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Water Law - The Exercise of Federal Jurisdiction in Reserved Water Rights Litigation - United States v. Adair - Oregon v. United States

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Water Law—The Exercise of Federal Jurisdiction in Reserved Water Rights Litigation. *United States v. Adair*, 723 F.2d 1394 (9th Cir. 1983), *cert. denied sub. nom. Oregon v. United States*, 104 S. Ct. 3536 (1984).

In 1975, the United States filed suit in the United States District Court for the District of Oregon for a declaration of water rights within the area once comprising the Klamath Indian Reservation.[1] Several months later, the State of Oregon began administrative proceedings to determine water rights within the Klamath Basin, including that area involved in the federal suit.[2] The state then intervened in the federal action as a defendant, and the Klamath Tribe intervened as a plaintiff.[3]

Citing the *Colorado River* abstention doctrine,[4] the state moved for dismissal on the ground that the federal court was not the proper forum.[5] The district court, in effect, denied the motion to dismiss through its pretrial order.[6] In that order, the court limited the issues to the scope and priority of water rights arising from the treaty between the United States and the Tribe and from later transfers of the reservation land.[7]

After a trial on the merits and the court's entry of judgment,[8] the defendants appealed, contending in part that the court should have dismissed the suit.[9] The United States Court of Appeals for the Ninth Circuit held that when a district court has proceeded to determine the nature and priority of water rights that are governed by federal law in a case involving Indian litigants, its decision should not be reversed. Such a reversal would waste judicial resources and thus violate the purpose of the *Colorado River* abstention doctrine.[10]

BACKGROUND

The controversy in *Adair* centered on the proper forum for adjudicating reserved water rights.[11] Before a federal court should consider abstaining in a reserved rights case, it must conclude that both it and

1. United States v. Adair, 478 F. Supp. 336 (D. Or. 1979), *aff'd as modified*, 723 F.2d 1394 (9th Cir. 1983), *cert. denied sub. nom.*, Oregon v. United States, 104 S. Ct. 3536 (1984).
2. *Adair*, 723 F.2d at 1399.
3. *Id.*
4. *See* Colorado River Water Conservation District v. United States, 424 U.S. 800 (1976).
5. *Adair*, 723 F.2d at 1399.
6. *Id.* at 1402 n.6. The court never expressly ruled on the motion to dismiss. *Id.*
7. *See id.* In limiting the issues before it to the scope and priority of the reserved water rights, the court left quantification and administration to the state.
8. As part of its judgment, the court retained jurisdiction. *Adair*, 478 F. Supp. at 350.
9. *Adair*, 723 F.2d at 1400.
10. *Id.* at 1404. The Ninth Circuit affirmed the district court's decision in all respects except for its refusal to determine the federal government's water priorities separately. *Id.* at 1420.
11. Although raising other issues on appeal to the Ninth Circuit, Oregon appealed to the U.S. Supreme Court only on the forum issue. *See* 52 U.S.L.W. 3900 (U.S. June 6, 1984).

the relevant state courts have personal and subject matter jurisdiction.[12] Federal district courts have jurisdiction to try cases involving reserved water rights by virtue of 28 U.S.C. § 1331, the federal-question statute.[13] Reserved water rights, commonly called *Winters* rights,[14] are a creation of the federal judiciary and therefore are governed by federal law.[15] The federal courts also have jurisdiction under 28 U.S.C. § 1345 because the United States is generally a plaintiff in these cases. Finally, 28 U.S.C. § 1362 confers federal jurisdiction for reserved rights cases involving Indian tribes.

State courts of general jurisdiction also have subject matter jurisdiction over reserved rights claims, but they do not have personal jurisdiction over the United States or Indian tribes unless the United States and the tribes have waived their sovereign immunity.[16] The United States has waived its immunity from state general water adjudications through the McCarran Amendment.[17] The McCarran Amendment does not expressly waive the sovereign immunity of Indian tribes, but it does so as a practical matter since the United States, as trustee for the Indians, can bind them through its participation in a state water suit.[18]

Because of concurrent jurisdiction, litigants have three alternative routes for determining reserved water rights. They may seek a general adjudication in state court,[19] a general adjudication in federal court,[20] or a federal court determination of reserved rights which is then grafted onto a state adjudication.[21] Indian tribes prefer a federal forum because they

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12. *See* R. CASAD, JURISDICTION IN CIVIL ACTIONS § 1.01 (1983).

13. Colorado River Water Conservation District v. United States, 424 U.S. at 809 n.15. 28 U.S.C. § 1331 (1982) reads: "The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States."

14. *See* Winters v. United States, 207 U.S. 564 (1908).

15. *See generally* Ranquist, *The Winters Doctrine and How It Grew: Federal Reservation of Rights to the Use of Water*, 1975 B.Y.U. L. REV. 639.

16. *See* Arizona v. San Carlos Apache Tribe, 103 S. Ct. 3201, 3212-14 (1983).

17. United States v. District Court in and for the County of Eagle, 401 U.S. 520, 524 (1971). 43 U.S.C. § 666 (1982) provides in part:

> Consent is hereby 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 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.

18. Arizona v. San Carlos Apache Tribe, 103 S. Ct. at 3213 n.17.

19. *See* Comment, *Determination of Federal Water Rights Pursuant to the McCarran Amendment: General Adjudication in Wyoming*, 12 LAND & WATER L. REV. 457 (1977).

20. *See Adair*, 723 F.2d at 1398-99.

21. NATIONAL WATER COMMISSION, WATER POLICIES FOR THE FUTURE: FINAL REPORT TO THE PRESIDENT AND TO THE CONGRESS OF THE UNITED STATES 483 (1973).

fear that state courts are prejudiced against their claims.[22] The states, on the other hand, have generally sought state adjudication of all water claims, including reserved rights claims.[23] This dispute over the forum has been called "half of the battle" in reserved rights litigation.[24]

The United States Supreme Court squarely confronted the issue of the proper forum for reserved rights suits in *Colorado River Water Conservation District v. United States.*[25] In *Colorado River,* the United States District Court for the District of Colorado, relying on traditional abstention doctrines,[26] dismissed a water suit brought by the United States in its own behalf and as trustee for an Indian tribe.[27] The Tenth Circuit reversed the dismissal and the United States Supreme Court granted certiorari. The Supreme Court held that the district court had correctly abstained even though none of the traditional grounds for abstention, which are all based on comity, applied. The Court created a new abstention doctrine aimed at saving judicial resources.[28]

Colorado River abstention is based on a balancing test. In deciding whether to dismiss, a district court must weigh practical considerations in favor of dismissal, especially the avoidance of duplicative litigation, against its heavy obligation to exercise jurisdiction.[29] "Only the clearest of justifications will warrant dismissal."[30]

Using this balancing test, the Supreme Court decided that dismissal was appropriate in *Colorado River.*[31] The most important factor in favor of dismissal was the legislative policy of the McCarran Amendment, namely, the avoidance of piecemeal adjudication in a river system which can result in needless duplication.[32] The Court also listed several secondary factors associated with the policy as further support for dismissal.[33]

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22. REPORT OF THE COMPTROLLER GENERAL, RESERVED WATER RIGHTS FOR FEDERAL AND INDIAN RESERVATIONS: A GROWING CONTROVERSY IN NEED OF RESOLUTION 127 (CED-78-176) (Nov. 16, 1978).

23. *See* Eliot and Balcomb, *Deference to State Courts in the Adjudication of Reserved Water Rights,* 53 DENVER L.J. 643 (1976).

24. *Indian Water Rights: Hearings Before the Subcomm. on Administrative Practice and Procedure of the Comm. on the Judiciary,* 94th Cong., 2d Sess. 13 (1976) (statement of Reid Chambers, Associate Solicitor, Dep't of the Interior).

25. 424 U.S. 800 (1976).

26. *See id.* at 813-16.

27. *Id.* at 805-06.

28. *Id.* at 817. Although *Colorado River* itself did not call its rule an abstention doctrine, lower courts and commentators have. *See* Levy v. Lewis, 635 F.2d 960, 965 (2d Cir. 1980).

29. *Colorado River,* 424 U.S. at 818.

30. *Id.* at 819.

31. *Id.*

32. *Id.*

33. *Id.* at 820. The secondary factors were:

> (a) the apparent absence of any proceedings in the District Court, other than the filing of the complaint, prior to the motion to dismiss, (b) the extensive involvement of state water rights occasioned by this suit naming 1,000 defendants, (c) the 300-mile distance between the District Court in Denver and the court in Division 7, and (d) the existing participation by the Government in Division 4, 5, and 6 proceedings.

In *Arizona v. San Carlos Apache Tribe,*[34] a case which it called a sequel to *Colorado River,*[35] the Supreme Court increased the weight to be given the McCarran Amendment in the balancing test for reserved rights cases.[36] The Court held that the McCarran Amendment itself provided the "clearest of justifications" for dismissal because the McCarran Amendment had been enacted to encourage state adjudication of all water rights.[37] No federal district court should exercise its concurrent jurisdiction, the Court stated, if it would thereby create "the possibility of duplicative litigation, tension and controversy between the federal and state forums, hurried and pressured decisionmaking, and confusion over the disposition of property rights."[38]

The *San Carlos* Court listed three exceptional situations in which a federal court may exercise its jurisdiction: when a state court expressly agrees to stay its consideration of the issues in the federal action, when the arguments for and against dismissal are closely matched and the suit is brought by Indians to adjudicate their rights only, or when the motion to dismiss is filed after the federal action is so far along that dismissal would itself create duplication and waste.[39]

THE PRINCIPAL CASE

In the wake of *Arizona v. San Carlos Apache Tribe,* the Ninth Circuit decided *United States v. Adair.*[40] The court admitted that the factors found controlling in *Colorado River* and *San Carlos* "necessarily determined" its analysis and that dismissal was proper in the majority of reserved rights cases.[41] It decided, however, that in *Adair* the district court did not clearly abuse its discretion when it concluded "that exceptional circumstances requiring dismissal were not presented."[42]

The Ninth Circuit determined in *Adair* that all three *San Carlos* exceptions allowing for the exercise of federal jurisdiction applied. The court rejected the state's argument that the exercise of jurisdiction.would be contrary to the policy of the McCarran Amendment.[43]

First, the state adjudication remained at an investigative stage at the time of the appeal, seven years after it had begun. From this, the court

34. 103 S. Ct. 3201 (1983).

35. *Id.* at 3204.

36. *See id.* at 3214-15. Dismissals should be the norm rather than the exception because "water rights adjudication is a virtually unique type of proceeding, and the McCarran Amendment is a virtually unique federal statute, and we cannot in this context be guided by general propositions." *Id.* at 3216.

37. *Id.* at 3214-15.

38. *Id.* at 3215.

39. *Id.*

40. *San Carlos* came after the parties in *Adair* had argued before the Ninth Circuit. The court therefore had the parties submit supplemental briefs to argue how *San Carlos* should affect the outcome of *Adair.* Supplemental Brief for the State of Oregon at 1, United States v. Adair, 723 F.2d 1394 (9th Cir. 1983).

41. United States v. Adair, 723 F.2d 1394, 1400 (9th Cir. 1983).

42. *Id.* at 1403.

43. *See id.* at 1404.

of appeals concluded that the state adjudication, in effect, had been stayed to await the outcome of the federal adjudication.[44]

Second, the district court had limited its exercise of jurisdiction to determine only those issues governed by the federal law of reserved water rights.[45] The Ninth Circuit reasoned that by so doing, the district court had not only avoided possible duplication, but had also narrowed the case to fit the limits of the second *San Carlos* exception. The Ninth Circuit stated that "in light of the district court's limited exercise of jurisdiction, the case presented, for all practical purposes, a suit to adjudicate Indian water rights on behalf of an Indian Tribe."[46]

Third, the federal action had been instituted months before the state began its proceeding. By the time of the ruling on the motion to dismiss, none of the preliminary steps necessary for state adjudication had been completed.[47] The Ninth Circuit implied from these facts that a dismissal would have created duplication and waste. Further, the district court had reached a final judgment by the time of the appeal. The Ninth Circuit decided that a reversal would have created the very duplication the McCarran Amendment had been enacted to avoid.[48]

ANALYSIS OF THE COURT'S OPINION

At first glance, it appears that the Ninth Circuit correctly applied the *San Carlos* exceptions to the facts of *Adair* in order to justify the district court's exercise of jurisdiction. In reality, however, the facts of *Adair* do not fit the exceptions set forth in *San Carlos.* None of the facts in *Adair* actually warrant the exercise of federal jurisdiction.

This does not mean that the Ninth Circuit had no good reason for its decision. The Ninth Circuit was faced with a dilemma which the appellate courts did not face in either *Colorado River* or *San Carlos.* In those cases, the district courts had dismissed the reserved rights suits before trial. The appellate courts did not have to nullify extensive adjudications which had been completed. In *Adair,* on the other hand, the case reached the Ninth Circuit after the district court had completed its adjudication. If the Ninth Circuit reversed, then the district court's work of several years would have been wasted. It is therefore not surprising that the court made every effort to fit the *Adair* case into one of the *San Carlos* exceptions so that the district court's adjudication could stand.

The "Express Agreement to Stay" Exception

Under *San Carlos,* a federal district court may exercise its jurisdiction when a state court expressly agrees to stay its consideration of the same issues that will arise in the federal adjudication.[49] Through its stay,

44. *Id.* at 1405.
45. *Id.* at 1406.
46. *Id.* at 1407.
47. *Id.* at 1404-05.
48. *Id.* at 1405.
49. *See supra* text accompanying note 39.

the state becomes a willing partner in a coordinated effort to adjudicate all the water rights on the river system involved. Therefore, the federal court does not interfere with the state's prerogative under the McCarran Amendment to adjudicate all the rights in a watershed.

The Ninth Circuit, in *Adair*, applied this "stay" exception without regard to its purpose. The court pointed to the state's slow progress in its adjudication and concluded that the state had effectively stayed its proceedings. But the *San Carlos* exception requires that the state *expressly agree* to stay its adjudication in order to ensure that the state has actually given its consent to the federal adjudication. In *Adair*, the State of Oregon did not expressly agree to stay its proceedings. In fact, there was no stay at all. The state's adjudication had slowly progressed only because it was difficult for the state to " 'move forward' when . . . a federal court [was] engaged in the process of declaring rights which will necessarily affect all other water rights on the river."[50] The State of Oregon's forced "stay" did not fall under the *San Carlos* "stay" exception because it was created by tension between the forums rather than by cooperation.

The "Adjudication of Indian Rights" Exception

In *Arizona v. San Carlos Apache Tribe,* the Supreme Court stated that a district court can exercise its jurisdiction when the arguments for and against dismissal are closely matched and the suit is brought by Indians to adjudicate only their reserved rights.[51]

The Ninth Circuit opined that the arguments for and against dismissal were closely matched in *Adair* because the district court had limited the case to only those issues governed by the federal law of reserved water rights. By limiting its determinations to federal issues, the federal court handled issues that matched its expertise, and its findings on those issues could be later integrated in the state adjudication. It avoided state issues which the state courts were better able to decide.[52] No possibility of duplicative litigation existed, and a strong argument in favor of dismissal disappeared.

The Ninth Circuit incorrectly concluded that the arguments for and against dismissal became closely matched when the district court limited the case to federal issues. As part of its judgment, the district court retained jurisdiction in order to supervise the distribution of water consistent with its opinion.[53] By retaining jurisdiction, the district court made duplicative litigation and tension between the forums a near certainty.[54]

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50. Reply Brief for Appellant, State of Oregon at 9, United States v. Adair, 723 F.2d 1394 (9th Cir. 1983).

51. *See supra* text accompanying note 39.

52. *Adair*, 723 F.2d at 1403 n.7.

53. United States v. Adair, 478 F. Supp. 336, 350 (D. Or. 1979).

54. *See* Supplemental Brief for the State of Oregon at 8, United States v. Adair, 723 F.2d 1394 (9th Cir. 1983).

Under *San Carlos,* the arguments for and against dismissal are never closely matched when there is even a possibility of duplication and tension.[55] Without closely matched arguments, the "adjudication of Indian rights" exception did not apply in *Adair.*

Even if the arguments for and against dismissal were closely balanced, *United States v. Adair* was not a suit brought by Indians to adjudicate their rights alone. The district court determined reserved water rights for the Tribe, individual Indians, the United States government, and non-Indian successors to Indian lands.[56] The adjudication was not within the limits of the "adjudication of Indian rights" exception. Therefore, the general rule of abstention should have applied.

The "Delay in the Motion to Dismiss" Exception

The third *San Carlos* exception to the general rule of abstention applies when a state or private party moves to dismiss the federal adjudication, in favor of a state adjudication,[57] after the federal suit is so far along that dismissal would itself create duplication and waste.[58] Clearly, it would be a waste of the court's and the litigants' efforts to have a federal case near completion dismissed in favor of an incipient state adjudication.

The Ninth Circuit declared that several circumstances brought *Adair* under this exception. First, the state proceedings started after the federal adjudication was underway. Second, the federal adjudication had progressed farther than had the state adjudication at the time the district court ruled on the motion to dismiss. Finally, the federal adjudication had progressed farther than had the state adjudication at the time the Ninth Circuit heard the appeal.[59]

None of these three facts, however, actually supports the court's use of the "delay in the motion" exception. When a district court decides whether to dismiss under the *Colorado River* abstention doctrine, the order in which the actions begin is irrelevant.[60] In *Colorado River,* as in *Adair,* the federal action was filed before the state adjudication began.[61] Nevertheless, the Supreme Court held in *Colorado River* that dismissal of the federal adjudication was proper. The Ninth Circuit should have reached the same conclusion in *Adair.*

55. Arizona v. San Carlos Apache Tribe, 103 S. Ct. 3201, 3215 (1983). "Although adjudication of those rights in federal court . . . might in the abstract be practical, and even wise, it will be neither practical nor wise as long as it creates the possibility of duplicative litigation."

56. *Adair,* 723 F.2d at 1407-08.

57. Normally, a state would delay in making a motion to dismiss because a state general adjudication had not yet begun. The McCarran Amendment only allows a district court to dismiss an adjudication out of deference to a concurrent state proceeding. *See supra* note 17.

58. *See supra* text accompanying note 39.

59. *See supra* text accompanying notes 47-48.

60. Moses H. Cone Memorial Hosp. v. Mercury Constr. Corp., 103 S. Ct. 927, 939 (1983).

61. *Id.* at 940.

In *Adair,* the Ninth Circuit improperly compared the progress of the state proceedings with the progress of the federal adjudication as of the time of the federal district court's ruling on the motion to dismiss. Under *Colorado River,* the time of the filing of the motion, not the time of the ruling on the motion, is controlling.[62] Usually a court rules on a motion to dismiss soon after it is filed, so the court need not distinguish between the two times. But in *Adair,* nearly two years elapsed between the filing of the motion to dismiss and the ruling on that motion.[63] At the time of the filing, both proceedings were in their infancy,[64] and therefore, the federal action should have been dismissed.[65] At the time of the district court's ruling on the motion, however, the parties and the district court had invested additional effort. The Ninth Circuit concluded that this additional effort precluded dismissal.[66] If the Ninth Circuit had followed *San Carlos* and compared the progress of the state and federal adjudications as of the time the motion to dismiss was filed in the district court, then the court could not have used the "delay in the motion" exception to justify its affirmance.

The critical fact which the Ninth Circuit used to affirm the district court's judgment under the "delay in the motion" exception was that the federal adjudication was complete at the time of appeal. Because of this fact, the court determined that the McCarran Amendment's policy of avoiding duplication and waste would not be served by a reversal of the lower court's judgment.[67]

The Supreme Court stated in *San Carlos* that a federal district court can deny a litigant's motion to dismiss if the federal adjudication is substantially complete at the time of the motion.[68] The purpose of the exception is to allow a district court to proceed confidently with an adjudication if the parties have not filed a motion to dismiss. The district judge is assured that the adjudication will not be nullified if a motion to dismiss is filed later in the proceeding and he denies the motion.

The exception never applies when a motion to dismiss is filed early in an adjudication as it was in *Adair.* In such a case a district court has not expended substantial time or effort which would be wasted if it dismissed. Unless one of the other *San Carlos* exceptions to the *Colorado*

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62. The Ninth Circuit itself admitted that the time of the motion was determinative:

> We realize, of course, that where both the state and the federal proceedings are in their infancy at the time of a motion to dismiss the federal proceeding, both *Colorado River* and *San Carlos Apache Tribe* indicate that absent unusual circumstances, the federal court should defer to the state proceeding.

Adair, 723 F.2d at 1405 n.8.

63. Supplemental Brief for the State of Oregon at 6, United States v. Adair, 723 F.2d 1394 (9th Cir. 1983).

64. *See Adair,* 723 F.2d at 1402-03.

65. *See supra* note 62.

66. It is hard to see how the Ninth Circuit could come to this conclusion since at the time of the ruling on the motion to dismiss, the district court had not even limited the issues for trial. *See Adair,* 723 F.2d at 1402 n.6.

67. *See supra* text accompanying note 48.

68. *See supra* text accompanying note 39.

River abstention doctrine applies, the district court will clearly abuse its discretion if it adjudicates.

The district judge's abuse of discretion occurs at the time he rules on the motion to dismiss, and the court of appeals should review that ruling based on the posture of the case as of that time. If the district judge denies the motion to dismiss and the adjudication is completed at the time of *appeal*, this fact does not aid an appellate court in deciding whether the district court has abused its discretion. The Ninth Circuit should not have based its decision in *Adair* on the fact that the district court had completed its adjudication by the time of appeal.

The Adair Dilemma

One can understand why the Ninth Circuit decided *Adair* the way it did. If the Ninth Circuit reversed the district court's decision, the parties would have been right back where they were eight years before. This result would have been repugnant to the spirit of the *Colorado River* doctrine and the McCarran Amendment.[69]

Unfortunately, the Ninth Circuit's decision to affirm the district court in *Adair* based on the adjudication's completion at the time of appeal undermines the Supreme Court's decisions in *Colorado River* and *San Carlos*. The *Adair* decision may encourage district courts to adjudicate reserved rights cases even though they should obviously abstain under the *Colorado River* abstention doctrine. The district courts may expect their improper decisions to be affirmed because the adjudications will be complete at the time of appeal. *Adair* opens the door to abuses of discretion by district judges who may wish to hear reserved rights cases.

Not only did *United States v. Adair* undermine the *Colorado River* doctrine, it also violated the Supreme Court's guidelines in *San Carlos*. The *San Carlos* exceptions did not really apply to the facts of *Adair*, but the Ninth Circuit's decision stands because the Supreme Court denied certiorari. Lawyers handling cases like *Adair* in the future will risk a similar result if they do not find a way to obtain early appellate review.

Possible Solutions to the Adair Dilemma

The dilemma in *Adair* arose because the attorneys for the State of Oregon appealed the district court's denial of their motion to dismiss after the adjudication was complete.[70] If they had appealed the denial of the motion immediately, the dilemma would not have arisen. The court of appeals could have reversed and sent the case to state court without nullifying a completed adjudication. The court could have thus avoided a questionable application of the *San Carlos* exceptions.

69. The Ninth Circuit called such an option "throw[ing] the baby out with the bath." *Adair*, 723 F.2d at 1404.

70. *See supra* text accompanying notes 8-9.

A denial of a motion to dismiss is an interlocutory, rather than a final, decision.[71] Appeals from interlocutory decisions are governed by 28 U.S.C. § 1292. Certain interlocutory decisions are appealable as of right under subsection 1292(a), but a denial of a motion to dismiss is not one of them. The only way to appeal a denial of a motion to dismiss before a trial court reaches its final decision is through subsection 1292(b). This subsection grants jurisdiction to an appellate court when both the appellate court and the district court approve. Before a district judge may certify an appeal from his interlocutory decision, he must "be of the opinion that such an order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation."[72]

If a district court denies a motion to dismiss in a reserved water rights case, that denial is tailor-made for certification for appeal. Such an order involves the *Colorado River* doctrine which is a controlling question of law over which there is substantial ground for disagreement. An immediate appeal would also advance the termination of a reserved rights adjudication. A court of appeals could answer the abstention question before the district court had invested much time in the adjudication. If, as in the majority of such cases, dismissal is required, then the court of appeals is spared the dilemma presented by *Adair.*

Although 28 U.S.C. § 1292(b) is an attractive solution to the problem presented by *Adair,* it is a solution dependent upon the cooperation of the district judge. If the judge does not approve an immediate appeal from his decision denying the motion to dismiss, then the appellate court must await a final judgment before it can entertain an appeal on the interlocutory decision.

If a district judge refuses to certify his interlocutory decision for immediate appeal, the state's attorneys may petition a court of appeals for an extraordinary writ of mandamus or prohibition.[73] The United States Supreme Court has established two conditions which must exist before a writ may issue. "[T]his Court has required that a party seeking issuance have no other adequate means to attain the relief he desires . . . and that he satisfy the 'burden of showing that (his) right to issuance of the writ is 'clear and indisputable'."[74]

In a reserved rights case like *United States v. Adair,* a state clearly has no means of obtaining adequate appellate review other than through an extraordinary writ. An appeal after final judgment is inadequate. The court of appeals in *Adair,* for example, was constrained to affirm the

71. *See* R. CASAD, JURISDICTION IN CIVIL ACTIONS § 6.01[5][c] (1983).

72. 28 U.S.C. § 1292(b) (1982).

73. "Once power is found to issue a writ, little concern is shown to define the possible technical and historic difference between mandamus and prohibition." C. WRIGHT, A. MILLER, E. COOPER, & E. GRESSMAN, FEDERAL PRACTICE & PROCEDURE § 3932, at 206-07 (1977).

74. Allied Chemical Corp. v. Daiflon, Inc., 449 U.S. 33, 35 (1980).

district court's decision because a reversal at that late date would have created duplication in conflict with the *Colorado River* doctrine's primary purpose.

A petitioner in a writ proceeding must not only show that he has no other adequate means of obtaining relief. He must also show that he has a clear and indisputable right to the writ's issuance. Courts of appeal have often interpreted this standard to mean that a district judge must clearly abuse his discretion before a writ will issue.[75] This is the same standard as that applied by the Ninth Circuit in *United States v. Adair,* which was an appeal from a final judgment. Therefore, a petitioner for a writ of prohibition has no greater burden than the appellants had in *Adair.* It is likely that lawyers who seek a writ of prohibition in a reserved rights case will be able to obtain it.

CONCLUSION

In *Adair,* the Ninth Circuit purported to follow the *Colorado River* and *San Carlos* holdings, yet none of the *San Carlos* exceptions actually supported the Ninth Circuit's decision. The court's main reason for upholding the district court's decision—that the case had been tried and a reversal would create duplication—was not to be found in either of the Supreme Court opinions.

The Ninth Circuit was faced with a dilemma for which its precedents had not prepared it. The court could have followed the strict requirements of *San Carlos* and reversed. Reversal would have caused further delay and duplication in an already protracted litigation. On the other hand, the court could have affirmed the district court's decision in spite of the district court's abuse of discretion. The Ninth Circuit chose this second alternative and affirmed, but in so doing it created a precedent for unfettered district court discretion in reserved rights cases.

Water lawyers representing states or private parties can avoid the *Adair* dilemma only by moving for interlocutory review when district courts deny motions to dismiss. They can obtain interlocutory review through discretionary appeals under 28 U.S.C. § 1292(b) or through petitions for extraordinary writs. If, before trial, appellate courts review district court decisions to hear reserved rights cases, then the federal forums will only be available when and if the states desire federal participation, and *Adair* will be treated as an anomaly.

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75. *See* Will v. Calvert Fire Ins. Co., 437 U.S. 655, 677 (1978) (Brennan, J., dissenting). In *Calvert,* a majority of the justices indicated willingness to issue a writ of mandamus based on a district judge's misapplication of the *Colorado River* abstention doctrine. *See id.* at 667-68 (Blackmun, J., concurring in the judgment).