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Water Law - Procedural Inconsistencies and Substantive Issues in the Federal Reserved Water Rights Doctrine - United States v. Akin

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CASE NOTES

WATER LAW— Procedural Inconsistencies and Substantive Issues in the Federal Reserved Water Rights Doctrine. United States v. Akin, 504 F.2d 115 (10th Cir. 1974).*

The United States filed suit in the United States District Court for the District of Colorado to adjudicate all water rights held, in its own right and on behalf of certain Indian tribes, in the San Juan River Basin. The reserved water rights claimed in this suit consisted of those used in connection with national park lands, Bureau of Reclamation projects, Indian reservations, and other lands reserved by the United State in Colorado. These claims were brought against approximately 1200 named defendants, presumably irrigators who would have their private water rights impaired or destroyed without compensation by application of the federal reserved water rights doctrine. Several water conservation districts intervened as party defendants, and subsequently initiated proceedings in a Colorado state court seeking determination of rights to the same water claimed by the United States in the federal district court. The United States was joined as a defendant in the state court action, pursuant to the McCarran Amendment[1] which waives sovereign immunity in actions for general adjudication of water rights. The United States District Court assumed it had jurisdiction over

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1. 43 U.S.C. § 666 (1952):

> (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 purchases, 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 States to the use of the water of any interstate stream.

first suit, relying on 28 U.S.C. § 1345,[2] but sustained the motion to dismiss filed by the water conservation districts on grounds of the abstention doctrine. As a result, the matter was to be left for state court determination. On appeal to the United States Court of Appeals for the Tenth Circuit the United States argued that it was error for the United States District Court to dismiss on the ground of abstention since the issue of federal reserved water rights was a proper subject for its consideration. The water conservation districts argued that the McCarran Amendment gives a state court exclusive jurisdiction over the United States in adjudications of federal reserved water rights, and alternatively that if the district court had subject-matter jurisdiction it properly abstained from deciding the case. The United States Court of Appeals for the Tenth Circuit reversed the district court judgment, holding that federal district courts may properly assume jurisdiction over suits initiated by the United States for the purpose of adjudicating rights to federal reserved water.[3]

THE FEDERAL RESERVED WATER RIGHTS DOCTRINE AND ITS APPLICATION IN COLORADO

Although there are still some well-known water law experts who believe the "reservation doctrine must go", the federal reserved water rights doctrine seems firmly established in the law of water rights.[4] The power of the federal government to reserve water rights on Indian reservations was established in *Winter v. United States.*[5] This power was expanded to include reservations of water on non-Indian reserved land in *Arizona v. California.*[6] As it now stands the reserved water rights doctrine provides:

2. 28 U.S.C. § 1345 (1948):
   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.
3. United States v. Akin, 504 F.2d 115, 122 (10th Cir. 1974).
4. F. TRELEASE, FEDERAL-STATE RELATIONS IN THE LAW OF WATER RIGHTS 259 (1971).
5. 207 U.S. 564 (1908).
6. 373 U.S. 546 (1963).

> If the United States, by treaty, act of Congress or executive order reserves a portion of the public domain for a federal purpose which will ultimately require water, and if at the same time the government intends to reserve unappropriated water for that purpose, then sufficient water to fulfill that purpose is reserved from appropriation by private users.[7]

This synopsis of the federal reserved water rights doctrine fails to indicate that the limits and possible consequences of the doctrine are relatively unclear to those who are involved in the adjudication and administration of federal and state water rights. Aside from the disputes in recent years over the validity of the reserved rights doctrine itself, there has arisen a very complex problem concerning the procedural and substantive aspects of federal reserved rights The McCarran Amendment has played a very central role in the evolution of this problem. A major obstacle in regard to applicability was raised in *Dugan v. Rank*,[8] where the United States Supreme Court held that the provisions of the McCarran Amendment applied only to "general" adjudications of water rights and did not include suits by individual claimants against the United States.[9] This decision sharply narrowed the scope of the McCarran Amendment to a relatively small number of water rights disputes. The second level of difficulty concerns whether the language of the McCarran Amendment established exclusive jurisdiction over general water rights adjudications in state or federal courts. A federal district court, in *In re Green River Drainage Area*,[10] ruled that the McCarran

7. F. TRELEASE, *supra* note 4, at 109.
8. 372 U.S. 609 (1963).
9. *Id.* at 618. For its conclusion, the Court relied heavily on S. Rep. No. 755, 82d Cong., 1st Sess. 9 (1951), wherein the Hon. Pat McCarran stated in a letter to the Hon. Warren G. Magnuson that:
> S. 18 * * * [is] not intended to be used for any other purpose than to allow the United States to be joined in a suit wherein it is necessary to adjudicate all of the rights of 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.

This same analysis had previously been used in the state of Nevada *ex rel.* Shamberger, 279 F.2d 699, 701 (9th Cir. 1960), where the court held that a suit brought by the state against the United States, for a declaration that the United States may not use underground waters located on naval reserved lands without applying therefor under state law, was not a general adjudication within the language of the McCarran Amendment.
10. 147 F. Supp. 127 (D. Utah 1956).

Amendment does not vest exclusive jurisdiction in either state or federal courts.[11] The court did conclude that where a suit, utilizing the joinder provisions of the McCarran Amendment, was brought in a state court otherwise having jurisdiction, the case was not removable to a federal court merely because the United States was a party.[12] The action would be removable only if the United States could show that the other defendants were of diverse citizenship, that there was a federal question at issue, or that the suit was otherwise removable under the provisions of 28 U.S.C. § 1441.[13] The final problem area concerns the question of whether the provisions of the McCarran Amendment are applicable to federal reserved water rights cases. The United States Supreme Court, in the companion cases of *United States v. District Court, County of Eagle*[14] and *United States v. District Court, Water Division No. 5,*[15] clearly held that the McCarran Amendment procedure is applicable to adjudications involving federal reserved water rights and was not limited to cases concerning federal water rights acquired pursuant to state law.[16] The United States Supreme Court, in these two decisions, was not faced with the question of whether or not jurisdiction over the adjudication of federal reserved water rights rests solely in the state courts. The Court did, however, hold that questions concerning the volume and scope of federal reserved rights were federal questions reviewable by the United States Supreme Court after initial determination by the Colorado state courts.[17]

All the decisions discussed to this point concerned joinder of the United States, pursuant to the McCarran Amendment, in suits brought originally in state courts. The court, in *United States v. Akin,*[18] adds another dimension to this complicated area by considering the propriety of an action by the United States to adjudicate federal reserved water rights brought originally in federal district courts.

11. *Id.* at 134.
12. *Id.* at 138.
13. 28 U.S.C. § 1441 (1948).
14. 401 U.S. 520 (1971).
15. 401 U.S. 527 (1971).
16. United States v. Dist. Court, County of Eagle, 401 U.S. 520, 524 (1971).
17. *Id.* at 525-26.
18. United States v. Akin, 504 F.2d 115 (10th Cir. 1974).

BASIS FOR THE DECISION IN *Akin*

The *Akin* decision established the right of the United States to adjudicate its claims to reserved water as a plaintiff in federal district courts. This conclusion was achieved through analysis of the basic meaning of 28 U.S.C. § 1345.[19] The court justified its decision that federal courts had jurisdiction over such suits by finding: 1) The elimination of a removal provision from the Senate Bill which eventually became the McCarran Amendment does not imply that exclusive jurisdiction over questions concerning federal reserved rights was thereby established in state courts;[20] 2) The United States has the ability to remove actions originally filed in state courts if it meets the general requirements of removal;[21] and)3 The decision in *Eagle,* allowing joinder of the United States as a *defendant* in state court proceedings, does not imply that the United States cannot bring an action as a plaintiff in federal court to adjudicate federal reserved water rights.[22] The court summarized its position on jurisdiction by concluding that "§ 666 [McCarran Amendment] has a very limited coverage and is perhaps only procedural. It permits, but does not necessarily require, the United States being subject to state jurisdiction."[23]

The court supplied a second level of analysis by concluding that the federal district court erred in abstaining from consideration of the case.[24] The court's decision on this issue was justified by finding the general criteria for the traditional abstention doctrine inapplicable.[25] The court buttressed its position by a conclusion that the presence of the United States, as a plaintiff seeking to adjudicate federal reserved water

19. 28 U.S.C. § 1345 (1948). *See* note 2 *supra.*
20. United States v. Akin, 504 F.2d 115, 118-19 (10th Cir. 1974).
21. *Id.* at 119.
22. *Id.*
23. *Id.*
24. *Id.* at 122.
25. *Id.* at 120-21. The court rejected the applicability of the fundamental abstention doctrine found in R.R. Comm'n of Texas v. Pullman Co., 312 U.S. 496 (1941). The court, furthermore, rejected the exceptions to the abstention doctrine found in Burford v. Sun Oil Co., 319 U.S. 315 (1943), since a state regulatory scheme was not present in this case, and in Kaiser Steel Corp. v. W.S. Ranch Co., 391 U.S. 593 (1968), since no novel question of state law had been raised.

rights, was primarily for the advancement of a national interest, and that this factor "militates strongly against the applicability of abstention."[26]

PROBLEMS IN ADMINISTERING THE *Akin* DECISION

The significance of the *Akin* case lies in its implications that procedural problems exist and in its silence on substantive aspects of the adjudication of federal reserved water rights. A comparison of the *Eagle*[27] and *Water Division No. 5*[28] decisions and the *Akin* decision discloses that two parallel systems for the adjudication of federal reserved water rights have been established. The court in *Akin* admits that its decision may place a premium on the "race to the courthouse," but justifies its position by finding that when state and federal courts have concurrent jurisdiction the court first receiving the action may decide the issues raised therein.[29] What the court fails to realize is that such a premium on the "race" may merely serve to accentuate the federal-state conflict over federal reserved water rights. Each side in a reserved right dispute in Colorado will now be striving to file an action first with the loser of the "race" embittered by the loss of an allegedly favorable forum. The *Akin* decision also serves to establish a dual system of recordation of federal and state water rights which is in opposition to traditional notions of judicial economy, and which will necessitate close coordination between federal and state courts in Colorado. If such coordination is not achieved, an orderly determination of the volume and scope of reserved water rights cannot be realized. It might have been better if the *Akin* court had upheld the district court's decision to abstain, thus allowing uniform treatment by state courts more accustomed to dealing with water rights problems.[30]

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26. United States v. Akin, 504 F.2d 115, 122 (10th Cir. 1974).

27. United States v. Dist. Court, County of Eagle, 401 U.S. 520 (1971).

28. United States v. Dist. Court, Water Division No. 5, 401 U.S. 527 (1971).

29. United States v. Akin, 504 F.2d 115, 121 (10th Cir. 1974).

30. 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, 111 (1970).

The problems raised in respect to adjudications of federal reserved water rights under Colorado law[31] are miniscule in comparison to the situation which exists in states like Wyoming, where there will be no more general adjudications of water rights and the procedure for water rights determination is almost totally administrative.[32] This problem, unresolved to this point by the courts, has received extensive treatment by commentators, and consideration by a handful of lower courts.[33] The situation is essentially one of fitting an administrative determination of water rights into the express language of the McCarran Amendment, which seems applicable only to "suits" within a judicial context.[34] To achieve this type of interpretation would necessitate a great deal of judicial stretching. Additional problems may be forthcoming if the United States files an action, as in *Akin*, in a federal district court located in a state with only administrative proceedings. Although presumably individual water rights claimants would have an opportunity to have the relationship between their claims as against federal reserved water rights adjudicated, the resulting conflict with state appropriation laws may cause further federal-state antagonism.[35] Given the uncertainty of such suits by the United States, in the first place, such a solution for states without court adjudications of water rights is tenuous at best. The most workable solution to these problems seems to be federal legislative action, as will be discussed later in this note.

SUBSTANTIVE QUESTIONS LEFT UNSOLVED BY *Akin*

The substantive questions left unanswered by the court in *Akin* raise more difficulties within the reserved rights doc-

31. COLO. REV. STAT. ANN. §§ 37-92-101 to -602 (1973).
32. F. TRELEASE, *supra* note 4, at 207. The basic Wyoming provisions for administration of water rights may be found in WYO. STAT. § 41-211 (Interim Supp. 1974).
33. *See In re* Silvies River, 199 F. 495, 501 (D. Ore. 1912); Rank v. Krug, 142 F. Supp. 1, 71-74 (S.D. Cal. 1956); Morreale, *Federal-State Rights and Relations*, 2 WATERS AND WATER RIGHTS § 106.2 at 95 (R. Clark ed. 1967); 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, 117-19 (1960).
34. F. TRELEASE, *supra* note 4, at 206.
35. INTERSTATE CONFERENCES ON WATER PROBLEMS, SPECIAL TASK FORCE REPORT ON THE PROPOSED FEDERAL WATER RIGHTS LEGISLATION 19-20 (1975). Although this report deals specifically with recently proposed federal legis-

trine than the procedural anomalies which have been established. Although the Supreme Court in *Eagle* concluded that federal reserved water rights raise a federal question, properly reviewable if preserved in the state court action,[36] it did not expressly indicate the extent to which state law is applicable in defining the scope and quantity of such rights. The *Akin* decision raises a further question as to how far a federal court must go in applying state substantive law to federal reserved water rights determinations. The only case which has approached these general questions was an action filed in a state court pursuant to the McCarran Amendment, and thus fails to deal directly with the question raised by *Akin*. In *Avondale Irrigation District v. North Idaho Properties, Inc.*,[37] the Idaho Supreme Court held that "under 43 U.S.C. § 666 [McCarran Amendment], the United States is bound by Idaho state law, and therefore must quantify the amount of water claimed under the reservation doctrine at the time of the general adjudication of water rights."[38] The court, however, qualified its conclusion in a footnote by finding that the United States need not comply with certain Idaho statutes, such as the requirement of diversion and application to beneficial use and the prohibition against speculative water rights.[39] The conclusion to be drawn from *Avondale* is that in jurisdictions which provide for general court adjudications of water rights,[40] the United States may be required to establish its reserved rights in accordance with certain state substantive provisions. The same conclusion seems applicable to a situation where the United States files suit in federal court to adjudicate federal reserved rights, since the court in *Akin* subscribed to the holding in *Eagle*[41] that questions of volume and scope of federal reserved rights "are federal

lation, it does indicate state antagonism to federal forums for determination of federal water rights claims.

36. United States v. Dist. Court, County of Eagle, 401 U.S. 520, 525-26 (1971). The conclusion was reaffirmed in United States v. Akin, 504 F.2d 115, 122 n.6 (10th Cir. 1974).

37. 96 Idaho 1, 523 P.2d 818 (1974).

38. *Id.* at 821-22. *See* United States v. Hennen, 300 F. Supp. 256, 263-64 (D. Nev. 1968).

39. *Id.* at 822 n.10.

40. *See, e.g.* IDAHO CODE § 42-1409 (Supp. 1974); COLO. REV. STAT. ANN. §§ 37-92-101 to -602 (1973).

41. United States v. Dist. Court, County of Eagle, 401 U.S. 520, 529 (1971).

questions which, if preserved, can be reviewed here [United States Supreme Court] *after final judgment by the Colorado Court.*"[42]

The preceding analysis, however, fails to resolve questions concerning the substantive aspects of federal reserved rights in states without general court adjudications. A dilemma is raised on this matter, since without solving the procedural problems inherent in states with administrative proceedings a quest for substantive determinations seems futile. The inability to fit federal reserved rights determinations into an administrative context makes consideration of alternate solutions desirable. Although some commentators would argue that the impact of reserved water rights is *de minimus,*[43] the potential threat of reserved rights is substantial, particularly in Wyoming.[44] In answer to this potential threat a multitude of legislative solutions have been advanced.[45] Of the most recent legislative proposals,[46] the "Kiechel Bill,"[47] which is to be proposed to the United States House of Representatives,

42. United States v. Akin, 504 F.2d 115, 122 n.6 (10th Cir. 1974). (emphasis added).

43. Kiechel and Burke, *Federal-State Relations in Water Resources Adjudication and Administration; Integration of Reserved Rights With Appropriative Rights*, 18 ROCKY MT. MIN. L. INST. 531, 538 (1973).

44. F. TRELEASE, *supra* note 4, at x. *See* Comment, *Federally Reserved Rights to Underground Water—A Rising Question in the Arid West*, 1973 UTAH L. REV. 43, 49-54 (1973) (effect of reserved rights on underground and percolating waters). *See also* United States v. Cappaert, 508 F.2d 313 (9th Cir. 1974), where the court held that the federal government had established a use prior to that of appropriators under state law by an implied reservation of water for the maintenance of natural water levels in an underground basin.

For an analysis of the effect of reserved rights on the development of oil shale *see* Comment, *The Federal Reserved Water Doctrine—Application to the Problem of Water For Oil Shale Development*, 3 LAND & WATER L. REV. 75, 94, 97 (1968).

45. *See* Morreale, *Federal-State Conflicts Over Western Waters—A Decade of Attempted "Clarifying Legislation"*, 20 RUTGERS L. REV. 423 (1966) (review and analysis of past legislative efforts); and Note, *Limiting Federal Reserved Water Rights Through the State Courts*, 1972 UTAH L. REV. 48, 55 (1972) (solution relying on state court deliberations and compensation).

46. *See* PUBLIC LAND LAW REVIEW COMMISSION, ONE THIRD OF THE NATION'S LAND: A REPORT TO THE PRESIDENT AND TO THE CONGRESS 146-49 (1970) and WATER POLICIES FOR THE FUTURE: FINAL REPORT TO THE PRESIDENT AND TO THE CONGRESS OF THE UNITED STATES BY THE NATIONAL WATER COMMISSION 461-68 (1973).

47. This bill has not yet been introduced in the United States House of Representatives. References here are made to the June 30, 1974, draft of the bill supplied by Mr. Walter Kiechel, Jr., Deputy Assistant Attorney General, Land and Natural Resources Division of the Department of Justice [hereinafter cited as the Kiechel Bill].

deserves special attention. By requiring an inventory of all federal reserved water rights[48] this proposal would answer many of the substantive questions raised by *Eagle* and *Avondale*, and would be particularly helpful in quantifying federal reserved rights in states with only administrative proceedings. The "Kiechel Bill", however, would give exclusive jurisdiction to the federal district courts over disputes concerning the inventory of federal reserved rights.[49] This provision does not expressly repeal the McCarran Amendment, thereby giving rise to further procedural inconsistencies, Judicial review is provided in the "Kiechel Bill" to guard against the possibility of overreaching by federal agencies in the inventory of federal reserved water rights. The present fear that the federal government, through the reserved water rights doctrine, will usurp state water laws and present uses of water[50] makes it unlikely that adjudications in federal district courts will be satisfactory to western water users.[51] The logical recourse for the present water user would be to seek state court determination under the *Eagle* principle. This situation would result in a return to the dual system established by the *Akin* decision, and inevitably to long jurisdictional disputes. The final criticism to be raised in respect to the "Kiechel Bill" is that it fails to provide just compensation for the loss by present appropriators of their right to water. This lack of compensation, a concept supported by the National Water Commission[52] and the Public Land Law Review Commission,[53] can only lead to an inefficient system of water rights which deters other water uses without regard for the maximum utilization of water resources.[54]

48. Kiechel Bill § 3 (June 20, 1974 draft).

49. Kiechel Bill § 5 (June 20, 1974 draft).

50. Denver Post, February 23, 1975, at 39, col. 1.

51. *See* SPECIAL TASK FORCE REPORT ON THE PROPOSED FEDERAL WATER RIGHTS LEGISLATION, *supra* note 35. The dissatisfaction discussed in this report centers on a usurpation of the state voice in determinations of federal water rights.

52. WATER POLICIES FOR THE FUTURE, *supra* note 46, at 467.

53. ONE THIRD OF THE NATION'S LAND, *supra* note 46, at 146.

54. F. TRELEASE, *supra* note 4, at 147-60.

CONCLUSION

The United States Circuit Court of Appeals for the Tenth Circuit in *United States v. Akin*,[55] has held that the United States may institute an action in federal district courts for adjudication of federal reserved water rights. In allowing a deviation from previously established procedures for adjudication of such rights, the court has caused a procedural inconsistency to arise in states with general court determinations of water rights. This procedural problem, coupled with the substantive questions which it engenders, poses an additional enigma for states with only administrative determinations of water rights. The solution to these problems lies inevitably in federal legislative action which would provide for reasonable quantification of federal reserved water rights, procedural uniformity, and just compensation for the loss of present uses.

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55. United States v. Akin, 504 F.2d 115 (10th Cir. 1074).