

C. McCARRAN AMENDMENT CONSIDERATIONS.

1. McCarran Amendment Adjudication Issues.

A rather curious mystique about how the "McCarran Amendment" impacts the Montana water adjudication process seems to have come into being as that process has moved forward. We find it curious because the amendment itself was designed to provide a straightforward, simple solution to an unfortunate but simple problem.

The problem was that, because of the sovereign immunity of the United States, rights to the use of water claimed by the federal establishment under state law or federal law could not be adjudicated in state water right proceedings unless repre-

representatives of the United States waived the federal immunity to state court action and voluntarily subjected those rights to the jurisdiction of the state courts. As might be expected, no representative of the United States or of tribes claiming Winters doctrine rights was ever willing to voluntarily subject such claims to a state adjudication process.

As a result, prior to the McCarran Amendment, no state in which the federal establishment or the tribes claimed rights to the use of water could ever have a complete adjudication of water rights because there was no way the state process could identify and quantify those claims. For the public lands states of the west, where the federal and tribal establishments are the largest landowners, the situation became intolerable. No one could know whether his water right, once adjudicated in a state proceeding, had any usefulness at all so long as the specter of unquantified federal and tribal claims hung over his head.

To remedy this intolerable condition, congressional representatives of the western states persuaded the Congress to pass the "McCarran Amendment" in 1952. By its adoption, the Congress told the representatives of the United States that they could no longer hide behind the doctrine of sovereign immunity to prevent federal and tribal claims to water from being included in state adjudication proceedings if the United States was properly invited into those proceedings and if these proceedings were " * * * for the adjudication of rights to the use of water of a river system or source, * * *."

As might be expected, challenges to the use of the McCarran Amendment to get the United States into state proceedings have been raised in a number of cases. Those challenges have resulted in a body of law which interprets the intent of the McCarran Amendment and how the federal-state relationships are adjusted by its operation.

One challenge was based on a race to the courthouse theory. In Colorado River Water Conservation District v. United States,¹⁹ the federal government had brought suit in the United States District Court for the District of Colorado against some 1,000 local water users seeking a declaration of the government's water rights, both those based on state law and those based on federal reservations. Following commencement of the federal suit, a defendant in that suit initiated a state water adjudication proceeding and, following the procedure provided for under the McCarran Amendment, served the United States therein. Thereafter, the federal district court dismissed the federal case on the grounds that the doctrine of abstention required deference to the subsequently initiated state court proceedings. The issue finally decided by the United States Supreme Court was whether the operation of the McCarran Amendment terminated jurisdiction of federal courts to adjudicate federal water rights and whether, if that jurisdiction was not terminated, the district court's dismissal of the case was appropriate. That Court held that the McCarran Amendment's consent to jurisdiction in the state courts did not deprive the federal courts of jurisdiction, but made the state court's jurisdiction concurrent with the federal court's in matters involving federal rights to the use of water. Even so, the Court approved the dismissal of the federal court proceedings on the basis of "wise judicial administration, giving regard to conservation of judicial resources and comprehensive disposition of litigation."²⁰ The Court stated:

Turning to the present case, a number of factors clearly counsel against concurrent federal proceedings. The most important of these is the McCarran Amendment itself. The clear federal policy evinced by that legislation is the avoidance of piecemeal adjudication of water rights in a river system. This policy is akin to that underlying the rule requiring that jurisdiction be yielded to the Court first acquiring control of property, for the concern

in such instances is with avoiding the generation of additional litigation through permitting inconsistent dispositions of property. This concern is heightened with respect to water rights, the relationships among which are highly interdependent. Indeed, we have recognized that actions seeking the allocation of water essentially involve the disposition of property and are best conducted in unified proceedings. [Citations omitted.] The consent to jurisdiction given by the McCarran Amendment bespeaks a policy that recognizes the availability of comprehensive state systems for adjudication of water rights as the means for achieving these goals.²¹

The Court recognized that Colorado's water adjudication statute established a "single continuous proceeding for water rights adjudication."²² So, a race to the federal courthouse cannot defeat the intent of the McCarran Amendment.

Other challenges to the use of the McCarran Amendment have called upon the courts to determine whether particular state adjudication procedures are adequate to resolve the federal claims. Two of those grew out of two different adjudication procedures which had been used in the state of Colorado. We believe a brief review of those two cases will be instructive in analyzing how well the Montana procedure meets the McCarran standard.

In one of those cases, United States v. District Court for Eagle County,²³ the courts were called upon to determine whether Colorado's 1943 Adjudication Act proceedings qualified under the McCarran "river system" adjudication standard. Colorado's 1943 Act authorized adjudication proceedings by the various district courts for separate and distinct water districts (similar to Montana subbasins) encompassing only a portion of a stream system which was actually located within each water district. Proceedings held under that statute were challenged as not meeting the McCarran Amendment standard because

they did not encompass an entire stream system but only, as in Montana, a part thereof. In holding that the proceedings met the standard, the United States Supreme Court said:

Eagle River is a tributary of the Colorado River; and Water District 37 is a Colorado entity encompassing all Colorado lands irrigated by water of the Eagle and its tributaries. . . . * * * . . . We deem almost frivolous the suggestion that the Eagle and its tributaries are not a 'river system' within the meaning of the Act. . . . The 'river system' must be read as embracing one within the particular State's jurisdiction. . . . 24

In 1969, Colorado replaced the 1943 Act procedures with a new adjudication system which abolished the water district concept. It placed jurisdiction for the adjudication of rights from a whole watershed in a single water court and changed the claim procedure so that an individual claimant could initiate proceedings to adjudicate his particular claim as against all other users, including the United States, within the watershed whenever he chose to do so. This procedure was challenged under McCarran as being piecemeal with claims being filed on a month-by-month basis and thus not the kind of unified proceeding required by the McCarran Amendment. In disposing of that challenge and holding that the 1969 Act procedures met the McCarran test, the United States Supreme Court in the case of United States v. District Court for Water Division No. 5 said:

The major issue--the scope of the consent-to-be-sued provision in 43 U.S.C. § 666--has been covered in the Eagle County opinion and need not be repeated here.

It is emphasized, however, that the procedures under the new Act are much more burdensome on the Government than they were under the older Act. It is pointed out that the new statute contemplates monthly proceedings before a water referee on water rights applications. These proceedings, it is argued, do not constitute general adjudications of water rights because

all the water users and all water rights on a stream system are not involved in the referee's determinations. The only water rights considered in the proceeding are those for which an application has been filed within a particular month. . . .

* * *

It is argued from those premises that the proceeding does not constitute a general adjudication which 43 U.S.C. § 666 contemplated. As we said in the Eagle County case, the words "general adjudication" were used in *Dugan v. Rank*, 372 U.S. 609, 613, 83 S.Ct. 999, 1005, 10 L.Ed.2d 15, to indicate that 43 U.S.C. § 666 does not cover consent by the United States to be sued in a private suit to determine its rights against a few claimants. The present suit, like the one in the Eagle County case, reaches all claims, perhaps month by month but inclusively in the totality; . . .²⁵

Those decisions and the Colorado River decision were followed by Arizona v. San Carlos Apache Tribe of Arizona.²⁶ The San Carlos case involved a dispute over Indian water rights in both Arizona and Montana. In San Carlos, the United States Supreme Court reconfirmed the propriety, under the McCarran Amendment, of concurrent jurisdiction in both the state and federal courts, but then stated:

In the cases before us, assuming that the state adjudications are adequate to quantify the rights at issue in the federal suits, and taking into account the McCarran Amendment policies we have just discussed, the expertise and administrative machinery available to the state courts, the infancy of the federal suits, the general judicial bias against piecemeal litigation, and the convenience to the parties, we must conclude that the district courts were correct in deferring to the state proceedings
27.

The court then directed the federal district court to retain its concurrent jurisdiction but to stay further proceedings thereunder while the Montana proceedings went forward and so

that challenges to the adequacy of those proceedings could later be considered if necessary.²⁸

2. Sufficiency of Montana Act Under McCarran Standards.

In response to the United States Supreme Court's invitation in San Carlos, proceedings framing such a challenge in Montana resulted in the opinion of the Montana Supreme Court in State ex rel. Greely v. Confederated Salish and Kootenai Tribes.²⁹ The state Supreme Court confirmed the Montana Water Use Act as adequate, on its face, to adjudicate both Indian and federal reserved water rights. In ruling on that question, the Montana Supreme Court concluded that under the Act the water courts could apply federal law to questions of beneficial use, diversion requirements, quantification, and priority dates, thus enabling a proper differentiation between Indian and federal reserved water rights and water rights based on state law. The court, obviously recognizing its general supervisory role in matters conducted by the judiciary, reserved judgment on the question of whether the conduct of the proceedings under this statute also met the Court's understanding of what adequate proceedings under the McCarran Amendment might be.

We thus have four pronouncements by the United States Supreme Court and one by the Montana Supreme Court which can be used to measure whether the present Montana statutory scheme meets the McCarran standard. In the three of the Supreme Court cases, the Court dealt with two different types of procedures in Colorado, one of which is very similar to the one now in use in Montana. Specifically, with respect to the Montana statutory scheme, we have the determinations in both San Carlos and Greely. Applying those standards in a consistent way requires us to conclude that the current phase of the Montana statutory process is adequate to adjudicate the federal and tribal claims under the McCarran amendment.

It is important to emphasize that none of the five cases we have described attempted to address or define "adequacy" in the context of substantive water law. Instead, because the McCarran Amendment is a procedural statute, those cases dealt only with procedural matters. This is most appropriate because if the proceedings meet the procedural adequacy standards, they will automatically provide remedies for correcting substantive errors if they occur and result in any impairment of the federal and tribal rights. We conclude that the Montana system makes such remedies available and unless and until the Montana judicial system fails to make those remedies meaningful by correcting any perceived substantive errors affecting federal and tribal rights, there can be no reason for the federal court to exercise its concurrent jurisdiction. We have no reason to believe that if substantive errors affecting federal and tribal claims should be committed by the water courts, such errors would not be corrected by order of the Montana Supreme Court in a properly prosecuted appeal to it.

We are not unmindful of criticisms of the process which are based on McCarran Amendment arguments.

One argument claims that the proceedings failed to result in a sufficiently accurate quantification of rights, including federal rights. As discussed in subsections A.3. and D.1. of this report, however, we have found that Montana's adjudication system, as implemented under both the old verification procedures and the new examination rules, has produced and continues to produce reasonably accurate determinations of water rights and that adequate remedies are available to address the inaccuracies which inevitably result in any adjudicatory process. We do not find that federal or Indian rights are disadvantaged by the adjudication in the state forum. Neither more, nor less stringent examination is accorded to appropriators of water rights under state law than that accorded federal and Indian

water rights. As such, the Montana adjudication system as implemented allows a comprehensive and adequate quantification of claims.

Second, it is claimed that the water courts' failure to further utilize the expertise of DNRC and to direct additional claims verification and reverification, together with application of the prima facie standard, unjustly places the burden on every party of examining all other claims to rebut the claims' prima facie validity. This is said to deny procedural due process to claimants who do not have the resources to adequately protect their rights and who receive disparate treatment at the hands of the court due to the lack of uniformity in claims examination procedures. As discussed in Overview section B and Analysis subsections A.3., B.1., and B.10. hereof, we find no constitutional due process or equal protection infirmity under the circumstances. We note, moreover, that this challenge goes to the basis of the procedure--that claim, objection and adjudication is so burdensome as to defeat due process. It is this very procedure, however, that the Montana Supreme Court has already found to be adequate on its face when measured against the requirements of the McCarran Amendment.

Third, it has been asserted that the adjudication process, as applied, contravenes the federal policy behind the McCarran Amendment of avoiding piecemeal litigation, because Montana's expedited adjudication fails to avoid tension and controversy between the federal and state forums and results in hurried and pressured decision making and confusion over the disposition of property rights, no different than would occur under piecemeal federal proceedings. It is also asserted that issuance of temporary preliminary decrees in streams with federal and Indian claims, subject to a later incorporation of the adjudicated or negotiated resolution of those claims, is not a general adjudication; rather, the court is proceeding to settle all non-

federal and non-Indian claims prior to and separate from a later incorporation of Indian and federal water rights. We do not find either of these arguments persuasive. As previously discussed, we do not find the water court's implementation of the statutes to provide an unreasonable means of determining water rights, particularly in light of the remedies available to address improper court conduct or inaccurate results. Nor do we find that entry of temporary preliminary decrees causes the adjudication to be "piecemeal." We note that Colorado River Water Conservation District v. United States³⁰ found Colorado's adjudication system to be a "comprehensive" as opposed to piecemeal one, even though it reached various claims on a month-by-month basis, because it was "inclusive[] in the totality."³¹ Any doubt as to the inclusiveness in the totality of Montana's adjudication process would be removed upon the full notice and opportunity to litigate all claims which should be afforded at the preliminary decree stage. This notice and opportunity to litigate any and all claims prior to entry of a final decree in essence makes everyone a party to the general proceedings, whether or not they have chosen to participate, and assures a comprehensive adjudication.

Like the quest for the Holy Grail, the search for an exhaustive list of substantive and procedural criteria that a state water rights adjudication must meet in order to become a "McCarran Act Adjudication" is doomed to failure. The continuation of critical introspection and public arguments about whether the Montana process meets such an elusive list of standards is a significant disservice to the people of Montana. This is so because the question of whether the Montana process meets whatever those standards may be has been definitively and affirmatively answered by the only two authorities that count: the United State Supreme Court and the Montana Supreme Court.

The United States Supreme Court, in directing that the U.S. District Court in Montana defer to the state court proceedings, recognized that the state system was better equipped to adjudicate the multitude of claims, including those of the United States (whether based on state law or federal law) than the federal court system. In the process, the Court recognized that the Montana system met the threshold requirements of the McCarran Act, i.e., the avoidance of piecemeal adjudication rights in a river system, the avoidance of inconsistent disposition of property, that the state system be comprehensive and ultimately adjudicate an entire river system within the state.

That Court premised its directive on an assumption, ". . . that the state adjudications are adequate to quantify the rights at issue in the federal suits" ³² The Montana Supreme Court in State ex rel. Greely v. Confederated Salish and Kootenai Tribes concluded that the Montana process would adequately quantify the federal and tribal claims. That court did reserve judgment on whether the actual conduct of the proceedings would achieve that result, while clearly indicating that it is available to correct, on a genuine factual showing of need, any real, rather than perceived shortcomings in the conduct of the process which might prevent the adjudication from "adequately quantifying the rights at issue in the federal suit."

But the final proof of the pudding is seen in the fact that the United States is not seeking relief from the Montana Supreme Court or complaining to the federal district court that the Montana process is not working for federal claims. Instead it has filed, as we understand it, as many as 32,000 claims and 6,400 objections. The U.S. is participating in the state process both as claimant and objector; it is not boycotting the process.

3. Adequacy of Integration of Federal Rights.

This topic is addressed above.

4. Conflicts Between Montana Law and Federal Law.

This topic is addressed above.

5. Montana Adjudication Remedial Measures.

This topic is addressed above.

D. ACCURACY OF ADJUDICATION DECREES.

1. Accuracy of Final Decrees.

A lead question in the study design asks whether the adjudication process can be expected to result in "sufficiently accurate" final decrees.

The accuracy question was asked in light of assertions that the adjudication process has been abused by the massive filing of excessively overstated or "bogus" claims. On the basis of those assertions, it is argued that unless the legislature once again changes how the adjudication process must go forward, the process will inevitably result in the wholesale issuance of final decrees which are not "sufficiently accurate." As a consequence, dire results such as the loss of McCarran Act jurisdiction or the loss of litigation advantage in interstate equitable apportionment actions are predicted to occur.³³

Some criticism of decretal accuracy is based upon the prevalent reliance on the old "notices of appropriation" filed in the late 1800s in the clerk and recorders' offices. These notices are thought to reflect exaggerations of flow rates and