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The McCarran Amendment - A Method of Clarifying the Implied Reservation Doctrine

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THE MC CARRAN AMENDMENT — A METHOD OF CLARIFYING THE IMPLIED RESERVATION DOCTRINE*

In the arid West, water rights are the crucial factor in determining what land will become economically productive, and what land will lie fallow. So much of the West's economic growth depends on the ability to have water available for use that any threat of losing the right to such use causes grave concern among water users. One such threat to water rights is the implied reservation doctrine.[1] The reasoning upon which the doctrine rests is that first the United States gained paramount title to all the land (and things appurtenant thereto) which constituted the western United States. The Government then encouraged development and disposed of some of this land under various acts of Congress. The Supreme Court in interpreting one of these acts[2] said that title to water not previously appropriated or transferred under this act did not pass with subsequent transfer of the land.[3] Thus, since the Government owned this water when it set aside or reserved certain lands, it also reserved enough of the previously unappropriated water for the reservation purposes, and subsequent private appropriations took subject to the federal rights.[4]

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1. *See* Wheatley & Corker, STUDY OF THE DEVELOPMENT, MANAGEMENT, AND USE OF WATER RESOURCES ON THE PUBLIC LANDS. S-15-16 (1969): [hereinafter referred to as STUDY]. The following can be described as the elements of the implied reservation doctrine as proposed by the Government.
   a. When the federal government made a reservation or withdrawal of land (e.g., national forests), it also impliedly reserved the right to enough water to fulfill the purpose of the reservation.
   b. The amount of water reserved is the amount needed both now and in the future for the needs of the reservation.
   c. The Government's water right is not dependent upon the application of the water to a beneficial use as state laws require, nor is it lost by non-use.
   d. The right has a priority date from the time of the creation of the reservation and is junior only to those private appropriations prior to the reservation date.
   e. The reservation of the land and the water can be made by either Congress or by executive order of the President.

   See also Moses, *Federal-State Water Problems*, 47 DENVER L.J. 194, 207 (1970); Winters v. United States, 207 U.S. 564 (1908); Arizona v. California, 373 U.S. 546 (1963).
2. Desert Land Act of 1877, 43 U.S.C. § 321 (1970).
3. California Oregon Power Co. v. Beaver Portland Cement Co., 295 U.S. 142 (1935).
4. *See* Warner, *Federal Reserved Water Rights and their Relationship to Appropriative Rights in the Western States*, 15 ROCKY MT. MIN. L. INST. 399 (1969); Meyers, *The Colorado River*, 19 STAN. L. REV. 1 (1966); Trelease, *Government Ownership and Trusteeship of Water*, 45 CALIF. L. REV. 638 (1957).

The Court took a long time to completely adopt the doctrine. It was first invoked to protect the water of an Indian reservation created by treaty.[5] This decision was somewhat based on public policy to protect Indians.[6] Later the doctrine was applied to an Indian reservation created by executive order.[7] Finally, the Court applied this doctrine to all federal land reservations[8] and has since reaffirmed these prior decisions.[9] This doctrine is looked upon by many as a type of federal water right that, if ever used as proposed, could destroy many state-created water rights.[10] To date only one case has been found where a state-created water right has been destroyed,[11] but the implications are awesome enough to produce a great deal of controversy. Once the doctrine was formally established, the emphasis of its opposition turned to trying to limit its definition and potential effect.

The problems raised by this doctrine can be divided basically into two areas. First, the invocation of the sovereign immunity doctrine by the United States can militate against parties bringing suit to establish their relative water rights *vis-a-vis* those of the United States. The second area concerns the determination of the quantitive extent of the United States' water right under the doctrine and the consequences thereof to the holders of private rights.

In order to solve some of the issues surrounding the reservation doctrine (*e.g.,* the amount of water the Government is entitled to, the amount of compensation if any, and the priority date) the United States must be brought into court. To do so, the United States must first waive its sovereign immunity. "The United States, as sovereign, is immune from suit save as it consents to be sued."[12] Congress alone

5. Winters v. United States, 207 U.S. 564 (1908).
6. *Id.* at 577.
7. United States v. Walker River Irrigation District, 104 F.2d 334 (9th Cir. 1939).
8. FPC v. Oregon, 349 U.S. 435 (1955).
9. United States v. District Court for the County of Eagle, 401 U.S. 520 (1971); Arizona v. California, 373 U.S. 546 (1963).
10. *See generally* Corker, *Water Rights and Federalism—The Western Water Rights Settlement Bill of 1957,* 45 CALIF. L. REV. 638 (1957); Munro, *The Pelton Decision: A New Riparianism?* 36 ORE L. REV. 221 (1957).
11. Glenn v. United States, Civil No. C-153-61 (D. Utah Mar. 16, 1963).
12. United States v. Sherwood, 312 U.S. 584, 586 (1941).

can waive the immunity of the United States from suit.[13] Before sovereign immunity is considered waived, there must be specific legislative action by Congress.[14]

In the field of adjudication of water rights, Congress passed, as part of the Department of Justice Appropriation Act of July 10, 1952,[15] the McCarran Amendment. The McCarran Amendment granted a limited waiver of sovereign immunity,[16] thereby providing the only means available to bring the United States into court in order to solve the questions raised by the implied reservation doctrine.[17] Until recently, because of ambiguities and bad drafting, the McCarran Amendment has been a disappointing means of determining the extent of the Government's reserved water rights.[18]

Because of the previous lack of success of the McCarran Amendment, *United States v. District Court for the County of Eagle*[19] and *United States v. District Court for Water Division No. 5*,[20] are noted as important breakthroughs in this area of the law. It is the purpose of this comment to review these two cases with respect to their place in the development of the case law in this area and their contribution to solving the problems surrounding the implied reservation doctrine, including those added by the McCarran Amendment.

United States v. District Court for the County of Eagle[21] arose out of an attempt to join the United States in a suit to adjudicate water rights on the Eagle River in Colorado. The United States, as a water user in the Eagle River Water District, was served with notice of a suit to settle water rights in the district. This notice required the United States to defend

13. Dalehite v. United States, 346 U.S. 15, 30 (1935).
14. *Id.* at 34.
15. Department of Justice Appropriation Act of July 10, 1952, ch. 651, § 208 (a)-(c), 66 Stat. 560, 43 U.S.C. § 666 (1970) [hereinafter referred to as the McCarran Amendment].
16. *See* Appendix.
17. *See* PUBLIC LAND LAW REVIEW COMM., ONE THIRD OF THE NATION'S LAND: A REPORT TO THE PRESIDENT AND TO THE CONGRESS, 141-55 (1970) [hereinafter cited as REPORT]; Hillhouse, *The Public Land Law Review Commission Report: Icebreaking in Reserved Waters?* 4 NATURAL RESOURCES LAWYER 369 (1971); Moses, *Federal-State Water Problems*, 47 DENVER L.J. 194 (1970).
18. 2 WATERS AND WATER RIGHTS § 106.2 (Clark ed. 1967).
19. 401 U.S. 520 (1971).
20. 401 U.S. 527 (1971).
21. 401 U.S. 520 (1971).

in the District Court of Eagle County its claim to water in the Eagle River. The United States moved for dismissal on the grounds that it had not consented to be sued. The Colorado court denied the motion, holding that the United States had consented to this suit since this was the type of suit Congress had contemplated when it lowered the bar of sovereign immunity with the McCarran Amendment.[22] The Government, after losing in the Colorado Supreme Court, then appealed directly to the United States Supreme Court.

In deciding *Eagle County,* the Court considered several of the major questions surrounding both the reservation doctrine and the McCarran Amendment. One of the first issues resolved was whether the federal courts had exclusive jurisdiction.[23] In *In re Green River Drainage Area,*[24] a federal district court found that Congress did not intend that the waiver of immunity be conditional on suits brought in federal courts. Out of apparent distrust for state courts, the Government did not accept this interpretation and raised the issue again. In *Eagle County* the Supreme Court resolved the issue when it held that any federal questions presented could be preserved and taken to federal court for review. Nevertheless, the original decision could be in the state courts.

A more fundamental question which *Eagle County* resolved was whether the Government's reserved water rights were subject to adjudication under the McCarran Amendment. The Government contended that section 666(a)(2)[25] restricted the Amendment's waiver of immunity to only appropriative rights acquired under state law.[26] The Government's contention was based on the *ejusdem generis* doctrine,[27] whereby the word "otherwise" would operate to include only water rights acquired by appropriation, purchase, or exchange.[28] However, the Court found the Government's read-

22. 458 P.2d 760 (Colo. 1969).
23. 401 U.S. 520 (1971).
24. 147 F. Supp. 127 (D. Utah 1956).
25. *See* Appendix.
26. 401 U.S. 520, 523 (1971).
27. *See generally* Comment, *Adjudication of Water Rights Claimed by the United States—Application of Common Law Remedies and the McCarran Amendment of 1952,* 48 CALIF. L. REV 94 (1960).
28. The argument is that since the Government was claiming only reserved water rights on the Eagle River, the doctrine of *ejusdem generis* excluded them from the statute's application.

ing of the statute was incorrect. The Court determined that the broader provision, section 666(a)(1), was the applicable one, even if the Government's interpretation of section 666(a)(2) was correct. The Court said: "[W]e deal with an all-inclusive statute concerning the adjudication of rights to the use of water of a river system which in section 666(a)(1) had no exceptions and which, as we read it includes appropriative rights, riparian rights, and reserved rights."[29]

For some time there was serious question whether the Amendment applied to anything less than a complete river system, *i.e.,* a major river and all its tributaries. The early cases that considered this problem, *Miller v. Jennings*[30] and *California v. United States,*[31] indicated that less than a complete river system was unacceptable.

> The only proper method of adjudicating the rights on a stream, whether riparian or appropriative or mixed, is to have all owners of lands on the watershed and all appropriators who use water from the stream involved in another watershed in court at the same time.[32]

In 1968 this line of thinking still persisted when once again a court dismissed an attempted water rights adjudication of less than the entire river system.[33] Clearly the remedies of those wishing to solve the problems in this area were, practically speaking, non-existent. The reason for this lack of a remedy was due to the practical impossibility of joining and attaining jurisdiction over the thousands of water rights holders on any major stream system. This is not to say that the courts had no cause for finding such a stringent reading necessary. Some of the legislative deliberations on the McCarran Amendment used this same kind of language, and the Supreme Court felt this reading gave distinct advantages.[34] In fact, the language of one congressional report said that the Amendment's purpose was

29. 401 U.S. 520, 523 (1971).
30. 243 F.2d 157 (5th Cir. 1957).
31. 235 F.2d 647 (9th Cir. 1956).
32. California v. United States, 235 F.2d 647, 663 (9th Cir. 1956).
33. United States v. Hennen, 300 F. Supp. 256 (D. Nev. 1968); *see also* City of Chino v. Superior Court of Orange County, 255 Cal. App. 2d 747, 63 Cal. Rptr. 532 (1967).
34. Pacific Livestock Co. v. Oregon Water Bd., 241 U.S. 440, 454 (1916).

> to allow the United States to be joined in a suit wherein it is necessary to adjudicate all of the rights of the various owners on a given stream. This is so because unless all of the parties owning or in the process of acquiring water rights on a particular stream can be joined as parties defendant, any subsequent decree would be of little value.[35]

However, another major accomplishment of *Eagle County* was the clarification and narrowing of the definition of the term "river system" in the statute from that given by previous cases.[36] Rejecting a definition from an earlier case,[37] the Court said:

> We deem almost frivolous the suggestion that the Eagle and its tributaries are not a "river system" within the meaning of the Act. No suit by any State could possibly encompass all of the water rights in the entire Colorado River which runs through or touches many States. The "river system" must be read as embracing one within the particular State's jurisdiction.[38]

Previously, another major stumbling block has been in the type of suit allowed. The language of the Court and some of the legislative history required a general adjudication.[39] The Court of Appeals in *State v. Rank* gave a definition of the type of suits needed to join the United States.[40] This case also provided an insight into what courts consider constitutes a general adjudication:

> [T]here can be little doubt as to the type of suit Congress had in mind. It was not a dispute between certain water users as to their use of water of a stream system; rather it was the quasi-public proceeding which in the law of western waters is known as a "general adjudication" of a stream system; one in which the rights of all claimants on a stream system as between themselves, are ascertained and officially stated.[41]

35. S. Rep. No. 755, 82d Cong. 1st Sess. 9 (1951).
36. Dugan v. Rank, 372 U.S. 609, 618 (1963); Turner v. Kings River Conservation Dist., 360 F.2d 184, 197 (9th Cir. 1966).
37. Dugan v. Rank, 372 U.S. 609, 618 (1963).
38. 401 U.S. 520, 523 (1971).
39. S. Rep. No. 755, 82d Cong. 1st Sess. 4, 5 (1951).
40. State v. Rank, 293 F.2d 340, 349 (9th Cir. 1961).
41. *Id.* at 347. *See also* STUDY, *supra* note 1, at 191.

Dugan v. Rank was an action by several of the downstream owners of riparian and overlying land on the San Joaquin River. These landowners wanted to enjoin officials of the Bureau of Reclamation from impounding water in a federal dam, contrary to the rights of these owners in the beneficial use of the waters. Because of the general adjudication requirement, *Dugan* held this was not a proper suit to bring under the McCarran Amendment.[42]

Using the reasoning of *Dugan,* the Government argued that the Colorado proceeding in *Eagle County* was not a general one. The Court answerd by saying: "This proceeding, unlike the one in *Dugan* is not a private one to determine whether named claimants have priority over the United States. The whole community of claims is involved."[43] As such, it was general and thus within the purview of the statute giving consent to join the United States as defendant in certain suits involving the adjudication of water rights.

Finally, the Government argued that the McCarran Amendment did not apply because the purpose of the original proceeding was merely to update the water rights on the Eagle River, and many of the holders of these water rights were not present before the court. The Court found this argument extremely technical and refused to so confine the McCarran Amendment.[44] The Court, discarding the Government's contention, said that "the absence of owners of previously decreed rights may present problems going to the merit,"[45] but the Court felt that these problems could be dealt with when they arose, as they were federal questions and fully reviewable. The water rights not represented in the present case were not enough to prevent the United States from being joined in a suit under the McCarran Amendment.

The companion case to *Eagle County, United States v. District Court for Water Division No. 5,*[46] also presented McCarran Amendment problems. *Water Division No. 5* involved

42. 372 U.S. 609, 618 (1963).
43. 401 U.S. 520, 525 (1971).
44. *Id.*
45. *Id.* at 525-26.
46. 401 U.S. 527 (1971).

a new Colorado statute, enacted after the *Eagle County* case had commenced, which allowed monthly proceedings before a Colorado district court acting as a water referee.[47] This court was to consider only those claims filed with it during the previous month. As in *Eagle County*, the issue before the Court was whether Colorado's new statute was such that there could be joinder of the United States in a suit pursuant to the McCarran Amendment. After *Eagle County,* the Court had little trouble in finding that all claims would be eventually adjudicated. The fact that the proceedings were held on a month-by-month basis did not prevent the adjudication of all water rights "inclusively and in the totality."[48]

These two cases have formulated important rules. However, not all important issues have been solved. The most important, and certainly most controversial of these issues, concerns compensation of those who may have their water rights destroyed. Under present rules, if the reservation doctrine is invoked, individuals who lose their water rights will not be compensated.[49] It is the position of the Government that the federal reserved water rights have the status of appropriative rights. Thus, water appropriated after the Government's priority date (determined by the date of the particular reservation) and after the Desert Land Act of 1877 is subject to all water reserved by the Government. Those who appropriated before this date have priority over the Government.[50]

The proponents of the private interests contend, on the other hand, that this right was not established in court until the case of *Arizona v. California*[51] and none of the private appropriators had notice or reason to know of any such right of the Government until this case. Those who appropriated many years ago did not have a chance to know their claims were subject to others not appearing on record. The Government had invited these people to invest their lives and

47. Water Rights Determination and Administration Act of 1969, COLO. REV. STAT. ANN. §§ 148-21-1 to -45 (Supp. 1969).
48. 401 U.S. 527, 529 (1971).
49. STUDY, *supra* note 1; *see also* Glenn v. United States, *supra* note 11.
50. STUDY, *supra* note 1.
51. 373 U.S. 546 (1963).

money in land, machinery, and irrigation projects. They believed the water rights they received were valid, and it is upon these water rights that so much depends. It is suggested that for the sake of justice these people should be paid for the serious harm which will result from the Government taking whatever water it needs.[52]

Another of the problems *Eagle County* and *Water Division No. 5* left unsolved was the amount of water the Government's water right entitles it to. The Supreme Court in *Eagle County,* avoiding the question directly, said such questions if decided in a state proceeding were federal questions and entitled to review in federal courts.[53] While the Supreme Court avoided making the initial decision to apportion the water, it did seem to leave the door open for the state courts to begin the job of quantifying the federal government's reserved rights. If true, this could lead to the accomplishment of the main objectives of those who oppose the reservation doctrine.

A third and very important unresolved question arises in states like Wyoming which adjudicate water rights administratively. The Wyoming system carries on the general determination process before an administrative agency rather than judicially. The court in *Rank v. Krug* mentioned an initial reaction to this problem though the issue was not before it. The court, citing another case in *Rank,*[54] said by common understanding the word "adjudicated" means determination by a court or judge in a judicial proceeding. It requires a judgment or decree by a court.[55] Going further, the court in *Rank* said, "[I]n view of the meaning of the word 'suit' the words 'adjudication' or 'administration' of rights in a suit clearly contemplate judicial action. Courts of equity in carrying out a decree of adjudication of water rights have traditionally undertaken the administration of water

52. REPORT, *supra* note 17, at 141-55; *see also* Corker, *Federal-State Relations in Water Rights Adjudication and Administration,* 17 ROCKY MT. MIN. L. INST. 579, 581, 602 (1971).

53. 401 U.S. 520, 526 (1971).

54. 142 F. Supp. 1, 73 (1956), *citing* Goldwyn v. United Artists Corp., 113 F.2d 703 (3rd Cir. 1940).

55. *Id.*

rights.'"[56] While the court in *Rank* used this language about administrative handling of the problem, the issue was not before the court and thus it has not been determined that a suit is the exclusive remedy. One writer, however, has concluded from *Rank* that it is impossible for a state administrative proceeding to come under the McCarran Amendment.[57] Another writer, on the other hand, has said that Congress could not have intended that Colorado and Montana (by virtue of their special statutes) should adjudicate water rights with the United States while intending that Wyoming (and states following this type of water rights administration system)[58] could not do so[59] because the initial proceeding is administrative.[60]

CONCLUSION

With the decisions in *Eagle County* and *Water Division No. 5* several of the questions surrounding the McCarran Amendment were answered. The most important was the modification of the requirements for the McCarran Amendment to apply. The United States can now be joined much easier. Thus, issues previously blocked by the inability to sue can now be raised.

Not all problems are settled, and even with these two cases there will be much discord. The questions concerning the quantitive extent of rights under the implied reservation doctrine and the relative priorities thereof still remain. When these problems are aired in court, will the Government get an ideal water right of unlimited quantity and flexibility, coupled with very early priority dates? There are hints that the courts will not adopt such a liberal water right for the Government, but the strength of these hints is questionable.

56. Rank v. Krug, 142 F. Supp. 1, 73 (1956), *citing* Nebraska v. Wyoming, 325 U.S. 589 (1945).

57. Comment, *supra* note 27, at 117.

58. Trelease, *Reclamation Water Rights*, 32 ROCKY MT. L. REV. 464, 495 (1960).

59. *Id.* at 495, *citing* Lasky, *From Prior Appropriation to Economic Distribution of Waters by the State—via Irrigation*, 1 ROCKY MT. L. REV. 161 (1928).

60. Mr. Trelease cites no case law, but in another area of the law, the Supreme Court has ruled that a Federal Trade Commission Clayton Act administrative proceeding "can be considered as a 'civil or criminal' proceeding." Minnesota Mining & Mfg. Co. v. New Jersey Wood Finishing Co., 381 U.S. 311 (1965).

The Court in *Arizona v. California* and *Eagle County* indicated that the quantity of water may be limited. For example, the Court in *Arizona v. California,* in its decree designating the amounts of water the various parties were to receive, set a quantity for the Indian reservation involved in the suit. The amount the reservation was to receive was fixed as that amount which could be used to irrigate all of the irrigable land on the reservation by current efficient practices.[61] Further, the Court in *Eagle County* said the amount awarded by the state courts for other reservations was a reviewable federal question. The last pronouncement indicates that while state courts could adjudicate amounts, justice must be done to the United States. Finally, the *Eagle County* and *Water Division No. 5* cases have been described by one writer as at least a "modest victory" for those who think that state created water rights deserve a better deal under the fifth and fourteenth amendments than in the past.[62]

A second question, notwithstanding the eventual scope of the reservation doctrine, is whether those persons who lose their water by the doctrine's use will be compensated for the resulting loss. There are several places indicating that the Court will not accept the Government's argument that, since it is not taking anything the water holder owned, he should not be compensated. First, the Public Land Law Review Commission[63] stated in its recommendation number 56 that compensation should be given for interfering with water rights valid before *Arizona v, California* since before this date there was no notice to the holders that their claims were subject to others. Also, there are Congressional pressures which would force compensation and other pressures, not related to this area, to give all citizens a remedy against the United States.[64]

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61. 373 U.S. 546, 595-97 (1963).
62. Corker, *supra* note 52, at 582.
63. REPORT, *supra* note 17, at 155.
64. S. 598, 92d Cong. 1st Sess. (1971).

APPENDIX

The McCarran Amendment, 43 U.S.C. § 666(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 of 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 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.