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WATER RIGHTS: THE McCARRAN AMENDMENT AND INDIAN TRIBES' RESERVED WATER RIGHTS

Elizabeth McCallister

In *Colorado River Water Conservation District v. United States*, conjointly with *Akin v. United States*,¹ the Supreme Court inaugurated a new era in the adjudication of water rights for Indian tribes by holding that state courts have jurisdiction over reserved water rights for Indian tribes. *Akin* departed from a congressional policy permitting the adjudication of Indian property rights and disputes involving Indian country solely in federal courts.² Moreover, the Court departed from its own policy of leaving Indian tribes and their property rights free from state jurisdiction.³ Clearly a radical departure from past holdings, the Court based its decision on the McCarran Amendment,⁴ two prior Supreme Court cases,⁵ and the availability of a judicial system for adjudication of water rights.⁶ This note will determine the effects that *Akin* may have on the adjudication of Indian tribes' reserved water rights from surface streams on Indian reservations and use of water originating upstream from the reservations. It does not discuss Indian use of ground water or rights of Indian allottees.

The definition of a reserved water right of an Indian tribe is essential in determining whether the McCarran Amendment confers jurisdiction. In *Winters v. United States*,⁷ the Supreme Court held that the United States reserved water rights for the Indians by implication when the reservations were created.⁸ This position has not been seriously questioned.⁹ *Winters* held that "the Government, when it created that Indian reservation, intended to deal fairly with the Indians by reserving for them the waters without which their lands would have been useless."¹⁰ The United States holds legal title or "owns" reserved Indian water rights, much like a trustee who owns legal title to a trust *res*.¹¹ This special relationship between the United States and Indian tribes has long been recognized.¹² Therefore, the United States as "owner" of Indian reserved water rights can be joined as a defendant in general stream adjudication in state courts under the McCarran Amendment.¹³

Past doctrine indicated that state courts had been barred by the doctrine of sovereign immunity from entertaining any suits against the United States to determine any of its water rights, be they fixed, reserved, or rights held as trustee for the Indian tribes.¹⁴ It is likewise undisputed that, in the absence of specific congressional language,

Indian tribes may not be joined as defendants for a determination of their rights.¹⁵ Therefore, if state courts do have jurisdiction to adjudicate reserved water rights, that jurisdiction must be derived from the McCarran Amendment.

On its face, the McCarran Amendment supports the view of the *Akin* Court. The McCarran Amendment provides:

(a) 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. . . . 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. . . . (c) Nothing in this Act shall be construed as authorizing the joinder of the United States in any suit or controversy in the Supreme Court of the United States involving the right of States to the use of the water of any interstate stream.¹⁶

However, the legislative history does not support this view. A predecessor to the McCarran Amendment, Senate Bill No. 18 in the 82nd Congress, indicated that the sponsors were concerned with water rights the United States acquired from individuals and not with reserved rights held by the United States as trustee for various Indian tribes.¹⁷ Acting Assistant Secretary of the Interior, Mastin G. White, recommended against enactment unless state court actions involving water rights held by the United States on behalf of Indian tribes were excluded.¹⁸ Significantly, this was the only mention of Indian reserved water rights.¹⁹ Furthermore, Sections 1360(b)²⁰ and 1362²¹ of Title 28 of the United States Code indicate that Congress did not grant to state courts jurisdiction over Indian reserved water rights.

The United States Tenth Circuit Court of Appeals in *Akin* held that the McCarran Amendment allows the United States to be joined as a defendant in any state court action involving the United States' water rights,²² but did not impliedly repeal, with respect to water rights cases, a general statute authorizing federal district courts to exercise original jurisdiction over all civil action commenced by the United States.²³ The Supreme Court concurred with the findings of the appeals court concerning jurisdiction.²⁴ Senator Pat McCarran, the bill's principal sponsor, stated that the McCarran Amendment

... 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 any subsequent decree would be of little value.²⁵

The McCarran Amendment permits, but does not necessarily require, the United States to be subjected to state jurisdiction.²⁶

The Court cited *United States v. District Court for Eagle County*²⁷ and *United States v. District Court for Water Division No. 5*²⁸ for the proposition that Indian tribes' reserved water rights come within the interpretation of the McCarran Amendment. The United States initiated a writ in the Colorado Supreme Court seeking to prohibit the District Court of Eagle County from asserting jurisdiction over the United States in a supplemental water adjudication.²⁹ The government asserted that the state court did not have jurisdiction to adjudicate the reserved water rights under the McCarran Amendment.³⁰ The Colorado Supreme Court discharged the rule.³¹ The United States Supreme Court held that the McCarran Amendment gave consent to join the United States as defendant in a suit for adjudication of rights to use of water of river systems.³² The Court concluded that the amendment applies to appropriated rights, riparian rights, and reserved rights.³³

United States v. District Court for Water Division No. 5 is a companion case to *Eagle County*.³⁴ The United States asserted that all the water users and their rights on a stream system are not involved in the referee's determination on a monthly basis and this procedure does not constitute general adjudications.³⁵ The Court held that the state statutory proceedings reach all claims in their totality, although adjudication is made on a monthly basis and is within the interpretation of the McCarran Amendment.³⁶ The question of state court jurisdiction to adjudicate Indian reserved water rights was not before the Supreme Court in either case.³⁷ However, the *Akin* Court viewed the government's trusteeship of Indian reserved water rights as ownership, and held that the logic of those cases clearly extended to such rights.³⁸

The *Akin* Court recognized that the case turned, not on a jurisdictional problem of federal courts to adjudicate United States' claims concerning reserved water rights, but on whether the Colorado system for allocation of water and the adjudication of conflicting claims to that resource were adequate to resolve the federal claims.³⁹ The majority of the Supreme Court recognized that the

Colorado system had established elaborate procedures for the allocation of water and the adjudication of conflicting claims to that resource.⁴⁰ The Court stated that this would avoid a "piecemeal adjudication of water rights."⁴¹

However, Justice Stewart, dissenting, asserted that, "First, the issues involved are issues of federal law. A federal court is more likely than a state court to be familiar with federal water law and to have had experience in interpreting the relevant federal statutes, regulations, and Indian treaties."⁴² He stated: "It is not necessary to determine that there is no state-court jurisdiction of these claims to support the proposition that a federal court is a more appropriate forum than a state court for determination of questions of life-and-death importance to Indians."⁴³

Justice Stevens agreed: "I find the holding that the United States may not litigate a federal claim in a federal court having jurisdiction thereof particularly anomalous."⁴⁴ Another effect that this holding could have, according to Stevens, would be to impair the private citizen's right as well as that of the United States to assert a federal claim in a federal court.⁴⁵

The effect of the amendment is to give concurrent jurisdiction to the state and federal courts over controversies involving federal rights to the use of water. There is no irreconcilability in the existence of concurrent state and federal jurisdiction.⁴⁶ Justice Brennan stated that concurrent jurisdiction rests not on considerations of proper constitutional adjudication or state-federal regulation, but on considerations of "wise judicial administration, giving regard to conservation of judicial resources and comprehensive disposition of litigation."⁴⁷ However, he concluded that only in exceptional circumstances will a federal suit be dismissed because of the presence of concurrent state proceedings.⁴⁸ The Court held that the McCaran Amendment did not diminish federal district court jurisdiction under Section 1345 of Title 28 of the United States Code.⁴⁹

On remand the Colorado state court will have to consider federal and state law in the allocation, through means of quantification⁵⁰ of the reserved water rights of Indian tribes.⁵¹ A positive aspect of quantification is that this serves as a notice of Indian priority to all non-Indian users.⁵² The Supreme Court held that this allocation does not depend upon present use, but belongs to the reservation for future use.⁵³

In determining quantification, the state court will have to decide whether Indians' priority dates from the creation of the reservation,⁵⁴ or if there is an aboriginal title to the water.⁵⁵

In *Arizona v. California*, the Supreme Court held that quantifica-

tion for the reserved water rights would be determined by the quantity needed for every irrigable acre on the reservation and it is irreducible.⁵⁶ However, not every reservation is an agricultural community. Some use their water in fisheries, or as the Navajo reservation has in building an electrical component industry, or in industries and tourist businesses.⁵⁷ The application of the theory of rights arising from aboriginal title would place no limitations on use of the streams under Indian ownership.⁵⁸

Problems in determining standards for quantification stem from conflicting theories on basic Indian law. It has been said that Indian rights stem from primitive tribal laws, federal laws, and quasi-contractual law.⁵⁹ In the Southwest, Indian rights are colored by Spanish law, which was applicable to them for more than two centuries.⁶⁰

Indian tribes have objected to hearings before a state court due to a tradition of controversies between state officials and Indians over water rights.⁶¹ One remedy would be to establish a federal agency for water rights adjudication.⁶² However, judicial review should be required because of the many issues of law presented.⁶³

Many Indian tribes are averse to any quantification of water rights, preferring to leave these rights free of limitations.⁶⁴ Yet, failure to make a positive determination has the vice of uncertainty. However, a final quantification, without any provision for future application for additional water based on projected water requirements, is not advisable as ignoring the possibility of variations in future requirements.⁶⁵

In conclusion, the Supreme Court gave state courts jurisdiction to adjudicate reserved water rights if the state has established an appropriate system for determining these rights. However, jurisdiction should be granted only if state courts will use the criteria necessary to determine the methods of quantification as established in *Arizona v. California*⁶⁶ and *United States v. Nevada*,⁶⁷ which provide that the allocation should be irreducible but with provisions for increase dependent on future variations in need. If the state courts follow this criteria, the prime drawback of this system resides in the fact that appeals from the state courts will be limited to a grant of certiorari from the United States Supreme Court. Otherwise, jurisdiction residing in state courts would not be as ill-advised as it now appears.

NOTES

1. 424 U.S. 800 (1976) [hereafter referred to in the text as *Akin*].
2. State *ex rel.* Reynolds v. Lewis, 88 N.M. 636, 545 P.2d 1014 (1976).
3. McClanahan v. Arizona Tax Comm'n, 411 U.S. 164 (1973). See also Mattz v. Arnett, 412 U.S. 481 (1973); Kennerly v. District Ct., 400 U.S. 423 (1971); Menominee Tribe v. United States, 391 U.S. 404 (1968).
4. 43 U.S.C. § 666 (1970).
5. See United States v. District Ct. for Water Div. No. 5, 401 U.S. 527 (1971); United States v. District Ct. for Eagle County, 401 U.S. 520 (1971).
6. See COLO. REV. STAT. ANN. § 37-92-101 *et seq.* (1974), which provides that the state is divided into seven water divisions, each division encompassing one or more entire drainage basin for the larger rivers in Colorado. Adjudication of water claims within each division occurs on a continuous basis. Each month, water referees in each division rule on applications for water rights filed within the preceding five months, or refer those applications to the water judge of their division. Every six months, the water judge passes on referred applications and contested decisions by referees. A state engineer and engineers for each division are responsible for the administration and distribution of the waters of the state according to the determinations in each division.
7. 207 U.S. 564 (1908).
8. *Id.*
9. State *ex rel.* Reynolds v. Lewis, 88 N.M. 636, 545 P.2d 1014, 1017 (1976).
10. 207 U.S. 564 (1908).
11. Arizona v. California, 373 U.S. 546, 600 (1963).
12. See, e.g., Seminole Nation v. United States, 316 U.S. 286, 296-97 (1942); United States v. Kagama, 118 U.S. 375, 381-84 (1886); Worcester v. Georgia, 31 U.S. (6 Pet.) 515 (1832); Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1 (1831).
13. State *ex rel.* Reynolds v. Lewis, 88 N.M. 636, 545 P. 2d 1014, 1018 (1976).
14. *Id.*
15. United States v. Fidelity & Guaranty Co., 309 U.S. 506 (1940).
16. 43 U.S.C. § 666 (1970).
17. See *Hearings Before a Subcomm. of the Comm. of the Judiciary on S. 18*, 82d Cong., 1st Sess., 8 (Apr. 25, Aug. 3, Aug. 8, 1959).
18. See S. REP. NO. 755, 82d Cong., 1st Sess., 8 (1951).
19. Colorado River Water Cons. Dist. v. United States *sub nom.* Akin v. United States, 424 U.S. 800 (1976).
20. 28 U.S.C. § 1360 (b) (1970) provides: "Nothing in this section shall authorize the alienation, encumbrance, or taxation of any real or personal property, including water rights, belonging to any Indian or any Indian tribe, band or community that is held in trust by the United States or is subject to a restriction against alienation imposed by the United States; or shall authorize regulation of the use of such property in a manner inconsistent with any Federal treaty, agreement, or statute or with any regulation made pursuant thereto; or shall confer jurisdiction upon the State to adjudicate, in probate proceedings or otherwise, the ownership or right to possession of such property or any interest therein."
21. 28 U.S.C. § 1362 (1970) provides: "The district courts shall have original jurisdiction of all civil actions, brought by an Indian tribe or band with a governing body duly recognized by the Secretary of the Interior, wherein the matter in controversy arises under the Constitution, laws or treaties of the United States."
22. United States v. Akin, 504 F.2d 115 (1974).

23. 28 U.S.C. § 1345 (1970).
24. 424 U.S. 800 (1976).
25. See S. REP. NO. 755, 82d Cong., 1st Sess., 8 (1951).
26. *United States v. Akin*, 504 F.2d 115, 119 (1974).
27. 401 U.S. 520 (1971).
28. 401 U.S. 527 (1971).
29. 401 U.S. 520 (1971).
30. *Id.* at 1001.
31. *Id.* at 999.
32. *Id.*
33. *Id.*
34. 401 U.S. 527 (1971).
35. *Id.*
36. *Id.*
37. 401 U.S. 520 (1971). See also 401 U.S. 527 (1971).
38. 424 U.S. 800 (1976).
39. *Id.*, 96 S.Ct. 1236, 1247.
40. *Id.*, 96 S.Ct. at 1239-40.
41. *Id.*, 96 S.Ct. at 1247.
42. *Id.*, 96 S.Ct. at 1250.
43. *Id.*, 96 S.Ct. at 1250-51.
44. *Id.*
45. *Id.*, 96 S.Ct. at 1250-51.
46. *Id.*, 96 S.Ct. at 1242.
47. *Id.*, 96 S.Ct. at 1246.
48. *Id.*
49. 28 U.S.C. § 1345 (1970).
50. U.S. National Water Comm'n, Final Report on Water Policies for the Future (1973), at 477 [hereinafter cited as Water Comm'n Report]. The volume of water to which Indians have rights is quantified by irrigable acreage within a reservation (*i.e.*, land which is practicable for irrigation) and not by Indian population, present use, or projected future use.
51. F. TRELEASE, FEDERAL-STATE RELATIONS IN WATER LAW 160-74 (National Technical Information Service 1971) [hereinafter cited as TRELEASE].
52. Water Comm'n Report, *supra* note 50, at 482.
53. *Arizona v. California*, 373 U.S. 546, 600 (1963).
54. *Winters v. United States*, 207 U.S. 564 (1908).
55. Veeder, *Indian Prior and Paramount Rights to the Use of Water*, 16 ROCKY MT. MIN. L. INST. 631 (1971). Many treaties can't be read as cessions to the United States of Indian titles to other lands. By this theory, the Indians, not the United States, reserved the water, so the aboriginal title to the water would be superior to appropriations made under state laws, even prior to the date of the creation of the reservation.
56. 373 U.S. 546 (1963).
57. Water Comm'n Report, *supra* note 50, at 475. See also *United States v. California & Nevada*, 412 U.S. 534 (1973).
58. TRELEASE, *supra* note 51, at 163.
59. Bloom, *Indian "Paramount" Rights to Water Use*, 16 ROCKY MT. MIN. L. INST. 669 (1971).
60. TRELEASE, *supra* note 51, at 165.
61. Water Comm'n Report, *supra* note 50, at 483.

- 62. *Id.* at 478.
- 63. *TRELEASE*, *supra* note 51, at 221.
- 64. Water Comm'n Report, *supra* note 50, at 476.
- 65. *Id.*
- 66. *Arizona v. California*, 373 U.S. 546 (1963).
- 67. *United States v. California & Nevada*, 412 U.S. 534 (1973).