

Duchesne

October 11, 1939

DISTRIBUTION OF WATER ON INDIAN RESERVATIONS

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 unduly burdensome to the court and was discontinued. The State Engineer undertook to appoint a Water Commissioner to administer the water, but because of the contention of the Indian Service that he had no authority to act, the Commissioner could not function satisfactorily and that arrangement was discontinued.

This situation squarely presents the question as to whether the State or

Federal Government has the power to distribute to appropriators 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, and 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 13 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. When Utah was admitted to the Union it assumed the same status insofar as the reservation of sovereign power was concerned as the original 13 states. *Ward v. Race Horse*, 163 U. S. 504, 41 L. ed. 244, 16 Sup. Ct. 1076.

The Enabling Act, Section 4, provides:

(Copy "1" from Revised Statutes of Utah, 1933)

The Enabling Act required the people of the proposed State of Utah to disclaim all right and title to "lands lying within ~~the~~ 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, 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 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 will also be noticed 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 providing for the reservation in the United States of sovereign power over the distribution and control of water within

the boundaries of Indian reservations or in 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 reservation and the Uncompahgre reservation:

(Copy "2", p. 900; p. 901.)

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:

(Copy from p. 146)

The act of June 21, 1906, 34 Stat. 325, (Kappler on Indian Affairs, Vol. 3, p. ²⁴³~~419~~), provides for the construction of an irrigation system to irrigate the allotted lands of the Indians on the Uintah Indian reservation as follows:

(Copy from white paper)

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):

(Copy)

The following comment of the United States Supreme Court in the case of California-Oregon Power Company v. Beaver Portland Cement Company, _____ U.S. _____,

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:

(Copy footnote, p. 731 and 732)

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:

(Copy p. 731)

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 severed from one another by various Acts of Congress, I see little merit to the contention that when the Uintah and Uncompahgre Indian reservations were established that 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 reservations or by the Enabling Act or 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 providing for the

appropriation and control of water on the Uintah reservation under the laws of the State of Utah.

There have been several decisions of the Federal Court including one by the United States Supreme Court which at first blush would appear to be contrary to this conclusion; they are: *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. 662, 49 L. ed. 1089; *Skeem v. United States*, 273 Fed. 93.

The case of *Winters v. United States*, supra, is the leading case.

It is not in point on the question now under discussion for the reason that it involved the construction of a treaty with the Indians under which the Ft. Belnap Indian reservation was established. It was a suit 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 into the reservation. The United States Supreme Court held that ~~both~~ although there is no express reservation in the treaty of water rights the Indians did not intend to convey such rights to the Government. The court said:

(Copy from file, p. 136)

As stated above, the Uintah and Uncompahgre Indian reservations were created

by Executive Order and thus there is no treaty with the intention to construe, and 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 reservation and the operation of the system including the distribution of water therefrom has been recognized. In none of the cases cited above has the Congress in the same manner recognized the sovereign right of the State to control the use and appropriation of water.

The Supreme Court of the State of Utah in the case of Sowards v. Meagher, 37 U. 212, 218, 108 Pac. 113, affirmed the approval by the State Engineer of an Application to appropriate water on an Indian reservation. The court said:

(Copy from file, p. 134 and 135.)

The statutes of the State of Utah (Revised Statutes of Utah, 1933, Title 100, as amended) authorizes the State Engineer to administer all of the waters in the State and particularly the measurement, appropriation, apportionment, and distribution thereof. There are no exceptions to the general statute which would deny 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 public domain or private lands. As stated above, some of the rights are decreed by the District

Court of the United States in 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 U. 265. 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:

(Copy from file, p. 2)

CONCLUSION

The State of Utah has the sovereign right, by appropriate legislation, to provide for the distribution and control of water upon Indian reservations within its boundaries for the reason that such sovereignty is an incident of ~~state~~ statehood and 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 Indian reservation 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 the water belonging to Indians as well as to white men from rivers and other natural sources on the Uintah Indian reservation to the appropriators thereof. 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 381.

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