

Brigham Young University Journal of Public Law

Volume 10

Issue 2

Article 6

Multijurisdictional Water Resources Regulation

5-1-1996

Wrestling With The Bear: A Compact Approach to Water Allocation

Jeff Boyce

Follow this and additional works at: <https://digitalcommons.law.byu.edu/jpl>



Part of the [Water Law Commons](#), and the [Water Resource Management Commons](#)

Recommended Citation

Jeff Boyce, *Wrestling With The Bear: A Compact Approach to Water Allocation*, 10 BYU J. Pub. L. 301 (1996).

Available at: <https://digitalcommons.law.byu.edu/jpl/vol10/iss2/6>

This Comment is brought to you for free and open access by BYU Law Digital Commons. It has been accepted for inclusion in Brigham Young University Journal of Public Law by an authorized editor of BYU Law Digital Commons. For more information, please contact hunterlawlibrary@byu.edu.

Wrestling With The Bear: A Compact Approach To Water Allocation*

I. INTRODUCTION

At the close of my waterskiing run I threw the rope in the air and started to glide gracefully into the depths of Bear Lake. The rocks and the dirt abruptly stopped short my gentle glide.¹ It was at this time I realized just how bad the water shortage in Bear Lake was. The ground I now stood on was hundreds of feet from where the shoreline had been just a year before. The summer of 1993 is remembered in the Bear River Basin for water shortages. The signs of these water shortages were obvious: Utah water-skiers without enough water to ski on, Wyoming farmers without enough water to irrigate, and Idaho hydroelectric plants without enough water to produce power.² Competing interests were vying for as much water as possible. Similar scenarios are becoming commonplace around the country.³

Without some mechanism for water allocation on interstate streams, times of shortage will bring endless fighting and litigation. Three mechanisms, including federal statutes, equitable apportionment, and interstate compacts, apportion water between states on interstate streams.⁴ The success of each mechanism has varied. This paper will focus on the attempts of Idaho, Utah and Wyoming to reach a fair allocation of the Bear River by interstate compact.

In forming the Bear River Compact (the "Compact") the states enumerated their purposes: removing causes of controversy, providing for efficient uses of water, developing additional water resources, promoting interstate comity, and accomplishing an equitable apportionment between the states.⁵ In this paper, the success or failure of the Compact to

* Copyright © 1996 by Jeff Boyce.

1. My injuries were minimal.

2. Matthew S. Brown, *Is there common ground in Bear River battle?*, DESERET NEWS, Aug. 7, 1994, at B1.

3. Ryan Dennett, Las Vegas and the Virgin River: Cashing in on an unclaimed Jackpot in the Southern Desert (Nov. 1, 1994) (unpublished student paper, on file at the J. Reuben Clark Law School Library).

4. DAVID H. GETCHES, WATER LAW IN A NUTSHELL 397 (2d ed. 1990).

5. Amended Bear River Compact, UTAH CODE ANN. § 73-16-2 (1995); IDAHO CODE § 42-3402 (1990); WYO. STAT 41-12-101 (1995).

accomplish the stated purposes will be examined. Comparisons with other interstate compacts and other forms of allocation will be used to detect the strengths and weaknesses of the Amended Bear River Compact (the "Amended Compact").⁶ Part VII of this paper will examine the future of the Amended Compact. Round three of the wrestling match concerning the Bear River could be more hazardous than the first two rounds.

II. THE HISTORY AND GEOGRAPHY

The Bear River begins in the Uinta Mountains of Utah and ends at the mouth of the Great Salt Lake, only 90 miles from the river's origin; yet, during its course from headwaters to mouth, the river travels over five hundred miles and makes five state line crossings involving three states.⁷ The Bear River is the largest river in North America that does not reach the ocean.

The Bear River begins in Utah and flows north into Wyoming, passing near the city of Evanston. The stream then flows back into Utah near the towns of Woodruff and Randolph. Next, the Bear River crosses back into Wyoming near Pixley Dam. The volume of the flow gains strength with the additions of the tributaries from Smith's Fork and Thomas Fork. The flow of the Bear River turns east into the State of Idaho. Originally, the natural flow of the Bear River did not feed into Bear Lake, nevertheless, water storage projects have allowed the diversion of the Bear River into Bear Lake. The water was originally diverted to Bear Lake to produce power generated from the Utah Power and Light hydroelectric plants. Since the time of the diversion, water storage in Bear Lake has been important to irrigation, consumptive, and recreational uses. The Bear River then flows north until near Soda Springs where it turns southwest heading back toward Utah. The river flows through Cache Valley and eventually enters the Great Salt Lake. In its entirety, the Bear River drains an area of 6,900 square miles in three states.

Historically, the first white explorers and inhabitants of the Bear River Basin were trappers. The Bear River was originally named the Miller River after the leader of an early expedition of Jacob Astor's British-owned American Fur Company.⁸ In 1818, trapper and explorer

6. See *infra* parts V, VII.

7. BEAR RIVER COMMISSION, SEVENTH BIENNIAL REP. O-5 (1991-1992).

8. WALLACE N. JIBSON, HISTORY OF THE BEAR RIVER COMPACT 1 (1991). Wallace Jibson participated in negotiations for both the original Bear River Compact and the Amended Compact. He served for many years as the federal representative to the Bear River Commission. He has authored the only history of the Bear River Compact and is generally

Michael Bourdon of the Northwest Fur Company gave the river its present name because of the many bears seen along the river.⁹ Unfortunately, few bears remain. Despite this, the river continues to flow.

Along with the development of the West came the development of water claims. John Myers made the first water right claim on the Bear River in 1862 near Evanston, Wyoming.¹⁰ Myers' claim was the earliest water right priority on the Bear River, and the first in Wyoming.¹¹ J. W. Meyers, a relative of John Myers, is presently a Wyoming member of the Bear River Commission. When asked about the importance of water rights in the intermountain area, he stated, "[w]ater makes the western country. Without water the Great Basin would just dry up and blow to the Sierra Nevadas."¹²

Mormon pioneers and other settlers in the area established more water claims. Wallace Stegner, who wrote many books concerning the settling of the West, stated in his book *Mormon Country* that "Mormonism flowed down the rivers and the irrigable valley. . . . Because Mormons were and are agricultural people, they developed irrigation."¹³ The population growth spurred the need for water development.

The arid west needed irrigation for the settlers to survive. A story is told that Mormon leader Brigham Young encountered the western explorer and trapper Jim Bridger near Farson, Wyoming prior to the Mormon settlement of Utah.¹⁴ When asked about the possibility of settling in the Salt Lake Valley, Bridger told Young that he would give the Mormon Church a thousand dollars for the first bushel of corn grown in the desert country.¹⁵ Young never collected the money from Bridger, but without irrigation, Young could never have won the bet. For the Mormons, divertible water from the rivers enabled the desert to blossom like a rose.¹⁶

As the territories worked towards statehood, they also jockeyed for water. Major John Wesley Powell, the Director of the U.S. Geographical Survey and a noted western explorer, realized the importance

considered the primary authority on the compact. Mr. Jibson has retired and presently lives in River Heights, Utah. He is still contacted by the Bear River Commission for advice.

9. *Id.*

10. Brown, *supra* note 2, at B3.

11. JIBSON, *supra* note 8, at 2.

12. Telephone Interview with J. W. Myers, Wyoming Representative, Bear River Commission (Oct. 28, 1994).

13. WALLACE STEGNER, *MORMON COUNTRY* 155 (2d ed. 1981).

14. LEONARD ARRINGTON, *BRIGHAM YOUNG AMERICAN MOSES* 141 (1985).

15. WALLACE STEGNER, *THE GATHERING OF ZION* 165 (2d ed. 1981). See also, Historical Road Marker, Farson, Wyoming.

16. *Isaiah* 35:1 (King James).

and scarcity of water in the West. At that time, most people thought that there was enough water to irrigate the West. Powell knew the arid nature of the region and proposed careful planning to regulate the use of the limited resource.¹⁷

In the Eleventh Annual Report of the United States Geological Survey, Major Powell, speaking of the Bear River, stated: "In times of scarcity, who is to apportion this water? What protection do present users enjoy against the stronger and richer canal companies . . . ? Notices of appropriation caused uneasiness among individuals and communities, especially in Idaho, for fear of a contest regarding water"¹⁸ Additionally, Major Powell urged Congress to pass laws in the West governing priorities and beneficial use of water resources.¹⁹ Even before statehood, records indicate disputes concerning water rights on the Bear River.²⁰ The wrestle for the water in the Bear River had begun. The need for an interstate compact allocating water rights among Idaho, Utah and Wyoming was born.

The history of the Bear River or an understanding of the Bear River Compact would not be complete without discussion of the role of the Utah Power and Light Company (UP&L). The Telluride Power Company first began the project of diverting Bear River water and storing the water in Bear Lake for power production. UP&L bought Telluride Power and finished the diversion of the river into the Bear Lake in 1918.²¹ UP&L has since built and maintained five hydroelectric power plants along the river. In 1912, UP&L signed a deal with Utah-Idaho Sugar Company. UP&L was given land in exchange for an agreement to pump a continuous flow of 900 cfs from Bear Lake between May 1 and October 31 and 150 cfs between November 1 and April 30 each year for irrigation, municipal, and other uses. The first storage rights for Bear Lake were established in 1912, making the claim a priority right over most lake users. UP&L has recently been purchased by a power company from Oregon. The buyout of UP&L leaves some uncertainty as to the continuing role of UP&L in determining water rights.

17. JOHN W. POWELL, REPORT ON THE LANDS OF THE ARID REGION OF THE UNITED STATES 131-33 (1962). Wallace Stegner, who edited and wrote the introduction for the latest published edition of Powell's report, documented Powell's insight for recognizing the need for regulation of the limited water resources in the west. Others have recognized Powell's leadership in western water development. See MARK REISNER, CADILLAC DESERT 5 (1986). The development of the west directly correlated to the available water supply; LEONARD RICE & MICHAEL D. WHITE, ENGINEERING ASPECTS OF WATER LAW 113 (1987).

18. JIBSON, *supra* note 8, at 2.

19. JIBSON, *supra* note 8, at 2.

20. JIBSON, *supra* note 8, at 2.

21. JIBSON, *supra* note 8, at 3.

III. THE COMPACT APPROACH

To accomplish the goal of fair allocation, Idaho, Utah and Wyoming elected to negotiate an interstate compact instead of allowing Congress to allocate the Bear River or leaving it to the courts to decide in litigation. Interstate compacts have become the most common method of apportioning interstate waters.²² Attorney Jerome C. Muys, a member of the National Water Commission, said that "[t]here are certain obvious advantages to the compact approach which appear essentially uncontestable."²³ Muys pointed to the compact's main advantage: the ability of a compact to plan the water allocation for an entire river basin, as well as the ability to provide continuity in planning by a permanent administrative agency set up by the compact. Dan Tarlock noted in his book, *Law of Water Rights and Resources*, that compacts provide more comprehensive technical information and better enforcement mechanisms than other forms of interstate water allocation.²⁴

Litigation in the Supreme Court can be time consuming, costly, and unpredictable. Further, the Supreme Court cannot carry out or plan allocation for comprehensive river basins. The Supreme Court indicated that solving allocation problems by interstate compact is preferable to litigation.²⁵

Like litigation, congressional legislation has defects that make federal lawmaking undesirable in comparison to interstate compacts. Generally, states would not like to have the future of their water rights decided by the federal government. Calvin Funk, a Utah member of the Bear River Commission, feels that the "compact approach keeps issues of allocation alive and up to date. In comparison, a law changing allocation takes years to get through Congress."²⁶

Felix Frankfurter and James M. Landis, in their classic work for the *Yale Law Journal*, recommended the utility of the interstate compact by noting that compacts can enable "sensible compromise, not following strictly legal lines."²⁷ Further, they felt compacts can better provide for the creative, continuing administration that is needed in changing

22. GETCHES, *supra* note 4, at 398.

23. JEROME C. MUYS, INTERSTATE WATER COMPACTS: THE INTERSTATE COMPACT AND FEDERAL-INTERSTATE COMPACT 323 (Legal study No. 14 prepared for Nat'l Water Commission 1971).

24. DAN TARLOCK, LAW OF WATER RIGHTS AND RESOURCES § 10.05 (1991).

25. See *Arizona v. California*, 373 U.S. 546 (1963).

26. Telephone Interview with Calvin Funk, Utah Representative, Bear River Commission (Oct. 28, 1994).

27. Felix Frankfurter & James M. Landis, *The Compact Clause of the Constitution - A Study in Interstate Adjustments*, 34 YALE L.J. 685, 706 (1925).

conditions.²⁸ The complexities of the needs in the Bear River Basin illustrate that the interstate compact was the only mechanism available to accomplish the goal of fair allocation effectively. Litigating or legislating water rights would have been far too inflexible to meet the various needs.

IV. PROCEDURE FOR ADOPTION

States base the right to negotiate interstate compacts on Article I, Section 10, Clause 3 of the Constitution. The formation of compacts generally follows five steps: the first step is congressional authorization to negotiate the compacts; the second step is the appointment of commissioners or representatives from each state; compact negotiation is the third step; next is the ratification by the state legislatures and governors; the last step is congressional consent.²⁹ Although congressional preauthorization is not always necessary, its approval after state ratification is necessary.

By the beginning of the Second World War, conflict over water rights had developed in the Bear River Basin. Wallace Jibson, a participant in the negotiations of both the original and the Amended Compact, wrote the history of the Bear River Compact.³⁰ He noted that, "[f]riction among upper basin users over Bear Lake storage rights and lack of interstate control over irrigation season natural flow, together with the U.S. Bureau of Reclamation's concern for future reclamation project development, brought about negotiations toward an interstate compact."³¹

The first series of meetings between Idaho, Utah, and Wyoming began in March of 1943 and set the foundation for future meetings. A chairperson, secretary, and representatives from each state were chosen. To comply with the Constitution, Congress granted authority to the states to negotiate and enter a compact.³² Consent was granted by Congress on July 26, 1946, thus, the first step toward forming a compact had been accomplished. President Truman appointed a representative of the federal government to be involved with the negotiations.³³

28. *Id.* at 685.

29. Douglas L. Grant, *Water Apportionment Compacts Between States*, 4 WATER AND WATER RIGHTS § 46.02 (R. Beck ed., 1990).

30. JIBSON, *supra* note 8.

31. JIBSON, *supra* note 8, at 7.

32. H.R. 4870, 80th Cong., 1st Sess. (1946).

33. E.O. Larsen was appointed by President Truman. He was replaced by Wallace Jibson.

The negotiations for the first Bear River Compact lasted nine years before the representatives agreed on the kind, the scope, and, most importantly, the amount of water allocated to each state. The length of the negotiations demonstrated the complexity of the compact process and illustrated the length of time needed for states to wrestle over these types of issues.³⁴ Round one of the wrestle over the river had concluded successfully.

V. SCOPE OF THE COMPACT

Most compacts deal exclusively with surface waters. Yet, even those compacts that deal only with surface waters have problems defining the meaning of surface waters. For example, the Upper Colorado River Basin Compact includes all tributaries as surface water,³⁵ but, other compacts treat tributaries differently. Even the definition of tributaries varies. For instance, the Upper Colorado Compact defines a tributary as water that is at some time part of the surface system. The original Bear River Compact dealt exclusively with surface waters and included all the tributaries that drain into the Bear River Basin as surface waters.

The Amended Bear River Compact widens the scope of the agreement by regulating ground water, as well as surface waters. The inclusion of ground water distinguishes the Amended Bear River Compact as one of only four compacts that includes ground water.³⁶

The scope of compacts often include provisions for water quality, water allocation, flood control, facility development, recreational uses, hydroelectric power, pollution control, in-stream rights and water storage rights. Federal water reserve rights and Native American reserve water rights are now usually also addressed in compacts. Most new federal interstate compacts need to include both water quality and environmental considerations.³⁷ No compact yet includes atmospheric water.³⁸ The Amended Bear River Compact deals with water allocation, storage rights and hydroelectric power. Some people consider flood control part of the Amended Bear River Compact.³⁹

34. Getting states to agree even on small issues is hard. For example, Utah and Wyoming are yet to agree on how to spell Uintah (Uinta) County.

35. Upper Colorado River Compact, WYO. STAT. § 41-12-401 (1995).

36. Grant, *supra* note 29, § 46.03.

37. George W. Sherk, *Resolving Interstate Water Conflicts in the Eastern United States: The Re-emergence of the Federal-Interstate Compact*, 30 WATER RESOURCES BULLETIN: AMERICAN WATER RESOURCES ASSOCIATION, No. 3, at 406 (June 1994).

38. Professor Ray Jay Davis, Lecture at J. Reuben Clark Law School Water Law Class (Sept. 6, 1994) (asserting that future interstate compacts might include a provision for atmospheric water to avoid controversy).

39. See *Kunz v. Utah Power and Light Co.*, 792 P.2d 926 (Idaho 1990).

A. Water Allocation

Percentage of flow, guaranteed quantities and storage allocation are the forms of water allocation used most frequently in compacts. The kind of allocation that compacts select should depend on the geographical setting, the historical context, and the allocation of risk.⁴⁰ Many compacts use varied forms of allocation on different sections of a river.

1. Percentage of Flow

Percentage of flow allocation means that once the states agree on a set percentage, each state then bears the risk of water shortage proportionately according to agreement.⁴¹ Percentage of flow is the most common form of allocation; yet, as Zachary McCormick noted, the percentage of flow mechanism conflicts with the doctrine of prior appropriation.⁴² Prior appropriation is based on a "first in line, first in time" basis for water appropriation.⁴³ Percentage of flow allocation might take away private water rights that are already claimed under prior appropriation. This view is supported by the Supreme Court ruling in *Hinderlider v. La Plata River and Cherry Creek Ditch Co.*, which held that an interstate compact overrides state water rights.⁴⁴ Despite the conflict with prior appropriation, percentage of flow offers the most equitable form of interstate allocation.

2. Guaranteed Quantities

Guaranteed quantity allocation sets a fixed amount of water to be delivered to a downstream state. In times of shortage, upstream states still have to deliver the set amount of water agreed upon. Upstream states find this objectionable since compliance with the compact might even be impossible during times of severe shortage.

40. Amy Newsome, *Calling a Truce in the Water Wars of the Southeast: A Proposal to Adopt a Federal-Interstate Compact* (Nov. 1, 1994) (unpublished student paper, on file at the J. Reuben Clark Law School Library).

41. Zachary L. McCormick, *Interstate Water Allocation in Compacts in the Western United States—Some Suggestions*, 30 WATER RESOURCES BULL. No. 3, at 386 (1994).

42. *Id.* at 388.

43. AMERICAN WATER WORKS ASS'N, *WATER RIGHTS OF THE FIFTY STATES AND TERRITORIES* 26 (1990); *See also* FRANK J. TRELEASE & GEORGE A. GOULD, *WATER LAW: CASES AND MATERIALS* 17-22 (4th ed. 1986); LEONARD RICE & MICHAEL D. WHITE, *ENGINEERING ASPECTS OF WATER LAW* 96 (1987).

44. 304 U.S. 92 (1938).

3. *Storage Allocation*

Storage allocation limits the amount of water an upstream state can hold in storage facilities. This allows states to reserve water for times of shortage and promotes efficient use of water.⁴⁵ The problem with storage allocation is that during times of shortage, downstream states receive only the water that is in excess of the stated storage agreements. A shortage or drought would cause the downstream states to receive nothing.

B. Allocation of the Bear River

The first interstate compact negotiators tried to allocate the water of the Bear River on a priority basis, despite state lines.⁴⁶ This means of allocation was impossible because, had it been adopted, all of the water in the system would have been fully appropriated. Strict adherence to priority would have negated any water storage allowance for the upper regions of the river. Likewise, strict priority would have caused severe crop failure in some regions. Finally, the Supreme Court's ruling in *Nebraska v. Wyoming*⁴⁷ suggested that a strict adherence to priority is not always the rule, even in prior appropriation states. Negotiators looked to means of water allocation other than a priority basis.

Compact negotiators decided to divide the Bear River into three divisions and to treat allocation differently in each division. This plan illustrates the flexibility of a compact in dealing with complex matters. The Upper Division of the River extends from its source in the Uinta Mountains to, and including, Pixley Dam in Wyoming.⁴⁸ The Central Division includes the portion of the Bear River from Pixley Dam to, and including, Stewart Dam.⁴⁹ The Lower Division of the Bear River includes the flow from Stewart Dam to the Great Salt Lake⁵⁰ and encompasses Bear Lake and its tributary drainage. The allocation provisions for the three divisions of the Bear River apply only during times of shortage. Article IV of the Amended Bear River Compact distinguishes direct flow from divertible flow for each division.⁵¹

45. McCormick, *supra* note 41, at 389.

46. JIBSON, *supra* note 8, at 8.

47. 325 U.S. 589, 618 (1945).

48. Amended Bear River Compact, UTAH CODE ANN. § 73-16-2 (1995).

49. *Id.* at Art. II(4).

50. *Id.* at Art. II(5).

51. *Id.* at Art. IV.

1. *Upper Division*

Subdivided into four smaller divisions, two in Utah (upper, lower) and two in Wyoming (upper, lower), the Upper Division is allocated by percentage of flow and storage allocation. The allocation of divertible flow is based on percentage of irrigated acreage in each subdivision. Division based on irrigated acreage gave the Upper Utah subdivision 0.6 percent of divertible flow, Upper Wyoming 49.3 percent, Lower Utah 40.5 percent, and Lower Wyoming 9.6 percent. These percentages were only used in times of water shortage or emergency. A water emergency is declared in the Upper Division of the Bear River if the divertible flow is less than 1,250 cfs during irrigation season. Percentage allocation only in times of emergency is a unique provision not common in most interstate compacts.

Storage allocation is also used in the Upper Division. The compact allocates existing storage rights to each of the three states above Stewart Dam. Under the Original Compact, Idaho received 324 acre-feet of water storage, Utah received 11,850 acre-feet of storage rights, and Wyoming received 2,150 acre-feet. These amounts were increased when the compact was amended.⁵²

2. *Central Division*

The allocation of the Central Division is very similar to the Upper Division. The Central Division extends from Pixley Dam to, and including, Stewart Dam. Irrigated acreage is again used as a basis for a percentage agreement between Idaho and Utah concerning divertible flow. Idaho agreed to use 43 percent of the divertible flow, leaving Wyoming with the remaining 57 percent. If any water remained unused it was allocated to Idaho in the Lower Division. The storage allocations named in the Upper Division also include the Central Division. Again, the percentages are only enforced in times of water shortage. When either the divertible flow in the Central Division is less than 870 second-feet, or the flow of the Bear River at Border Gaging Station is less than 350 second-feet, a water emergency is deemed to exist, and allocation percentage will be enforced.⁵³

52. *Id.*

53. *Id.*

3. Lower Division

The Lower Division begins below Stewart Dam and extends to the mouth of the Great Salt Lake. The Lower Division includes the very important Bear Lake. After Bear Lake was developed for water storage, downstream farmers became increasingly dependent on the lake for irrigation. Wallace Jibson, in his history of the compact, said that "Bear Lake had become the lifeblood also to thousands of irrigated acres in Idaho and lower Utah."⁵⁴ The storage facilities of Bear Lake continue to play a major role in farming today. Cache County farmer Jim Watterson, who irrigates 300 acres of land from the Bear River said, "I live and die by this river."⁵⁵

Allocation of the Lower Division differs from the upper two divisions. The initial compact did not divide the divertible flow or future developable water between Idaho and Utah. The reason for this seems to be the lack of historical controversy between irrigators below Bear Lake.⁵⁶ Rights between Idaho and Utah were left to a priority basis.

Drafters included a mechanism in the original compact which allowed Utah users to file a petition alleging that Idaho users were depriving downstream users of water.⁵⁷ The commission was then given the power to adjudicate the issue and make the changes.⁵⁸ This provision might prove to be controversial in the future. Norm Stoffer of Utah's Department of Natural Resources, Division of Water Resources feels that the Compact's provision for petitioning could be a stumbling block because it allows water allocation to be amended without following the usual procedure.⁵⁹ An Idaho representative to the Bear River Commission said that "Utah should not be able to petition for more water until there is some allocation device to cap ground water use in Cache Valley, Utah."⁶⁰ Another weakness of the Amended Compact is that a percentage of flow allocation was not adopted in the Lower Division.

Water storage rights existed in Bear Lake before the compact was negotiated. UP&L had obtained the right to divert 5,500 cfs of Bear River water into Bear Lake by a Federal District Court decree known as

54. JIBSON, *supra* note 8, at 8.

55. Brown, *supra* note 2.

56. JIBSON, *supra* note 8, at 35.

57. Amended Bear River Compact, UTAH CODE ANN. § 73-16-2 (1995).

58. *Id.* at Art. IV(3)(b).

59. Telephone Interview with Norman Stoffer, Utah Department of Natural Resources-Division of Water Resources (Oct. 28, 1994).

60. Telephone Interview with Rodney Wallentine, Idaho Representative, Bear River Commission (Oct. 28, 1994).

the "Dietrich Decree."⁶¹ Established on July 14, 1920, the decree allowed UP&L to release the water from Bear Lake at UP&L's discretion "for the generation of electric power, and for such irrigation or other beneficial purposes, recognized by law, as the plaintiff (UP&L) may devote or dedicate said released stored water, by use, sale, rental, or otherwise."⁶² This right to store 5,500 cfs of water from the Bear River became controversial in compact negotiations because the right directly affected downstream rights. The Dietrich Decree gave UP&L a priority right over most downstream users; additionally, upstream users could be affected, although they were not involved in the litigation.

Concerned about storage rights, compact negotiators were faced with the problem of compliance with the Dietrich Decree. They tried to accommodate users above Bear Lake, desiring to store more water, and farmers below Bear Lake, wanting to maintain their previous water appropriation. Utah had already gone through the process of water adjudication; the compact's changes would directly alter the established water allocation status quo. The negotiators reached a compromise by reserving

[a] portion of the storage capacity in Bear Lake for primary use by, and protection of, irrigated uses and rights downstream from Bear Lake. This compact-established 'irrigation reserve' establishes minimum Bear Lake levels, which correspond to upstream storage development, below which Bear Lake cannot be drawn down for power purposes only.⁶³

In other words, UP&L cannot release Bear Lake water stored exclusively for generating power when the lake level is below the set irrigation reserve level of 5,914.70 feet (UP&L datum).

Since August 7, 1989, UP&L has not been able to release water solely for the generation of power.⁶⁴ Water released for irrigation can also be used for power as long as the downstream users' rights are not forfeited. The irrigation reserve agreement slightly altered the Dietrich Decree. UP&L actively participated in the compact negotiations and gave up some autonomy in the compact agreement.

The irrigation reserve agreement has proven to be an equitable solution to the needs of upstream users, UP&L, and downstream irrigators. The agreement has generally been considered a success of the compact; yet, the recreational users and inhabitants of Bear Lake have not always enjoyed the effects of the compact. In 1983, when the lake was

61. JIBSON, *supra* note 8, at 5.

62. JIBSON, *supra* note 8, at 5.

63. BEAR RIVER COMMISSION, SEVENTH BIENNIAL REPORT O-6 (1991-1992).

64. JIBSON, *supra* note 8, at 11.

at a very high level, homeowners along the shore complained that UP&L was not pumping enough water out of Bear Lake. Similarly, in the last three years, when the lake has been at unusually low levels, the same homeowners and recreational users have complained that UP&L was pumping too much water out of the lake to meet the needs of downstream farmers. In fact, Bear Lake residents have filed a class action against UP&L for dredging Bear Lake to drain more water downstream.⁶⁵ The needs of the homeowners must be considered when the compact is amended in 1998.

C. Federal Reserve Rights

The doctrine of federal reserve rights and Native American reserve rights can be major stumbling blocks to the formation or enforcement of an interstate compact. Basically, this doctrine states that:

[w]hen the United States sets aside or reserves a part of its lands for particular uses or purposes, it reserves by implication the right to enough of the unappropriated waters on or adjacent to the lands to meet the uses and purposes. This implied reservation usually takes priority as of the time the lands are reserved.⁶⁶

The doctrine of federal reserve rights was announced by the Supreme Court in *Winters v. United States*.⁶⁷ The reserve doctrine can cause problems with state water law because there is another party with a water claim, and usually that claim has a priority over other existing users. This same problem can cause confusion in compact negotiations because federal water rights are guaranteed some allocation.

Native American reserve rights are very similar to the federal rights. Each tribe in their traditional region has a right to a claim of water. The case of *Arizona v. California* solidified this reserve right for Native Americans.⁶⁸ This right is also a right with priority. The problem that compacting states have with Native American reserve rights is that often the amount allocated for the tribe or the region is unquantified.⁶⁹

Some compacts deal with reserved rights by addressing them head on and considering the rights directly in allocating the water, though most compacts use saving language in avoiding the subject. The compacts

65. Brown, *supra* note 2; See also Lance Frazier, *Citizens Sue to Protect Bear Lake*, HERALD JOURNAL, Dec. 8, 1994, at A1.

66. AMERICAN WATER WORKS ASS'N, *supra* note 43, at 74.

67. 207 U.S. 564, 577 (1908).

68. *Arizona v. California*, 376 U.S. 340, 345 (1964).

69. FRANK J. TRELEAVE & GEORGE A. GOULD, *WATER LAW: CASES AND MATERIALS* 768 (4th ed. 1986).

"commonly contain a savings clause that nothing in the compact shall be construed as affecting the obligation of the United States to Indians, or water rights owned by Indians."⁷⁰ The Amended Bear River Compact uses similar "saving clause" language. Article XIII of the Amended Compact says:

Nothing contained in this Compact shall be deemed: 1. To affect the obligations of the United States of America to the Indian Tribes; 2. To impair, extend or otherwise affect any right or power of the United States, its agencies or instrumentalities involved herein; nor the capacity of the United States to hold or acquire additional rights to the use of the water of the Bear River. . . .⁷¹

To date there have been no major controversies concerning reserve rights in the Bear River Basin and problems with Native American reserve rights in the future are unlikely. There are no Native American reservations in the basin. However, Federal reserve rights could become an issue in the allocation of water for the Bear River Migratory Bird Refuge since the refuge has petitioned for more water. Federal reserves could also exist in the national forest lands of the basin, specifically in the Bear Lake Valley. In the future, compacting states need to consider in more detail the impact of federal reserve rights when determining water allocation between the states.

VI. RATIFICATION

Negotiations lasted from 1943 until 1955 when the three states finally agreed to a compact. The representatives of the three states and a representative of the federal government signed the compact. The compact was then sent to each of the state legislatures. After state ratification, the compact was sent to the United States Congress for consent and was finally signed into law by President Dwight D. Eisenhower on March 17, 1958.

Immediately following the ratification, the compact's provisions were put to the test. Water shortages were common during the years of 1958 to 1961. Jibson noted that "[i]nterstate regulation was badly needed and achieved an equitable division of natural flow during these first years of operation."⁷² Initially, the states struggled to comply with new regulations, especially since compliance with the regulations might unjustly

70. McCormick, *supra* note 41, at 389.

71. Amended Bear River Compact, UTAH CODE ANN. § 73-16-2 (1995).

72. JIBSON, *supra* note 8, at 20.

benefit the other states. Nevertheless, the end result was positive and the states accepted and followed the allocation guidelines.

VII. AMENDED BEAR RIVER COMPACT

The original Bear River Compact stated that at time periods not exceeding twenty years, the compact would be amended.⁷³ As the years passed, experience in operation under the original compact showed some successes and some concerns. Jibson felt the stated purposes of the compact were being accomplished for each state. He wrote:

Certainly the initial Compact provided a workable agreement that corrected the two most serious problems leading up to the pact: storage allocation above the Bear Lake and an equitable division of natural flow. An important consideration throughout negotiations and during years of operation was that of accomplishing the purposes of the Compact with as little interference as possible in the administration of water under state law.⁷⁴

In sum, the shortcomings of the original compact concerned storage rights in both the upper and lower portions of the river. The states were now ready for round two to begin.

A. Allocation changes

The Amended Bear River Compact became law through the same ratification procedure and was signed by President Carter on February 8, 1980. The amendments to the original compact included: (1) additional storage granted above Bear Lake for 74,500 acre-feet, of which 4,500 acre-feet were granted to Idaho, and 35,000 acre-feet were granted to Utah and Wyoming;⁷⁵ (2) water (including ground-water) appropriated to a beneficial use after January 1, 1976, limited to an annual depletion of 28,000 acre-feet;⁷⁶ (3) additional storage rights of water to the upper and central divisions that would otherwise bypass Bear Lake when all other direct flow and storage rights were satisfied; (4) water not applied to beneficial use prior to January 1, 1976, allocated on a depletion basis; and (5) provisions that granted Idaho the first right to develop and deplete 125,000 acre-feet in the Lower Division, to Utah, the second right to develop and deplete 275,000 acre-feet in the same division, and to the

73. Amended Bear River Compact, UTAH CODE ANN. § 73-16-2 (1995).

74. JIBSON, *supra* note 8, at 22.

75. This additional storage in the Upper and Central Divisions was not to be allowed when the elevation of Bear Lake was below 5911 feet (UP&L datum).

76. Idaho was allocated 2,000 acre-feet; Utah and Wyoming each were allocated an additional 13,000 acre-feet. These allocations are also conditional on the level of Bear Lake.

Lower Division, the third right to divide equally, and develop and deplete the next 150,000 acre-feet.⁷⁷ These changes were added to the original Bear River Compact to form the Amended Compact. Primarily, the changes allowed more storage rights for the Upper Division without infringing on the rights of other users in times of shortage.

The increasing demand on available water resources made other resources such as ground water more meaningful. The inclusion of ground water in the Amended Compact was an important element. With improvements in water measurement, the exact allocation for each state could be better refined. Ground water plays an important role in this allocation. A recent *Water Resources Bulletin* pointed out that "ignoring ground water can pose a problem because ground water is hydrologically connected to surface flow and reduction in ground water levels may eventually manifest itself in reduction of surface flow."⁷⁸ For compacts to maintain equitable apportionment, ground water withdrawals must be included. Ground water not included in the allocation is a possible weakness of existing compacts.⁷⁹

Ground water allocation will become a larger issue in amending the compact in 1998. Studies are presently being done in Cache Valley studying the relationship of surface and ground water.⁸⁰ The use of one resource and its impact on the other raises complex questions, which the Amended Compact presently treats in a simplistic manner.

Because of a compromise, one provision left out of the Amended Compact was an allocation for the Bear River Migratory Bird Refuge in Box Elder County, Utah. Federal Fish and Wildlife officials wanted a reservation of 120,000 acre-feet for further development of the marsh land area. This reservation was left out of the amended version because of Idaho's concern that Utah was allocated too much storage water in the Lower Division.⁸¹

The Bear River Migratory Bird Refuge will continue to be an issue in the debate over water allocation. Water shortages in the refuge can cause epidemics of botulism that destroy the bird population.⁸² Al Trout, manager of the U.S. Fish and Wildlife Service's Bear River Bird Refuge recently said, "We are going dry. We have 43,000 acres of wetlands and we expect to come through with water for about 4,000."⁸³

77. Amended Bear River Compact, UTAH CODE ANN. § 73-16-2 (1995).

78. McCormick, *supra* note 41, at 392.

79. Blaine Cannon, The Snake River Compact: Facing an Uncertain Future (Dec. 16, 1994) (unpublished student paper, on file at the J. Reuben Clark Law School Library).

80. JIBSON, *supra* note 8, at 35.

81. JIBSON, *supra* note 8, at 25.

82. Brown, *supra* note 2, at B3.

83. Brown, *supra* note 2, at B3.

Wildlife interests groups are other parties that will compete for water in the next round of amendments. Speaking on the matter, the engineer-manager of the Bear River Commission, Don Barnett pointed out that the compact has always respected the storage rights of the Bird Refuge that were established under Utah law.⁸⁴ Since the refuge water claim postdates other water claims in the area, obtaining refuge water allocation is a problem.⁸⁵

Utah still has the right to develop the facilities for more water storage under the Amended Compact. A reservoir has been proposed near Tremonton, Utah that would store and release water to the refuge in times of shortage. Yet, Jibson feels that environmentalists have not favored water storage above the refuge despite the positive effects it would have on the wetlands and the bird population.⁸⁶ Another possible option is intervention by the federal government to reserve water for a federal bird refuge.

B. Administration of the Amended Bear River Compact

Most interstate compacts create an administrative agency, usually called a "commission," to make rules, gather information, and enforce the compact agreements.⁸⁷ Article III of the Amended Compact establishes the "Bear River Commission." Commissions generally have one or more representatives from every state and a federal representative involved in the compact.⁸⁸ The Amended Bear River Compact provides for a commission with nine commissioners, three from each signatory state and a chairman who will be a representative of the federal government.⁸⁹ Some compacts, like the Amended Compact, do not allow the federal representative to vote.⁹⁰ Conversely, the Upper Colorado River Basin Compact allows the federal representative to vote like any commissioner of the states could.⁹¹ Another compact allows the federal representative to vote if there is a tie.⁹²

The bylaws of the Amended Bear River Compact require a voting quorum in order to take action. "Six Commissioners who shall include

84. Telephone Interview with Don Barnett, Bear River Commission (Oct. 28, 1994).

85. *Id.*

86. Telephone Interview with Wallace N. Jibson (Oct. 28, 1994). Wallace Jibson is the author of HISTORY OF THE BEAR RIVER COMPACT. See JIBSON, *supra* note 8.

87. GETCHES, *supra* note 4, at 408.

88. Grant, *supra* note 29, §46.03; see also MUYS, *supra* note 23, at 13.

89. Amended Bear River Compact, UTAH CODE ANN. § 73-16-2 (1995).

90. Red River Compact, ARK. CODE ANN. § 15-23-501 (Michie 1994).

91. Upper Colorado River Basin Compact, Art. VIII(a), WYO. STAT. § 41-12-401 (1995).

92. Yellowstone River Compact, Art. III(f), WYO. STAT. § 41-12-601 (1995).

two Commissioners from each state shall constitute a quorum. The vote of at least two-thirds of the Commissioners when a quorum is present shall be necessary for the action of the Commission."⁹³ Under the rules of the commission, one state could be blocked on an issue by the other states voting together. However, many compacts require a unanimous vote among commissioners before taking action.⁹⁴

The Amended Bear River Compact says that the commissioners shall be selected in accordance with state law. Usually the appointment is made by the executive of the state and the expenses of each commissioner are paid by the state he or she represents. The expenses of the Bear River Commission are paid by the signatory states on an equal basis.⁹⁵

The primary purpose of the commission is to take steps necessary to ensure that the allocation provisions in the compact are enforced. The main limitation of most interstate compacts is that authority given to interstate commissions is very restricted. Jerome Muys said that "the authority granted to compact commissions has been exceedingly limited and their funding accordingly anemic."⁹⁶ This has not been a complaint of the Amended Bear River Compact. The Amended Compact gives the commission the power to issue orders and enforce them by action before state administrative officials or by court proceedings.⁹⁷ Other compacts are less generous with their enforcement powers. For instance, the South Platte River Compact contains no enforcement provisions;⁹⁸ however, most compacts provide their respective commissions with some enforcement power.⁹⁹

With the use of compacts expanding and the scope of compacts enlarging, the enforcement power of compacts must also increase. If a commission is responsible for administering the compact, it is logically the first forum to be used in resolving disputes.¹⁰⁰ Water rights are especially valuable to states; therefore, delegating the authority to allocate such an asset to a commission is difficult and can be politically unpopular. McCormick, in his work on compacts stated, "states may be loathe to cede control, and the scarcer the water, the more difficult it may be to obtain such a concession. Water users who lose water as a result of such a third-party decision are likely to feel sold out by their state govern-

93. Amended Bear River Compact, Art. III(a), UTAH CODE ANN. § 73-16-2 (1995).

94. MUYS, *supra* note 23, at 14.

95. The Amended Bear River Compact, UTAH CODE ANN. § 73-16-2 (1995).

96. MUYS, *supra* note 23, at 17.

97. Amended Bear River Compact, UTAH CODE ANN. § 73-16-2 (1995).

98. South Platte River Compact, COLO. REV. STAT. § 37-65-101 (1990); *see also* Grant, *supra* note 29.

99. Grant, *supra* note 29, § 46.03.

100. McCormick, *supra* note 41, at 389; *see also* Sherk, *supra* note 37, at 407.

ment."¹⁰¹ Yet, for compacts to accomplish purposes like equitable apportionment, the commissions must have the power to enforce compact provisions. The Amended Bear River Compact is a good example of a commission having sufficient power to act without taking away the ability of the states to oversee their own water resources.

The roles of a commission involve gathering information and administering the measurement provisions of the compact. Data gathering is generally supervised by an engineer employed by the commission. Information showing state compliance with compact regulation can be used in most enforcement proceedings as *prima facie* evidence.¹⁰² Data collection is also useful in making changes or amendments to compacts. The Amended Compact provides that the commission release a study every two years reporting on the allocations of the compact.¹⁰³

Most compacts provide provisions for water rights changes since needs vary over time. Although some interests remain constant, others increase or decrease, and new interests appear. Compacts that do not provide continuity have a very limited appeal. The Amended Compact includes provisions for water transfer or exchange.¹⁰⁴ Transfer or exchange are mechanisms that provide additional flexibility between states.

Another mechanism that provides flexibility in water allocation is the amendment process. The Amended Bear River Compact has a very unique and important amending process. Most compacts require ratification by the respective state legislatures and by the federal government.¹⁰⁵ The Amended Bear River Compact provides that "at intervals not exceeding twenty years, the Commission shall review the provisions hereof, and after notice and public hearing, may propose amendments to any such provision."¹⁰⁶ The twenty-year time period is not mandatory; therefore, the rule is flexible. The provisions of the old Amended Compact remain intact until the new version would be ratified by the state legislatures and Congress. The Amended Compact is scheduled to be amended in 1998. New issues such as water quality considerations and recreational use needs will face the negotiators. The amendment process is necessary to meet the needs of the states. A model interstate compact

101. McCormick, *supra* note 41, at 390.

102. Amended Bear River Compact, Art. IV(D), UTAH CODE ANN. § 73-16-2 (1995).

103. *Id.* at Art. III(D)(2).

104. *Id.* at Art. IX.

105. Grant, *supra* note 29, § 46.03.

106. Amended Bear River Compact, Art. XIV, UTAH CODE ANN. § 73-16-2 (1995).

should include provisions for change. The Amended Compact's twenty-year rule is a good model that allows flexibility and stability.

The Bear River Commission has contracts with universities in each of the signatory states to collect and gather data concerning water use, water depletion, water storage, and future needs.¹⁰⁷ The data collected will be a measuring stick for changes in the upcoming amendment process.

Termination of the Bear River Compact is possible through a unanimous vote of the states.¹⁰⁸ Like many other compacts, should the Amended Bear River Compact terminate, the rights established under the Amended Compact would continue unimpaired.¹⁰⁹ Some compacts do not have any provisions concerning termination.¹¹⁰

VIII. FUTURE OF THE AMENDED BEAR RIVER COMPACT

The process to change the Amended Bear River Compact may begin in the next four years. Round three of the negotiations promises to be at least as wild as the previous two rounds. The viability of the compact will depend on the mechanism's ability to deal with increasing demands on a limited resource. Several challenges must be faced. With more groups joining the wrestle for the river, the amendment process could be a long fight.

There is increasing demand for the water in the Lower Division of the Bear River in Utah. As the population steadily grows in Cache Valley and along the Wasatch Front, the need for more water for consumptive use grows. Plans have been developed to pipe the water from the Bear River to Salt Lake City for consumptive use.¹¹¹ The compact provision allowing Utah users to petition the commission for more water threatens to result in litigation.

Another group voicing its desire for more water allocation storage rights are the people living along the Bear Lake shore. An activist speaking for the interests of the Bear Lake residents recently said, "If we don't reverse the process soon, Bear Lake may never recover."¹¹² The concerns of Bear Lake residents are contrary to the concerns of UP&L and the downstream irrigators. The hydroelectric plants along the Bear

107. JIBSON, *supra* note 8, at 27.

108. Amended Bear River Compact, Art. XV, UTAH CODE ANN. § 73-16-2 (1995).

109. *Id.*; *cf.*, Arkansas River Compact, Art. XII, COLO. REV. STAT. § 37-69-101 (1990); Yellowstone River Compact, Art. XII, WYO. STAT. § 41-12-601 (1995).

110. *See, e.g.*, Amended Costilla Creek Compact, COLO. REV. STAT. § 37-68-101 (1990).

111. John J. Wise, *Plan Would Export Water to Utah's Wasatch Front*, BRIGERLAND 58 (Mar. 26, 1989); *see also* Apps. chart 5.

112. BROWN, *supra* note 2, at B3.

River used to be the main power producers for the company. Now those same power plants account for less than 3 percent of UP&L's total production.¹¹³ The reason for the drop in production is because of water shortages.

Irrigators downstream depend on the flow of the Bear River for their livelihood. In Box Elder County alone, 65,000 to 75,000 acres of farmland are totally dependent on the Bear River for irrigation water.¹¹⁴ If the reserve level of Bear Lake was increased to meet the needs of Bear Lake residents, the farmers downstream would experience severe crop failure. The irrigators and UP&L have a federal court decree¹¹⁵ and the current provisions of the Amended Compact protecting their rights. The Bear Lake residents are trying to establish their right to more water under a public trust doctrine.¹¹⁶ Hearings have been held concerning the controversy. The issue is becoming politically charged and preparations are being made to set the stage for future compact amendments.

Ground water development and its relationship with surface water will need to be further addressed by those re-amending the Compact. Another issue is the state of the water storage facilities presently in use. Many of the dams and reservoirs are old and need maintenance. Cutler Dam in Cache County was originally constructed in 1889 and was not finished until 1920.¹¹⁷ There is a proposal to build a new storage facility near Tremonton, Utah. This new facility could benefit the Wasatch Front and also protect the Bear River Migratory Bird Refuge from further depletion.¹¹⁸ One major obstacle to the building of new facilities is funding.

Perhaps the largest obstacle the Amended Compact will face in the future is compliance with environmental interests.¹¹⁹ State Engineer Bob Morgan, who works with water rights in Utah, feels that "environmental issues are playing a larger role."¹²⁰ These environmental concerns are especially meaningful in the Bear Lake Valley and the wetlands of the federal Bird Refuge.

113. Brown, *supra* note 2, at B3.

114. Telephone Interview with Calvin Funk, Utah Representative, Bear River Commission (Oct. 28, 1994).

115. JIBSON, *supra* note 8, at 25.

116. See Frazier, *supra* note 65.

117. John J. Wise, *Bear River Basin*, BRIGERLAND 88 (Mar. 26, 1989).

118. JIBSON, *supra* note 8, at 19.

119. Brown, *supra* note 2; see also ROBERT E. BECK, 6 WATER AND WATER RIGHTS 547 (1991) (discussing environmental concerns); Lawrence McDonnell, *Federal Interests in Western Water Resources: Conflict and Accommodation*, 29 NAT. RESOURCES J. 391, 398 (1989).

120. Brown, *supra* note 2, at B3.

The modern compact trend, evident in the Bear River Basin, is to widen the scope of compact provisions. A wide variety of interests are starting to jockey for water in the upcoming negotiations. Originally, the compact had to meet the needs of three states and UP&L. Now, the interests of many more groups are affected by the compact's allocation provisions.

Interested parties in the Upper Division would like to change the storage rights allocation so they are completely independent from the Bear Lake reserve levels. The Amended Compact gives the Upper Division extra water storage rights as long as the lake is above the reserve level. J. W. Meyers feels that the storage rights in the division should be set regardless of the lake level.¹²¹ Such alterations are unlikely to happen because they affect other downstream users.

The Amended Compact negotiators felt that the Compact's provisions might not need to be amended in the future. Many people, including members of the compact commission, feel there is nothing wrong with the present allocations. Norm Stoffer, from the Utah Division of Natural Resources, said that "if there is nothing wrong with the system don't mess with it."¹²² Most irrigators would prefer that their rights were not disturbed.

IX. CONCLUSION

Have the stated purposes listed in the Amended Bear River Compact been accomplished? Wallace Jibson, involved with the negotiations for both the original compact and the Amended Compact, wrote: "I believe the stated purposes of the Bear River Compact are being accomplished: interstate comity, equitable apportionment, removal of controversy, and additional development. The Compact has modified state law and administration only where deemed necessary and proper by the signatory states."¹²³

The success of the compact can really be measured by the controversy, or lack of controversy, concerning water rights since the original Bear River Compact was ratified. Since 1958 there has been little dispute or litigation over water rights. The Commission's Engineer-Manager, Don Barnett, stated: "Since the compact was ratified there have been no real bad feelings or grief between the states even during times of short-

121. Telephone Interview with J.W. Myers, Wyoming Representative, Bear River Commission (Oct. 28, 1994).

122. Telephone Interview with Norman Stoffer, Utah Department of Natural Resources-Division of Water Resources (Oct. 28 1994).

123. JIBSON, *supra* note 8, at 29.

age."¹²⁴ Every state or interest may have not received exactly what they desired, and the compact may have faults; but the compact has been a workable solution for the parties involved.¹²⁵ Causes of controversy have been effectively removed, additional water resources have been developed efficiently, and the signatory states have been able to deal as equals in allocating the water between the states.

The Amended Bear River Compact illustrates many of the reasons why an interstate compact is preferable to federal legislation, or court litigation. "Of all the means by which these conflicts might be resolved, the federal-interstate compacts offer the greatest opportunity to both resolve existing conflicts and to either prevent or resolve future controversies."¹²⁶ Compacts provide a continuing, flexible means of fair allocation. In the end, Landis and Frankfurter were correct in stating that interstate compacts can enable "sensible compromise, not following strictly legal lines."¹²⁷ Beck noted that "compacts can provide for creative continuing administration needed to deal with changing conditions."¹²⁸

The future of the Amended Bear River Compact will depend on the ability of the states to wrestle over the new issues and provide workable compromises. For the compact to remain potent, the Bear River Commission will have to be entrusted with the power to enforce the compact provisions and tame potential litigators.

A recreational user describing the Bear River wrote: "Swift and serene. Placid and polluted. Spectacularly scenic. Visually obnoxious. A river. A ditch. A dumping ground. Quencher of thirsty crops. A corridor for canoes. Utah's last watering hole."¹²⁹ The river will continue to be vitally important to the interests of Idaho, Utah and Wyoming. Additionally, the citizens of the states continue to rely on and enjoy the river named Bear.

Jeff Boyce

124. Telephone Interview with Don Barnett, Bear River Commission (Oct. 28, 1994).

125. The author is originally from Cache Valley, Utah and probably presents a Utah bias. However, commissioners from all three states agree that the Amended Compact has provided a workable solution.

126. Sherk, *supra* note 37, at 407.

127. Frankfurter & Landis, *supra* note 27.

128. Grant, *supra* note 29, at 552.

129. John J. Wise, *Down The Bear*, HERALD JOURNAL, June 6, 1994, at D1.