

DISTRIBUTION OF WATER ON INDIAN RESERVATIONS

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October 17, 1939

The distribution of the waters of the Duchesne and Uintah rivers has been a source of controversy for many years because such waters traverse the Uintah Indian reservation and have been appropriated by both white men and Indians. The Indian Service contends that the State Engineer has no right to administer water on the Indian reservation appropriated and used by Indians, and the white men, on the other hand, have been unwilling to permit the Indian Service to distribute the water to them.

Many of the rights of both white men and Indians have been decreed by the United States District Court, and for a few years a Water Commissioner appointed by the court was in charge of distribution. This administrative task proved to be unfully burdensome to the court and the practice of appointing Water Commissioners was discontinued. The State Engineer appointed a Water Commissioner to distribute the water, but he could not function satisfactorily because of the contention of the Indian Service that he had no authority to act.

This situation squarely presents the question as to whether the State or Federal government has the power to distribute waters on Indian reservations which have been appropriated by both white men and Indians. More specifically, has the Indian Service or the State Engineer the right to distribute the waters of the Uintah and Duchesne rivers?

The ultimate problem is one of sovereignty and its solution must be found in the United States Constitution, the Utah Enabling Act, the Executive Orders, the Acts of Congress relative to the establishment of the Uintah

Indian reservation, and the several Acts of Congress relating to the appropriation and use of water in the arid states.

The Constitution of the United States is an instrument of grant. The original thirteen states granted to the Federal government only those powers as a sovereign which are expressly mentioned in the Constitution or which may be reasonably implied. All other powers were reserved by the several states and, in general, it may be said that subject to the powers granted to the Federal government the states have all powers and rights of a sovereign over property within their boundaries. Except for this limitation, the states have the power to regulate the personal and property rights and the duties of all persons within their jurisdiction for the public convenience and the public good.

When Utah was admitted to the Union it assumed the same status insofar as the reservation of sovereign power was concerned as the original thirteen states. *Ward v. Race Horse*, 163 U. S. 504, 41 L. ed. 244, 16 Sup. Ct. 1076; *Eschmaba Company v. Chicago*, 107 U. S. 678; *Cardwell v. American Bridge Company*, 113 U. S. 205. In the *Cardwell* case, *supra*, it is said:

"The Act admitting California declares that she is admitted into the Union on an equal footing with the original states in all respects whatever. She was not, therefore, shorn by the clause as to navigable waters within her limits of any of the powers which the original states possessed over such waters within their limits."

The Enabling Act, Section 4, provides:

". . . . And if the constitution and government of said proposed State are republican in form, and if all the provisions of this Act have been complied with in the formation thereof, it shall be the duty of the President of the United States to issue his proclamation announcing the result of said election, and thereupon the proposed State of Utah shall be deemed admitted by Congress into the Union, under and by

virtue of this Act, on an equal footing with the original States, from and after the date of said proclamation."

The Enabling Act required the people of the proposed State of Utah to disclaim all right and title to "lands lying within said limits (boundaries of the State) owned or held by any Indian or Indian tribes and that until the title thereto shall have been extinguished by the United States, the same shall be and remain subject to the disposition of the United States, and said Indian lands shall remain under the absolute jurisdiction and control of the Congress of the United States." These conditions are met by Article III, <sup>section</sup> Second Edition, of the Constitution of Utah, in which the identical language of the Enabling Act is used. It will be noticed that there is no language in either the Enabling Act or the Constitution of Utah by which the power to regulate the use of and to distribute the waters found within the boundaries of the State of Utah, is reserved to the United States or granted by the people of the State of Utah to the United States, and it should also be noted that the Constitution of the United States contains no express grant by the State of the sovereign right to control the distribution of waters within the boundaries of the State of Utah. The only other source of sovereign power in the United States would be Acts of Congress enacted before Utah became a state which reserve to the United States sovereign power to distribute and control water within the boundaries of Indian reservations, or Executive Orders reserving such power. Let us examine the various Executive Orders and Acts of Congress relating to the Uintah Indian reservation. Following are the proclamations establishing the Uintah and the Uncompahgre reservations:

Department of the Interior  
Washington, October 3, 1861

"SIR: I have the honor herewith to submit for your

in consideration the recommendation of the Acting Commissioner of Indian Affairs that the Uintah Valley, in the Territory of Utah, be set apart and reserved for the use and occupancy of Indian tribes.

"In the absence of an authorized survey (the valley and surrounding country being as yet unoccupied by settlements of our citizens), I respectfully recommend that you order the entire valley of the Uintah River within Utah Territory, extending on both sides of said river to the crest of the first range of contiguous mountains on each side, to be reserved to the United States and set apart as an Indian reservation.

"Very respectfully, your obedient servant,  
CALEB B. SMITH, Secretary

"The President.

Executive Office, October 3, 1861.

"Let the reservation be established, as recommended by the Secretary of the Interior.

A. LINCOLN."

"Uncompahgre Reserve

(In Uintah and Ouray Agency; occupied by Taboquache Ute; acts of June, 15, 1880 (21 Stat., 199), and June 7, 1897 (30 Stat. 62) )

"Executive Mansion, January 5, 1882

"It is hereby ordered that the following tract of country, in the Territory of Utah, be, and the same is hereby, withheld from sale and set apart as a reservation for the Uncompahgre Utes, viz: Beginning at the southeast corner of township 6 south, range 25 east, Salt Lake meridian; thence west to the southwest corner of township 6 south, range 24 east; thence north along the range line to the northwest corner of said township 6 south, range 24 east; thence west along the first standard parallel south of the Salt Lake base-line to a point where said standard parallel will, when extended, intersect the eastern boundary of the Uintah Indian Reservation as established by C. L. Du Bois, United States deputy surveyor, under his contract dated August 30, 1875; thence along said boundary southeasterly to the Green River; thence down the west bank of Green River to the point where the southern boundary of said Uintah Reservation, as surveyed by Du Bois, intersects said river; thence northwesterly with the southern boundary of said reservation to the point where the line between ranges 16 and 17 east of Salt Lake meridian will, when surveyed, intersect

said southern boundary; thence south between said ranges 16 and 17 east, Salt Lake meridian, to the third standard parallel south; thence east along said third standard parallel to the eastern boundary of Utah Territory; thence north along said boundary to a point due east of the place of beginning; thence due west to the place of beginning.

CHESTER A. ARTHUR"

There have been several Acts of Congress relating to the Uintah Indian reservation in which water and water rights are mentioned. In the act of March 3, 1905, Chapter 1479, 33 Stat. 1048, it provides:

"That before the opening of the Uintah Indian Reservation the President is hereby authorized to set apart and reserve as an addition to the Uintah Forest Reserve, subject to the laws, rules, and regulations governing forest reserves, and subject to the mineral rights granted by the Act of Congress of May twenty-seventh, nineteen hundred and two, such portion of the lands within the Uintah Indian Reservation as he considers necessary, and he may also set apart and reserve any reservoir site or other lands necessary to conserve and protect the water supply for the Indians or for general agricultural development, and may confirm such rights to water thereon as have already accrued: Provided, That the proceeds from any timber on such addition as may with safety be sold prior to June thirtieth, nineteen hundred and twenty, shall be paid to said Indians in accordance with the provisions of the act opening the reservation."

The act of June 21, 1906, 34 Stat. 325 (Kappler on Indian Affairs, Vol. 3, p. 243), provides for the construction of an irrigation system to irrigate the allotted lands of the Indians on the Uintah Indian reservation as follows:

"Irrigation

"For constructing irrigation systems to irrigate the allotted lands of the Uncompagere, Uintah, and White River Utes in Utah, the limit of cost of which is hereby fixed at six hundred thousand dollars, one hundred and twenty-five thousand dollars which shall be immediately available, the cost of said entire work to be reimbursed from the proceeds of the sale of the lands within the former Uintah Reservation:

"PROVIDED, That such irrigation systems shall be constructed and completed and held and operated, and water therefor appropriated under the laws of the State of Utah,

and the title thereto until otherwise provided by law shall be in the Secretary of the Interior in trust for the Indians, and he may sue and be sued in matters relating thereto:

"AND PROVIDED FURTHER, That the ditches and canals of such irrigation systems may be used, extended, or enlarged for the purpose of conveying water by any person, association, or corporation under and upon compliance with the provisions of the laws of the State of Utah:

"AND PROVIDED FURTHER, That when said irrigation systems are in successful operation the cost of operating same shall be equitably apportioned upon the lands irrigated, and, when the Indians have become self-supporting, to the annual charge shall be added an amount sufficient to pay back into the Treasury the cost of the work done, in their behalf, within thirty years, suitable deduction being made for the amounts received from disposal of the lands within the former Uintah Reservation."

The right of the State of Utah to control the appropriation and use of waters on the Uintah Indian reservation is further recognized in the act of March 3, 1909, Chapter 263, 35 Stat. 781 (Kappler on Indian Affairs, Vol. 3, p. 419):

"To enable the Commissioner of Indian Affairs to perfect and protect the rights of the Uncompaggre, Uintah, and White River Utes in Utah in and to the waters appropriated under the laws of the State of Utah for the irrigation systems authorized by the act of June twenty-first, nineteen hundred and six, two hundred thousand dollars, or so much thereof as may be necessary, the amount expended hereunder to be reimbursed from the proceeds of the sale of lands within the former Uintah Reservation: Provided, That said sum, or any part thereof, shall be used only in the event of failure to procure from the State of Utah, or its officers an extension of time in which to make final proof for waters appropriated for the benefit of the Indians, and any sum expended hereunder shall be reimbursed from the proceeds of the sale of the lands within the former Uintah Reservation."

The following comment of the United States Supreme Court in the case of California-Oregon Power Company v. Beaver Portland Cement Company, 295 U. S. 142, 55 Sup. Ct. 725, 79 L. ed. 1356, clearly indicates that the State of Utah has the power to control the appropriation and distribution

of water upon the Uintah Indian reservation because of the provisions of the Acts of Congress quoted from above: (295 U. S. at p. 164)

"In this connection it is not without significance that Congress, since the passage of the Desert Land Act, has repeatedly recognized the supremacy of state law in respect of the acquisition of water for the reclamation of public lands of the United States and lands of its Indian wards. Two examples may be cited:

"The Reclamation Act of 1902, c. 1093, 32 Stat. 388, directed the Secretary of the Interior (section 8 (43 USCA Sec. 383) ) to proceed in conformity to the state laws in carrying out the provisions of the act, and provided that nothing in the act should be construed as affecting or intending to affect or in any way interfere with the laws of any state or territory 'relating to the control, appropriation, use, or distribution of water used in irrigation.'

"The Act of June 21, 1906, c. 3504, 34 Stat. 325, 375, made an appropriation for constructing irrigation systems to irrigate lands of the Uncompahgre, Uintah, and White River Basins in Utah, with the proviso that 'such irrigation systems shall be constructed and completed and held and operated, and water therefor appropriated under the laws of the State of Utah,' etc. This was amended by the Indian Appropriation Act of March 3, 1909, c. 263, 35 Stat. 781, 812, which again recognized the supremacy of the laws of Utah in respect of appropriation, and provided that the appropriation should 'be used only in the event of failure to procure from the State of Utah or its officers an extension of time in which to make final proof for waters appropriated for the benefit of the Indians.'"

After an exhaustive review of the several Acts of Congress from 1866 to 1877 relating to the appropriation and use of water on the public domain, including the Acts of 1866, 1870, and the Desert Land Act, the United States Supreme Court concluded:

"As the owner of the public domain, the government possessed the power to dispose of land and water thereon together, or to dispose of them separately. *Howell v. Johnson* (U.S.) 69 F. 556, 558. The fair construction of the provision now under review is that Congress intended to establish the rule that for the future the land should be patented separately; and that all nonnavigable waters thereon should be reserved for the use of the public under the laws of the states and territories named. The words that the water of all sources of water supply upon the public lands and not navigable 'shall remain and be held free

for the appropriation and use of the public<sup>e</sup> are not susceptible of any other construction. The only exception made is that in favor of existing rights; and the only rule spoken of is that of appropriation. It is hard to see how a more definite intention to cover the land and water could be evinced."

In view of the legislative and judicial recognition of the fact that water on the public land and the public land itself are separate and distinct and have been covered from one another by various Acts of Congress, there is no basis for the contention that when the Uintah and Uncompagre Indian reservations were established the sovereign power over the appropriation and distribution of waters on reservations was withdrawn by the United States Government either by the Executive Orders creating the reservations, by the Enabling Act or by subsequent legislation. Such a conclusion is strongly supported by the express recognition of the right of State control in the Acts of June 21, 1906 and March 3, 1909 quoted above.

There is a federal statute, general in nature, which should be discussed. It provides:

"Section 361. Irrigation lands; regulation of use of water. In cases where the use of water for irrigation is necessary to render the lands within any Indian reservation available for agricultural purposes, the Secretary of the Interior is authorized to prescribe such rules and regulations as he may deem necessary to secure a just and equal distribution thereof among the Indians residing upon any such reservations; and no other appropriation or grant of water by an riparian proprietor shall be authorized or permitted to the damage of any other riparian proprietor. Feb. 8, 1887, c. 119, Sec. 7, 24 Stat. 390." - U.S.C.A. Sec. 361.

This section was no doubt intended to authorize the Secretary of the Interior to distribute among the individual Indians water in their canals which had been appropriated by the United States for use on the reservation. If for the sake of argument, it is assumed that this section was intended to apply to water in rivers, lakes and other natural sources before diversion

into canals or ditches owned and maintained by the reservation, it being a general statute would be subject to later special legislation, such as the act of June 21, 1906, which expressly provides for appropriation and control under state law.

There have been several decisions of the Federal courts including one by the United States Supreme Court which at first blush would appear to be contrary to the conclusion that the several states have reserved jurisdiction over water on Indian reservations. *Winters v. United States*, 207, U.S. 564, 28 Sup. Ct. 207, 52 L. ed. 340; *United States v. Walker River Irrigation District*, 104 Fed. (2d) 334; *United States v. Winans*, 198 U. S. 371, 25 Sup. Ct. 642, 49 L. ed. 1089; *Strom v. United States*, 273 Fed. 93. The case of *Winters v. United States*, supra, a leading case, was a writ brought to restrain Winters and other white men from constructing dams in the Milk river in Montana which would prevent the water of the river from flowing across the Belknap reservation. The United States Supreme Court held that although there was no express reservation of water rights in the treaty the Indians did not intend to convey such rights to the Government. The court said:

"The power of the Government to reserve the waters and exempt them from appropriation under the state law, is not denied and could not be. *United States v. Rio Grande Ditch & Irrigation Co.*, 174 U. S. 690, 702; *United States v. Winans*, 198 U. S. 371. That the Government did reserve them we have decided, and for a use which would be necessarily continued through years. This was done May 1, 1888, and it would be extreme to believe that within a year, Congress destroyed the reservation and took from the Indians the consideration of their grant, leaving them a barren waste--took from them the means of continuing their old habits, yet did not leave them the power to change to new ones. Appellants' argument upon the incidental repeal of the agreement by the admission of Montana into the Union, and the power over the waters of Milk river, which the State thereby acquired, to dispose of them under its law is elaborate and able, but our construction of the agreement and its effect make it unnecessary to answer the argument in detail. For the same reasons we have not discussed the doctrine of riparian rights urged by the Government."

As stated above, the Uintah and Uncompahgre Indian reservations were created by Executive Order and there was no treaty involved. Furthermore, by a series of Acts of Congress, the sovereign power of the State of Utah to control the appropriation of water for an irrigation system constructed on the reservations and the operation of the system including the distribution of water therefrom has been recognized. In none of the cases last cited has the Congress expressly or by implication recognized the sovereign right of the state to control the use and appropriation of water upon the various Indian reservations.

The Supreme Court of the State of Utah in the case of *Scotts v. Meagher*, 37 Utah 212, 215, 105 P. 113, asserted the right of state control by affirming the approval by the State Engineer of an Application to appropriate water on an Indian reservation. The court said:

"It is now well settled and recognized that there is a distinction between initiating or acquiring a right to the use of unappropriated public waters on public domain, and a right or interest in or to the public lands themselves, and that the former is not dependent upon the latter to initiate and acquire a right in and to the use of unappropriated public water, whether on the public domain, or within a reservation or elsewhere is dependent upon the laws or customs of the state in which such water is found. Property in and to the use of unappropriated water of a stream or spring, or lake, on the public domain, or within a reservation, may be acquired for a beneficial purpose by mere appropriation, and the first appropriator to the extent of his appropriation when completed and established, is the owner as against all the world . . . . We have no doubt the unappropriated public water on a reservation or on a public domain is subject to appropriation and may be appropriated for a beneficial purpose though the appropriator has not, when his application is filed with the State Engineer, a present right in or to the lands along the stream from which the water is proposed to be diverted or in or to the lands proposed to be irrigated by him. In this respect the appropriation of unappropriated public water on a reservation and the location of a mining claim or other lands on or within a reservation rest on different foundations and are controlled by different principals. The one is a proper subject of rightful acquisition, the other is not. An appropriation made of such water will be protected even as against the Government of the United States."

The statutes of the State of Utah (Revised Statutes of Utah, 1933, Title 100, as amended) authorize the State Engineer to administer all of the waters in the State and particularly the measurement, appropriation, apportionment, and distribution thereof. There is no exception to the general statute which would deny to the State Engineer the right and the authority to administer waters on Indian reservations or to treat them in any respect different from waters on the public domain or private lands.

Some of the water rights belonging to both Indians and white men were decreed by the District Court of the United States for the District of Utah in the case of United States v. Cedar View Irrigation Company, et al. The decree provided specifically for the appointment of a Water Commissioner to distribute the waters of the Uintah river and its tributaries. The appointment of a Commissioner by the court does not deprive the State Engineer of the right to appoint a Water Commissioner in the manner and for the purposes provided by Section 100-5-1, Revised Statutes of Utah, 1933, as amended. This has been so held in the case of Caldwell v. Erickson, 61 Utah 265, 213 p. 182. The court in considering Sections 62 and 64 of Chapter 67, Laws of Utah, 1919, which have not been substantially changed by the recent codification, said:

"The provisions of sections 62 and 64, when considered in connection with the reasons hereinbefore urged in favor of a construction giving the state engineer jurisdiction over waters formerly decreed as well as of the public waters of the state, irresistibly lead to the conclusion that the Legislature must have deliberately intended that the state engineer should be given such control, and that the appointment of a commissioner by him, when lawfully made, should supersede any appointment made by the court, under a former decree."

#### CONCLUSION

The State of Utah has the sovereign power, by appropriate legislation,

to provide for the distribution and control of water upon Indian reservations within its boundaries for the reason that such power is an incident of statehood which has not by the Constitution of the United States or by the State Constitution been granted to the United States government. Furthermore, the United States government has by several Acts of Congress expressly recognized the sovereignty of the State of Utah over water on the Uintah and Uteapahgre Indian reservations and has in the Act of June 21, 1906 expressly provided that irrigation systems constructed on the Uintah Indian reservation "shall be constructed and completed and held and operated, and water therefrom appropriated under the laws of the State of Utah."

The State Engineer, as the executive officer charged with the duty of administering the waters of the State, including the distribution thereof, has authority to appoint a Water Commissioner pursuant to the laws of the State of Utah to distribute water belonging to Indians as well as to white men from rivers and other natural sources on the Uintah Indian reservation. The State Engineer, of course, has no authority over or interest in the distribution of water among the Indians from their private canals, ditches, and other diverting works. Such power rests with the Indian Service, as provided by United States Code Annotated, Title 25, Section 361, quoted above.

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