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McCarran Amendment Adjudications— Problems, Solutions, Alternatives

*Michael D. White**

Recent times have seen states seeking means other than the McCarran Amendment to settle disputes over federal and nonfederal water rights. This article examines the usefulness and current problems with the McCarran Amendment. The author concludes that alternative mechanisms to McCarran adjudications have only limited applicability. He further suggests several ways in which McCarran Amendment adjudications could be improved, both by the parties involved, and by modifying the Amendment itself.

The controversy over using litigation, as opposed to negotiation, of United States' reserved water rights has spawned a boisterous debate. The participants, however, are often ignorant of the historical background of both the bases of the federal water rights¹ and the traditional adjudication process.²

* Partner, White & Jankowski, Denver, Colorado and Special Ass't Att'y General for the State of Wyo. in the General Adjudication of the Bighorn River System (1982).

1. When the United States acquired the lands now comprising the Western United States, whether by purchase, treaty or conquest, it owned not only the land but also all other natural resources, including water. Through a variety of land disposition statutes, the United States encouraged settlement of those lands and, eventually, the acquisition of water rights to serve those lands pursuant to the laws of the states or territories in which they were located. Those laws typically required that water rights be obtained pursuant to the doctrine of prior appropriation (first in time, first in right). Notwithstanding the urgent policy of encouraging Western migration and settlement, the United States foresaw the need to reserve lands to itself. Consequently, it set aside vast tracts for a wide variety of purposes, including such things as Indian reservations and national forests. Shortly after the turn of the century, however, the United States discovered that much of the West's water had already been appropriated, leaving insufficient water to serve the lands which had been reserved. Consequently, desperately needing to correct the oversight, the United States then asserted that it was not bound by state or territorial water laws based on the appropriation doctrine but, instead, held a different kind of water right, a "reserved right." In general, a reserved right stands for the proposition that, when the United States reserves a piece of land, it also impliedly reserves enough water to carry out the purposes of the land reservation with a water reservation. This concept was greeted with open arms by the federal judiciary and, finally,

Historically, the uncertain scope and nature of federal water rights, tended to retard water development in the Western states.³ Initially, the federal rights (especially the reserved right) were quantified only when the United States needed water. In these situations it usually took water away from existing appropriators through actions for injunctive relief.⁴ Subsequently, Western appropriators and states sought to obtain judicial determinations in advance of the actual needs of the federal government since it would not otherwise disclose how much water it might claim. Those early quantification attempts inevitably failed. The United States was always successful in asserting sovereign immunity.⁵ Frustrated, the states convinced their congressional delegations to support legislation which would waive that defense on behalf of the United States. In 1952, Congress finally waived the immunity in what is referred to today as the "McCarran Amendment."⁶

Following enactment of the McCarran Amendment, Western states successfully brought the federal government into state courts for the deter-

the United States Supreme Court in *Winters v. United States*, 207 U.S. 564 (1908) a decision involving the Fort Belknap Indian reservation in Montana. Thereafter, it was commonly assumed that the reserved right or the *Winters* right was applicable to only Indian reservations. By 1955, however, it was clear that the reserved right would be extended to other types of reservations as well. See *Federal Power Comm'n v. Oregon*, 349 U.S. 435 (1955); and *Cappaert v. United States*, 426 U.S. 128 (1976).

2. As Western water was appropriated, inevitable conflicts arose among users. The most difficult aspect of that early water litigation was the determination of exactly what water rights existed, since there was seldom any reliable record evidence of even the existence of a water right, let alone its amount, use, point of diversion, priority, etc. After competing water users resolved to go to court, their options were limited and generally unsatisfactory. Tort actions involved far more than simply defining the water rights involved and, moreover, were binding only on the parties to that particular controversy. Quiet title actions were cumbersome and were accompanied by inevitable notice and jurisdictional problems. The modern declaratory judgment action was usually not available. Consequently, state legislatures, or courts, soon created a new proceeding, derived from quiet title actions but akin to today's declaratory judgment action, which allowed the judicial determination of water rights *before* conflicts arose. Although each state approach was slightly different, each generally included the following elements. *Petition*: Either a water user or state engineer would petition the court to conduct an adjudication for a particular stream system. *Notice*: The court would provide personal notice to those water users whose names were given to it and would publish notice of the adjudication. Both notices would advise water users to prove their rights or suffer their subordination to other claims being adjudicated. *Statements of Claim*: Each water user would then, usually by counsel, file a statement of claim for each of their water rights. *Hearings*: After the cutoff date for statements of claim, the court would conduct factual hearings on them. The testimony was usually straightforward (location, use, date, amount) and often without cross-examination. *Decree*: At the conclusion of the hearing, the court would prepare a tabulation of the water rights in order of their priority, incorporating it in its decree and often disclaiming any finding with respect to water right ownership. *Administration*: The court's decree would then serve as the warrant of the stream's water commissioner who would police the use of the water rights to insure that no more water was diverted than that to which each right was entitled and that, in times of shortage in stream flows, all water rights divested strictly in their order of priority.

3. Hypotheticals illustrating these kinds of uncertainties can be found at Trelease, *Government Ownership and Trusteeship of Water*, 45 CALIF. L.REV. 638, 652-53 (1957).

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

5. See, e.g., *Dugan v. Rank*, 372 U.S. 609, 618, *aff'd in part sub nom. City of Fresno v. California*, 372 U.S. 627 (1963).

6. Amendment to Departments of State, Justice, Commerce, and the Judiciary Appropriations Act, Pub. L. No. 945, Title II, §§ 208(a)-(c), 66 Stat. 560 (1952), (codified at 43 U.S.C. § 666 (1982)).

mination of federal reserved rights as part of a particular state's existing general adjudication processes. Those adjudications were among the most complex, time consuming, and expensive of litigation. Recently, some states have sought to avoid or abort such litigation in favor of negotiation or settlement.⁷ In order to do so, however, there needed to be *excess water* or *excess money* (for construction of storage facilities) available to satisfy federal reserved rights claims. Unfortunately, unappropriated water has not been available in all Western rivers for that purpose. In addition, during these economic times, there is precious little excess money available, even from the federal government itself. Finally, the current trend seems to be for Indians to attempt off-reservation marketing of water in excess of their reservation needs.⁸ Such an approach, especially when diversions by non-Indian appropriators are curtailed, usually "sticks in the craw" of Western states.

Since negotiated settlements may no longer be universally acceptable or practical, states and their water users are again forced to explore adjudications, with all their obvious deficiencies. That inquiry requires (1) the identification of the most objectionable problems with McCarran adjudications, and (2) the resolution of those problems.

THE INHERENT NATURE OF GENERAL ADJUDICATIONS

The pertinent characteristics of the general state adjudications into which the states sought to bring the United States were two-fold. Generally, they were lengthy, and usually they included a multitude of parties. It was not unheard of for several hundred parties and water rights to be involved, necessitating drawn-out and bifurcated proceedings.⁹ As a result, fifteen to twenty years frequently elapsed between initiation of adjudication and entry of decree.¹⁰ Historically, however, as long as all water users got along there was no adjudication.¹¹

Because even the more streamlined approach offered by adjudication procedures proved to be less than satisfactory in most states a variety of modification arose and can be classed into three basic categories. *Master/Referees*: Recognizing the time-consuming but uncomplicated nature of the work involved, courts frequently assigned masters or referees to handle ministerial work.¹² *Administrative Procedures*: Further recogniz-

7. For a related article on settlement of federal Indian reserved water rights in this issue, see Tarlock, *One River, Three Sovereigns: Indian and Interstate Water Rights*, XXII LAND & WATER L. REV. 631 (1987).

8. *Id.*

9. *See, e.g.* Colorado v. Southwestern Colorado Water Conservancy Dist., 671 P.2d 1294 (Colo. 1983).

10. *See, e.g.* City and County of Denver v. Colorado Water Conservation Dist., 696 P.2d 730 (Colo. 1985); *see also* United States v. Dist. Court in and for the County of Eagle, 169 Colo. 555, 458 P.2d 760 (1969), *aff'd* 401 U.S. 520 (1971).

11. In 1972, for example, I handled first adjudication on the Colorado River which included water rights one-hundred years old.

12. *See, eg.*, 182 Cal. App. 3d 82, 227 Cal. Rptr. 161 (1986), the United States v. State Water Resources Control Board; *see also* United States v. Super. Court, 144 Ariz. 265, 697

ing that the entire function of the court was virtually ministerial in nature, many states (*e.g.*, Wyoming and the many states which copied its system) opted for a more efficient administrative permit system with permits being issued on a continuing basis, judicial review often being had only in event of dispute and typically under the state's administrative procedure act.¹³ *Continuing Adjudications*: Other states, principally Colorado, have abandoned the individual adjudication approach in favor of keeping the courts open to deal with individual water rights whenever they are presented for adjudication.¹⁴

INITIAL USE OF THE GENERAL ADJUDICATION PROCESS TO DEAL WITH FEDERAL WATER RIGHTS

Into this traditional adjudication process, the states and water users wished to bring an unwilling United States. While the McCarran Amendment's waiver is simple to describe, the specific legislative language,¹⁵ bears careful study. The judicial gloss that has been added during thirty-five years to the original statute now establishes a ritualized insect dance as a condition precedent to the actual waiver:

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

(b) Summons or other *process* in any such suit shall be served upon the Attorney General or his designated representative.¹⁶

The primary congressional intent behind this language was to require the United States to participate in state water adjudications to the same extent as every other water right owner.¹⁷ Despite that intent, the federal government must be given special treatment, carefully tailored to meet McCarran Amendment requirements, in such proceedings.

P.2d 658 (1985); *New Mexico v. McLean*, 76 N.M. 45, 412 P.2d 1 (1966); *City of Pasadena v. City of Alhambra*, 33 Cal. 2d 908, 207 P.2d 17 (1949); *Handy Ditch Co. v. Sixth Side Ditch Co.*, 26 Colo. 333, 58 P. 30 (1899).

13. See WYO. STAT. ANN. §§ 41-1-101 to -5-203 (1977 & Supp. 1986).

14. See COLO. REV. STAT. §§ 37-92-101 to -602 (1973 & Supp. 1986).

15. 43 U.S.C. § 666 (1982).

16. *Id.* (emphasis in original and added).

17. See SEN. R. 755, 82d Cong., 1st Sess. (1951).

The lessons of well over one-hundred subsequent cases, which refer to or construe the McCarran Amendment's waiver of sovereign immunity, can be summarized as follows:

1. The action must be a "suit," *i.e.* a judicial and not an administrative proceeding.¹⁸ With respect to this requirement, although courts may not be inclined to inquire too closely,¹⁹ the probable rule is that, so long as a judicial determination is an integral part of the adjudication process, it probably qualifies as a "suit."²⁰

2. The litigation must be a true "adjudication," *i.e.* a general adjudication of all water rights on a "river system."²¹ While some courts have found this requirement to be satisfied by class actions,²² others have not.²³ The definition of "river system," however, is fairly relaxed. It does not mean, for example, that all the rivers in a valley must be included. Rather a single river is sufficient.²⁴ This can include a small tributary, or that portion of the mainstream of an intrastate river located within one state.²⁵

3. The relief claimed must be an *inter sesse* determination of all water rights.²⁶ All claimants, however, need not be joined immediately, so long as they become parties eventually.²⁷ Furthermore, the adjudication must include only claimants filing in one particular action and need not involve claimants in previous adjudications;²⁸ although such a situation probably raises the spectre of "antedation."²⁹ The waiver is usually not effective when the

18. Rank v. Krug, 142 F. Supp. 1 (D.C. 1956), *aff'd in part, rev'd in part on other grounds sub nom.* California v. Rank, 293 F.2d 340 (9th Cir. 1961), *modified on other grounds* 307 F.2d 96 (9th Cir. 1962), *aff'd in part, rev'd in part on other grounds sub nom.* Dugan v. Rank, 372 U.S. 609 (1963), *aff'd in part sub nom.* City of Fresno v. California, 372 U.S. 627 (1963).

19. Barcellos & Wolfson, Inc. v. Westlands Water Dist., 491 F. Supp. 263 (E.D. Cal. 1980); *see also* United States v. Adair, 723 F.2d 1394 (9th Cir. 1984); United States v. Bluewater-Toltec Irrig. Dist., 580 F. Supp. 1434 (D.N.M. 1984).

20. Pacific Livestock Co. v. Lewis, 241 U.S. 440 (1916).

21. Town of Durham v. United States, 167 F. Supp. 436 (D.N.H. 1958); *see also* Hurley v. Abbott, 259 F. Supp. 669 (D. Ariz. 1966); Seacoast Water Comm'n v. City of Portsmouth, 106 N.H. 15, 203 A.2d 649 (1964).

22. Rank v. Krug, 142 F. Supp. 1 (D.C. 1956), *aff'd in part, rev'd in part on other grounds sub nom.* California v. Rank, 293 F. 2d 340 (9th Cir.1961), *modified on other grounds* 307 F.2d 96 (9th Cir. 1962), *aff'd in part, rev'd in part on other grounds sub nom.* Dugan v. Rank, 372 U.S. 609 (1963), *aff'd in part sub nom.* City of Fresno v. California, 372 U.S. 627 (1963). *See also* Spanish Fork West Field Irrig. Co. v. United States, 9 Utah 2d 428, 347 P.2d 184 (1959).

23. City of Chino v. Super. Court of Orange County, 255 Cal. App. 2d 747, 63 Cal. Rptr. 532 (1967).

24. Rank v. Krug, 142 F. Supp. 1 (D.C. 1956), *aff'd in part on other grounds sub nom.* California v. Rank, 293 F.2d 340 (9th Cir. 1961), *modified on other grounds* 307 F.2d 96 (9th Cir. 1962), *aff'd in part, rev'd in part on other grounds sub nom.* Dugan v. Rank, 372 U.S. 609 (1963), *aff'd in part sub nom.* City of Fresno v. California, 372 U.S. 627 (1963).

25. United States v. Dist. Court in and for the County of Eagle, 401 U.S. 520 (1971).
26. United States v. Adair, 723 F.2d 1394 (9th Cir. 1984); *see also* Barcellos & Wolfson, Inc. v. Westlands Water Dist., 491 F. Supp. 263 (E.D. Cal. 1980).

27. United States v. Bluewater-Toltec Irrig. Dist., 580 F. Supp. 1434 (D.N.M. 1984).

28. United States v. Dist. Court in and for Water Div. No. 5, 401 U.S. 527 (1971).

29. United States v. Bell, 724 P.2d 631, 644-45 (Colo. 1986).

relief sought is injunctive,³⁰ declaratory,³¹ or the *nunc pro tunc* correction of an existing decree.³²

4. Every conceivable type of federal water right is subject to determination: appropriative,³³ riparian,³⁴ reserved,³⁵ Indian,³⁶ and Indian in "disclaimer" states.³⁷

5. Notwithstanding the waiver of the right to plead that state law is inapplicable,³⁸ federal water rights are generally determined based on federal law,³⁹ even though there is purportedly no distinct body of federal water law.⁴⁰ Despite this, certain state law concepts, such as quantification, will be applied to federal water rights.⁴¹ In some instances, however, the McCarran waiver may not repeal immunities created by other federal statutes.⁴²

6. While the McCarran waiver of sovereign immunity allows state court adjudication of federal water rights, state and federal jurisdiction is concurrent, federal jurisdiction was not abolished by the McCarran waiver.⁴³ Nevertheless, "wise judicial administration" may require the dismissal of a suit in federal court in favor of a concurrent state adjudication in which the United States has been properly joined.⁴⁴

30. *California v. Rank*, 293 F.2d 340 (9th Cir. 1961), *modified on other grounds*, 307 F.2d 96 (9th Cir. 1962), *aff'd in part, rev'd in part on other grounds sub nom. Dugan v. Rank*, 372 U.S. 609 (1963), *aff'd in part sub nom. City of Fresno v. California*, 372 U.S. 627 (1963); *see also Turner v. Kings River Conservation Dist.*, 360 F.2d 184 (9th Cir. 1966); *Town of Durham v. United States*, 167 F. Supp. 436 (D.N.H. 1958).

31. *Miller v. Jennings*, 243 F.2d 157 (5th Cir.), *cert. denied*, 355 U.S. 927, *reh'g denied*, 355 U.S. 885 (1957); *see also City of Fresno v. California*, 372 U.S. 627 (1963); *Bryan v. Westside Calhoun County Navigation Dist.*, 202 F. Supp. 201 (S.D. Tex. 1961).

32. *United States v. Hennen*, 300 F. Supp. 256 (D. Nev. 1968).

33. *United States v. Dist. Court in and for the County of Eagle*, 169 Colo. 555, 458 P.2d 760 (1969), *aff'd* 401 U.S. 520 (1971); *see also In re Green River Drainage Area*, 147 F. Supp. 127 (D. Utah 1956).

34. *United States v. District Court in and for the County of Eagle*, 169 Colo. 555, 458 P.2d 760 (1969), *aff'd* 401 U.S. 520 (1971).

35. *Id. see also State ex rel. Reynolds v. Lewis*, 88 N.M. 636, 545 P.2d 1014 (1976).

36. *In re Determination of Conflicting Rights to Use of Water from Salt River Above Granite Reef Dam*, 484 F. Supp. 778 (D. Ariz. 1980); *see also Jicarilla Apache Tribe v. United States*, 601 F.2d 1116 (9th Cir. 1979), *cert. denied* 444 U.S. 995 (1979); *Reynolds v. Lewis*, 88 N.M. 636, 545 P.2d 1014 (1976).

37. *Reynolds v. Lewis*, 88 N.M. 636, 545 P.2d 1014 (1976); *see also Montana ex rel. Greeley v. Confederated Salish and Kootenai Tribes of the Flathead Reservation*, 712 P.2d 754 (Mont. 1985); *United States v. Super. Court of County of Maricopa*, 144 Ariz. 265, 697 P.2d 658 (1985); *Arizona v. San Carlos Apache Tribe of Indians*, 463 U.S. 545 (1983).

38. 43 U.S.C. § 666(a) (1982).

39. *Nevada ex rel. Shamberger v. United States*, 165 F. Supp. 600 (D. Nev. 1958); *see also In re Determination of Conflicting Rights to Use of Water from Salt River Above Granite Reef Dam*, 484 F. Supp. 778 (D. Ariz. 1980).

40. *United States v. Hennen*, 300 F. Supp. 256 (D. Nev. 1968).

41. *Avondale Irrig. Dist. v. North Idaho Properties, Inc.*, 96 Idaho 1, 523 P.2d 818 (1974); *see also United States v. Denver*, 656 P.2d 1 (Colo. 1982).

42. *Lenoir v. Porters Creek Watershed Dist.*, 568 F.2d 1081 (6th Cir. 1978).

43. *Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800, *reh'g denied* 426 U.S. 912 (1976); *see also Beck v. California*, 479 F. Supp. 392 (C.D. Cal. 1979); *In re Green River Drainage Area*, 147 F. Supp. 127 (D. Utah 1956).

44. *Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800, *reh'g denied* 426 U.S. 912 (1976).

7. The McCarran Amendment does not implicitly provide for, or prohibit the removal of, state court adjudications to federal courts. If all defendants join in the removal petition and other statutory requirements have been satisfied, however, removal is appropriate.⁴⁵

8. Once properly joined, the United States may default.⁴⁶

9. Whether filing fees are proscribed "costs"⁴⁷ remains undecided, although the United States, on occasion, has agreed to pay them.⁴⁸

10. A "suit for administration" may well be appropriate only after adjudication, to enforce the resulting decree.⁴⁹ In the non-Indian context, at least, that administration is to be undertaken by the state,⁵⁰ and includes quiet title actions involving any previously adjudicated water right.⁵¹

THE CURRENT CLIMATE FOR RESOLUTION OF FEDERAL WATER RIGHTS REGARDLESS OF THE FORM OF RESOLUTION.

Like any complex litigation, McCarran adjudications have several major drawbacks which rational parties will wish to avoid. Consequently, these parties often search out alternatives to litigation.⁵² Regardless of the form of resolution selected, the inherent characteristic of all such forms seems to be the social, political, and institutional schizophrenia resulting from the incompatibility of being fair while at the same time obtaining certainty. Upon that issue, there seems to be a common polarization. States and their water users not only want certainty, but also a little justice, at least for themselves. Certainty is essential to those interests so that water-dependent development can proceed. Justice, at least from that viewpoint, dictates that whatever resolution may be reached, will not injure present users. The United States, on the other hand, appears to prefer its own brand of justice. Historically and currently, the United States is generally content to leave its water rights unadjudicated—at least until those rights must be finally exercised. Little regard is given to the resultant uncertainty this absence of adjudication imposes on non-federal water right development. The federal view tends to be focused

45. South Dakota *ex rel.* Meierhenry v. Rippling Water Ranch, Inc., 531 F. Supp. 449 (D.S.D. 1982); *see also* National Audubon Soc'y v. Dept. of Water & Power of City of Los Angeles, 496 F. Supp. 499 (E.D. Cal. 1980); *cf.* New Mexico *ex rel.* Reynolds v. United States, 408 F. Supp. 1029 (D.N.M. 1975).

46. Rank v. Krug, 142 F. Supp. 1 (D.C. 1956), *aff'd in part, rev'd in part on other grounds sub nom.* California v. Rank, 293 F.2d 340 (9th Cir. 1962), *modified on other grounds* 307 F. 2d 96 (9th Cir. 1962), *aff'd in part, rev'd in part on other grounds sub nom.* Dugan v. Rank, 372 U.S. 609 (1963), *aff'd in part sub nom.* City of Fresno v. California, 372 U.S. 627 (1963).

47. An example here is expert witness fees.

48. *See, e.g.* United States v. Denver, 656 P.2d 1 (Colo. 1982).

49. South Delta Water Agency v. United States, 767 F.2d 531 (9th Cir. 1985).

50. United States v. Denver, 656 P.2d 1 (Colo. 1982).

51. Federal Youth Center v. Dist. Court in and for the County of Jefferson, 169 Colo. 555, 458 P.2d 760 (1969).

52. *See supra* note 7.

narrowly on receiving at least that water that is necessary to operate federal facilities and reservations, and perhaps more.

It is fashionable today to bewail the problems of litigation and to wonder aloud why reasonable people cannot resolve federal water right issues without resorting to the courts. While a number of successful negotiated settlements of federal water rights, including those claimed on behalf of Indians, have occurred,⁵³ it appears to be virtually Hornbook Law that those resolutions will not occur in the absence of excess water or excess money necessary to fund the settlement.⁵⁴ Furthermore, the operational results of those settlements have not always been happy chapters in the history of Western water development.⁵⁵

CRITICISM OF THE GENERAL ADJUDICATION PROCESS AS A TOOL TO RESOLVE FEDERAL WATER RIGHT CLAIMS

The most frequently voiced criticisms of general adjudications in which the United States has been joined pursuant to the McCarran Amendment are that the proceedings are: too expensive, too time-consuming, promote overreaching, exacerbate differences and promote distrust, and reach uneven results. To some extent, these criticisms are fairly shared by McCarran Amendment adjudications with virtually every other form of complex litigation. These criticisms may reflect no more than the modern impatience with litigation in general. While it is expensive indeed to litigate federal water rights claims in the general adjudication setting, it is important to remember that the *unit* costs of adjudication are not that great.

For example, in Wyoming's Big Horn Adjudication, involving virtually every type of water right and all water users on a major stream system, the costs were less than \$10.00 per acre-foot awarded and no more than \$5.00 per acre-foot claimed. While the total cost in adjudications involving hundreds of thousands of acre-feet can be quite substantial, it is important to maintain a perspective recognizing that we are dealing with units of water which are invariably adjudicated for a very small fraction of their fair market value. Furthermore, although McCarran Amendment adjudications are thought to take far too long to reach final judgment, it is likewise important to remember that general adjudications themselves have historically taken a decade or more to complete. Were one to calculate the amount of adjudication time required for each acre-foot of water, there is little doubt that the time involved is fairly insubstantial. For example, in Wyoming's Big Horn Adjudication, the adjudication time was less than four days per acre-foot from the time the complaint was filed to the entry of the Wyoming Supreme Court's judgment, which followed removal and remand proceedings, extensive discovery, almost a year of trial before a master, review of the master's report by the district court, and appeal of the district court decision by all parties to the Wyoming Supreme Court.

53. *Id.*

54. *Id.*

55. Folk-Williams, *What Indian Water Means to the West*, 1 WATER IN THE WEST 13-15 (1982).

Notwithstanding the obvious unit economies in general adjudication, there are a number of areas in which there can be substantial improvements. Those improvements fall into two broad categories: (1) improved performance by litigants under the existing procedures dictated by the McCarran Amendment, and (2) congressional modifications of the McCarran Amendment procedures.

PRACTICAL IMPROVEMENTS TO THE CONDUCT OF McCARRAN ADJUDICATIONS

As explained above, reported decisions establish with fair specificity the attributes necessary for general adjudications in which the United States can be joined under the McCarran Amendment. Within those procedures, however, there are ample opportunities for the litigants to take decisive and practical steps which will eliminate many adjudications' disadvantages. For example, states should take the lead in the litigation and staff the litigation, on both sides of the bench, with highly qualified personnel. The judge, or more likely the master, should be ruthless and experienced. All too often, whether young or old, the lawyer selected as a master is inexperienced⁵⁶ or has become rusty in the courtroom in general, and is particularly unfamiliar with water adjudications. Consequently, an inordinate amount of time is wasted while a court learns the ropes, frustrating early progress by the parties. Similarly, the selection of counsel, by all parties, will have a dramatic impact on eventual costs. Lawyers experienced in water adjudications can quickly get to the heart of the controversy, while those who are not, will inevitably create a period of prolonged agony for everyone involved.⁵⁷ Finally, a word must be said about the expert witnesses who dominate the factual presentations in litigation which is essentially fact-centered. Those experts must enjoy the highest qualifications, not necessarily as academics, but as practitioners and as witnesses. Furthermore, an experienced master, and experienced counsel, should insist on the absolutely invaluable step of putting all of the experts together in an attempt to reach stipulations as to all but the most hotly contested facts. Lastly, both the United States and the state can develop their litigation strategy so as to facilitate the litigation. The state, for example, should initiate the adjudication, thus reducing the economic burden on nongovernmental parties and promoting efficiencies of scale in litigation preparation. In addition, with careful planning, the state can develop information and techniques which will spin-off information of value to future water resources planning and administration, outside the litigation context.⁵⁸ From a federal standpoint, although it appears to be standing policy that the United States will not participate

56. For example, during my first day of trial as a Colorado Master-Referee, despite two year's experience in water litigation, I unhappily was unable to recite the oath when swearing in the first witness. Without a script immediately available (it had been offered by the clerk, but rejected by me in my arrogance) I was forced to call a recess and recover the clerk's copy of the oath.

57. *Jane Doe v. United States Dept. of Justice*, 753 F.2d 1092 (D.C. Cir. 1985).

58. The computer model developed by the State of Wyoming in the Big Horn Adjudication, for example, is suitable for use in all areas of the state, once a correspondingly-detailed data base is developed with respect to stream flows and the exercise of water rights.

in general adjudications unless involuntarily joined,⁵⁹ the United States can certainly be more aggressive and forthcoming in the assertion of its claims and its response to discovery once it is joined.⁶⁰

FURTHER AMENDMENTS TO McCARRAN

While it may be a bit professorial to suggest statutory revisions in the McCarran Amendment, several could be made, at least in terms of removing many of the drawbacks to litigating federal water rights. Remedial legislative action should focus on three aspects of the McCarran Amendment: (1) reassessment of the need for a "suit" as a precondition to waiver of sovereign immunity,⁶¹ (2) removal of the judicial gloss requiring that an adjudication of federal rights be "general" in nature, involving all water users on a stream system,⁶² and (3) removal of the prohibition against the assessment of costs against the United States.⁶³ Since very few of the Western states still use general adjudications in water right determinations as a matter of course, having adopted a more streamlined administrative permit system in their place, the most appropriate resolution procedure in those states would be the same administrative approach used for all other water rights. As a practical matter, it is doubtful that Congress really intended that the classic general adjudication be the only situation in which the United States could be involuntarily joined. Senator McCarran (from Nevada, which is a long-standing permit state)⁶⁴ either did not realize the nature of his own state's adjudication process or expected that administrative adjudications would satisfy the requirements of his amendment. By removing the "suit" requirement, states could resolve federal water right claims without the now unusual step of conducting a general adjudication which often requires, among other things, the enactment of new legislation.⁶⁵ Water adjudications are no exception to the general rule that the complexity of litigation increases geometrically with the number of parties. By requiring the adjudication of federal water rights to be one which is "general" in nature, the federal judiciary has created remarkable roadblocks to the judicial determination of federal water rights. If, instead of requiring a "general" adjudication involving all water users on a river system, the McCarran Amendment was amended to allow determination of federal water rights, the result would be a very clean and straight-forward determination of federal water rights. This determination would also be made using exactly the same procedure which is used for any other water user in permit states. The theoretical difficulty with doing this is the issue of antedation. This issue

59. *Sierra Club v. Andrus*, 487 F. Supp. 443 (D.C. 1980).

60. In the Big Horn Adjudication, for example, approximately three years were consumed by jurisdictional wrangling, the United States' resistance to discovery, and the United States' reluctance or inability to state its claims with specificity.

61. See *supra* notes 18-20.

62. See *supra* notes 21-25.

63. See *supra* note 16.

64. NEV. REV. STAT. §§ 533.325 to .435 (1986).

65. See, e.g., 1977 Wyo. Sess. Laws ch. 2.

could be handled conveniently under the typical judicial review of administrative decisions as it arose.

Finally, by prohibiting the assessment of costs against the United States, which has been argued to include even filing fees, the McCarran Amendment imposes the entire financial burden of conducting the litigation on the state rather than on the water claimants themselves.⁶⁶ Since classic general adjudications usually resulted in the allocation of costs among the various claimants at the time of the decree, the Amendment's prohibition actively discourages adjudication of federal claims in these financially-difficult times. Why the United States, as a representative of the entire public, should be exempted from contributing its fair share of the institutional costs of adjudicating its water rights, makes little sense. By excusing the United States from paying its fair share of costs the McCarran Amendment encourages the very federal footdragging that is largely responsible for the significantly high cost of adjudicating its water rights.

CONCLUSION

After thirty-five years of experience under the McCarran Amendment, as was the case with the fellow who carried the cat home by the tail, we have learned several important and lasting lessons. General adjudications, while inherently cumbersome, time-consuming, and expensive, may well be the only tool by which federal water rights can be determined with specificity and finality. Nevertheless, there are practical steps which can be taken by responsible litigants to substantially reduce the disadvantages of this or any other type of complex litigation. Finally, while it may smack of looking a gift horse in the mouth, the McCarran Amendment's waiver of sovereign immunity is in dire need of revision. As it stands now, the Amendment dictates what often is a prohibitively expensive and time-consuming litigation. By thoughtful re-examination of the waiver, Congress could dramatically simplify adjudication of federal water rights.

66. 43 U.S.C. § 666(a) (1982).

