exact procedure, the State Engineer must establish policy which satisfies the intent of the statute and the decree. In your case, the 1931 Beaver River Decree does specify in some cases that the water is to be distributed on a time basis. For example, on the Dry Creek rights in the Greenville town ditch, the decree says:

Said water to be prorated to the . . . owners to the right to the use thereof for periods of time in the proportion that their individual shares held bears to the whole number of shares.

Lacking such specific instruction, the standard procedure for dividing rights of equal priority when there is insufficient flow to fully satisfy all such rights is to divide to each appropriator that proportion of the flow which their right bears to the total flow under all rights of equal priority. If it is agreeable to the appropriators and provides a more efficient use of the water, the division can be made "by time" rather than "by flow", but the basic principle of prorating is still observed.

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By this memo, you are directed to continue the established policy to distribute rights of equal priority by prorating (either by "time" or by dividing flow, whichever is most appropriate) in cases where there is insufficient flow to meet all said rights.

Regarding the provision of the necessary control and measuring devices to enable the State Engineer to fulfill his duties, section 73-5-4 reads:

Every person using water in this state shall construct or install and maintain a substantial head gate, cap, valve or other controlling works, weir flume and measuring device at each point where water is diverted or turned out, for the purpose of regulating and measuring the quantity of water that may be used.

If the owner of the irrigation works. . .shall refuse or neglect to construct or install such. . .devices after thirty days' notice to do so by the state engineer, the state engineer may forbid the use of water until the user thereof shall comply with his requirement. . . .

I realize that this information may not be sufficient to satisfy some of those persons who are presently questioning our policy in your area. If we are unable to satisfy those persons that this policy is proper and fair, they will always have the option of bringing a lawsuit and seeking an amendment to the present decree as regards their rights.

pc: Lee Sim, Assistant State Engineer - Distribution
John Mabey, Assistant Attorney General

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