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ROLE OF THE STATE COURTS IN
ADJUDICATING INDIAN WATER RIGHTS

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ROLE OF THE STATE COURTS IN
ADJUDICATING INDIAN WATER RIGHTS

OUTLINE

I. HOW DO STATE COURTS GET INVOLVED IN ADJUDICATING
INDIAN WATER RIGHTS?

A. The McCarran Amendment, 43 U.S.C. § 666,
provides:

Suit for adjudication of water
rights -- Joinder of United States as
defendant; costs

(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 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 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.

(c) Nothing in this section 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.

- B. History of Amendment. Senate Report No. 755, 82d Cong., 1st Sess., pt.1 (1951).

The United States and its Indian wards have vast land holdings and water claims in the west. Before the McCarran Amendment, state court proceedings to adjudicate water rights were frustrated because the United States could not be joined as a party. The express purpose of the McCarran Amendment was to permit the joinder of the United States as a defendant in state court actions adjudicating all water rights to a river system or source.

II. WHAT IS A GENERAL ADJUDICATION?

- A. The McCarran Amendment authorizes joinder of the United States as a party in all suits "for the adjudication of rights to the use of water of a river system or other

source." Dugan v. Rank, 372 U.S. 609, 835 S.Ct. 999 (1963).

The only proper McCarran Amendment suit is one in which all persons who claim rights to water in a designated geographic area are before the court. Miller v. Jennings, 243 F.2d 157 (5th Cir. 1957) cert. denied, 355 U.S. 827 (1959). Specifically, a proper McCarran Amendment General Adjudication requires that:

1. All claimants to water rights along the river must be made parties.
 2. The relief to be sought must be inter sese among all claimants; and
 3. The water rights of all claimants, inter sese, must be established.
- B. Not all cases concerning water rights invoke application of the McCarran Amendment. A "private suit to determine water rights solely between . . . [a party] and the United States...." does not come under the Amendment. Dugan v. Rank, supra.

III. INDIAN WATER RIGHTS ARE SUBJECT TO ADJUDICATION
IN STATE COURTS.

- A. The McCarran Amendment waives sovereign immunity and allows joinder of the United States, as trustee of Indian water rights, in state court general water adjudications. Arizona v. San Carlos Apache Tribe of Arizona, ___ U.S. ___, 103 S. Ct. 3201, 3213 n.17 (1983); Colorado River Water Conservation District v. United States, 424 U.S. 800, 811, 96 S.Ct. 1236, 1242 (1976); See also, United States v. District Court for Eagle County, 401 U.S. 520, 19 S.Ct. 998 (1971); United States v. District Court for Water Div. 5, 401 U.S. 527, 91 S.Ct. 1003 (1971).
- B. The Indian tribes may intervene and participate in state court general water adjudications. The tribes' presence is unnecessary to adjudicate their water rights. See, Arizona v. San Carlos Apache Tribe of Arizona, supra n.17; Colorado River Water Conservation District v. United States, supra.

C. No per se conflict of interest exists when the United States represents both the Indian tribes -- protecting the water rights which it holds in trust for the tribes -- and the other governmental agencies which have claims to water. See, Colorado River Water Conservation District v. United States, 424 U.S. 800, 813, 96 S.Ct. 1236, 1243 (1976). See also, Nevada v. United States, _____ U.S. _____, 103 S.Ct. 2906, (1983).

IV. ARIZONA V. SAN CARLOS APACHE TRIBE OF ARIZONA,
____ U.S. _____, 103 S.Ct. 3201 (1983).

A. Arizona Facts.

1. During the late 1970's, administrative proceedings to adjudicate all water rights on Arizona's major river systems were filed. In 1979 the statutes governing the proceedings were amended to provide, inter alia, for court adjudication; service of process was commenced in two of the cases.
2. After service of process on some 70,000 claimants, six Indian tribes on the

Salt River watershed filed actions in Arizona Federal District Court. Some of the tribes filed removal petitions, some sought injunctive and declarative relief to preclude the state court from proceeding, and some sought adjudication of their water rights. None of the tribes sought a general adjudication of all water rights on the involved river systems.

3. Federal District Court Judge Valdemar Cordova remanded to state court, dismissed or stayed the tribes' cases and held that the proceedings in the Arizona state courts were general adjudications under the McCarran Amendment in which Indian water rights could properly be determined. Matter of Determination of Conflicting Rights, 484 F. Supp. 778 (D. Ariz. 1980). Judge Cordova held that the "disclaimer clause" in the Arizona Constitution and Enabling Act did not prevent Arizona state courts from exercising jurisdiction over the adjudication of federal water rights, expressly

following the Tenth Circuit's holding in Jicarilla Apache Tribe v. United States, 601 F.2d 1116, (10th Cir.), cert. denied, ___ U.S. ___, 100 S.Ct. 530 (1979).

B. Montana Facts.

1. In Montana, the United States and various Indian Tribes brought actions in federal district court to adjudicate rights to certain streams.

Subsequently, the Montana Department of Natural Resources and Conservation filed a petition in state court to adjudicate water rights in the same streams.

2. The defendants in the Montana federal suits filed motions to dismiss in 1976 which were granted in 1979. See, Northern Cheyenne Tribe v. Tongue River Water Users, 484 F.Supp. 31 (D.Mont. 1979).

C. The Ninth Circuit's decision in San Carlos Apache Tribe of Arizona v. Arizona, 668 F.2d

1093 (9th Cir.) reversed ___ U.S. ___, 103 S.Ct. 3201 (1983); and Northern Cheyenne Tribe v. Adsit, 668 F.2d 1080 (9th Cir. 1982) reversed ___ U.S. ___, 103 S.Ct. 3201 (1983).

1. In 2-1 decisions, the Ninth Circuit reversed both the Montana and Arizona Federal District Courts and held that, notwithstanding the McCarran Amendment, because of the Enabling Act and State Constitutional disclaimers of jurisdiction over Indian lands; Arizona and Montana state courts lacked jurisdiction to determine water rights held by the United States on behalf of its Indian wards. The Court of Appeals also held in Adsit, supra, that the "wise-judicial administration doctrine" did not apply to the Montana litigation.

2. The Arizona and Montana Constitutions and Enabling Acts contain essentially identical "disclaimer" language:

The Enabling Act and the
Arizona Constitution provides:

Second. That the people inhabiting said proposed State do agree and declare that they forever disclaim all right and title to the unappropriated and ungranted public lands lying within the boundaries thereof and to all lands lying within said boundaries owned or held by any Indian or Indian tribes, the right or title to which shall have been acquired through or from the United States or any prior sovereignty, and that until the title of such Indian or Indian tribes shall have been extinguished the same shall be and remain subject to the disposition and under the absolute jurisdiction and control of the Congress of the United States:

3. As a result of the Ninth Circuit decision, the state court proceedings were stayed pending Supreme Court action. In Arizona, except for the Little Colorado River adjudication, all of the river system adjudications had been consolidated into one proceeding, the Gila River System adjudication.

D. Issues Before the U.S. Supreme Court.

1. What is the effect of the McCarran Amendment in those states which were admitted to the Union subject to federal legislation that reserved "absolute jurisdiction and control" over Indian lands in the Congress of the United States?

2. If the courts of such states do have jurisdiction to adjudicate Indian water rights, should concurrent federal suits brought by Indian tribes, rather than by U.S., and raising only Indian claims, also be subject to dismissal under the doctrine of Colorado River Water Conservation District v. United States, supra?

E. The U.S. Supreme Court's Holding.

1. The McCarran Amendment removes any federal limitation on state court jurisdiction over Indian water rights which may have existed because of federal Enabling Acts. State law

determines whether state Constitutional disclaimer provisions precluded jurisdiction.

2. Concurrent federal suits brought by the Indian tribes, and raising only Indian claims, are subject to dismissal under the doctrine of Colorado River.

F. The U.S. Supreme Court's Rationale.

1. The court held, and noted that the parties agreed, that Public Law 280 would not have authorized the states to assume jurisdiction over the adjudication of Indian water rights. Thus, the presence or absence of state court jurisdiction over Indian water rights claims depended upon the Enabling Acts and the McCarran Amendment and not Public Law 280.
2. The court held that it need not decide the extent of any jurisdictional limit the Enabling Acts placed on state courts because, whatever the limitation, the McCarran Amendment

removed it. The court reasoned that Congress had not distinguished between disclaimer and non-disclaimer states in passing the McCarran Amendment.

Further, any other construction of the Amendment would "enervate" its objective.

3. The tribes argued that the Colorado River wise judicial administration test, upon which the district courts had based dismissal of the tribes' actions, was inappropriately applied. The Supreme Court held that the Montana and Arizona Federal District Courts correctly deferred to the state proceedings because the concurrent federal proceedings would be duplicative and wasteful. Further, a race to determine issues first would occur in the parallel state and federal proceedings if the federal court did not abstain. The court emphasized the policy of the McCarran Amendment -- encouraging states to quantify Indian water rights in the course of comprehensive water adjudications.

4. In dicta, the court stated that a federal water suit need not always be stayed in deference to a concurrent state adjudication. A state court may stay its proceedings or the federal action may proceed beyond a point at which it would be economical to stay it. See, United States v. Adair, 723 F.2d 1394 (9th Cir. 1983).

G. Issues Left Open In Arizona v. San Carlos Apache Tribe of Arizona.

1. The court did not decide whether there were any state constitutional disclaimer impediments to the exercise of state court jurisdiction over Indian water rights because this was a question of state law. The court assumed that jurisdiction existed because the state courts had taken jurisdiction over Indian water rights. The presence or absence of jurisdictional disclaimers has rarely been dispositive of the jurisdictional question. 103 S.Ct. at 3211. (citing, Draper v. U.S. 164 U.S. 240, 17 S.Ct.

107 (1896) and Organized Village of
Kake v. Egan 369 U.S. 60, 82 S.Ct. 562
(1962).)

2. Various questions had been raised at the District and Circuit Court levels relating to the jurisdiction or adequacy of the state courts to adjudicate some of the issues asserted in the Federal District Court suits. These questions were left open for resolution on remand. Among the questions raised were: Whether the state court adjudications would adjudicate alleged federal reserved rights to groundwater; whether the state adjudicatory schemes are constitutional, under the state constitutions; whether the state courts have jurisdiction to adjudicate rights based upon aboriginal rights or rights based upon Spanish or Mexican law. See, Arizona v. San Carlos Apache Tribe, supra, n.20.

3. The Court did not decide whether the proper course for the district courts, in deferring to state proceedings, is to stay the federal suits or dismiss them without prejudice, but noted that the federal forum should remain available in case the state court decides it does not have jurisdiction over some or all of the claims. See, Arizona v. San Carlos Apache Tribe, supra, n.21.

V. ARIZONA ADJUDICATION.

A. Ninth Circuit Action.

1. After the Supreme Court's ruling, several of the tribes asked the Ninth Circuit to either decide the issues "reserved" in footnote 20 or remand the Federal District Court to decide those issues.
2. By order dated December 9, 1983 the Ninth Circuit rejected the tribes' request, withdrew its original decision on remand and instructed the District

Court to stay the federal proceedings until the state court proceedings had been concluded.

B. State Court Action in Gila River Adjudication.

1. After the original decision of the Arizona Federal District Court allowing the state court adjudications to proceed, the United States and tribes had filed Motions to Dismiss. Following the Supreme Court's decision in San Carlos, the motions were rebriefed and reargued.
2. By order of March 14, 1984, Stanley Z. Goodfarb, Judge of the Maricopa County Superior Court, denied the renewed Motions to Dismiss the general adjudication as to the tribes.
 - a. Article XX, § 4 of Arizona's Constitution, Which Contains Disclaimer Language Identical To That In Arizona's Enabling Act, Need Not Be Amended.

Judge Goodfarb rejected arguments that amendment of the Arizona constitution was a prerequisite to state court jurisdiction over Indian water rights. Citing the San Carlos decision, he reasoned that because the federal law Enabling Acts were no obstacle to state jurisdiction over water rights, the Arizona Constitutional provision, which contained identical language, posed no obstacle.

b. The Action, An Arizona General Adjudication, Qualifies As A General Adjudication Under The McCarran Amendment.

The United States Supreme Court in San Carlos left undetermined the adequacy of the Arizona general adjudication statutes and proceedings to comprehensively adjudicate water rights including Indian water rights.

Judge Goodfarb held that the Arizona general adjudication scheme was adequate and qualified as a "comprehensive adjudication" under the McCarran Amendment, relying on two Arizona Federal District Court decisions which had held that the Arizona general adjudication scheme was adequate under the McCarran Amendment. (CIV 78-145 TUC-MAR); Matter of Determination of Conflicting Rights, 484 F.Supp. 778 (1980).

The court expressly left open the issue whether groundwater rights would be determined in the general adjudication.

Judge Goodfarb held that water rights grounded upon aboriginal or other ancient law, if they exist at all, would be either included or excluded from the adjudication at some later date.

c. The Arizona General Adjudication Statutes, A.R.S. § 45-251 et. seq. Are Constitutional.

Judge Goodfarb rejected arguments that general adjudication statutes violated Arizona Constitutional provisions concerning special legislation, judicial rule making power and separation of powers. Specifically, he upheld a statute which provides that prior water rights determinations are final.

The court order fully discussed the finality of prior water rights determinations, citing Arizona v. California, ___ U.S. ___, 103 S.Ct. 1382 (1983), and Nevada v. United States, ___ U.S. ___, 103 S.Ct. 2906 (1983), wherein the United States Supreme Court identified and discussed the necessity for finality in water rights decrees and judgments and applied the doctrine of res

judicata to prior water rights determinations and decrees.

- d. The Procedural Issues Raised, Which Are Of No Constitutional Significance, Do Not Require Dismissal.

Judge Goodfarb held that the issue of abatement under Rule 6(f) of the Arizona Rules of Civil Procedure was moot and that designation of the Arizona Department of Water Resources (DWR) as technical advisor to the court was appropriate. The Judge reasoned that the DWR's technical assistance created no conflict of interest even though the State of Arizona was a party to the adjudication.

3. Current Status of Gila River Adjudication.

- a. In his Order denying the Indian tribes' Motions to Dismiss, Judge

Goodfarb set a hearing date to determine what steps were necessary to proceed with the Gila River adjudication. He requested a memorandum from the Department of Water Resources before the hearing to advise him concerning the necessary future procedures.

The hearing was held and the next necessary step in the adjudication is service of process on potential claimants in the unserved portion of the Gila River System. Service will begin on portions of the Salt River on July 1, 1984. Service on other river systems will commence on various dates throughout 1984 and 1985.

- b. There are several legal issues which are unresolved at this stage of the adjudication. These include: (1) whether there are federal reserved groundwater rights; (2) whether and to what extent groundwater rights will be

adjudicated as part of the general adjudication; (3) whether the "practicable irrigable acreage" standard will apply to Indian reserved rights and what that standard means in defining the extent of those rights; (4) the preclusive effect of existing water rights decrees; (5) how the Arizona Superior Court will administer any ultimate decree.

C. Little Colorado River Adjudication.

The Navajo Tribe and United States have filed Motions to Dismiss raising essentially the same issues raised in the Gila River adjudication. Argument is set for June 15, 1984.

VI. STATUS OF ADJUDICATIONS IN SOME OTHER WESTERN STATES

A. In Wyoming, the general adjudication of certain streams has been divided into three phases: (1) Indian water rights; (2) federal non-Indian reserved rights; (3) non-federal

non-Indian rights. Phase two of the case has been settled. Phase three has not yet begun. Phase one has proceeded through service, and a Master's Report concerning inter sese rights. The Master's Report was amended by a state judge, who then retired. A subsequent state judge is reviewing the report and will ultimately render a decision which the Wyoming Supreme Court will review.

- B. In New Mexico, several actions to determine conflicting water rights have been filed. (United States v. Bluewater-Toltec Irrigation District, et al.; City of Grants, et al. v. United States; Kerr- McGee Corporation, et al. v. United States.)

1. The United States, acting on behalf of the Pueblos of Acoma and Laguna, filed the Bluewater action in December, 1982. In June, 1983, a Motion for More Definite Statement was filed by defendants because the United States had failed to state specifically which waters were involved in the action. The court granted the motion.

The United States never provided a more definite statement but instead filed a Motion for Leave to File a First Amended Complaint which sought a general adjudication of the Rio San Jose Stream System. Defendants moved to dismiss the Bluewater Complaint as originally filed.

2. In August and September, 1983, two state court adjudications were instituted. Kerr-McGee Corporation v. United States; City of Grants v. United States (the "state cases"). The United States removed both actions to Federal District Court in Albuquerque and moved to consolidate the removed state actions with the prior-filed Bluewater action. Defendants in the state cases moved to consolidate the two state cases, separate and apart from the Bluewater case, and to remand the consolidated state cases back to state court. The two removed state cases were consolidated before Federal District Judge Baldock.

3. On February 28, 1984, Judge Baldock remanded the consolidated state court actions, dismissed the Bluewater action, and directed that further proceedings should be held in a state court.

4. On March 9, 1984, the United States filed a Motion for Reconsideration under Rule 59(e) of the Federal Rules of Civil Procedure. The court denied the motion on April 16, 1984. It is unknown at this time whether the United States will appeal dismissal of the Bluewater case.

5. If appealed, a major issue on the appeal will be whether dismissal of a substantive claim of trespass asserted by the United States which arises out of the alleged wrongful use of Pueblo water by the defendants is proper as part of the dismissal of the claim seeking a determination of water rights. Related issues that may be raised include: (a) Whether stay rather than dismissal was the

appropriate action for the District Court to take; and (b) whether either stay or dismissal is proper where the action at issue was a "private water right action," rather than a general adjudication.

VII. General Adjudication of Water Rights In Arizona. A.R.S. § 45-251, et seq.

A. General Adjudication: Terms Defined.
A.R.S. § 45-251.

The statutes (§ 45-251(1)) define a "General Adjudication" as an "action for the judicial determination or establishment of the extent and priority of the rights of all persons to use water in a river system and source."

(Emphasis added)

1. Importantly, a "person" includes the United States of America and the Indian tribes (§ 45-251(2)).
2. A "River System and Source" means all waters appropriable under § 45-131 (essentially all surface water) and all

water subject to claims based upon federal law, apparently including water rights based upon the "Winters" doctrine.

B. Initiating an Adjudication. A.R.S. § 45-252.

A "general adjudication" is initiated when one or more water users upon a river system or source (the rights to which have not been previously adjudicated) files a petition in the Arizona Superior Court (§ 45-252(A), (C)), which requests the court to determine the relative priority of water rights of all persons in a river system (§ 45-252(D)).

1. The Arizona Supreme Court assigns a judge to preside over the general adjudication (§ 45-252(C)); appoints a master (a master is not required in cases with fewer than 100 claimants); and consolidates the adjudication with other pending general adjudications if appropriate.

C. Service of Summons. A.R.S. § 45-253.

Personal service of the summons and petition is not required (§45-253(A)). The Superior Court orders the clerk to issue summons.

1. The summonses shall: specify the date that the "statement of claimant" must be filed; describe the adjudication.
2. Once claimants are identified -- the court identifies claimants with the assistance of the Director of the Department of Water Resources -- the summons are sent by registered or certified mail, return receipt requested, to all known potential claimants.
3. Unknown potential claimants receive notice by publication of the summons at least once a week for 4 consecutive weeks in appropriate counties (§ 45-253(B)).
4. The Director is required to publicize the general adjudication (§ 45-253(C)).

D. Making a Claim. A.R.S. § 45-254.

Each potential claimant must file with the Superior Court the court-approved and verified statement of claimant form within 90 days of the date of service.

The court may extend the time for filing the statement of claimant form for good cause.

1. Organizations can file one statement of claimant on behalf of its members.
2. The statement of claimant must contain certain factual information concerning the nature of the claim (§ 45-254(C)).
3. Any potential claimant failing to file a claim as required is barred and estopped from subsequently asserting a claim and forfeits all rights he theretofore claimed.
4. A potential claimant who did not have actual knowledge or notice of the pending action and avows his lack of knowledge or notice may, within one

year of the date for filing claims,
move to intervene. The court is
required to grant the motion.

E. Rules Governing General Adjudications.
A.R.S. § 45-259.

Arizona Rules of Evidence, the Arizona Rules
of Civil Procedure and other procedural
rules govern unless they conflict with a
specific provision of the general
adjudication statutes, in which case, the
latter controls.

F. Appointment of Master. A.R.S. § 45-255.

In cases where there are less than 100
potential claimants the Arizona Supreme
Court may appoint a Master to report on all
legal and factual issues. The Supreme Court
must appoint a Master in cases with more
than 100 potential claimants.

G. Role of Master. A.R.S. §
45-257(A)(1), (2), (3).

The Master shall:

1. Conduct hearings and take testimony to determine the relative rights of each claimant.
 2. Prepare and file a report containing factual and legal determinations with the Arizona Superior court.
 - a. Each claimant can object to the Master's report if he does so within 180 days of the report's filing.
 3. Maintain control over all records and documents at locations designated by the court.
- H. Technical Assistance from the Director of the Department of Water Resources. A.R.S. § 45-256.

The court or master is required to request technical assistance from the Director of the Department of Water Resources concerning

all matters upon which the director has expertise.

The director has several specific duties in rendering his expertise.

1. He must:
 - a. Identify hydrological boundaries of the river system and source;
 - b. Identify the names and addresses of all reasonably identifiable potential claimants, including, at a minimum, current record owners of all real property in the geographic scope of the adjudication;
 - c. Locate and make available to the public records relevant to the determination of factual and legal issues;
 - d. Conduct a general investigation of the river system;

- e. Investigate facts relevant to the claims of each claimant;
 - f. Do whatever else is necessary for a proper determination of relative rights.
2. The director's technical assistance is first set forth in a preliminary report.
- a. Each water claimant is given notice that the preliminary report is available for inspection and comment.
 - b. The director is required to adopt rules to provide for adequate notice that the report is available and adequate time for inspection.
 - c. After the comment period has expired, the director revises the report, if appropriate, and shall file it with the court or Master.

3. The director's technical assistance is summarized and set forth in a final report which is filed with the court or Master.

- a. The report is available to any claimant for inspection.
- b. Each claimant may, within 180 days of the report's filing, file written objections to the report.
- c. Those parts of the report not objected to in writing are summarily admitted into evidence.
- d. Those parts of the report which are objected to in writing are not admitted into evidence until the objector has had an opportunity to contest the objectionable portions of the report.
- e. Each objecting claimant can present evidence to support his objections, support his claim or object to another's claim.

I. The Superior Court's Role.

The superior court shall review the Master's report as required by Rule 53 Arizona Rules of Civil Procedure and shall:

1. Determine extent and priority date of and adjudicate any interest in or right to water in a river system.
 - a. However, if water rights have been previously determined in a judgment or decree, the court must accept the rights and dates in the judgment or decrees unless the rights have been abandoned.
2. Establish a list or tabulation of water rights and their relative priorities.
3. Refer the final decree to the Director of the Department of Water Resources for enforcement and administration under continuing jurisdiction of the court.

4. Ensure that a record of the general adjudication is accessible and usable.
5. Record a certified copy of final decree in each county within a geographic scope of adjudication.
 - a. This recordation is constructive notice of the contents of the judgment or decree.

