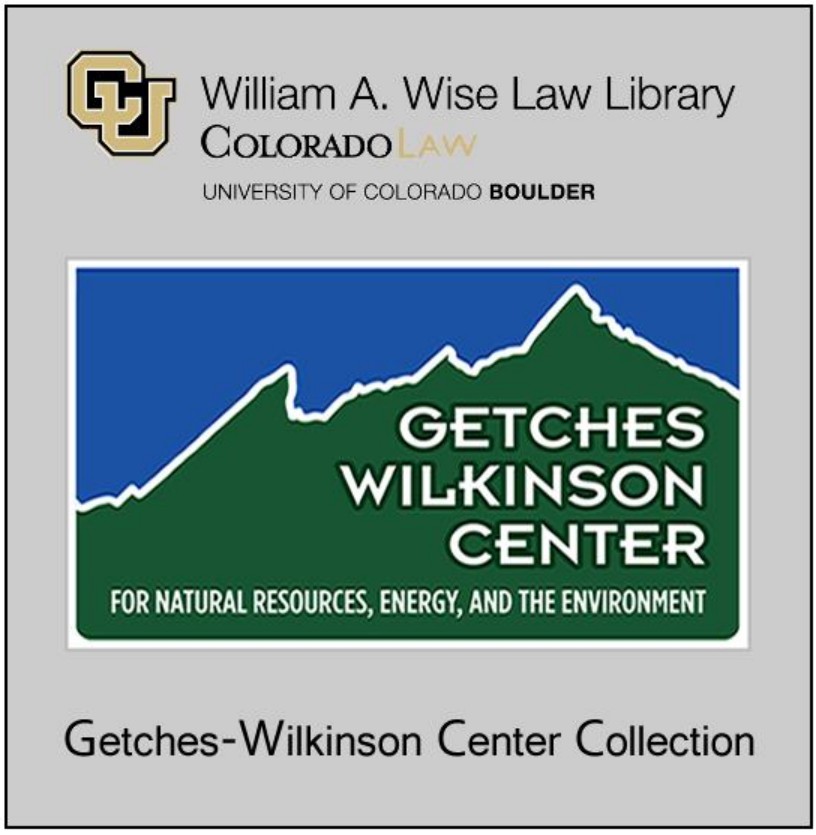
Dams: Water and Power in the New West (Summer Conference, June 2-4) 1997

6-4-1997

# Western Water Development: Visions of the Future

Bennett W. Raley




Bennett W. Raley, *Western Water Development: Visions of the Future*, *in* DAMS: WATER AND POWER IN THE NEW WEST (Natural Res. Law Ctr., Univ. of Colo. Sch. of Law, 1997).

# Western Water Development: Visions of the Future

Bennett W. Raley
Trout & Raley, P.C.
Denver, Colorado

**DAMS: WATER AND POWER IN THE NEW WEST**

June 2-4, 1997

Natural Resources Law Center
University of Colorado
School of Law
Boulder, Colorado

## I. Summary

References to the "New West" are viewed by some as code words for a philosophy of governance that ignores existing laws and redefines existing rights out of existence in order to reshape the legal and political landscape to meet current needs without the complications presented by a recognition of existing laws and past decisions. However, for the purposes of this outline, let us assume that this paranoia is not appropriate, and that the "New West" will emerge as a result of a process based on a rule of law that first recognizes and respects the reality of rights and the legitimacy of expectations that have been created under existing laws, and then looks for ways to achieve the goals of the "New West" without taking the intellectually bankrupt path of "ignoring away" problems created by the existence of prior decisions that are inconsistent with the current vision of a western utopia. With this assumption in place, what realities should a "New West" visionary recognize? What laws must the visionary change in order to allow the vision to be fulfilled? What existing commitments must the visionary respect?

Unless the adherents of the vision of a "New West" want to justify the paranoia about their intent, they must 1) recognize that the inevitable disputes over the allocation of water between mutually exclusive demands requires the use of an allocation methodology that will yield predicable results, and that *ad hoc* decision-making by federal agencies is not a workable alternative; 2) concede that existing state and federal laws allow the use of the doctrine of prior appropriation to allocate water between competing demands, regardless of whether they are based on state or federal law; and 3) respect the outcome of the application of the doctrine of prior appropriation to competing demands for water because state and federal laws have, for better or worse, considered the right of use of water created under these systems to be a vested property right that is enforceable against other claims, whether based on state or federal law.

A vision of the "New West" that is based on these principles will have a far greater chance of being transformed into reality than will visions that ignore or seek to define away the status quo. Simply put, visions of the future that do not respect water allocations made under existing

systems force those who have developed a reliance on those allocations to fight at all costs. Moreover, the barely disguised hatred of the doctrine of prior appropriation by environmentalists is misdirected and unfortunate. Like it or not, unless one is an anarchist, there has to be some system for allocating water between mutually exclusive demands in times of shortage in order to determine who goes without. And while it would have been possible for Congress to adopt riparian law for the allocation of water in the West, or to reserve massive quantities of water from appropriation and use, or to delegate this authority to federal land managers, it did not do so, and instead chose to allow states to use prior appropriation as the method to allocate and create property rights in the use of water. While many of these decisions were made in the 1800s, Congress validated those decisions in 1952 by adopting the McCarran Amendment in order to ensure that federal uses of water, regardless of whether they were based on state or federal law, were integrated within the existing priority systems. That was and is the law, and a vision of the future must start with the existence of McCarran and a recognition of the consequences of this reality.

## II. The McCarran Amendment.

The McCarran Amendment provides in relevant part:

> Consent is hereby given to join the United States as a defendant in any suit (1) for the adjudication of rights to the use of water of a river system or other source, or (2) for the administration of such rights, where it appears that the United States is the owner of or is in the process of acquiring water rights by appropriation under State law, by purchase, by exchange, or otherwise, and the United States is a necessary party to such suit. The United States, when a party to any such suit, shall (1) be deemed to have waived any right to plead that the State laws are inapplicable or that the United States is not amenable thereto by reason of 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 . . . . 43 U.S.C. § 666(a) (1982).

## A. Background of McCarran.

Congress severed water from the public lands in the West more than 100 years ago and allowed the states to allocate and administer rights to this water under state law. As a result of this deference to state law, most states in the West established legal systems which created or confirmed rights to use a defined quantity of water from a particular source for specified purposes. More importantly, these systems established a mechanism for allocating water between mutually exclusive uses in times of shortage. The fundamental public policy rationale for the development of state water allocation and administration systems was to create certainty and to avoid conflict with respect to whether water would be available for a particular use in order to promote efficient economic investments by the public and private sectors. The compelling nature of this policy was also recognized in the national context through the resolution of interstate conflicts over the use of water by the negotiation of interstate compacts and the entry of equitable apportionment decrees, both of which were designed to reduce conflict and promote certainty regarding the use of water.

The ability of the state systems to function to avoid conflict and create certainty was threatened by the subsequent development of the *Winters* doctrine (*Winters v. United States*, 207 U.S. 564 (1908)) of implied federal reserved water rights, because the doctrine of sovereign immunity precluded the involuntary joinder of federal claimants to the use of water in order to determine the existence and scope of claims to water based on federal law. Consequently, it was impossible for existing and prospective users of water under either state or federal law to rely on state water adjudications to determine their relative rights to the use of a particular quantity of water at a particular time from a particular source. As a result, state systems were unable to fulfill their intended function of promoting certainty and avoiding conflict regarding the right to use water. Instead, it appeared that claims and expectations for the use of water would be created under two

separate systems, with no systematic mechanism for determining the relative rights of claimants under either system.

The McCarran Amendment was enacted as a direct result of the dispute between water users in the Quinn River Basin in Nevada who were unable, because of the doctrine of sovereign immunity, to force the United States to adjudicate its water rights for the Fort McDermitt Indian Reservation. (*See* Berry, The McCarran Water Rights Amendment of 1952: Policy development, interpretation, and impact on cross-cultural water conflicts. Thesis, University of Colorado, 1993) The consequence of this refusal was that the water users were unable to resolve the conflicts between multiple claimants to the same water. The source of this frustration was eloquently expressed years later by the Colorado Supreme Court in *United States v. District Court for Eagle County* (458 P.2d 760 (Colo. 1969), aff'd, 401 U.S. 520 (1971)):

> We have a situation in which the federal sovereign claims water rights which are nowhere formally listed, which are not the subject of any decree or permit and which, therefore, are etheric in large part to the person who has reason to know and evaluate the extent of his priorities to the use of water. To have these federal rights in a state of uncorrelated mystery is frustrating and completely contrary to orderly procedure--and this is equally true from the standpoint of the United States as well as Colorado and its citizenry.

**B. Legislative History of McCarran.**

A Senate Judiciary Committee Report on a prior version of what ultimately became the McCarran amendment recognized the problem faced by water users throughout the West:

> In the administration of and the adjudication of water rights under State laws the State courts are vested with the jurisdiction necessary for the proper and efficient disposition thereof, and by reason of the interlocking of adjudicated rights on any stream system, any order or action affecting one right affects all such rights. Accordingly all water users on a stream, in practically every case, are interested and necessary parties to any court proceedings. It is apparent that if any water user claiming to hold such right by reason of the ownership thereof by the United States or any of its

departments is permitted to claim immunity from suit in, or orders of, a State court, such claims could materially interfere with the lawful and equitable use of water for beneficial use by the other water users who are amenable to and bound by the decrees and orders of the State courts. Unless Congress has removed such immunity by statutory enactment, the bar of immunity from suit still remains and any judgment or decree of the State court is ineffective as to the water right held by the United States. . . . . The bill (S. 18) was introduced for the very purpose of correcting this situation and the evils growing out of such immunity. The committee believes that such a situation cannot help but result in a chaotic condition. . . . If a water user possessing a decreed water right is immune from suits and proceedings in the courts for the enforcement of valid decrees, then the years of building the water laws of the Western States in the earnest endeavor of their proponents to effect honest, fair and equitable division of the public waters will be seriously jeopardized. If such a condition is to continue in the future it will result in a throw-back to the conditions that brought about the enactment of the statutory water laws, i.e., the necessity that the public waters so necessary to the economic welfare of the arid States be allotted in as equitable manner as possible to all users of the available supply thereof. It is said of such laws by the Supreme Court in the case of Pacific Live Stock Co. v. Oregon Water Board, (241 U.S. 447):

> All claimants are required to appear and prove their claims; no one can refuse without forfeiting his claim, and all have the same relation to the proceeding. It is intended to be universal and to result in a complete ascertainment of all existing rights, to the end, first, that the waters may be distributed, under public supervision, among the lawful claimants according to their respective rights without needless waste or controversy; second, that the rights of all may be evidenced by appropriate certificates and public records, always readily accessible, and may not be dependent upon the testimony of witnesses with its recognized infirmities and uncertainties; and, third, that the amount of surplus or unclaimed water, if any, may be ascertained and rendered available to intending appropriators. . . .

The committee is of the opinion that there is no valid reason why the United States should not be required to join in a proceeding when it is a necessary party and to be required to abide by the decisions of the Court in the same manner as if it were a private individual. ( S. Rep. No. 755, 82d Cong., 1st Sess., 4-6 (1951), emphasis added).

The Departments of the Interior and Justice opposed the waiver of sovereign immunity. (*Id.* at 8.) In a letter from Mastin G. White, Acting Assistant Secretary of the Interior, to Senator McCarran, the Department of the Interior expressed a fear that S. 18 would lead to a situation where the United States "would be forever precluded from asserting" those "rights and interests which the United States has in the stream systems of the Nation" which were not asserted in a general water adjudication. Interior also suggested that the waiver be limited to adjudications of the "rights to the consumptive use of waters within that State" that were based on state law. William Veeder, who testified before the Senate Judiciary Committee on behalf of the Department of Justice, also expressed a concern that the waiver of sovereign immunity would result in a "multiplicity of suits," and that the United States would overlook some of its claims and be bound by the decrees entered in the general adjudications:

> . . . . I know of no stream system of any size at all in which you wouldn't have a general adjudication if we were sued in connection, for instance, with the Forest Service rights . . . . Where the United States is a party the United States of necessity must come in and bring in, for instance its forest service rights, its soil conservation rights, its Indian rights, and when that occurs you must have every one in there or the decree will not be effective or you will be charged with splitting a cause of action, res judicata, one or the other. ( Record of April 25, 1951 hearing of United States Senate Subcommittee of Committee on the Judiciary at 6-7).

Notwithstanding the objections of Interior and Justice, the Committee (and ultimately Congress and the President) concluded that the legislation was "meritorious." ( S. Rep. No. 755, 82d Cong., 1st Sess., 2 (1951). In addition, the Committee rejected the suggestion that McCarran be limited to claims for consumptive uses of water acquired under state law, thereby preserving the all-inclusive or universal nature of the general adjudications which would result from the waiver of sovereign immunity.

**C. Implementation of McCarran.**

The opposition of the United States to the McCarran Amendment continued after it was enacted into law, which resulted in a trio of cases in the 1970s which addressed federal attempts to evade the intent of McCarran. In *U.S. v. District Court for Eagle County* (401 U.S. 520 (1971)), the United States argued that McCarran did not waive sovereign immunity with respect to the adjudication of federal reserved water rights, and that McCarran applied only to water rights acquired under state law. The Supreme Court rejected this attempt to limit the scope of McCarran. In the companion case of *United States v. District Court in and for Water Division No. 5*, (401 U.S. 527 (1971)), the Supreme Court also rejected the assertion of the United States that the Colorado system of a series of monthly adjudications was not a general adjudication within the meaning of McCarran. Finally, in *Colorado River Water Conservation District v. U.S. (Mary Akin)* (424 U.S. 800 (1976)), the Supreme Court rejected the assertion of the United States that the McCarran waiver of sovereign immunity did not extend to adjudications of reserved rights claimed for federal Indian reservations, and also held that abstention by the federal courts was proper in the case of ongoing state court water adjudication proceedings.

These three cases required that the Supreme Court consider the legislative history and intent of McCarran. In *Eagle County*, the Court first pointed out that the reason that the United States was objecting to having to adjudicate federal reserved water rights in state court was that the purpose of the Colorado appropriative water rights system was to "require[] the permanent fixing of rights to the use of water at the time of the adjudication, with no provision for the future needs, as is often required in the case of reserved water rights" established under federal law. With this opening, the Court recognized and accepted the principle that the purpose of a McCarran adjudication was to establish permanent rights to the use of water. The Court went on to say that:

> [W]e deal with an all inclusive statute concerning the adjudication of "the rights to the use of water of a river system" which in § 666(a)(1) has no

> exceptions and which, as we read it, includes appropriat[ive] rights, riparian rights, and reserved rights. (U.S. v. District Court for Eagle County, 401 U.S. 520, 524 (1971) (emphasis added)).

In *Mary Akin*, the Court again opened with a recognition that the purpose of state water laws was to provide for the "allocation of water and adjudication of conflicting claims to that resource." (424 U.S. at 804). With respect to the claim by the United States that the McCarran waiver of sovereign immunity did not include federal reserved water rights for indian reservations, the Court considered the Senate Committee Report on S. 18, and concluded that:

> Thus, bearing in mind the ubiquitous nature of Indian water rights in the Southwest, it is clear that a construction of the Amendment excluding those rights from its coverage would enervate the Amendment's objective. (*Id.* at 811).

The Court then considered the intent of McCarran, and again concluded that it was all inclusive and intended to allow comprehensive adjudications of all claims to the use of water, regardless of the legal theory underlying such claims:

> The clear federal policy evinced by that legislation is the avoidance of piecemeal adjudication of water rights in a river system. . . . [T]he concern . . . 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. 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 of achieving these goals. *(Id.* at 800, 819).

The next important step in the implementation of McCarran was predicted by Mr. Veeder and Mr. White. In 1971, the United States asserted its claims for a federal water right for the Naval Oil Shale reserves located in the Colorado River basin in Colorado. The original filing asserted a claim to water from tributaries to the Colorado River. In 1983, the United States attempted to amend its claim to add a claim to waters diverted from the mainstem of the Colorado River, and asserted that the amended claim should receive a

priority date which was "antedated" back to the date of the original filing. The State of Colorado and Colorado water users opposed the attempt to antedate back to the original priority date. In *United States v. Bell,* ( 724 P.2d 631 (Colo. 1986)), the Colorado Supreme Court recognized that the claim for antedation would adversely affect water users who obtained water rights in the intervening period:

> If the 1983 amendment relates back to 1971 and the application is granted, the priorities of the holders of 4400 individual water rights adjudicated based on claims filed between 1971 and 1983 will be affected. . . . [B]ut for the relation back of the amendment, these nonparties . . . might not have made the effort to obtain adjudicated rights if they had known the United States was claiming reserved rights to water from the Colorado River mainstem. (*Id.* at 638).

The Court then considered the effect of the McCarran Amendment on the claim for antedation, and proved that the fears of the federal officials regarding the effect of McCarran were well founded:

> Before the enactment of the McCarran Amendment, sovereign immunity barred involuntary joinder of the United States as a party in state court general water rights adjudications. . . . Because the United States was not subject to joinder prior to the McCarran Amendment and its absence from previous adjudications was privileged, once it is properly joined and provided the opportunity to adjudicate its claims, it may be decreed reserved water rights with priorities that antedate other adjudicated water rights to the date of the reservation. To that extent the postponement doctrine does not prevent the United States from receiving the priorities to which it would otherwise have been entitled. However, the postponement doctrine does apply to the United States' amendment claiming water from the mainstem of the Colorado River. Were the amendment to relate back to the original application, and thus antedate prior claims, the purposes of the McCarran Amendment would be frustrated, and the United States would have avoided the equivalent of a filing deadline. The McCarran Amendment was meant to promote certainty in water allocation by subjecting undeclared and unquantified federal water rights to state adjudication. . . . We believe that the certainty that the McCarran Amendment attempts to provide by allowing joinder of the United States in water adjudications would be destroyed if, under the reserved rights doctrine, the United States were able to add a separate claim for mainstem Colorado River water rights through an amendment with relation back to the original application for water rights made thirteen years before for

> water from a different source. . . . Moreover, if the United States' claims to water in or on the reserved lands had already been adjudicated, the United States could not now seek antedated priority for a new claim. The doctrine of res judicata bars the United States from re-opening reserved water rights adjudications even where prior claims have not been adjudicated or the United States erroneously has omitted certain claims. (*Id,* at 640, 642).

**D. McCarran and Agency Actions.**

The existence of McCarran Act adjudications forced federal agencies to consider all potential claims for water rights, including claims that would be based on other than traditional reserved rights theory. The first major effort in this regard was the June 25, 1979 Opinion of Solicitor of the Interior Krulitz which generally asserted the principle that federal appropriative or "federal nonreserved water rights" could be obtained by federal agencies, in contravention of State substantive law, in order "to carry out congressionally authorized management objectives on federal lands." ( Krulitz Op., 86 I.D. 553, 574). On January 16, 1981, a Supplement to this Opinion was issued by Solicitor Martz, which concluded that FLPMA and the Taylor Grazing Act did not qualify as a basis for assertion of a federal non reserved water right independent of State law: "FLPMA . . . does not give an independent statutory basis for claims for water uses inconsistent in any way with the substantive requirements of state law." Martz also stated that "a particular paramount Federal purpose . . . mandated by act of Congress" is necessary to support a federal claim for a water right which is in derogation of State law. ( Martz Op., 88 I.D. 253. In September, 1981, Solicitor Coldiron again addressed this issue, and agreed with the Martz Opinion that FLPMA and the Taylor Grazing Act do not provide "an independent statutory basis for water uses which are inconsistent with the substantive and procedural requirements of state law." The Coldiron Opinion concluded, furthermore, that there is no basis for the assertion of the Krulitz federal appropriative nonreserved water rights theory, in light of the United States Supreme Court decisions in *United States v. New Mexico* (438 U.S. 696 (1978)) and *California v. United States* ( 438

U.S. 645 (1978)), "The Court thus held that the United States water use is limited until it reserves the water or complies with the various state laws to appropriate that water, in the same manner as any other individual." (Coldiron Op. 88 I.D. 1055, 1062).

Finally, the Department of Justice also addressed this issue in 1982 in a Memorandum to the Assistant Attorney General, Land and Natural Resources Division, which agreed with the principle that "the assignment of land management functions to a federal agency does not provide an appropriate legal basis for assertion of water rights by federal agencies." However, the Justice Department recognized that Congress could act to preempt State law with regard to the appropriation of unappropriated water: "[T]he federal constitutional authority to preempt state water law must be clearly and specifically exercised, either expressly or by necessary implication. Otherwise, the presumption is that the western states retain control over the allocation of unappropriated water within their borders." (*Federal "Non-Reserved" Water Rights*, 6 Op. Off. Legal Counsel 328 (1982)).

The most important aspect of the debate over the existence of "nonreserved" rights is that although these opinions reach differing conclusions on the issue of whether federal claims to the use of water which are outside the parameters of traditional reserved rights theory are subject to state law, they all concede that (1) the use of water to attain federal purposes which are not within the scope of the reserved rights doctrine constitutes the acquisition of a water right that must be asserted and established in McCarran adjudications, and (2) the federal claims for water are limited to "unappropriated waters," which means that, absent the exercise of the power of eminent domain, federal claims to water cannot divest prior appropriators of their property interest in the right of use of water in priority. These principles remain applicable regardless of whether the legal basis for the assertion of federal claims to the use of water is tied to a reservation of lands.

## III. Conclusion

The decision by Congress to integrate federal and state claims to the use of water in a manner that inevitably makes some federal claims subordinate to non-federal claims is based on the sound public policy considerations of the promotion of certainty and avoidance of conflict. Congress clearly has the authority to amend or repeal McCarran. However, it has not done so to date. More importantly, if it were to limit the scope of McCarran, it must also replace the existing systems with a rational alternative, and explain how the new system will affect the thousands of water rights created under existing water allocation systems. Likewise, a visionary of the "New West" who is not prepared to accept existing allocation systems as the water allocation methodology for the brave new world that they seek to create will have to articulate the theory and practice of the substitute, and persuade Congress to adopt the new system.

Assuming that there is such a thing as a "vision of the New West" that is shared by more than one person, once the principle of recognition of existing rights and expectations is accepted by all, there is a great deal of progress that can be made towards meeting new and different values for water. For example, existing systems can be optimized to provide environmental and recreational benefits without loss of yield from these systems. Likewise, existing markets for the transfer of water can be used to shift water to meet new demands, and water markets can clearly be expanded and made more efficient. Finally, the construction of additional water supply infrastructure may allow more efficient management and enable greater cooperation between traditional and non-traditional water users. However, the political consensus necessary to make progress towards these goals, and to pay for the reallocation of water when necessary, will not exist until the holders of the vision abandon their attempts to craft the New West without regard to existing realities.