Land & Water Law Review

Volume 12
Issue 2 *Symposium on the Federal Rules of Evidence*

Article 3

1977

Determination of Federal Water Rights Pursuant to the McCarran Amendment: General Adjudications in Wyoming

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DETERMINATION OF FEDERAL WATER RIGHTS PURSUANT TO THE McCARRAN AMENDMENT: GENERAL ADJUDICATIONS IN WYOMING

Increasing populations in the western United States have expanded demand for water, already a scarce resource in the region, to the point that potential demand far exceeds present ability to increase sources of supply.[1] A product of the expansion in water demand has been the development of conflicting claims between federal and state authorities to the ownership, control and administration of western waters.[2]

It has been estimated that federal lands in the western United States provide over sixty percent of the total water runoff in the region.[3] The majority of the federal runoff originates on land presently administered by the Forest Service and the National Park Service.[4] Federal claims to ownership of millions of acres of land in the West[5] provide the

1. SENATE SELECT COMM. ON NATIONAL WATER RESOURCES, NATIONAL WATER RESOURCES, S. REP. No. 29, 87th Cong., 1st Sess. 65 (1961).
2. Colo. River Water Cons. Dist. v. United States, ____ U.S. ____, 96 S. Ct. 1236 (1976). *See generally,* Note, *Federal Water Rights Legislation and the Reserved Rights Controversy,* 53 GEO. L.J. 750 (1965); SENATE SELECT COMM. ON NATIONAL WATER RESOURCES, WATER RESOURCES ACTIVITIES IN THE UNITED STATES, 86th Cong., 2nd Sess. (Comm. Print No. 32, Water Supply and Demand, 1960).
3. PUBLIC LAND LAW REVIEW COMM'N, ONE THIRD OF THE NATION'S LAND: A REPORT TO THE PRESIDENT AND TO THE CONGRESS BY THE PUBLIC LAND LAW REVIEW COMMISSION, at 141 (1970) [hereinafter cited as ONE THIRD OF THE NATION'S LAND].

   The Commission quantified the importance of waters originating are federal lands to western development:

   > 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 mapor 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.

   Id. See also 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, 550 (1973) [hereinafter cited as Keichel and Burke].
4. ONE THIRD OF THE NATION'S LAND, *supra* note 3, at 141; Kiechel and Burke, *supra* note 3, at 550.
5. *See* Hanks, *Peace West of the 98th Meridian—A Solution to Federal-State Conflicts Over Western Waters,* 23 RUTGERS L. REV. 33, 43 (1968).

United States with a sound basis for asserting paramount rights to water in many western states.[6]

The potential impact of these federal water claims on western development is substantial. The availability of water is often a determinative factor in the economic productivity of land in the semiarid West. To a substantial degree the western states have come to depend upon water originating on federal lands. As a result, many state officials openly fear that federal claims on large quantities of water could retard development in the western United States.[7]

At the center of the federal-state controversy in the area of water rights is the reservation docrine, and the difficulties encountered by state water authorities in coordinating federal water claims based on the doctrine with state water law, administration and planning. The controversy has been compounded by uncertainties surrounding the ability of a plaintiff to bring a lawsuit against the United States for the purpose of adjudicating conflicting water claims.

In 1952 the Congress, attempting to remove much of this uncertainty, passed a general waiver of sovereign immunity in the area of water rights litigation providing that:

> 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.[8]

6. SENATE SELECT COMM. ON NATIONAL WATER RESOURCES, NATIONAL WATER RESOURCES, *supra* note 1, at 65.

7. *Id. See generally* NATIONAL WATER COMM'N, WATER POLICIES FOR THE FUTURE: FINAL REPORT TO THE PRESIDENT AND TO THE CONGRESS OF THE UNITED STATES BY THE NATIONAL WATER COMMISSION, at 459 (1973) [hereinafter cited as WATER POLICIES FOR THE FUTURE]; TRELEASE, FEDERAL-STATE RELATIONS IN WATER LAW (Report No. NWC-L-71-014, National Water Comm'n, Legal Study No. 5) (1971) [hereinafter cited as TRELEASE].

8. This statute, hereinafter cited as the McCarran Amendment, was enacted in 1952 as a rider to the appropriations act for the Justice Department. Department of Justice Appropriations Act, 1953, §§ 208(a)-(c), 66 Stat. 560 (1952), 43 U.S.C. § 666 (1970).

The McCarran Amendment provides an exclusive method whereby the United States may be joined in a state adjudication of water rights, thus allowing quantification of the extent of the federal claims, including those asserted under the reserved rights doctrine, and coordination of such claims with state-created water rights.

When Congress enacted the McCarran Amendment it removed one of the major obstacles to the determination of federal water rights. However, after a series of court decisions in which the scope of the statute was litigated, a number of serious questions remained unanswered. Further complicating the interpretation of the Amendment, was the legislative history of the McCarran Amendment which is, at best, inconclusive in defining the type of procedure in which the statute waives immunity.

During its 1977 session the Wyoming Legislature enacted a bill designed to permit a general judicial adjudication of all water claims within the State.[9] The enactment was in response to substantial questions regarding the issue of whether the Wyoming procedure of administrative adjudication of water rights was within the parameters of the McCarran Amendment. The primary purpose of the new Wyoming adjudication statute is to provide a method for quantifying federal reserved water rights in the State and coordinating those rights with water rights derived under state law.[10]

The purpose of this comment is to analyze the new Wyoming judicial adjudication statute and its impact with regard to federal water rights in the State. After analyzing the nature and impact of the reserved rights doctrine, as well as the use of the McCarran Amendment in water rights litigation, this comment will examine the newly enacted Wyoming judicial adjudication procedure, focusing primarily on the availability of the McCarran Amendment in the adjudication of federally reserved rights in Wyoming.

9. Enrolled Act No. 2, 44th State Legislature (1977). The purpose of the bill is to allow litigation to quantify federal rights in Wyoming which may be brought in state courts pursuant to the McCarran Amendment. Casper Star-Tribune, January 25, 1977, at 1, col. 1.
10. *Id.*

THE RESERVED RIGHTS DOCTRINE

The reserved rights doctrine operates to create in the federal government water rights which are independent of and paramount to private water rights derived through state law. Briefly stated, the doctrine holds that where the United States reserves by treaty, act of Congress, or executive order part of the public domain for a purpose which will potentially require water, then a sufficient amount of water will be deemed reserved from appropriation under the state law to fulfill that purpose.[11]

The doctrine has developed through a series of decisions of the United States Supreme Court. In *United States v. Rio Grande Dam and Irrigation Co.*[12] the Court hinted at the existence of the doctrine. In dicta the Court indicated that the states are prevented from legislating so as to destroy or disrupt the right of the United States, "as the owner of lands bordering on a stream, to the continued flow of its waters; so for at least as may be necessary for the beneficial uses of the government property."[13]

The Supreme Court firmly recognized the doctrine of reserved rights nine years later in *Winters v. United States.*[14] In *Winters* the Court squarely held that when Congress created an Indian reservation an implied right to an unspecified quantity of water for the Indian's use was also created.[15] The decision further held that the implied reserved right was superior to the rights of subsequent appropriators claiming rights arising under state law,[16] even though the Indians had failed to make a diversion for beneficial use.

In 1955, the reserved rights doctrine was extended to non-Indian withdrawals of the public domain. The Court held in *Federal Power Commission v. Oregon,*[17] that the Desert Land Act of 1877,[18] which previously had been thought

11. TRELEASE, *supra* note 7, at 109.
12. 174 U.S. 690 (1899).
13. *Id.* at 703.
14. 207 U.S. 564 (1908).
15. *Id.* at 576.
16. *Id.* at 576.
17. 349 U.S. 435 (1955).
18. 43 U.S.C. § 321 (1970).

to sever waters from the western federal lands and subject all non-navigable western waters to the laws of the states, was inapplicable to reserved lands and lands open for sale and disposition to the public.[19] Prior to the decision many authorities had presumed that the reserved rights doctrine under the *Winters* decision was limited to Indian reserved lands. However, the *Federal Power Commission v. Oregon* decision clearly extended the doctrine to all federally reserved lands and to those other lands which are open for sale and disposition to the public.

The reserved rights doctrine was again before the Court in *Arizona v. California.*[20] The Court delineated the parameters of the doctrine, holding that regardless of the method used to create the reservation of federal lands the reservation doctrine will apply and each reservation of land from the public domain will be accompanied by an implied right to an unspecified quantity of water sufficient to fulfill the purpose of the reservation.[21]

The doctrine thus has the effect of creating in the federal government claims to ownership and control of large quantities of western waters. Although a party acquiring a water right under state law prior to the reservation or withdrawal has a vested right superior to the federal right, a party acquiring a right under state law subsequent to the reservation is junior to the federal right.[22]

The impact of the reserved right doctrine is potentially severe in the Western states. Dating from the expansion of the doctrine in *Federal Power Commission v. Oregon* a number of federal agencies began to rely on reserved rights as a source of water claims in addition to acquisition under state law.[23] The decision in *Arizona v. California* led a substantial number of federal agencies to adopt a policy of noncompliance with state law in the acquisition of water rights

19. Federal Power Comm'n v. Oregon, *supra* note 17, at 446-48.
20. 373 U.S. 546 (1963).
21. *Id.* at 595-601. *See* Note, *Limiting Federal Reserved Water Rights Through State Courts*, 1972 UTAH L. REV. 48, 50-51 (1972).
22. Hanks, *supra* note 5, at 48.
23. ONE THIRD OF THE NATION'S LAND, *supra* note 3, at 142.

for use on reserved lands. Reliance was placed instead, on federal claims through the reserved rights doctrine.[24]

Many of the problems created by the reserved rights doctrine are those encountered in coordinating potentially vast but unqualified federal claims with state planning and administration. Federal policies abrogating compliance with state water laws and claiming paramount federal rights under the authority of the reserved rights doctrine have tended to impair planning and development at the state level. Development, dependent upon the availability of water, has been disrupted because neither present nor future water availability can be assured in light of the unquantified federal claims.[25]

THE MCCARRAN AMENDMENT

Absent an express waiver of sovereign immunity in the area of water rights determination, the states were precluded from realizing a complete determination of the extent of claims on state water sources.[26] State adjudication and determination procedures were able to fully delineate claims

24. These agencies include the Forest Service and the military departments. ONE THIRD OF THE NATION'S LAND, *supra* note 3, at 142.

25. WATER POLICIES FOR THE FUTURE, *supra* note 7, at 460; Kiechel and Burke, *supra* note 3, at 536.

The uncertainty generated by the reserved rights doctrine was summarized by the Colorado Supreme Court:

> Our situation with respect to water rights has been that priorities are decreed under state laws, but any water rights of the United States in Colorado remain mysterious, largely unknown, uncatalogued and unrelated to decreed water rights. This creates an undesirable, impractical and chaotic situation. . . . We have a situation in which the federal sovereign claims water rights which are nowhere formally listed. Which are not the subject of any decree or permit and which, therefore, are etheric in large part to the person who has reason to know and evaluate the extent of his priorities to the use of water. To have these federal rights in a state of uncorrelated mystery is frustrating and completely contrary to orderly procedure . . . . United States v. Dist. Court in and for the County of Eagle, 169 Colo. 555, 458 P.2d 760, 765 and 772 (1969).

The severe repercussions generated by the uncertainty surrounding federal reserved rights and the impairment of state planning and coordination are realized upon consideration of the extent to which the western United States is dependent upon waters originating upon or flowing through federal lands. *See* discussion, *supra* note 3.

26. The doctrine of sovereign immunity in the context of water rights is exhaustively discussed in Comment, *Adjudication of Water Rights Claimed By the United States Application of Common-Law Remedies and the McCarran Amendment of 1952*, 48 CAL. L. REV. 94, 94-100 (1960).

arising under state law, but the extent of federal claims through the reserved rights doctrine remained unquantified.

The McCarran Amendment was enacted as a legislative waiver of sovereign immunity, granting to the states the power to join the United States in any general litigation involving all water rights on a stream.[27] The purpose underlying the immunity waiver was to insure participation of the United States in state adjudication proceedings.[28]

For a time after the passage of the McCarran Amendment the United States participated in all forms of state adjudication proceedings with minimal resistance. However, emergence of federal non-Indian reserved rights in *Federal Power Commission v. Oregon*[29] generated intense resistance to the concept of reserved rights in the western states. Federal agencies, apprehensive of provincial attitudes developing in state courts, sought to keep adjudication of federal reserved rights out of the reach of state judges and water officials.[30]

27. Department of Justice Appropriation Act, 1953, §§ 208(a)-(c), 66 Stat. 560 (1952), 43 U.S.C. §§ 666 (1970). The statute is reproduced in text accompanying note 8 *supra*.

Congress had previously promulgated immunity waivers which either did not specifically refer to proceedings involving water rights or which were applicable only to particular federal projects. The Tucker Act, 28 U.S.C. § 1346 (1970), and the Tort Claims Act, 28 U.S.C. § 2671-80 (1970), are general waivers of immunity to certain suits which may be applied in the area of water law. *For* an immunity waiver relating particularly to water law, *see* section 14 of the Colorado River Storage Project Act, 43 U.S.C. § 620m (1970), allowing the joinder of the United States in suits for enforcement of that act in the United States Supreme Court.

28. Town of Durham v. United States, 167 F. Supp. 436 (D.N.H. 1958); TRELEASE, *supra* note 7, at 202.

The legislative history of the statute indicates that the waiver was designed to allow participation of the United States in state adjudications. This purpose is implicit in a letter written by Senator McCarran, sponsor of the Amendment, to Senator Magnuson regarding the latter's concern that suits within the scope of the amendment might be brought in an effort to block or delay certain federal developments such as the Hell's Canyon project:

> S.18 is not intended to be used for the purpose of obstructing the project of which you speak or any similar project and it 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. S. REP. No. 755, 82d Cong., 1st Sess. 9-10 (1951).

29. *Supra* note 17.

30. TRELEASE, *supra* note 7, at 203. *See* text accompanying note 24, *supra*.

The position taken by the United States in *Green River Adjudication v. United States*[31] is illustrative of this federal apprehension. Joined in an adjudication pursuant to the McCarran Amendment, the United States filed claims to 715 different water rights, principally deriving the claims from the reservation of national forest lands. Additionally, the federal government attempted to obtain a ruling that the decree of the state court would not preempt other water claims when eventually needed for the reservation, which uses would be superior to all nonfederal rights with priorities later than the reservation date. The argument was rejected by the Utah court, holding that the federal government could assert only those rights decreed and would be bound by the decree to the same extent as any other party.[32]

The reluctance of the federal government to be joined in state adjudication proceedings has escalated the federal state controversy regarding the control and use of waters originating on federally reserved lands. Delineation of the scope of proceedings to which the McCarran Amendment waives immunity has become an important arena for the federal-state controversy. A number of troublesome questions regarding the extent of the statute's immunity waiver remain. These questions revolve around the two types of proceedings addressed in the McCarran Amendment: suits for the adjudication of water rights, and suits for the administration of rights.

Suits for the Adjudication of Water Rights

The McCarran Amendment waives sovereign immunity and gives consent to the joinder of the United States in any suit "for the adjudication of rights to the use of water of a river system or any other source. . . ."[33] The phrase "adjudication of rights to the use of water" has developed through the statutes and case law of the western states to have a rath-

31. 17 Utah 2d 50, 404 P.2d 251 (1965).
32. *Id.* at 252. *See also* Denver v. Northern Colo. Water Cons. Dist., 130 Colo. 375, 276 P.2d 992 (1954) where the federal government, apprehensive of state court attitudes toward reserved rights, withdrew from a Colorado adjudication.
33. 43 U.S.C. § 666(a)(1) (1970).

er restricted and technical meaning. The general nature of such an adjudication is the process wherein water rights are established as against all other users on a particular water source.[34] When the Congress included the suit for adjudication language in the McCarran Amendment it is clear that it was to this type of proceeding which the waiver of immunity was directed.[35] Essentially, a general adjudication procedure is established as part of a state water code, the purpose of which is to determine priorities of all users on a stream. The action is typically brought by a state administrative officer or a private water user.[36]

1. Adjudication of Water Rights: Judicial Proceedings.

It is clear from the express wording of subsection (a) (1) of the McCarran Amendment that the statute applies to judicial, as distinguished from administrative, proceedings properly denominated as general adjudications or general determination actions. The federal courts have uniformly held that the phrase "suits for adjudication" in the McCarran Amendment contemplates judicial proceedings wherein the plaintiffs seek to settle all water rights and claims on a particular water source.[37]

The waiver of sovereign immunity under subparagraph (a) (1) of the statute, does not extend to proceedings which are exclusively administrative in nature. The reasoning of *Rank v. Krug*[38] is limited in that it only indicates that the McCarran Amendment extends to judicial proceedings as general adjudications. Although dicta in the case supports the argument that administrative proceedings do not fall within the contemplated meaning of general adjudications under the statute, the issue is more directly discussed in

34. Comment, *Adjudication of Water Rights Claimed by the United States—Application of Common-Law Remedies and the McCarran Amendment of 1952*, *supra* note 26, at 105.
35. *Id.* at 101.
36. *See, e.g.*, UTAH CODE ANN. §§ 73-4-1 to 24 (1953) (action brought by state engineer); COLO. REV. STAT. ANN. § 37-92-302(1)(a) (1973) (action brought by private parties). Both statutory procedures should be distinguished from the Wyoming system which provides for an administrative proceeding. WYO. STAT. §§ 41-165 to -192 (1957).
37. *Accord*, Rank v. Krug, 142 F. Supp. 1 (S.D.Cal. 1956). *See generally*, CLARK, 2 WATERS AND WATER RIGHTS, § 106.2, at 95 (1967) [hereinafter cited as CLARK].
38. *Supra*, note 37.

Hurley v. Abbott.[39] In *Hurley* the court found that the language of subparagraph (a)(1) contemplated judicial determination of all claims upon a particular water source.[40] The judicial treatment of the scope of the waiver granted to suits for adjudication, if not conclusive on the issue of applicability to administrative proceedings, raises serious doubt that such proceedings fall within the parameters of the waiver.

2. Adjudication of Water Rights: Encompassing All Water Claimants.

The McCarran Amendment was first interpreted by the Supreme Court in *Dugan v. Rank.*[41] In that case the Court indicated that the statute contemplated adjudications which were general in nature. In effect the Court held that all parties claiming water rights on a stream system or other water source must be present in the adjudication and that all rights must be determined *inter se.*[42]

The requirement that the adjudication be comprehensive and general in nature is founded in the legislative history of the statute which indicates that the Amendment was intended to apply exclusively to suits for the delineation of water rights of all claimants.[43] The legislative evolution of the statute supports the conclusion drawn by the Ninth Circuit with regard to the nature of the comprehensive adjudication proceeding:

> There can be little doubt as to the type of suit Congress had in mind. It was not a private dispute between certain water users as to their conflicting rights to the use of water of a stream system; rather, it was the quasi-public proceedings . . . in which the rights of all claimants on a stream system, as between themselves, are ascertained and officially stated.[44]

39. 259 F. Supp. 669 (D.Ariz. 1966).
40. *Id.* at 670.
41. 372 U.S. 609 (1963).
42. *Id.* at 618.
43. *See* discussion regarding the legislative history of the statute, *supra*, note 28.
44. California v. Rank, 293 F.2d 340, 347 (9th Cir. 1961).

The policy underlying the requirement of a general adjudication is the protection of the United States from joinder in a proceeding which is directed only to the adjudication of federal rights. When the McCarran Amendment was introduced, a number of senators feared that the statute might be used by opponents of federal projects to delay proceedings by suing the United States for the determination of isolated claims upon a single water source. The history of the statute establishes that the McCarran Amendment was enacted only to provide a mechanism whereby the states could coordinate federal claims with water rights arising under state law. The statute does not provide a mechanism whereby federal claims may be the sole or even the primary focus of the adjudication.[45]

The holding of *Dugan v. Rank*, requiring the presence of all claimants in an adjudication, was before the Supreme Court in *United States v. District Court, County of Eagle*.[46] The Court indicated that the holding of *Dugan* was not to be applied in an overly technical manner. The federal government, vehemently resisting joinder in a Colorado adjudication, argued that the proceeding was not a general adjudication under the *Dugan* requirements since those claimants whose rights had been decreed in prior adjudications were not before the court. The Court, perceiving that the *Dugan* holding, read literally, would unjustifiably limit the scope of the McCarran Amendment, rejected the position of the government as "extremely technical." The Court agreed that the absence of some claimants under prior decrees could present some problems if a conflict developed between their rights and the federal rights involved, but held that this factor was insufficient to obviate the necessity of federal presence as a party to supplemental proceedings for adjudication.[47]

The *Eagle County* decision limits the availability of the general adjudication requirement as a technical device by which the United States may avoid joinder in state adjudi-

45. CLARK, *supra* note 37, § 106.2, at 95.
46. 401 U.S. 520 (1971).
47. *Id.* at 525-26.

cations. The decision does not abrogate the protective policy of the *Dugan* requirement in that it is doubtful whether a proceeding essentially private in nature would fall within the scope of the McCarran Amendment. However, the *Eagle County* holding clearly brings supplemental adjudication proceedings within the scope of the immunity waiver.

3. Adjudication of Water Rights: River Systems or Other Sources.

The *Eagle County* decision also eliminated an ambiguity regarding what constituted a river system for purposes of the McCarran Amendment. In *Eagle County* the federal government argued that an adjudication on a single tributary did not fall within the meaning of the statute. The Supreme Court, impatient with the government's attempts to avoid joinder under the Amendment on highly technical grounds, dismissed the argument as "almost frivolous."[48]

The extension of the applicability of the McCarran Amendment to adjudications involving tributaries or portions of single rivers was consistent with the position taken by previous courts.[49] Essentially, the adjudication may, within the scope of the statute, involve a complete river system, major tributaries or substantial portions of a river system. Therefore, it would seem rare that this language of the statute would place an adjudication outside of the immunity waiver.

4. Adjudication of Water Rights: The Nature of the Federal Right.

The application of the McCarran Amendment is limited to the rights to the use of water which the federal government acquired "by appropriation under State law, by purchase, by exchange, or otherwise. . . ."[50] Prior to *Eagle County* some question had remained as to whether the stat-

48. *Id.* at 523-25.
49. *See, e.g.*, Rank v. Krug, *supra* note 37.
50. 43 U.S.C. § 666(a)(2) (1970).

ute applied where the government claimed rights only under the reservation doctrine.

The *Eagle County* decision resolved this issue. The Court squarely held that the McCarran Amendment applies to any adjudication of federal rights, including appropriated rights, riparian rights and reserved rights.[51] Any remaining question regarding the applicability of the statute to reserved rights after *Eagle County* was evaporated in *Colorado River Water Conservation District v. United States*.[52] Relying upon the legislative history of the McCarran Amendment, the Court held that adjudications involving federally reserved rights, in particular rights reserved on behalf of Indians, were within the contemplated scope of the statute.[53] Accordingly, it appears that the nature of the federal claim presents no barrier to the determination and actual quantification of federal rights under the McCarran Amendment.[54]

Suits for the Administration of Water Rights

The McCarran Amendment gives consent to join the United States not only in suits for the adjudication of rights to the use of water, but also in "suits for the administration of such rights. . . ."[55] The extent of the waiver so provided raises substantial and generally unresolved questions.

Although the express language of the statute does not indicate clearly what is meant by suits for the administration of water rights, the legislative history does provide some guidance. It is apparent from the history of the McCarran Amendment that the bill was intended by its sponsor, Senator McCarran, to include actions to settle disputes regarding the interpretation of a decree rendered in a general adjudication and, further, to include actions affecting the rights determined by such a decree whenever the rights of all the

51. United States v. Dist. Court, County of Eagle, *supra* note 46, at 1002.
52. *Supra*, note 2.
53. *Id.* at 1242-43.
54. *See generally* TRELEASE, *supra* note 7; CLARK, *supra* note 37, § 106.2.
55. 43 U.S.C. § 666(a)(2) (1970).

users on the water source are involved.[56] It is quite likely that actions in the nature of quiet title and declaratory judgment would normally be within the accepted meaning of a suit for the administration of water rights as indicated by the legislative history of the McCarran Amendment.[57]

The general determination and adjudication process in a few western states is carried on exclusively by an administrative agency rather than by judicial action.[58] Thus, a serious question to be addressed is whether the statute waives sovereign immunity for administrative proceedings as opposed to judicial actions. If the McCarran Amendment does not waive immunity before administrative proceedings the anomalous result is reached that Congress has lifted the bar of sovereign immunity in some states but not in others.

Although administrative proceedings for the regulation of water rights serve a purpose identical to the analogous judicial proceedings, it is quite probable that the McCarran Amendment does not waive immunity for proceedings similar to the Wyoming administrative determination. It has generally been held that proceedings before administrative bodies are not suits within the generally accepted meaning of the term.[59] One commentator has even raised doubt as to the applicability of the statute to the California proceeding in which use is made of both administrative and judicial proceedings.[60]

56. *See Hearings on S.18 Before a Subcomm. of the Senate Comm. on the Judiciary*, 82d Cong., 1st Sess. 46-48 (1951); S. REP. No. 755, *supra* note 28, at 9-10.

57. Although such suits are not judicial general adjudications under most state water codes, the statute would appear to encompass them. *See generally* Comment, *Adjudication of Water Rights Claimed by the United States—Application of Common-Law Remedies and the McCarran Amendment of 1952*, *supra* note 26.

58. *See, e.g.*, WYO. STAT. §§ 41-165 to 192 (1957).

59. Rank v. Krug, *supra* note 37, at 71-72. *Cf.* United States v. Hennen, 300 F. Supp. 256, 263-64 (D.Nev. 1968), holding that subsection (a)(2) of the McCarran Amendment waives immunity in a suit to administer a decree rendered in a general adjudication. The court found that a suit for an administration is an action brought to execute the decree, to enforce its provisions to resolve conflicts at to the meaning of the decree, and to construe or interpret its language. *Id.*

60. CLARK, *supra* note 37, § 106.2, at 95.
The California procedure combines judicial and administrative proceedings so that no final determination may be made without a court decree. *See* CAL. WATER CODE §§ 2000-2900 (West 1971).

Although it is not likely that the McCarran Amendment waives immunity for administrative determinations, three areas of argument would appear to support such a waiver. Initially, the background of the statute, although certainly not definitive on the issue, would lend logical support to the application of the McCarran Amendment to administrative proceedings. In Nevada, where the sponsor of the legislation was a leading water lawyer, as in other western states, there is no avenue open to the courts except by initial participation in prior administrative proceedings.[61] In states utilizing the California system of combining administrative and judicial proceedings or in states adhering to the exclusive system of administrative determination, with appeals in the court, it would not seem unreasonable to argue that the historical background of and rationale for the McCarran Amendment contemplated waiver of sovereign immunity in these proceedings.

The distinction between judicial and administrative proceedings may often be viewed as an exercise founded on semantics rather than on practice. The procedure utilized pursuant to the Colorado Water Rights Determination and Administration Act of 1969[62] has been consistently held to comport with the requirements of the McCarran Amendment.[63] Although the Colorado procedure nominally establishes a system of judicial adjudication, the proceedings essentially parallel the proceedings conducted by a state administrator.[64] The differences between the Colorado system and a proceeding before a state administrator with rights of judicial appeal could be argued to provide a distinction without substance.

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61. TRELEASE, *supra* note 7, at 206-07.

62. COLO. REV. STAT. ANN. §§ 37-92-101 to 602 (1973).

63. *See* Colo. River Water Cons. Dist. v. United States, *supra* note 2; United States v. Dist. Court, County of Eagle, *supra* note 46; United States v. Dist. Court, Water Div. No. 5, 401 U.S. 527 (1971).

64. *See generally* Kiechel v. Burke, *supra* note 3.
The Colorado system relies heavily upon the work of a water clerk in each water division. The proceedings are facially judicial in nature. However, it is clear that the Adjudication proceeding utilizes the clerk in a functionally administrative capacity. *See* COLO. REV. STAT. ANN. §§ 37-92-101 to 602 (1973).

A more substantial argument for waiver in administrative proceedings may be found in the Supreme Court's perspective with regard to recent challenges to the scope of the Amendment. In a series of recent decisions the Court seems to have adopted the perspective that not only does the McCarran Amendment permit joinder in state proceedings, but state proceedings are normally the best place to determine federal water rights.[65] Even though *Eagle County* and *Colorado River Water Conservation District* arose in Colorado under a nominally judicial determination process, the lack of sympathy which the Court has evinced for "frivolous" and "technical" objections to the scope of the legislation may be dispositive of the issue here. It is not improbable that the Court would be willing to construe the McCarran Amendment so as to include administrative proceedings subject to appeal to the courts or administrative proceedings which are anterior to final judicial determinations. In effect, this position would support application of the McCarran Amendment to any proceeding, judicial or administrative in nature, which is not private in nature, but a public action reaching all claims on a water source.[66]

Conclusions: Possible Reforms

Despite the availability of arguments founded on the historical background of the McCarran Amendment and an apparently liberal construction of the scope of the statute by the Supreme Court, the prevailing view among most commentators is that the McCarran Amendment does not waive immunity for state administrative determination of the relative rights to the use of water on a stream.[67] Even if the statute were held to apply to administrative determination, however, a subtantial problem remains as in a number of states the relative rights to appropriation have already been adjudicated or determined, at least on some streams.

65. Colo. River Water Cons. Dist. v. United States, *supra* note 2, at 1246-48.
66. This reading of the McCarran Amendment is advocated by a leading authority in the area of federal-state relations in the area of water rights. *See* TRELEASE, *supra* note 7, at 207.
67. *See*, CLARK, *supra* note 37, § 106.2, at 95; Comment, *Adjudiaction of Water Rights Claimed by the United States—Application of Common-Law Remedies and the McCarran Amendment of 1952*, *supra* note 26, at 117.

Hence, there are no general adjudication proceedings into which the United States may be called.[68] The result, for all practical purposes is that the McCarran Amendment waives immunity in some states or parts of states, but not in all with respect to the determination of such interrelated water rights.

Commentators, recognizing the ambiguities regarding the scope of the McCarran Amendment, have called for reform and clarifying legislation on both the federal and state levels. The most simplistic and direct approach to clarifying the scope of the McCarran Amendment would, of course, involve congressional action amending the language of the statute. Given the underlying purpose behind the legislation, to insure participation of the United States in state water determination so as to effect a full and complete delineation of claims on limited water resources, the federal reform should clearly and unambiguously indicate that the McCarran Amendment waives immunity in any public proceeding which reaches all claims on a particular water source.[69] However the extension of the McCarran Amendment's waiver to administrative determination appears to be ill-fated. Since 1955 the Congress has considered a multitude of bills purporting to clarify federal and state relationships with regard to western waters. Each attempt has been soundly rejected.[70] Congress has indicated that the problems surrounding the applicability of the McCarran Amendment to certain state adjudication proceedings will not be resolved by subjecting the federal government, procedurally and substantively, to state water law.[71]

68. TRELEASE, *supra* note 7, at 207. Professor Trelease indicates that:
> Every stream in Wyoming is now adjudicated and although the United States may apply for a permit and then request its separate adjudication, there are no proceedings into which the United States may be called. In some states, New Mexico is an example, the same condition will obtain on streams that have been adjudicated, but the United States may be called in to establish its rights on other rivers which have so far been neglected.

69. Congressional clarification of the language of the McCarran Amendment is advocated by a number of commentators. *See, e.g.*, CLARK, *supra* note 37, § 106.2, at 95.

70. *See generally* Morreale, *Federal-State Conflicts Over Western Waters—A Decade of Attempted "Clarifying Legislation,"* 20 RUTGERS L. REV. 423 (1966).

71. *Id.* at 428.

An alternative federal approach is advocated by the Public Land Law Review Commission. This approach would entail limiting the extent of the reserved rights doctrine.[72] However, the reserved rights doctrine has been staunchly defended on the federal level as a mechanism allowing federal water use on a very flexible level, unimpeded by state control. The doctrine is financially defended on the basis that it lessens the cost of federal water related projects in that the federal government need not purchase water held by post-reservation appropriators.[73] Thus, a substantial resistance to any material limitation of the doctrine in accordance with the recommendation of the Public Land Law Review Commission must be expected.

It is, therefore, left to the states to provide a mechanism whereby water claims may be adjudicated and determined within the parameters of the McCarran Amendment. In developing such a procedure, a number of guidelines regarding the scope of the statute's applicability are available.

It is clear that the Colorado statutory adjudication process[74] provides an acceptable general adjudication for purposes of the McCarran Amendment. The *Eagle County* and *Colorado River Water Conservation District* decisions definitely establish that the supplemental proceedings are adjudications into which the United States may be brought for a determination of federal reserved rights along with other claims before the court.

The state attempting to reform its own adjudication proceeding so as to clearly fall within the parameters of the McCarran Amendment should be primarily concerned with two factors. Initially, to qualify as an adjudication under subsection (a)(1) of the statute, it would seem that the proceedings must be judicial in nature and general, as opposed to an essentially private action. Whether a proceeding combining the use of administrative and judicial determinations would fall within the definition of a "suit" within the

72. ONE THIRD OF THE NATION'S LAND, *supra* note 3, at 146-49.
73. *Id.* at 144.
74. *See* text accompanying note 63, *supra*.

statute is unclear. However, it is implied in the legislative history of the McCarran Amendment that the statute's waiver of immunity extends to this type of proceeding.[75] Secondly, to qualify as a suit to administer a decree of water adjudication, the proceeding should be framed as an action essentially designed to settle disputes regarding the interpretation of a decree rendered in a general adjudication, or an action affecting the rights determined by such a decree, involving the rights of all users on a water source.[76] General actions brought by a state official or a private user in the nature of declaratory judgments or actions to quiet title would be typical of an acceptable administrative suit under the McCarran Amendment.

As a state reforming its adjudication proceeding so as to comport with the McCarran Amendment moves further from either the Colorado adjudication proceeding or the guidelines delineated in the proceeding paragraph, the likelihood of judicial acceptance for McCarran Amendment purposes diminishes. In effect, the state should provide for a proceeding affecting all claimants on a water source with heavy judicial overtures or a judicial proceeding of a general nature brought to enforce or settle disputes arising out of a general adjudication decree.

THE WYOMING GENERAL ADJUDICATION STATUTE

Doubting the applicability of the McCarran Amendment to the Wyoming administrative system for water right determinations, the Wyoming Legislature enacted a bill which allows a general adjudication of the water rights of all claimants on any river system or other water source.[77] The statute authorizes the determination of the nature, extent and priority of the rights of each claimant on a particular source.[78]

75. *See* text accompanying notes 60-64, *supra*.
76. United States v. Hennen, *supra* note 59, at 261.
77. Enrolled Act No. 2, 44th State Legislature (1977).
78. Enrolled Act No. 2(1)(a), 44th State Legislature (1977).

The nature of the action authorized in the statute is that of a declaratory judgment action brought by the state attorney general for the general delineation of claims on a water source. The statute provides that the general adjudication shall entail the determination of the extent and priority of water rights on a particular water source through a judicial proceeding. The legislatively prescribed general adjudication is not, however, exclusively judicial in character. The statute authorizes the court conducting the general adjudication to certify to the State Board of Control any legal or factual issues which the court finds appropriate for administrative determination.[79]

The court conducting the general adjudication is vested with four duties. Initially, the court is to confirm all relevant rights evidenced by antecedent court decrees, certificates of appropriation or certificates of construction issued by the State Board of Control. The court is also directed to determine the status of ongoing permits to acquire water rights and adjudicate such rights to the extent possible. A determination is also to be made with regard to the extent and priority of any other interest in the water source before the court. Finally, the court of the general adjudication is directed to establish a tabulation of all relevant water rights and their respective dates of priority.[80]

The scope of the statute is broadly defined. The availability of statutory general adjudication is not limited by the nature of the water source, the type of claim to water involved, or by the nature of the defendants who are or may be claimants to the water.[81] Realizing that the nature of a general adjudication so broad in scope may present burdensome problems to the state attorney general bringing an action under the statute, the legislature provided that personal service is not required where the number of potential

79. Enrolled Act No. 2(1)(a)(i)(A)(1), 44th State Legislature (1977).
80. Enrolled Act No. 2(1)(a)(i)(A)(2)-(5), 44th State Legislature (1977).
81. The statute provides for a sweeping general adjudication "of the water rights of all persons in any river system and all other sources. . . ." Enrolled Act No. 2(1)(a), 44th State Legislature (1977). *See also* section (1)(a)(i)(B) of the act which defines the parties to whom the adjudication may apply.

defendants exceeds one thousand. Where the number of potential defendants exceeds this number, service by certified mail on known claimants and by publication for all other potential parties in interests is authorized.[82]

The purpose underlying the general adjudication statute is to allow the State of Wyoming to take advantage of the waiver of sovereign immunity provided by the McCarran Amendment, thus permitting an action for the purpose of quantifying federal reserved rights in state court rather than in federal court.[83] Although the statute facially indicates that a general adjudication action shall establish the extent and priority of all claims on a particular water source, the operation of the statute indicates that a much more limited purpose underlies the action. The court conducting a general adjudication under the statute has the authority only to confirm pre-existing rights.[84] The statute leaves no room for the court to declare abandonments or forfeitures or to otherwise alter the extent and priority of pre-existing water rights. Hence, the focus of the adjudication is primarily directed to presently unadjudicated rights, including federal claims under the reserved rights doctrine.[85] The scope of the adjudication is further limited by the fact that every stream in Wyoming is now adjudicated.[86] The primary outstanding and unadjudicated rights to water are federal claims. It is to these potentially vast and unquantified rights that the statute authorizing general water adjudications is directed.

82. Enrolled Act No. 2(1)(a)(ii), 44th State Legislature (1977).

83. *See* text accompanying note 9, *supra.*

84. Enrolled Act. No. 2(1)(a)(i)(A)(2), 44th State Legislature (1977).

85. Commenting on the focus of the new statute, the Wyoming Attorney General indicated that the proceeding allows the State to adjudicate the relative priority of water rights and to quantify any unadjudicated claims to water. The primary unadjudicated water claims are those of the federal government. Casper Star-Tribune, January 25, 1977, at 1, col. 1.

The State of Wyoming has filed suit for the general adjudication of all rights to the use of water in the Big Horn River system and all other sources of water in Water Division No. 3. *In re* the General Adjudication of All Rights to Use Water in the Big Horn River System and All other Sources, State of Wyoming, No. 4993 (Wyo. Dist. Ct., 5th Dist., filed Jan. 24, 1977). The principal claim to be adjudicated is that of the federal government. Casper Star-Tribune, January 25, 1977, at 1, col. 1.

86. *See* text accompanying note 68, *supra.*

The general adjudication procedure authorized would appear to conform to the requirements within the McCarran Amendment so as to allow joinder of the United States for the purpose of determining the extent and priority of federal water claims in Wyoming within the general adjudication. However, certain questions remain. These questions involve due process concerns and a number of areas in which the statute might fail to comport with the requirements of the sovereign immunity waiver in the McCarran Amendment.

Due Process: Notice Procedure under The General Adjudication Statute

The primary hurdle which the statute must overcome is the threshold issue of whether the general adjudication proceeding comports with due process requirements of notice and an opportunity to be heard. Of concern is the acceptability of notice by mail and notice by publication as provided in the statute when the number of potential defendants exceeds one thousand.

Non-personal notice is disfavored by the courts. The courts manifest a strong preference for personal service and notice in any proceeding where such notice is practical.[87]

The service and notice provisions of the Wyoming statute are very similar to the provisions established under the Colorado Water Rights Determination and Administration Act of 1969.[88] The Colorado Act essentially established seven water divisions within the state and provided for a continuing judicial adjudication of water rights within each division. The procedure involves the filing of a water right application with the water clerk for each water division. Notice of pending water claims is effected through mailing and publication.[89]

87. Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306 (1950).
88. *Compare* Enrolled Act No. 2(1)(a)(ii), 44th State Legislature (1977) *with* COLO. REV. STAT. ANN. § 37-92-302(3) (1973).
89. COLO. REV. STAT. ANN. § 37-92-302(3) (1973). *See generally* Kiechel and Burke, *supra* note 3.

The Colorado adjudication procedure has been before the courts in a series of decisions dating to the *Eagle County*[90] and *Water District No. 5*[91] cases. The impact of these decisions is that the Colorado statutory scheme for adjudication of water rights has been upheld as comporting with due process and McCarran Amendment requirements in all respects.[92]

The Wyoming statutory general adjudication scheme differs from the Colorado proceedings in that the Wyoming adjudication is not continuous in nature.[93] However, the judicial acceptance of the Colorado procedure for notice should be determinative of the issue in Wyoming as the lack of a continuous type of adjudication is immaterial to the due process notice considerations. The statutory schemes of both states embody the position that personal service would be prohibitive in an action nominally involving thousands of potential defendants. The provisions of service by mailing and publication are acceptable for purposes of due process in Colorado, and the Wyoming scheme does not materially alter the process.

The McCarran Amendment Requirement of a Judicial Proceeding

The initial requirement for compliance with the waiver of sovereign immunity in the McCarran Amendment is that the proceeding for adjudication or administration of water rights must be judicial in nature.[94] The utilization of an adjudication proceeding employing both judicial and administrative determinations raises some question as to the applicability of the McCarran Amendment to the Wyoming general adjudication procedure.

90. *Supra*, note 46.
91. *Supra*, note 63.
92. *See* text accompanying note 63, *supra*.
93. The Wyoming Statute is not designed to allow a continuous adjudication of all claims on a water source. The statute expressly restricts the adjudication to a process of confirming all previously adjudicated and decreed rights and quantifying and determining the priority of any unadjudicated, claims. Enrolled Act No. 2(1)(a)(i)(2) and (4), 44th State Legislature (1977). *Compare* the Wyoming Statute in this respect *with* COLO. REV. STAT. ANN. §§ 37-92-301 through 307, and 402 (1973).
94. *See* text accompanying notes 37 through 40, *supra*.

The Wyoming general adjudication procedure does not vest the conduct of the proceeding exclusively in the court or an administrative agency.[95] As was previously mentioned some question has been raised with regard to the applicability of the McCarran Amendment to procedures which combine judicial and administrative proceedings. The answer given in the context of the California proceeding, which combines judicial and administrative proceedings in such a way that no final determination is made without a court decree,[96] is that the McCarran Amendment implicitly waives immunity in the combined proceeding.[97]

The emphasis in the McCarran Amendment's waiver of sovereign immunity is that the proceeding must be consummated by a final decree rendered by a court. The California statutory scheme expressly utilizes supplementary administrative proceedings, but the final decree is rendered by a court. In Colorado the use of administrative determinations is an implicit but nevertheless integral part of the adjudication proceedings. Both the California and Colorado adjudication schemes have been held to comport with the requirements of the McCarran Amendment, largely because a final judicial decree is necessary to effectuate a final determination.

The Wyoming general adjudication scheme utilizes certification of legal and factual issues to an administrative body, but preserves a final determination of water rights on a particular source to a court decree. Thus, the utilization of an administrative agency within the Wyoming procedure would probably not prevent the joinder of the United States in a general adjudication under the McCarran Amendment, as the administrative proceeding is largely supplemental and the final determination must be rendered by a judicial decree.

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95. *See* text accompanying note 79, *supra.*
96. *See* text accompanying note 60, *supra.*
97. CLARK, *supra* note 37, § 106.2, at 95.

The McCarran Amendment Requirement of a General Adjudication

The most troublesome question posed by the Wyoming general adjudication statute is whether it provides for a suit for adjudication of a general nature within the meaning of the McCarran Amendment. *Dugan v. Rank*[98] established the requirement that the McCarran Amendment consents to the joinder of the United States only in general adjudication proceedings wherein all parties claiming water rights on a stream system must be before the court for the purpose of determining all claims to water on the stream.[99]

The Wyoming general adjudication statute essentially provides such an action. However, the adjudication does not provide for the determination of all claims on the water which is the subject of the proceeding. The priority and extent of all previously adjudicated rights on the water source may only be confirmed in the general adjudication.[100]

Essentially, a proceeding under the statute may be one directed primarily against the United States for the purpose of quantifying federal claims to Wyoming waters. Serious question has been raised with regard to whether the McCarran Amendment is sufficiently broad in scope to allow suits directed primarily or solely against the United States.[101] Such an action would violate the purpose of the McCarran Amendment, to assure the presence of the United States as a party in a proceeding to determine the extent and respective priorities of all claimants on a river system.

The Wyoming general adjudication statute does appear to fulfill the requirement of providing for an action nonprivate in nature and not directed primarily against the United States under the reasoning of *Eagle County*.[102] There the federal government argued that the Colorado adjudication proceeding was not general in nature since those whose

98. *Supra*, note 41.
99. *Id.* at 617-19.
100. *See* text accompanying notes 79 and 95, *supra*.
101. CLARK, *supra* note 37, § 106.2, at 95.
102. *Supra*, note 46.

rights had been decreed in prior adjudications were not before the court. Essentially, the position of the government was that the proceedings were supplemental in nature and therefore failed to comport with the general adjudication requirement of the McCarran Amendment.[103] The Court rejected the "extremely technical" position with regard to the scope of the McCarran Amendment, holding that the supplemental adjudications were within the scope of the sovreign immunity waiver.[104] Later cases dealing with the Colorado proceedings have continued the liberal interpretation of the applicability of the McCarran Amendment, culminating in the reasoning of *Colorado River Water Conservation District*[105] that considerations of judicial efficiency make state adjudication proceedings before state courts the best place for a determination of federal water claims under the reservation doctrine.[106]

The adjudication does reach all claimants to the water source in that all are joined in the proceeding, will be bound by its outcome, and issues bearing on their rights may be determined. The proceeding is not simply a suit by the State to determine the validity of unadjudicated claims to Wyoming water. Rather, the purpose of the suit is to incorporate the unadjudicated claims into the system of priorities which exists for adjudicated claims. Thus, the determination made by the suit can have serious consequences for those having adjudicated rights, and they can be expected to participate actively if they feel it is in their interest to do so. Furthermore, the suit seeks to do nothing more than is done in Colorado and other states—that is, to add the valid unadjudicated claims to the list of adjudicated claims. As such, the suit appears to be general in nature, and the fact that it does not allow the litigation of every possible issue concerning rights to the water source appears to be unimportant.

The issue of whether the Wyoming statute provides a general adjudication for purposes of the McCarran Amend-

103. *Id.* at 525.
104. *Id.* at 525-26.
105. *Supra* note 2.
106. *Id.* at 1246-48. *See* text accompanying note 65, *supra.*

ment could be a troublesome one. The state authorities recognize the likelihood of federal resistance to joinder under the statute. However, one lower state court has ruled that the Wyoming proceeding is one in which the United States may be joined under the McCarran Amendment.[107] In addition, the United States District Court for the District of Wyoming rejected federal attempts to remove to that court a suit brought by the State pursuant to the statute. In his Conclusions of Law, Judge Kerr stated that "the character and adequacy of the Wyoming water right adjudication system and the clear policy evinced by the McCarran Amendment"[108] called for the denial of the motion to remove.

The Wyoming General Adjudication Statute: Conclusion

The Wyoming legislature attempted to provide a mechanism whereby federal claims to water in the state based on the reserved rights doctrine might be quantified and coordinated with rights derived through state law. Such a mechanism would necessarily need the waiver of sovereign immunity provided by the McCarran Amendment which contemplates a general adjudication proceeding brought by the attorney general before a state court.

The Wyoming general adjudication statute leaves open the avenue for federal challenge as to its compliance with the McCarran Amendment. Although issues of due process and whether the statute provides for a judicial proceeding within the meaning of the McCarran Amendment raise some question as to the ultimate efficacy of the statute, the primary issue confronting the statute is whether the adjudication provided by the statute is truly a general, non-private

107. *In re* the General Adjudication of All Rights to Use Water in the Big Horn River System and All other Sources, State of Wyoming, *supra* note 85. On January 24, 1977, the District Court for the Fifth Judicial District entered an order providing:

> 1. This action is a general adjudication of all water rights on the Big Horn River System and all other sources in Water Division Number three, State of Wyoming, and 2. that the United States of America by its enactment of 43 U.S.C. § 666 has waived its sovereign immunity and has consented to be joined in this action . . . . *Id.*

108. Wyoming v. United States of America and all persons in the Big Horn River System and other sources in Water Division Number Three, State of Wyoming, No. C77-039K (D.Wyo. May 31, 1977).

proceeding. The legislative history of the statute indicates that its primary purpose is to provide for the determination of the extent and priority of federal reserved water rights. However, given judicial acceptance of the Colorado system, which is not essentially different from the Wyoming system, and given that the new Wyoming proceeding is harmonious with the underlying policies of the McCarran Amendment, it would appear the new Wyoming proceeding could withstand challenge as to its general nature. Also, if federal resistance proves successful, it could well prevent delineation of federal reserved rights and coordination with State-created water rights in the near future. If the unknown extent of federal reserved rights and their impact on Wyoming development cannot be resolved, the financial uncertainty currently impairing state planning and development will continue unabated.

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