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## Environmental Law—State Court Adjudication of Federal Reserved Water Rights

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## STATE COURT ADJUDICATION OF FEDERAL RESERVED WATER RIGHTS

Water is essential to the survival and development of the arid western United States.<sup>1</sup> Without specifying the exact quantity,<sup>2</sup> the United States has asserted claims to vast amounts<sup>3</sup> of water in the West<sup>4</sup> through the doctrine of federal reserved water rights,<sup>5</sup> thus hindering effective planning by the states<sup>6</sup> and increasing current users' fears of losing their water to the Government.<sup>7</sup> The McCarran Amendment,<sup>8</sup>

1. "In this part of the country there are vast areas in which rainfall is slight, water extremely valuable, and land virtually worthless unless there is available at least an adequate amount of water to supply domestic uses." Note, *Western Water and the Reservation Theory—The Need for a Water Rights Settlement Act*, 26 MONT. L. REV. 199, 200 (1965). The entire region's stability depends on the law governing water rights. After nearly 100 years of development "state law has achieved a reasonable certainty of results which has permitted substantial public and private development in the West." THE PUBLIC LAND LAW REVIEW COMM'N, ONE-THIRD OF THE NATION'S LAND, 142 (1970) [hereinafter cited as PLLRC].

2. "In some instances, Federal officials refused to disclose their existing uses of water and were also claiming reserved rights to future uses in any amount necessary to serve the purpose of withdrawn federal lands." NATIONAL WATER COMM'N, WATER POLICIES FOR THE FUTURE, 460 (1973) [hereinafter cited as NWC].

3. Federal lands are the source of most of the water in the 11 coterminous western states, providing 61 percent of the total natural runoff occurring in the region. Most of this runoff comes from land withdrawn or reserved for specific purposes. Forest Service reservations contribute about 88 and 8 percent respectively of the runoff from public lands and more than 59 percent of the total yield from all lands of those states.

PLLRC, *supra* note 1, at 141.

4. Federal reserved water rights affect the following seventeen western states: Arizona, California, Colorado, Idaho, Kansas, Montana, Nebraska, Nevada, New Mexico, North Dakota, Oklahoma, Oregon, South Dakota, Texas, Utah, Washington, and Wyoming. Morreale, *Federal-State Conflicts Over Western Waters—A Decade of "Clarifying Legislation"*, 20 RUTGERS L. REV. 423, 431 n.41 (1966).

5. The withdrawal or reservation of Federal Lands for specified purposes also reserved rights to use water on such lands, even though the legislative or executive action made no mention of water or its use. . . . [This reservation was] of sufficient unappropriated water to satisfy the reasonable requirements of those [land] reservations without regard to the provisions of state law.

PLLRC, *supra* note 1, at 144. The doctrine is based on the theory that because the federal government once owned all the western land and water as sovereign, it still owns all the water of which it did not specifically dispose. Morreale, *supra* note 4, at 431.

6. NWC, *supra* note 2, at 460; PLLRC, *supra* note 1, at 141-49.

7. Under the doctrine of federal reserved water rights such rights "would carry a priority as of the date of the reservation or withdrawal of the lands." PLLRC, *supra* note 1, at 142. This date often antedates all other uses of the river system.

[S]ince the priority date of reserved Federal rights is the date the Federal establish-

which waives immunity to joinder of the United States in suits to adjudicate water rights, has been applied to reserved waters<sup>9</sup> and may be the means of forcing the federal government to quantify<sup>10</sup> its claims<sup>11</sup>. This objective was furthered when the United States Sup-

ment was created—usually the turn of the century or earlier—a use commenced at any time by the Federal Government could wipe out water rights for other users that may have been in effect for 70 years or longer and without compensation.

NWC, *supra* note 2, at 460. For general discussions on the conflict between Government claims and private rightholders and some suggested solutions, see Corker, *Let There Be No Nagging Doubts: Nor Shall Private Property, Including Water Rights, Be Taken For Public Use Without Just Compensation*, 6 LAND & WATER L. REV. 109, 110 (1970) (arguing that taking of water rights should be compensated); Kiechel & Burke, *Federal-State Relations in Water Resources Adjudication and Administration: Integration of Reserved Rights with Appropriated Rights*, 18 ROCKY MTN. MIN. L. INST. 531 (1972) (generally favors the federal position and argues against compensation); Moses, *The Federal Reserved Water Rights Doctrine From 1866 through Eagle County*, 8 NAT. RES. LAW. 221 (1975) (on the background of the doctrine and the sources of federal power to reserve and to take water); Comment, *The McCarran Amendment—A Method of Clarifying the Implied Reservation Doctrine*, 7 LAND & WATER L. REV. 587 (1972) (the possible problems of using the McCarran Amendment to join U.S. in state court adjudications); 10 LAND & WATER L. REV. 477 (1975) (procedural problems in various states' determinations of federal water rights).

8. The McCarran Amendment provides:

(a) Consent is given to join the United States as a defendant in any suit (1) for the adjudication of rights to the use of water of a river system or other source, or (2) for the administration of such rights, where it appears that the United States is the owner or is in the process of acquiring water rights by appropriation under state law, by purchase, by exchange, or otherwise, and the United States is a necessary party to such suit. The United States, when a party to any such suit, shall (1) be deemed to have waived any right to plead that the state laws are inapplicable or that the United States is not amenable thereto by reason of its sovereignty, and (2) shall be subject to the judgments, orders and decrees of the court having jurisdiction, and may obtain review thereof, in the same manner and to the same extent as a private individual under like circumstances: *Provided*, That no judgment for costs shall be entered against the United States in any such suit.

(b) Summons or other process in any such suit shall be served upon the Attorney General or his designated representative.

(c) Nothing in this section shall be construed as authorizing the joinder of the United States in any suit or controversy in the Supreme Court of the United States involving the right of the States to the use of the water of any interstate stream.

43 U.S.C. §666 (1970).

9. *United States v. District Court (Eagle County)*, 401 U.S. 520 (1971).

10. The process of determining the amount the government claims has been called "quantification." PLLRC, *supra* note 1, at 141-49. "The prospective claims of the Government are highly uncertain as to time, manner and quantity of use." This has hindered planning and, therefore, development of the area has also been affected. NWC, *supra* note 2, at 467. The Government resists quantification apparently for policy reasons. "Private appropriators would like to see the federal rights quantified. The Government on the other hand, considers the open-ended nature to be a valuable property right, and essential to effective national planning." Comment, *Adjudication of Federal Reserved Water Rights*, 32 U. COLO. L. REV. 161 (1970).

11. In 1970, the Public Land Law Review Commission (PLLRC) found the major obstacle in refining and clarifying the doctrine of federal reserved water rights was the principle of sovereign immunity. This was prior to judicial expansion of McCarran,

reme Court in *Colorado River Conservation District v. United States*<sup>12</sup> held that the McCarran Amendment favored litigation of federal reserved water rights in state courts.

The United States instituted suit in Colorado District Court for adjudication of its reserved water rights in Colorado Water Division Seven<sup>13</sup> under authority of 28 U.S.C. §1345.<sup>14</sup> Approximately 1000 water rightholders, all in Division Seven, which is 300 miles from federal court in Denver, were named as defendants.<sup>15</sup> The State of Colorado conducts on-going adjudication of water rights in special state courts established under the 1969 Colorado Water Determination Act.<sup>16</sup> Shortly after the federal suit was instituted, the United States was joined in the state adjudication in Water Division Seven under the authority of the McCarran Amendment.<sup>17</sup> Colorado then moved in the district court to dismiss the federal court case.<sup>18</sup> The motion was granted on the grounds of abstention and comity.<sup>19</sup> The Tenth Circuit

which the PLLRC called "an unsatisfactory vehicle for obtaining definition of Federal reservation claims," because of earlier adverse decisions. PLLRC, *supra* note 1, at 148.

12. 424 U.S. 800 (1976), *rev'g* United States v. Akin, 504 F.2d 115 (10th Cir, 1974), *aff'g* United States v. Akin, No. C-4497 (D. Colo. June 10, 1973), *rehearing denied*, 426 U.S. 912 (1976).

13. For purposes of water rights adjudication, Colorado is divided into seven divisions. Colorado River Conservation Dist. v. United States, 424 U.S. 804 (1976).

14. "Except as otherwise provided by Act of Congress, the district courts shall have original jurisdiction of all civil actions, suits or proceedings commenced by the United States, or by any agency or officer thereof expressly authorized to sue by Act of Congress." 28 U.S.C. §1345 (1970).

15. 424 U.S. at 805.

16. The 1969 Colorado Water Determination Act was described by the Supreme Court as follows:

Under the Colorado Act, the State is divided into seven Water Divisions, each Division encompassing one or more entire drainage basins for the larger rivers in Colorado. Adjudication of water claims within each Division occurs on a continuous basis. Each month, Water Referees in each Division rule on applications for water rights filed within the preceding five months or refer those applications to the Water Judge of their Division. Every six months, the Water Judge passes on referred applications and contested decisions by referees. A State Engineer and Engineers for each Division are responsible for the administration and distribution of waters of the State according to the determination in each Division.

424 U.S. at 804-05; COLO. REV. STAT. ANN. §§ 37-92-101 to -602 (1974). *See also*, Note *Adjudication of Indian and Federal Water Rights in the Federal Courts*, 46 U.COLO. L. REV. 555, 568 n.79 (1975).

17. 424 U.S. at 806.

18. United States v. Akin, No. C-4497 (D. Colo. June 10, 1973), *aff'd*, 504 F.2d 115 (10th Cir. 1974), *rev'd sub nom.* United States v. Colorado River Conservation Dist., 424 U.S. 800 (1976). Colorado based its motion on the grounds that the McCarran Amendment deprived the federal court of jurisdiction over water rights within a state. 424 U.S. at 806.

19. United States v. Akin, No. C-4497 (D. Colo. June 10, 1973), *aff'd*, 504 F.2d 115

Court of Appeals reversed, holding that the district court had jurisdiction under 28 U.S.C. § 1345 and that abstention would be inappropriate.<sup>20</sup> The United States Supreme Court reversed the court of appeals, finding that despite the propriety of the district court's jurisdiction, "the consent to jurisdiction given by the McCarran Amendment bespeaks a policy that recognizes the availability of comprehensive state systems as the means for achieving" unified proceedings, thus avoiding piecemeal litigation and "inconsistent dispositions of property."<sup>21</sup>

Disputes over federal ownership of western waters are due, in part, to the nature of the state water laws.<sup>22</sup> When the western states were created from federal land,<sup>23</sup> the rule of prior appropriation was adopted by most of the states.<sup>24</sup> This rule provided that the first user of a reasonable amount of water for a beneficial purpose had a right to that amount for as long as the use continued.<sup>25</sup> Because a right by prior appropriation does not depend on ownership of land or the source of

(10th Cir. 1974), *rev'd sub nom.* *United States v. Colorado River Conservation Dist.*, 424 U.S. 800 (1976). "Without deciding the jurisdictional question, the District Court, on June 21, 1973, granted the motion . . . stating that the doctrine of abstention required deference to the proceedings in Division 7." 424 U.S. at 806.

20. *United States v. Akin*, 504 F.2d 115 (10th Cir. 1974), *rev'd sub nom.* *United States v. Colorado River Conservation Dist.*, 424 U.S. 800 (1976). The appellate court held that McCarran did not repeal 28 U.S.C. § 1345 in water cases. "Section 666 has a very limited coverage and is perhaps only procedural. It permits, but does not necessarily require, the United States being subjected to state jurisdiction." 504 F.2d at 119. The court found that federal courts had first acquired jurisdiction of this case and that they could not decline the exercise of expressly granted jurisdiction. *Id.* at 120.

21. 424 U.S. at 819.

22. *See generally, e.g., PLLRC, supra* note 1.

23. These states were created under the property clause of the U.S. Constitution. The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States; and nothing in this Constitution shall be so construed as to Prejudice any claims of the United States or of any particular State.

U.S. CONST. art. IV, § 3.

24. By 1935, "the doctrine of appropriation had been completely accepted. The states at this point had every reason to feel secure in their ability to legislate as they chose in regard to non-navigable waters within their boundaries. It was settled that even government patentees had only received land titles and had to acquire water rights in accordance with state law." Note, *Western Water and the Reservation Theory—The Need for a Water Rights Settlement Act*, *supra* note 1, at 203.

25. Senator McCarran described prior appropriation as:

[b]ased on the proposition that "first in time is first in right," and recognizes the right of a landowner on a given stream to continue the use of the water which he has appropriated for a beneficial use. No person can appropriate more than is reasonably necessary for the benefit of his land, and must continue to use that appropriation in a beneficial manner.

97 CONG. REC. 12947 (1951).

the water,<sup>26</sup> there was little concern over use of water from land which was reserved or acquired by the federal government.<sup>27</sup>

For a time, the United States appeared to comply with state law<sup>28</sup> and tried its water claims in state courts.<sup>29</sup> In *Federal Power Commission v. Oregon (Pelton Dam)*,<sup>30</sup> however, the Supreme Court held that federal statutes dispositive of water rights<sup>31</sup> did not dispose of water on

26. See PLLRC, *supra* note 1, at 142.

27. *Id.*

28. *Id.*

29. Any doubts as to the states' authority were "completely laid to rest" in *California Oregon Power Co. v. Beaver Portland Cement Co.*, 295 U.S. 142 (1935). Note, *Western Water and the Reservation Theory—The Need for a Water Rights Settlement Act*, *supra* note 1, at 202. See *Kansas v. Colorado*, 206 U.S. 46 (1907); *U.S. v. Rio Grande Dam and Irrigation Co.*, 174 U.S. 690 (1898); *Moses, The Federal Reserved Water Rights Doctrine from 1866 through Eagle County*, *supra* note 7, at 127. The Court found in *California Oregon Power Co.* that Congress 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." 295 U.S. at 164 n.2.

30. 349 U.S. 435 (1955). The Court found that "the Desert Land Act covers 'sources of water supply upon the public lands . . . .' The lands before us in this case are not 'public lands' but 'reservations.'" *Id.* at 448. A similar decision had been reached earlier with respect to Indian lands in *Winters v. United States*, 207 U.S. 564 (1908). The court held in *Winters* that "[t]he power of the Government to reserve the waters and exempt them from appropriation under the state laws is not denied and could not be . . . . That the Government did reserve them we have decided, and for a use which would be necessarily continued through the years." *Id.* at 577. The *Winters* case reformed an agreement granting the Indians some land but mistakenly omitting mention of water rights.

31. "Congress enacted three important acts dispositive of the water rights on the public domain. At least, most lawyers thought so until the Supreme Court disabused them." *Moses, The Federal Reserved Water Rights Doctrine from 1866 through Eagle County*, *supra* note 7, at 226. These Acts were the Homestead Act of 1862, 12 Stat. 392, the Act of 1870, 16 Stat. 218, and the Desert Land Act of 1877, 19 Stat. 377. See 43 U.S.C. § 661 (1970) which provides:

Whenever by priority of possession, rights to the use of water for mining, agricultural, manufacturing, or other purposes, have vested and accrued, and the same are recognized and acknowledged by the local customs, laws and the decisions of the courts, the possessors and owners of such vested rights shall be maintained and protected in the same . . . .

All patents granted, or preemption or homesteads allowed, shall be subject to any vested and accrued water rights, or rights to ditches and reservoirs used in connection with such water rights as may have been acquired under or recognized by this section.

43 U.S.C. § 321 (1970) provides:

[t]hat the right to the use of water . . . on or to any tract of desert land of three hundred and twenty acres shall depend upon bona fide prior appropriation; and such right shall not exceed the amount of water actually appropriated, and necessarily used for the purpose of irrigation and reclamation; and all surplus water over and above such actual appropriation and use, together with the water of all lakes, rivers and other 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 for irrigation, mining and manufacturing purposes subject to existing rights.

lands reserved by the Government. This decision allowed the United States to build a dam on federal lands in contravention of state law.<sup>32</sup> In *Arizona v. California*,<sup>33</sup> the Supreme Court went a step further and awarded waters from the Colorado River on the basis of federal reserved rights. The Supreme Court held that the United States had the power "to reserve water rights for its reservations and its property."<sup>34</sup> Further, the Court determined that rights reserved were for any amount necessary to cover future as well as present needs.<sup>35</sup> The *Pelton Dam* and *Arizona v. California* decisions created the doctrine of federal reserved water rights<sup>36</sup> nearly 100 years after the creation of the western states. Since all available water had been appropriated without regard to federal reserved water claims,<sup>37</sup> these decisions could have a devastating impact on the economy of arid regions.<sup>38</sup>

The McCarran Amendment was enacted in 1952 before the development of federal reserved rights,<sup>39</sup> but it has become a method for alleviating problems arising from Government claims.<sup>40</sup> Before McCarran, complete state adjudication of water rights was impossible, whenever the United States held a claim, because of sovereign immunity.<sup>41</sup> The United States' claims were usually acquired when water

32. See PLLRC, *supra* note 1, at 142.

33. 373 U.S. 546 (1963).

34. *Id.* at 598.

35. *Id.* at 600.

36. See generally NWC, *supra* note 2; PLLRC, *supra* note 1.

37. "Due to the fact that water is so scarce in the Western States, all such water has for many years been appropriated and put to beneficial use." 97 CONG. REC. 12947 (remarks of Sen. McCarran).

38. If the exercise of reserved rights deprived current users, the economy of the West particularly would suffer.

The importance of the water yield from public lands to the economy, present and future, of the 11 western states is clear: Approximately \$12.5 billion has been invested by public and private sources in water storage facilities, and additional billions have been invested to irrigate 23 million acres of land dependent in major part on public land water yields; about 96 percent of the region's 32 million people and most of its major cities and metropolitan areas are dependent in some degree on public land water; and the virtually entire hydroelectric capacity of 23.6 million kilowatts (as of 1968) is dependent upon water which originates on public lands.

PLLRC, *supra* note 1, at 141.

39. The doctrine of federal reserved water rights dates from either the *Pelton Dam* case, PLLRC, *supra* note 1, at 142, or *Arizona v. California*, NWC, *supra* note 2, at 464.

40. See Comment, *Limiting Federal Reserved Water Rights Through the State Courts*, 1972 UTAH L. REV. 48, 54.

41. [T]he State courts are vested with jurisdiction necessary for the proper and efficient disposition thereof, and by reason of the interlocking of adjudicated rights on any stream system, any order or action affecting one right affects all rights. Accordingly, all water users on a stream, in practically every case, are interested and necessary parties to any court proceedings . . . [T]o claim immunity from

rights were transferred<sup>42</sup> with land that was purchased from private holders by the Government. McCarran permits joinder of the United States "in any suit for the adjudication of rights to the use of water of a river system or other source"<sup>43</sup> where the United States is the owner "by purchase . . . or otherwise."<sup>44</sup> The purpose of McCarran is to produce "a proper and complete adjudication of the water rights of a given stream or water source" and avoid piecemeal adjudication by joining "all the parties having or claiming to have an interest in the waters of said stream."<sup>45</sup>

Judicial interpretation of McCarran before 1971 served primarily to limit its applicability.<sup>46</sup> McCarran can be invoked to join the United States only in a judicial hearing<sup>47</sup> in which all parties with rights in a particular stream system are before the court.<sup>48</sup> In addition, the hearing must adjudicate the rights of *all* parties on a given stream.<sup>49</sup> McCarran, however, does not limit waiver of immunity to federal courts but also operates to waive immunity in suits brought in state court.<sup>50</sup>

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suit in, or orders of, a State court . . . could materially interfere with the lawful and equitable use of water for beneficial use by the other water users who are amenable to and bound by the decrees and orders of the State courts.

S. REP. NO. 755, 82d Cong., 1st Sess. at 5 (1951).

42. 97 CONG. REC. 12948 (1951) (remarks of Sen. McCarran). Rights acquired from private holders differ from reserved rights in that reserved rights date from original federal ownership prior to "statehood."

43. S. REP. NO. 755, 82d Cong., 1st Sess. at 2 (1951).

44. *Id.* (emphasis added).

45. 97 CONG. REC. 12948 (1951) (remarks of Sen. McCarran).

46. Both PLLRC and NWC view the McCarran Amendment as poorly drafted and of little practical use. See PLLRC, *supra* note 1, at 148; NWC, *supra* note 2, at 466.

47. Rank v. Krug (United States), 142 F. Supp. 1 (S.D. Cal. 1956), *rev'd on other grounds sub nom.* California v. Rank, 293 F.2d 340 (9th Cir. 1961), 307 F.2d 96 (9th Cir. 1962), *modified on other grounds sub nom.* Dugan v. Rank, 372 U.S. 609 (1963). The court held, "[b]y common understanding, the word adjudicate means determination by a court or judge in a judicial proceeding. It requires a judgement or a decree by a court." *Id.* at 73.

48. Miller v. Jennings, 243 F.2d 157 (5th Cir. 1957). The court found "[t]here can be an adjudication of rights with respect to the upper Rio Grande only in a proceeding where all persons who have rights are before the tribunal." *Id.* at 159. *Accord*, California v. United States, 235 F.2d 647 (9th Cir. 1956); United States v. Hennen, 300 F. Supp. 256 (D. Nev. 1968).

49. Dugan v. Rank, 372 U.S. 609 (1963). The Court found the pending litigation inadequate to meet all possible claims. "In addition to the fact that all of the claimants to water rights along the river are not made parties, no relief is either asked or granted as between claimants, nor are priorities sought to be established as to the appropriative and prescriptive rights asserted." *Id.* at 618-19.

50. *In re Green River Drainage Area*, 147 F. Supp. 127, 134-35, 148-49 (D. Utah 1968).



In 1971, the Supreme Court first considered federal reserved water rights in the context of the McCarran Amendment.<sup>51</sup> In *United States v. District Court (Eagle County)*,<sup>52</sup> the United States challenged state court jurisdiction over federal reserved water rights. The Court held that McCarran was “broad enough to embrace ‘reserved’ waters.”<sup>53</sup> In *United States v. District Court (Water Division No. 5)*,<sup>54</sup> the companion case, the Court included Colorado’s system of on-going, monthly hearings within the definition of general adjudication.<sup>55</sup> Although *Eagle County* and *Water Division No. 5* expanded McCarran’s applicability, neither decision suggested that reserved water rights must be settled in state courts. They merely support the position that a state court *may* adjudicate federal reserved water rights.<sup>56</sup>

In *Colorado River Conservation District v. United States*,<sup>57</sup> the Supreme Court held that the United States’ suit for adjudication of federal reserved water rights should be dismissed in favor of the state suit in which the United States had been joined as defendant under the McCarran Amendment.<sup>58</sup> The Court rejected the United States’ arguments that federal jurisdiction must be exercised,<sup>59</sup> and that the Government’s fiduciary relationship to Indians required this case to be in federal court.<sup>60</sup> Likewise, the Court refused to accept the Colorado’s

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51. See notes 52-56 and accompanying text *infra*.

52. 401 U.S. 520 (1971).

53. *Id.* at 523. The Court added that “all such questions, including the volume and scope of particular reserved rights are federal questions which, if preserved, can be reviewed here after final judgment by the Colorado court.” *Id.* at 526.

54. 401 U.S. 527 (1971).

55. The Court defined general adjudication under McCarran. “43 U.S.C. § 666 does not cover consent by the United States to be sued in a private suit to determine its rights against a few claimants. The present suit, like the one in the Eagle County case, reaches all claims.” *Id.* at 529.

56. Even after *Eagle County* and *Water Division No. 5*, doubts continued as to the efficacy of McCarran. See, e.g., Comment: *Limiting Federal Reserved Water Rights Through State Courts*, *supra* note 40, at 54.

57. 424 U.S. 800 (1976).

58. *Id.* at 820-21.

59. *Id.*

60. The United States argued that “because of its fiduciary responsibility to protect Indian rights, any state court jurisdiction over Indian property should not be recognized unless expressly conferred by Congress.” *Id.* at 812. The Court took up the Indian claim immediately after finding federal court jurisdiction, because a finding that the matter of Indian water rights should be decided in federal court would have determined this case. The Court dismissed the Indian claim, however, holding that the policy and history of McCarran allowed joinder of Indian water rights in state court. The Court declared that federal responsibility to Indians had not been abdicated and that Indian claims may be satisfactorily protected in state court. *Id.* at 809-13. *But see* Pelcyger, *Indian Water*

arguments based on abstention and comity.<sup>61</sup> The Court found “different, limited” circumstances for dismissal.<sup>62</sup> Focusing on the policy of the McCarran Amendment, the Supreme Court held that the desired end of avoidance of piecemeal litigation<sup>63</sup> in a complete adjudication<sup>64</sup> at a conveniently located forum<sup>65</sup> was best served in the state court.<sup>66</sup>

*Rights: Some Emerging Frontiers*, 21 ROCKY MTN. MIN. L. INST. 743 (1975); Note, *Adjudication of Indian and Federal Water Rights in the Federal Courts*, 46 U. COLO. L. REV. 555 (1975).

Pelcyger, *supra* at 747, states that there is “compelling evidence of the hostility of states and their courts to Indians.” The author cites numerous cases where state court decisions adverse to property rights were reversed by the Supreme Court. *Id.* at 745-47.

61. Colorado argued that the dismissal to state court would be a proper exercise of abstention and comity. The Court found that none of the weighty reasons for abstention appeared in this case. It defined these reasons as follows: (a) federal constitutional issues which might be mooted or presented in a different posture by state proceedings; (b) difficult questions of state law bearing on a policy problem; (c) federal jurisdiction has been invoked to restrain state criminal proceedings. 424 U.S. at 813-17. The Court dismissed comity when it briefly alluded to it. “[T]here are principles unrelated to considerations of proper constitutional adjudication and regard for federal-state relations which govern in situations involving the contemporaneous exercise of concurrent jurisdictions, either by federal courts or by state and federal courts.” *Id.* at 817 (emphasis added).

62. The Court referred to four types of “doctrines” it had previously invoked for dismissing cases from federal court to state court. Under the first doctrine the court first obtaining *in rem* or *quasi in rem* jurisdiction over the property hears the case. *E.g.*, *Donovan v. City of Dallas*, 377 U.S. 408 (1964); *Princess Lida v. Thompson* 305 U.S. 456 (1939). In *Colorado River Conservation District*, the Court found that water rights adjudications “essentially involve the disposition of property.” 424 U.S. at 819. A second doctrine provides that the court first obtaining jurisdiction over a case takes the case. *E.g.*, *Pacific Livestock Co. v. Oregon Water Bd.*, 241 U.S. 440 (1916). *But see, e.g.*, *United States v. Bank of New York & Trust Co.*, 296 U.S. 463, 480 (1936) (federal court first obtained jurisdiction in this case but dismissed it to state court). In *Colorado River Conservation District*, Colorado began the water rights adjudication for the stream, but the Government did not become a party until the case was brought in federal court. Under the third doctrine, a court will dismiss a case to a more convenient forum. *E.g.*, *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501 (1947); *see* 1 W. BARRON, A. HOLTZOFF & C. WRIGHT, FEDERAL PRACTICE AND PROCEDURE § 87 (1960); C. WRIGHT, HANDBOOK OF THE LAW OF FEDERAL COURTS, 165 (2d ed. 1970). In *Colorado River Conservation District*, the Court observed that 1000 defendants in the water district live 300 miles from the federal forum. 424 U.S. at 820. Finally, a court will dismiss a case to avoid piecemeal litigation. *E.g.*, *Brillhart v. Excess Ins. Co.*, 316 U.S. 491 (1942). The Court found that avoidance of piecemeal litigation was a major purpose of the McCarran Amendment. 424 U.S. at 819.

63. 424 U.S. at 819.

64. *Id.* at 820.

65. *Id.*

66. *Id.* Justice Stewart’s dissent, joined by Justices Blackmun and Stevens, disagreed with the Court’s treatment of the case under property law and *in rem* jurisdiction. *Id.* at 821-26 (Stewart, J., dissenting). Justice Stewart argued that avoidance of piecemeal litigation would be impossible under the circumstances of this case, and that the Court

Jurisdiction to adjudicate federal reserved water rights in state courts follows earlier decisions under the McCarran Amendment.<sup>67</sup> *Colorado River Conservation District* was, however, the first case to favor state court adjudication of federal reserved water rights and the first decision concerned with effectuating the goals of the McCarran Amendment.<sup>68</sup> This case represents, therefore, the broadest interpretation of McCarran to date.

The decision in *Colorado River Conservation District* may create some problems. States with systematic, on-going adjudication, such as Colorado, could foreclose federal courts from exercising jurisdiction, even in circumstances where federal jurisdiction would be desirable.<sup>69</sup> A strong state policy preferring water rights adjudication in state court could work a hardship on out-of-state litigants.<sup>70</sup> Finally, federal reserved water rights, including Indian reservations, might also be subject to prejudices or favoritism in state court.<sup>71</sup>

Despite these problems *Colorado River Conservation District v. United States* is an effective step toward quantification of federal

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had an obligation to exercise unflagging jurisdiction over what he believed to be questions of federal law. *Id.*

Justice Stevens wrote a separate dissent in which he added three comments: federal claims should be litigated by the United States in federal court, unless an express statutory mandate commands otherwise; the decision will restrict access to federal court of private plaintiffs asserting water right claims in Colorado; and finally, the Supreme Court should defer to the court of appeals on balancing factors for and against federal jurisdiction. *Id.* at 826-27 (Stevens, J., dissenting).

67. *Id.* at 820. See notes 51-56 and accompanying text *supra*.

68. In *Cappaert v. United States*, 426 U.S. 128 (1976), the Supreme Court decided another case involving reserved water rights. Though the McCarran Amendment was not involved in the case, the Court referred to the Act and to *Colorado River Conservation District*. The Court found that "federal water rights are not dependent upon state law or state procedures and they need not be adjudicated only in state courts. *Id.* at 145. *Colorado River Conservation District* does not require the McCarran Amendment to be treated as a substantive statute. Rather, "the policy evinced by the amendment may, in the appropriate case, require the United States to adjudicate its water rights in state forums." *Id.* at 146. This may indicate that in the future, the Court may balance the policy of the Amendment and the "appropriateness" of the case to determine if litigation over federal reserved water rights is more properly brought in state or federal court.

69. One example of a situation in which federal jurisdiction may be desirable is in the area of conservation. *Cappaert* involved a pool of water in a cavern which was the only known habitat of a rare species of fish. The pool and the fish were specifically protected by a Presidential Proclamation of January 17, 1952. The Court held that the pool was within the implied reservation doctrine and that the case was properly in federal court. *Id.* at 138-42. Conservation of wildlife is one of many areas which may warrant special federal protection.

70. 424 U.S. at 827 (Stevens, J., dissenting).

71. See *Pelcyger*, *supra* note 60.

reserved water rights. States with statutes similar to Colorado's 1969 Water Determination Act<sup>72</sup> will be able to join the United States whenever federal reserved water rights are among claims being litigated on a particular river or river system.<sup>73</sup> The federal government could then be required to specify the amount of water it claims. If *Colorado River Conservation District* does not lead to such clarification, it should at least result in greater coordination between state and federal interests in the disposition of water rights. Finally, whatever "national planning" the federal government intends to accomplish with its reserved waters will take place on the state level in full view of *all* interested parties.

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72. COLO. REV. STAT. ANN. §§ 37-92-101 to -602 (1974).

73. For a discussion of problems faced by states which do not use a judicial system to distribute water rights but instead rely on administrative determinations, see 10 LAND & WATER L. REV. 477 (1975).

