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DEFERENCE TO STATE COURTS IN THE ADJUDICATION OF RESERVED WATER RIGHTS

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INTRODUCTION

On March 24, 1976, the Supreme Court of the United States held that the jurisdiction of a federal court to determine the United States' claims to reserved water rights, including claims asserted on behalf of Indian tribes, should yield to the adjudicatory process of a Colorado water court.[1] *Akin v. United States* culminated nearly a decade of litigation as to the proper forum for the adjudication of reserved right claims. This decision preserves the efficacy of the Colorado water adjudicatory system and confirms the salutary purpose of the McCarran Amendment.[2]

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[1] Colorado River Water Conservation Dist. v. United States, 424 U.S. 800 (1976) (this case is more commonly known by the name of its companion case, *Akin v. United States*) [hereinafter cited as *Akin*]. Although the federal claims were filed in a single action, two separate petitions for writ of certiorari were eventually filed. Both were granted and the cases were consolidated for hearing. 421 U.S. 946 (1975).

[2] 43 U.S.C. § 666 (1970), commonly known as the "McCarran Amendment," authorizes the joinder of the United States in certain adjudications of water rights. In full text, it 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 of or is in the process of acquiring water rights by appropriation under State law, by purchase, by exchange, or otherwise, and the United States is a necessary party to such suit. The United States, when a party to any such suit, shall (1) be deemed to have waived any right to plead that the State laws are inapplicable or that the United States is not amenable thereto by reason of its sovereignty, and (2) shall be subject to the judgments, orders, and decrees of the court having jurisdiction, and may obtain review thereof, in the same manner and to the same extent as a private individual under like circumstances: *Provided*, That no judgment for costs shall be entered against the United States in any such suit.
>
> (b) Summons or other process in any such suit shall be served upon the Attorney General or his designated representative.

Although the doctrine of abstention was expressly circumscribed and held inapplicable, deference to the state water court was nevertheless found to be proper upon considerations of "wise judicial administration."[3] Significantly, the claims asserted by the United States on behalf of two Indian tribes were found to be no basis for denying the power to adjudicate federal reserved water rights to the Colorado court.

I. THE IMPLIED RESERVATION DOCTRINE

The doctrine of implied reservation of water rights[4] was recently outlined by the Supreme Court in *Cappaert v. United States*:[5]

> This Court has long held that when the Federal Government withdraws its land from the public domain and reserves it for a federal purpose, the Government, by implication, reserves appurtenant water then unappropriated to the extent needed to accomplish the purpose of the reservation. In so doing the United States acquires a reserved right in unappropriated water which vests on the date of the reservation and is superior to the rights of future appropriators. Reservation of water rights is empowered by the Commerce Clause, Art. I, § 8, which permits federal regulation of navigable streams, and the Property Clause, Art. IV, § 3, which permits federal regulation of federal lands. The doctrine applies to Indian reservations and other federal enclaves, encompassing water rights in navigable and nonnavigable streams.[6]

> (c) Nothing in the 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.

The genesis of this limited waiver of sovereign immunity was first proposed by Senator McCarran of Arizona in 1949. After considerable attention by the legislative and executive branches of government, the "McCarran Amendment" was passed by Congress on July 4, 1952, as a rider to the Department of Justice Appropriations Act for fiscal year 1953. It was signed by President Truman on July 10, 1952. *See generally* Comment, *Adjudication of Water Rights Claimed By the United States—Application of Common-Law Remedies and the McCarran Amendment of 1952*, 48 CALIF. L. REV. 94 (1960); Comment, *The McCarran Amendment—A Method of Clarifying the Implied Reservation Doctrine*, 7 LAND & WATER L. REV. 587 (1972); Comment, *Adjudication of Federal Reserved Water Rights*, 42 U. COLO. L. REV. 161 (1970).

[3] 424 U.S. at 817.

[4] It is also frequently referred to as the reserved rights doctrine or the *Winters* doctrine. Winters v. United States, 207 U.S. 564 (1908).

[5] 96 S. Ct. 2062 (1976).

[6] *Id.* at 2069 (citations omitted). In *Cappaert*, the Court considered a Government claim to reserved waters appurtenant to Devil's Hole, which was established in 1952 as a

The Supreme Court first applied the doctrine of reserved rights in *Winters v. United States*[7] in regard to the Fort Belknap Indian Reservation in Montana. For several decades after *Winters,* it was a generally accepted notion that the judicially created doctrine was "a special rule of Indian law."[8] With only this limited exception, the states, not the Federal Government, were believed to be the source of all rights to the use of water within their boundaries.

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detached unit of the Death Valley National Monument. Devil's Hole is a limestone cavern which contains a pool inhabited by a unique species of fish, commonly known as Devil's Hole pupfish, which were isolated from their ancestral stock when the prehistoric Death Valley Lake System dried up. For survival, the pupfish depend upon a partially submerged rock shelf. The water in the pool, which covers the rock shelf, comes from a huge aquifer which extends beneath approximately 4,500 square miles of land.

Acting pursuant to state law, the Cappaerts pumped groundwater from wells about two and one-half miles from Devil's Hole for use on their ranch. During periods of their pumping, the water level in Devil's Hole dropped, exposing a greater area of the rock shelf and endangering the continued survival of the pupfish.

The Court avoided extending the doctrine of reserved rights to groundwater by finding that the pool was surface water. *Id.* at 2071. There was, however, no hesitation in declaring that reserved rights can be protected "whether the diversion is of surface or groundwater." *Id.* at 2072. The Court upheld an injunction which required the Cappaerts to limit their pumping so that a certain water level, necessary to preserve the pupfish, is maintained in the pool. *See generally* Note, *Federally Reserved Rights to Underground Water—A Rising Question in the Arid West,* 1973 UTAH L. REV. 43.

[7] 207 U.S. 564 (1908). Although the 1888 treaty which established the Indian reservation was silent as to water rights, the Court said:

> The power of the Government to reserve the waters and exempt them from appropriation under the state laws is not denied, and could not be. *The United States v. The Rio Grande Dam & Irrig. Co.* 174 U.S. 690, 702; *United States v. Winans,* 198 U.S. 371. That the Government did reserve them we have decided, and for a use which would be necessarily continued through years.

Id. at 577. The reserved right to 1,000 miner's inches of water, not appropriated under state law, was to be protected against diminishment by subsequent upstream appropriators who held valid Montana water rights. Without the water, the national policy of changing the Indians to a pastoral people would have been frustrated. Additionally, the Court noted the rule that any ambiguity in a treaty with Indians must be resolved in their favor.

[8] F. TRELEASE, FEDERAL-STATE RELATIONS IN WATER LAW 105 (1971) (Report NWCL-71-014 prepared under contract with the National Water Commission). Reserved water rights were found for Indian reservations in several instances. *See, e.g.,* United States v. Ahtanum Irrig. Dist., 236 F.2d 321 (9th Cir. 1956), *cert. denied,* 352 U.S. 988 (1957); United States v. Walker River Irrig. Dist., 104 F.2d 334 (9th Cir. 1939); United States v. Conrad Investment Co., 156 F. 123 (D. Mont. 1907), *aff'd,* 161 F. 829 (9th Cir. 1908). For discussion of reserved waters for Indian reservations see generally E. CLYDE, INDIAN WATER RIGHTS 377 (R. Clark ed. 1967); Bloom, *Indian "Paramount" Rights to Water Use,* 16 ROCKY MT. MIN. L. INST. 669 (1971).

The claim of the states to exclusive dominion over water rights, excluding reserved rights for Indians, was thought to have been recognized and strengthened by the Supreme Court in *California Oregon Power Co. v. Beaver Portland Cement Co.*[9] In construing the Acts of 1866 and 1870[10] and the Desert Land Act of 1877,[11] which because of their express recognition of and deference to state-decreed water rights were the keystones of the states' position, the Court remarked:

> What we hold is that following the act of 1877, if not before, all non-navigable waters then a part of the public domain became *publici juris*, subject to the plenary control of the designated states . . . with the right in each to determine for itself to what extent the rule of appropriation or the common-law rule in respect of riparian rights should obtain.[12]

The optimism of the states, engendered by *Beaver Portland,* was dashed two decades later in *Federal Power Commission v. Oregon.*[13] There the Court made a clear distinction between *public* lands, such as those involved in *Beaver Portland,* and *reserved* lands such as the Indian reservation and power site reservation which were before the Court in *Pelton Dam.*[14] The Acts of 1866, 1870, and 1877 were held to be inapplicable to reserved lands and waters appurtenant thereto. Thus, there appeared to be federal rights, independent of state law, to the use of waters appurtenant to reserved lands.[15]

It was not until 1963 in *Arizona v. California*[16] that the full scope and potential effects of the doctrine of reserved rights became apparent. After a massive evidentiary proceeding, a special

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[9] 295 U.S. 142 (1935). (This case is generally referred to as *Beaver Portland.*)

[10] Act of July 9, 1870, ch. 235, § 17, 16 Stat. 218, *amending* Act of July 26, 1866, ch. 262, § 9, 14 Stat. 251, 253. These Acts are now the basis of 43 U.S.C. §§ 661-66 (1970).

[11] 43 U.S.C. §§ 321-39 (1970) (originally enacted as Act of March 3, 1877, ch. 107, § 1, 19 Stat. 377).

[12] 295 U.S. at 163-64. For discussion of these Acts see C. WHEATLEY, C. CORKER, T. STETSON & D. REED, 1 STUDY OF THE DEVELOPMENT, MANAGEMENT, AND USE OF WATER RESOURCES ON THE PUBLIC LANDS 153-70 (1969) (prepared under contract with Public Land Law Review Commission).

[13] 349 U.S. 435 (1955). (This case is generally referred to as *Pelton Dam.*)

[14] Public lands are those federal lands subject to disposition under the public land laws. Reserved lands are the federal lands set aside for public purposes and are not subject to private entry or disposition. *Id.* at 448.

[15] *Id.*

[16] 373 U.S. 546 (1963).

master, appointed by the Supreme Court, concluded, *inter alia,* that in addition to its power to reserve waters by implication for Indian reservations, the United States could similarly reserve waters for national parks, forests, monuments, recreation areas, fish and wildlife refuges, and Bureau of Land Management lands.[17] However, the United States' claims were subjected to a strict burden of proof and were found to be *de minimus* in most instances. The Supreme Court expressly confirmed the extention of the implied reservation doctrine to non-Indian reservations[18] and generally adopted the special master's report.

Western waters users have been concerned about the implied reservation doctrine because of its "uncorrelated mystery" and "ethereal" character,[19] and because of the extensive public land acreage in the West. In particular, reserved lands such as national forests and parks are frequently the fountainheads of western water supplies.[20] The unasserted reserved rights of such lands cloud the character of state-decreed water rights because the existence, points of diversion (if any), places of use, priorities, and amount of reserved rights remain largely unknown. State administration, planning, and adjudications are disrupted and frustrated by these uncertainties. Water resource development may

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[17] *Id.* at 592-94.

[18] For further discussion of *Arizona v. California* see C. WHEATLEY, *supra* note 12, at 121-36; Haber, Arizona v. California—*A Brief Review,* 4 NATURAL RES. J. 17 (1964); Meyers, *The Colorado River,* 19 STAN. L. REV. 1 (1966).

[19] The Colorado Supreme Court so described the doctrine in United States v. District Court in and for the County of Eagle, 169 Colo. 555, 579-80, 458 P.2d 760, 772 (1969), *aff'd,* 401 U.S. 520 (1971). For a complete discussion of the doctrine of reserved water rights see E. MORREALE, FEDERAL-STATE RIGHTS AND RELATIONS, WATER AND WATER RIGHTS (R. Clark ed. 1967); F. TRELEASE, *supra* note 8; C. WHEATLEY, *supra* note 12; Moses, *Federal-State Water Problems,* 47 DENVER L.J. 194 (1970); Ranquist, *The Winters Doctrine and How it Grew: Federal Reservation of Rights to the Use of Water,* BRIGHAM YOUNG UNIV. L. REV. 639 (1975).

[20] Some 46% of the total land area in the West is public land. Approximately 88% of the runoff from public lands in the eleven coterminous western states is derived from national forests and about 59% of the total annual runoff in those states comes from national forests. *See* PUBLIC LAND LAW REVIEW COMMISSION, ONE THIRD OF THE NATION'S LAND 141 (1970); C. WHEATLEY, *supra* note 12, at 386.

Although the amount of water to be claimed for most reserved rights is expected to be minimal, substantial claims may be made for Indian and oil shale reservations. Holland, *Mixing Oil and Water: The Effect of Prevailing Water Law Doctrines on Oil Shale Developments,* 52 DENVER L.J. 657 (1975); Note, *A Proposal for the Quantification of Reserved Indian Water Rights,* 74 COLUM. L. REV. 1299 (1974).

be similarly impeded.[21] Owners of state water rights particularly object to the tenet of the doctrine that no compensation is paid for damage to water rights which become subordinate to reserved rights.[22]

II. JURISDICTIONAL DISPUTE

Since the mid-1950's, Congress has entertained legislation to define federal-state relations in water matters and, in particular, to address the reserved rights doctrine.[23] None of these legislative proposals had succeeded, however, when the jurisdictional battle over reserved rights adjudication erupted in 1967 in Colorado.

Upon petition of the Colorado River Water Conservation District, the District Court in and for Eagle County, Colorado initiated an adjudication of water rights in the Eagle River and its tributaries.[24] Notice of this proceeding was served upon the Federal Government pursuant to the requirements of the McCarran Amendment for joining the United States.[25] The United States moved that it be dismissed from the action for lack of jurisdiction based upon the Government's sovereign immunity. The motion was denied. The United States then applied to the Colorado Supreme Court for a writ in the nature of prohibition[26] on the contention that its reserved water rights were not within the purview of the McCarran Amendment's waiver of sovereign immunity and, therefore, could not be adjudicated in state court. The state supreme court denied the writ and declared:

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[21] For further discussion of the problems engendered by the doctrine see F. TRELEASE, *supra* note 8, at 117-30.

[22] *Id.* at 147m.

[23] For a complete discussion of these legislative proposals see Hanks, *Peace West of the 98th Meridian—A Solution to Federal-State Conflicts over Western Waters*, 23 RUTGERS L. REV. 33 (1968); Morreale, *Federal-State Conflicts over Western Waters—A Decade of Attempted "Clarifying Legislation,"* 20 RUTGERS L. REV. 423 (1966). The National Water Commission urged modification of the doctrine to provide for compensation for any water users whose prior rights are impaired by exercise of reserved rights. NATIONAL WATER COMMISSION, WATER POLICIES FOR THE FUTURE 467-69 (1973). *See also* PUBLIC LAND LAW REVIEW COMMISSION, *supra* note 20, at 146-49 (1970).

[24] The Colorado River Water Conservation District was established as a public agency in 1937 by the state legislature to promote "the conservation, use and development of the water resources of the Colorado River and its principal tributaries" and "to safeguard for Colorado, all water to which the state of Colorado is equitably entitled under the Colorado River Compact." COLO. REV. STAT. ANN. § 37-46-101 (1973).

[25] *See* note 2 *supra*.

[26] COLO. R. CIV. PROC. 106.

> For the reasons already expressed as to the promotion of orderly procedure, we hold that it was the purpose and intent of the McCarran Amendment that it be used to obtain jurisdiction over the United States with respect to its reserved water rights.[27]

The Supreme Court of the United States granted a petition for a writ of certiorari in order to consider the important jurisdictional question.[28] In 1971, in *United States v. District Court in and for the County of Eagle,*[29] the Government's argument that the McCarran Amendment did not submit reserved right claims to the jurisdiction of Colorado's courts was tersely repudiated by a unanimous Court:

> We reject that conclusion for we deal with an all-inclusive statute concerning "the adjudication of 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 appropriative rights, riparian rights, and reserved rights.[30]

In a companion decision, *United States v. District Court in and for Water Division No. 5,*[31] the Court, again unanimously,

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[27] United States v. District Court in and for the County of Eagle, 169 Colo. 555, 581, 458 P.2d 760, 773 (1969).

[28] 397 U.S. 1005 (1970).

[29] 401 U.S. 520 (1971) [hereinafter cited as *Eagle County*]. *Eagle County* concerned state court jurisdiction over reserved water rights pursuant to Colorado's 1943 Adjudication Act, COLO. REV. STAT. ANN. § 148-9-7 (1963), which has been replaced by the Water Right Determination and Administration Act of 1969, COLO. REV. STAT. ANN. §§ 37-92-101 to -602 (1973).

[30] 401 U.S. at 524. The Colorado Supreme Court decree was affirmed. Mr. Justice Douglas also stated:

> It is clear from our cases that the United States often has reserved water rights based on withdrawals from the public domain. As we said in *Arizona v. California*, 373 U.S. 546, the Federal Government had the authority both before and after a State is admitted into the Union "to reserve waters for the use and benefit of federally reserved lands." The federally reserved lands include any federal enclave. In *Arizona v. California* we were primarily concerned with Indian reservations. The reservation of waters may be only implied and the amount will reflect the nature of the federal enclave.

Id. at 522-23 (citations omitted). Mr. Justice Harlan concurred in the opinion but explicitly disclaimed "the intimation of any view as to the existence and scope of the so-called 'reserved water rights' of the United States." United States v. District Court in and for Water Div. No. 5, 401 U.S. 527, 530 (1971) (Harlan, J., concurring) (concurring opinion also applied to *Eagle County*).

[31] 401 U.S. 527 (1971) [hereinafter cited as *Water Division No. 5*]. The Colorado Supreme Court had, without opinion, denied the United States relief in the nature of prohibition in its efforts to defeat joinder in a state proceeding in a newly created water division. United States v. District Court in and for Water Div. No. 5, No. 24821 (July 9, 1970).

held that the judicial proceedings established by the Colorado Water Right Determination and Administration Act of 1969[32] were sufficient to constitute a general adjudication within the meaning of the McCarran Amendment.[33] Mr. Justice Douglas again affirmed the Colorado Supreme Court judgment and stated:

> As we said in the *Eagle County* case, the words "general adjudication" were used in *Dugan v. Rank*, 372 U.S. 609, 618 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; and, as we said in the other case, if there is a collision between prior adjudicated rights and reserved rights of the United States, the federal question can be preserved in the state decision and brought for review.[34]

Following these decisions, the United States submitted its claims in Colorado Water Divisions 4, 5, and 6 pursuant to the 1969 Adjudication Act and in various district courts under the 1943 Adjudication Act.[35] A master-referee was appointed to consider the federal claims in a single proceeding and on August 6, 1976, a Partial Master-Referee Report was submitted.[36]

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[32] COLO. REV. STAT. ANN. §§ 37-92-101 to -602 (1973). The 1969 Act represents a streamlining of water adjudicatory procedures whereby a basin-wide court division concept was substituted for the previous small district concept and a court-appointed referee frees the court from many preliminary matters. *See* Note, *A Survey of Colorado Water Law*, 47 DENVER L.J. 226, 296-304 (1970).

[33] *See* note 2 *supra*.

[34] 401 U.S. at 529-30.

[35] Water Div. No. 4, Cases W-425 through 438; Water Div. No. 5, Cases W-467 through 469; Water Div. No. 6, Cases W-85 and 86; District Court in and for Summit County, Civil Action 2371; District Court in and for Eagle County, Civil Action 1529 and 1548; District Court in and for Grand County, Civil Action 1768.

[36] Reserved water rights were found for national forests, parks and monuments, public springs and water holes and mineral hot springs. The priority dates were antedated to reflect the date the reservation and purpose of water use were established. For example, no minimum stream flow rights were recognized until the June 12, 1960 enactment of the Multiple Use Act, 16 U.S.C. § 528, which first declared fish and wildlife activities and outdoor recreation to be national forest purposes. Additionally, reserved rights on national forests were subordinated to state appropriations under the terms of the Organic Act of 1897, 16 U.S.C. §§ 473, 475-78, 479-82, 551 (1970), which grants the use of waters within national forests for domestic, mining, milling, and irrigation purposes under state law.

The master-referee granted the Government that amount of water reasonably necessary to effectuate the purposes of each reservation but held that the United States must follow certain quantification procedures. Under the doctrine of estoppel, two parties which

III. *Akin v. United States*

On November 14, 1972, less than eight months after *Eagle County* and *Water Division No. 5* were decided, the Federal Government instituted an action in federal court for the adjudication of its claims to the use of water in the San Juan River Basin in southwestern Colorado.[37] This action was brought by the United States in its own right and as trustee for the Ute Mountain Ute and Southern Ute Indian tribes. The complaint sought a determination and decree of federal water rights, both appropriative and reserved, as against 968 known defendants plus all unknown claimants of interest to water in the Mancos, La Plata, Animas, Florida, Los Pinos (Pine), Piedra, Navajo, and San Juan Rivers and water tributary thereto in the state of Colorado.[38] The United States also prayed for the appointment of a water master to administer the respective rights of all users as determined in the adjudication. Reserved water rights were asserted in connection with the Ute Mountain Ute and Southern Ute Indian Reservations, Mesa Verde National Park, San Juan National Forest, Yucca House and Hovenweep National Monuments, public waterhole and spring reservations, hot spring reservations, and certain Bureau of Reclamation Projects in the San Juan River Basin.

The initiation of the federal action was viewed by many Colorado water interests as an attempt to circumvent Colorado's hard-fought victories in *Eagle County* and *Water Division No. 5.* The United States Supreme Court had declared Colorado's water courts to be experienced, competent forums for the adjudication of federal reserved as well as appropriative rights. Did it not make common sense to utilize the state water courts with their well-defined procedures instead of a removed, less equipped federal court to conduct a massive water rights adjudication? The complaint's prayer for a water master to administer whatever rights

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had acquired water rights and acted in reliance upon the actions of the Federal Government were held to be protected from the detrimental assertion of reserved rights. The Master-Referee's Partial Report is being reviewed by the water court.

[37] United States v. Akin, Civil No. C-4497 (D. Colo., filed Nov. 14, 1972).

[38] These waters are within the San Juan Basin and are tributary to the Colorado River Basin. They constitute a part of Colorado's Water Division No. 7 which also includes a substantial portion of the Dolores River Basin. COLO. REV. STAT. ANN. § 37-92-201(1)(g) (1973). A map of Water Division No. 7 is produced in the appendix to this article.

were decreed was particularly bothersome. It gave rise to fears of confusion and conflicts between the water master and the existing state administrative scheme.[39]

Despite the commencement of the federal suit, the United States was served on December 22, 1972[40] under the McCarran Amendment to join Water Division No. 7 proceedings and to assert all of its claims to water in the Division. The Government responded in the state action by filing its claims, both reserved and appropriative, in the Dolores River drainage, but omitting its claims in the San Juan River drainage which had been filed earlier in federal court.[41]

In the federal action, several defendants and intervenors[42] moved to dismiss the complaint for lack of jurisdiction and upon considerations of abstention and comity. The United States had

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[39] The administration and distribution of the waters within Colorado rest with the State Engineer. The State Engineer has appointed a division engineer in each of the seven water divisions. Numerous water commissioners on the staff of each division engineer perform the necessary field work. Water rights are administered and distributed in accordance with court decrees which set priorities by historic date of appropriation for certain amounts of water for each right. For a further discussion of Colorado's administrative structure and scheme see G. RADOSEVICH, K. NOBE, D. ALLARDICE, & C. KIRKWOOD, EVOLUTION AND ADMINISTRATION OF COLORADO WATER LAW: 1876-1976 (1976); NATIONAL WATER COMMISSION, A SUMMARY DIGEST OF STATE WATER LAWS 155-73 (1973); Carlson, *Report to Governor John A. Love on Certain Colorado Water Law Problems*, 50 DENVER L.J. 293 (1973).

[40] The January 3, 1973 date cited by the Court in *Akin* referred to the date of service under the Federal Rules of Civil Procedure 4(d)(4) upon the U.S. Attorney in Denver and upon the Attorney General in Washington; service under the McCarran Amendment was achieved on December 22, 1972. 424 U.S. at 806.

[41] On October 6, 1976, the reserved right claims in the Dolores River drainage were rebuffed by the Colorado District Court in and for Water Division No. 7. Relying upon California Oregon Power Co. v. Beaver Portland, 295 U.S. 142 (1935), Stockman v. Leddy, 55 Colo. 24, 129 P. 222 (1912), United States v. District Court in and for the County of Eagle, 169 Colo. 555, 458 P.2d 760 (1969), the McCarran Amendment, and the history of Colorado's entry into the Union, the court held that in Colorado there can be no water rights reserved, at least subsequent to the admission of Colorado to the Union in 1876. *In re* Application for Water Rights of the United States of America, Cases W-1120-73 through W-1139-73 and W-1143-73 through W-1148-73, Oct. 6, 1976 (Findings of Law of Case and Order).

[42] The Colorado River Water Conservation District, the Board of Water Commissoners of the City and County of Denver, the Southwestern Water Conservation District, the Mancos Water Conservancy District and the State of Colorado appeared in the action to urge dismissal of the federal claims. The Southern Ute Indian Tribe, the Ute Mountain Ute Indian Tribe and the National Tribal Chairman's Association appeared as *amici curiae* through the Native American Rights Fund to urge retention of federal jurisdiction.

invoked the jurisdiction of the district court under the following statute:

> Except as otherwise provided by Act of Congress, the district courts shall have original jurisdiction of all civil actions, suits or proceedings commenced by the United States, or by any agency or officer thereof expressly authorized to sue by Act of Congress.[43]

This jurisdictional claim was contested on the ground that the McCarran Amendment was an Act of Congress which "otherwise provided" for specific state court jurisdiction. Once service was completed under the Amendment, it was argued that there could be no jurisdiction under 28 U.S.C. § 1345 to adjudicate federal water rights.

Even if federal court jurisdicton existed, the court was urged to decline to exercise it under the doctrine of abstention, which vests the court with the discretionary authority to dismiss or to stay an action even though the court is possessed of the requisite jurisdiction.[44] Abstention was first announced as a doctrine in *Railroad Commission of Texas v. Pullman Co.*[45] and has been approved by the Court on numerous occasions where the benefits of deferring to a state court outweighed the harm of dismissing or postponing a federal action.[46] The defendants and intervenors in *Akin* argued that under the guidelines of *Burford v. Sun Oil Co.*[47] and *Alabama Public Service Commission v. Southern Railway Co.*[48] abstention was proper to avoid disruption of a state program and state policy.[49] Specifically, although reserved water rights may be created independent of state law, they must be

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[43] 28 U.S.C. § 1345 (1970).

[44] The limited circumstances in which a court may invoke the doctrine of abstention were delineated by the Supreme Court in *Akin*. *See* note 63 *infra*.

[45] 312 U.S. 496 (1941).

[46] For discussion of abstention cases and the abstention doctrine see, H. HART & H. WECHSLER, THE FEDERAL COURTS AND THE FEDERAL SYSTEM (2d ed. 1973); 1A MOORE'S FEDERAL PRACTICE § 0.203, at 2101 (2d ed. 1976); C. WRIGHT, LAW OF FEDERAL COURTS (2d ed. 1970); Bezanson, *Abstention: The Supreme Court and Allocation of Judicial Power*, 27 VAND. L. REV. 1107 (1974); Comment, *Adjudication of Indian and Federal Water Rights in the Federal Courts*, 46 COLO. L. REV. 555 (1975).

[47] 319 U.S. 315 (1943).

[48] 341 U.S. 341 (1951).

[49] In *Burford*, abstention was deemed appropriate to avoid federal conflict with the Texas oil well drilling regulatory program. Railroad activity which was subject to a regulatory scheme under the jurisdiction of a state public service commission was the state interest deferred to in *Alabama*.

administered in a priority system with water rights established under state law. Also, as water rights in a priority system are interrelated by virture of their common source of supply, reserved rights would necessarily be entwined with appropriative rights in an administrative scheme.[50] Furthermore, abstention had been recognized as proper where the subject matter of the lawsuit was water—a unique resource of great concern to the state.[51]

The doctrine of comity was also advanced as a basis upon which the federal court should decline jurisdiction. Comity refers to a judicial policy of avoiding federal-state conflicts over matters within the normal sphere of state activity.[52] Federal jurisdiction was attacked as an unnecessary and substantial interference with Colorado's water right adjudication and administrative system and inconsistent with the longstanding congressional policy of deferring to state law and state proceedings in water right matters.[53]

The United States argued in rebuttal that the McCarran Amendment did not preclude the exercise of jurisdiction under 28 U.S.C. § 1345. The Amendment merely authorized joinder of the

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[50] Abstention has been held to be appropriate in similar circumstances. *See* Allegheny Airlines, Inc. v. Pennsylvania Pub. Util. Comm'n, 465 F.2d 237 (3d Cir. 1972), *cert. denied*, 410 U.S. 943 (1973).

[51] Kaiser Steel Corp. v. W.S. Ranch Co., 391 U.S. 593 (1968); Union Water Supply Corp. v. Vaughn, 355 F. Supp. 211 (S.D. Tex. 1972), *aff'd*, 474 F.2d 1396 (5th Cir. 1973); *cf.* Reetz v. Bozanick, 397 U.S. 82 (1970).

[52] Mr. Justice Black, in Younger v. Harris, 401 U.S. 37 (1971), described comity as:

> a proper respect for state functions, a recognition of the fact that the entire country is made up of a Union of separate state governments, and a continuance of the belief that the National Government will fare best if the States and their institutions are left free to perform their separate functions in their separate ways. . . . *What the concept does represent is a system in which there is sensivity to the legitimate interests of both State and National Governments, and in which the National Government, anxious though it may be to vindicate and protect federal rights and federal interests, always endeavors to do so in ways that will not unduly interfere with the legitimate activities of the States.*

Id. at 44 (emphasis added). Comity is perhaps best viewed as part of the abstention doctrine, though it alone can support a dismissal of a federal action where federal jurisdiction would disrupt state interests. *See* County of Allegheny v. Frank Mashuda Co., 361 U.S. 185 (1959); Allegheny Airlines, Inc. v. Pennsylvania Pub. Util. Comm'n, 465 F.2d 237 (3d Cir. 1972), *cert. denied*, 410 U.S. 943 (1973). *See also* Comment, *Federal Injunctions Against State Action*, 35 GEO. WASH. L. REV. 744 (1967).

[53] *See In re* Green River Drainage Area, 147 F. Supp. 127 (D. Utah 1956). *See also* F. TRELEASE, *supra* note 8; NATIONAL WATER COMMISSION, WATER POLICIES FOR THE FUTURE, *supra* note 24, at 459-71 (1973).

United States but did not bar the Federal Government from utilizing federal courts for water adjudications. The United States asserted it had initiated suit before its joinder in the state action and, as sovereign, should have its choice of forums. Abstention "is an extraordinary and narrow exception to the duty of a District Court to adjudicate a controversy properly before it,"[54] and should not be invoked to dismiss their action; the doctrine has generally been confined to instances where a federal constitutional question might be mooted or affected by an underlying issue of state law.[55] The United States claimed *Akin* involved no unresolved question of state law but rather posed questions of federal law which a federal court normally should resolve. Similarly, comity was a restricted doctrine applicable only to situations involving state criminal or quasi-criminal suits and, if it was to be applied at all in *Akin*, would require the state court to yield to the federal court which had first obtained jurisdiction.

Additionally, as *amici curiae* Indian groups pointed out, "[t]he policy of leaving Indians free from state jurisdiction and control is deeply rooted in the Nation's history,"[56] and, since water rights for Indian reservations were before the federal court, deference to a state forum would be inappropriate. In fact, the United States and the Indian groups argued that federal courts were the exclusive forum for the adjudication of reserved waters claimed for the Indian reservations and the state court had no jurisdiction over such claims. The McCarran Amendment did not expressly include Indian water rights and, in light of the long-standing policy against state jurisdiction over Indian matters, they urged that it not be interpreted to encompass Indian reserved rights. Support for this exclusion from the Amendment was claimed to be found in Public Law 280 which, *inter alia*, contains limitations on state civil jurisdiction over Indian lands and water rights.[57]

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[54] County of Allegheny v. Frank Mashuda Co., 360 U.S. 185, 188 (1959).

[55] *Id.* at 189; Railroad Comm'n v. Pullman Co., 312 U.S. 496 (1941).

[56] Rice v. Olson, 324 U.S. 786, 789 (1945). *See also* McClanahan v. Arizona Tax Comm'n, 411 U.S. 164 (1973); Worcester v. Georgia, 31 U.S. (6 Pet.) 515 (1832).

[57] Act of Aug. 15, 1953, ch. 505, tit. XVIII, 67 Stat. 588 (partially codified as 18 U.S.C. § 1162 (1970) and 28 U.S.C. § 1360 (1970), *as amended* 25 U.S.C. §§ 1321-26 (1970)). This Act, commonly known as Public Law 280, provides, after granting civil jurisdiction over Indian matters to five states, that nothing in the statute

The federal district court decided to abstain in recognition of the presence of applicable and workable state law and the state proceeding.[58] In adopting a practical approach, the court cited a desire to avoid a duplicative and piecemeal adjudication and administration. The state forum was declared to be able to fully and adequately adjudicate all issues including those concerning the Indian reservations.

The United States prosecuted an appeal to the Tenth Circuit Court of Appeals which reversed the order of dismissal.[59] The court concentrated upon the effect of the McCarran Amendment upon federal court jurisdiction. The district court had avoided that issue by its determination to abstain from exercising any jurisdiction it may have had. The circuit court held that the McCarran Amendment leaves federal jurisdiction under 28 U.S.C. § 1345 unimpaired and that the Amendment "does not express an intention that the United States shall utilize state courts for the purpose of litigating its claims to water."[60]

After finding federal jurisdiction, the Tenth Circuit turned to the abstention question. In abrupt fashion, the court concluded that the case before it did not fit within any of the extremely narrow areas in which abstention was proper. The Federal Gov-

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> 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.*

28 U.S.C. § 1360 (1970) (emphasis added). Colorado is not one of the five states enumerated in P.L. 280 and has not acted to assume P.L. 280 jurisdiction. Courts have recognized Colorado's jurisdiction in certain matters involving Indians, their property and reservations. United States v. McBratney, 104 U.S. 621 (1881); Martinez v. Southern Ute Tribe, 150 Colo. 504, 374 P.2d 691 (1962). *See also* Martinez v. Southern Ute Tribe, 249 F.2d 915 (10th Cir. 1957), *cert. denied,* 356 U.S. 960 (1958). *But see* Whyte v. District Court, 140 Colo. 344, 346 P.2d 1012 (1959), *cert. denied,* 363 U.S. 829 (1960). *See generally* THE LIBRARY OF CONGRESS' CONGRESSIONAL RESEARCH SERVICE FOR THE SENATE COMM. ON INTERIOR AND INSULAR AFFAIRS, 94TH CONG. 1ST SESS., BACKGROUND REPORT ON PUBLIC LAW 280 (COMM. PRINT 1975).

[58] Civil No. 4497 (D. Colo., July 30, 1973). The district court issued no written opinion.

[59] United States v. Akin, 504 F.2d 115 (10th Cir. 1974).

[60] *Id.* at 118.

ernment had won the race to the courthouse and the presence of the United States as plaintiff seeking to establish national rights militated strongly against the invocation of abstention. Therefore, the court of appeals directed the district court to proceed with the adjudication.[61]

The Supreme Court granted certiorari

> to consider the important questions of whether the McCarran amendment terminated jurisdicition of federal courts to adjudicate federal water rights and whether, if that jurisdiction was not terminated, the District Court's dismissal in this case was nevertheless appropriate.[62]

On March 24, 1976, the Court reversed the court of appeals and reinstated the district court's dismissal of the action. However, Mr. Justice Brennan, writing for six members of the Court, rejected the district court's reliance on the doctrine of abstention as the basis for declining federal jurisdicton.[63] Deference to the state forum was held proper because "in situations involving the contemporaneous exercise of concurrent jurisdictions,"[64] exceptional circumstances like those present in *Akin* can warrant dismissal of a federal complaint. Thus, the Court reaffirmed Colorado's position that federal reserved rights should be adjudicated in state court.

Although the petitioners did not raise the issue, the Court first considered whether the McCarran Amendment repealed the

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[61] For a discussion of the Tenth Circuit opinion see, Note, *Water Law: A Repudiation of Abstention*, 53 DENVER L.J. 225 (1976); Note, *Water Law—Procedural Inconsistencies and Substantive Issues in the Federal Reserved Water Rights Doctrine*, 10 LAND & WATER L. REV. 477 (1975); Comment, *Adjudication of Indian and Federal Water Rights in the Federal Courts*, 46 COLO. L. REV. 555 (1975).

[62] 424 U.S. at 806. The order granting certiorari to the two petitions appears at 421 U.S. 946 (1975). The petitions were supported by a joint brief from the States of Arizona, California, Idaho, Kansas, Montana, Nebraska, Nevada, New Mexico, North Dakota, Oklahoma, Oregon, South Dakota, Texas, Utah, Washington and Wyoming.

[63] Abstention was declared to be appropriate in only three general categories: First, where a federal constitutional issue might be mooted or presented in a different posture by a state court determination of a pertinent state law issue; second, where there are difficult questions of state law "bearing on policy problems of substantial public import whose importance transcends the result in the case at bar" and federal jurisdiction would be disruptive of state policy efforts; and third, where federal jurisdiction has been invoked to restrain state criminal, quasi-criminal nuisance, or tax collection proceedings. The Court held that *Akin* did not fall within any of these categories. 424 U.S. at 817.

[64] *Id.*

jurisdiction of the district court under 28 U.S.C. § 1345.[65] Upon review of the language and legislative history of the Amendment and citing the rule disfavoring an implied repeal, it was concluded that the McCarran Amendment did not bar federal district court jurisdiction under § 1345 and the district court had jurisdiction to hear the case.[66]

The Court held, however, that the McCarran Amendment grants the right to join the United States in a state proceeding to determine reserved rights held on behalf of Indians. The Amendment's language, legislative history and fundamental purpose were held to command an all-inclusive construction. The Court failed to find any support for the argument that Indian reserved rights were substantially different from other reserved rights.[67] Further, the Court rejected the notion that state court jurisdiction was inimical to Indian interests.[68]

Even though abstention principles were inapposite, deferral to the state proceeding was justified on consideration of "[w]ise judicial administration, giving regard to conservation of judicial resources and comprehensive disposition of litigation."[69] As an example of wise judicial administration, Mr. Justice Brennan cited the rule that courts generally yield to the first court which assumes jurisdiction over property.[70]

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[65] *See* text accompanying note 43 *supra*.

[66] 424 U.S. at 809.

[67] It has been argued that Indians themselves reserved water rights which they already owned prior to any land reservations established by the United States. Under this reasoning, Indian water rights are paramount rights and their priority could pre-date the land reservation. *See* Veeder, *Indian Prior and Paramount Rights for the Use of Water*, 16 ROCKY MT. MINERAL L. INST. 631 (1971). However, the Court held in *Akin* that the reserved water rights of Indian reservations are owned by the United States just like those of national parks and forests. 424 U.S. at 810.

[68] "Mere subjection of Indian rights to legal challenge in state court, however, would no more imperil those rights than would a suit brought by the Government in district court . . . ." *Id.* at 812.

The Court also noted that P.L. 83-280, 25 U.S.C. § 1322(b) (1970) and 28 U.S.C. § 1360(b) (1970) does not limit the special consent to jurisdiction of the McCarran Amendment. *Id.* at 812-13 n.20.

A Motion for Leave to File Petition for Rehearing and Petition for Rehearing by *amici curiae* Indian groups urged reconsideration of the dismissal of the claims asserted on behalf of the Indian reservation. The motion was denied. 96 S. Ct. 2239 (1976).

[69] 424 U.S. at 817, *quoting* Kerotest Mfg. Co. v. C-O-Two Fire Equip. Co., 342 U.S. 180, 183 (1952) and *citing* Columbia Plaza Corp. v. Security Nat'l Bank, 525 F.2d 620 (D.C. Cir. 1975).

[70] This rule was not applied but its underlying rationale of avoiding piecemeal litiga-

In *Akin* there were several factors which permitted dismissal of the federal suit under this pragmatic principle. The policy evinced by the McCarran Amendment itself speaks against piecemeal or concurrent adjudication of water rights in a river system. Water rights are best determined in unified proceedings such as those available under Colorado's comprehensive state system. Additionally, the Court found the following factors to be significant: First, the absence of any substantial federal court proceedings prior to the joinder of the United States in the Water Division No. 7 adjudication; second, the extensive involvement of state decreed water rights; third, the 300 mile distance from the state court in Water Division No. 7 to the federal court in Denver; fourth, the Government's adjudication of reserved rights in Colorado's water courts pursuant to *Eagle County* and *Water Division No. 5.*[71] Thus, in order to promote the wise use of judicial resources, the jurisdiction of the federal district court was required to yield to that of the state water court.[72]

Akin provides an avenue by which Colorado can deal with the troublesome reserved rights doctrine in a familiar and convenient forum. Acting pursuant to the McCarran Amendment, Colorado interests can require the United States to present all of its water claims, including those for Indian reservations, in the state's water courts. Thus, the "uncorrelated mystery"[73] of reserved rights can be dispelled.

The advantages of a water right adjudication in state rather than federal court could be substantial. The Idaho Supreme Court has held that under the McCarran Amendment, the United States is bound by Idaho state law at least to the extent of requir-

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tion and inconsistent disposition of property was cited in support of the federal dismissal. *Id.* at 819. Petitioners argued to the Court that under the holding in Pacific Live Stock Co. v. Lewis, 241 U.S. 440 (1916), the rule is confined to instances where the suits are virtually identical. Here, it was urged that the state court had on-going jurisdiction over the waters in Water Division No. 7 and would conduct an all-inclusive adjudication in contrast to the limited proceeding in federal court. Reply Brief for the Petitioners at 11.

[71] 424 U.S. at 820. It should be noted that prior to its joinder in the state action the United States had only filed its complaint and completed service on a few defendant state agencies. Except for the motions to intervene and to dismiss, there had been little substantive activity in the federal suit.

[72] Two dissenting opinions rejected the majority view and found that there was no justification at all for dismissal of the federal action. *Id.* at 821-27.

[73] *See* text accompanying notes 19-22 *supra.*

ing quantification of reserved rights in a general adjudication.[74] Similarly, each state forum will be able to conduct an integration of reserved rights into its water rights system in the manner it views to be most consistent with state law. Of course, should any state adjudication be improperly antagonistic to the federal claims, the United States Supreme Court has stated that all questions concerning the adjudication of reserved rights, including the volume and scope of particular rights, may be reviewed after final judgment in the state court.[75]

Despite the Supreme Court's emphatic holdings in the Colorado trilogy of *Eagle County, Water Division No. 5,* and *Akin,* other Western States may face resistance in attempting to join the United States under the McCarran Amendment. The doctrine of prior appropriation is the bedrock of the Western States' water law systems. However, divergent economic and political policies and the particularities of the water situation in each state have led to the enactment of differing adjudicatory and administrative systems. Many of these systems are now primarily administrative in constrast to Colorado's judicial adjudicatory scheme.[76] Since the McCarran Amendment's waiver of sovereign immunity has been limited to proceedings in the nature of a general adjudication,[77] the United States may attempt to defeat joinder in an action which differs from the historic concept of a judicial proceeding in which there is a complete ascertainment of all rights in a water source.[78] However, the Colorado trilogy demonstrates that the McCarran Amendment must be construed in a practical manner to effectuate the intent of Congress to allow the determination of all federal water claims in a state forum. The efforts of the United States to narrowly construe the concept of a general adjudication were totally rebuffed in *Eagle County* and *Water Division No. 5. Akin* provides further ammunition for state inter-

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[74] Avondale Irrig. Dist. v. North Idaho Properties, Inc., 96 Idaho 1, 523 P.2d 818 (1974). The United States did not seek review to the United States Supreme Court.

[75] United States v. District Court in and for the County of Eagle, 401 U.S. 520, 525-26 (1971); United States v. District Court in and for Water Div. No. 5, 401 U.S. 527, 529-30 (1971).

[76] *See* NATIONAL WATER COMMISSION, *supra* note 39.

[77] *See* United States v. District Court in and for the County of Eagle, 401 U.S. 520 (1971); United States v. District Court in and for Water Div. No. 5, 401 U.S. 527 (1971); Dugan v. Rank, 372 U.S. 609 (1963).

[78] *See* Pacific Live Stock Co. v. Lewis, 241 U.S. 440, 447-48 (1916).

ests by adding considerations of "the conservation of judicial resources and comprehensive disposition of litigation"[79] to any battle between state and federal forums. This latest pronouncement should be of significant assistance to other states who wish to join the United States in a state proceeding.

CONCLUSION

Akin is a milestone in the turbulent history of federal reserved rights adjudication. In Colorado, *Akin* concludes a trilogy of fiercely contested jurisdictional battles between the Federal Government and state water interests. All water rights, including federal reserved rights and Indian claims, will be determined in state court under state procedures and will be administered under the state system. Hopefully, this marks the final attempt by the United States to circumvent the common sense policy of the McCarran Amendment allowing all federal water rights claims to be litigated in state courts. Other Western States should find support in *Akin* for joining the United States under the McCarran Amendment to allow determination of reserved rights in their local forums.

In a broader context, *Akin* represents a laudatory step in the allocation of judicial power between the federal and state systems. Abstention, with its rather inflexible criteria, is no longer the only doctrine under which federal courts may decline to determine a controversy within its jurisdiction. Quite remarkably, the Court has declared that "the virtually unflagging obligation of federal courts to exercise the jurisdiction given them"[80] may be waived where there are dominant practical considerations for utilizing a state forum. While the caution of the Court indicates that the standard for dismissing a complaint from federal court on considerations of judicial administration will not be easily met, *Akin* welcomes attention to practical concerns when a federal court is confronted with a federal-state jurisdictional conflict. The Court's pragmatic focus enhances the legitimate role of state courts in our dual judicial scheme.

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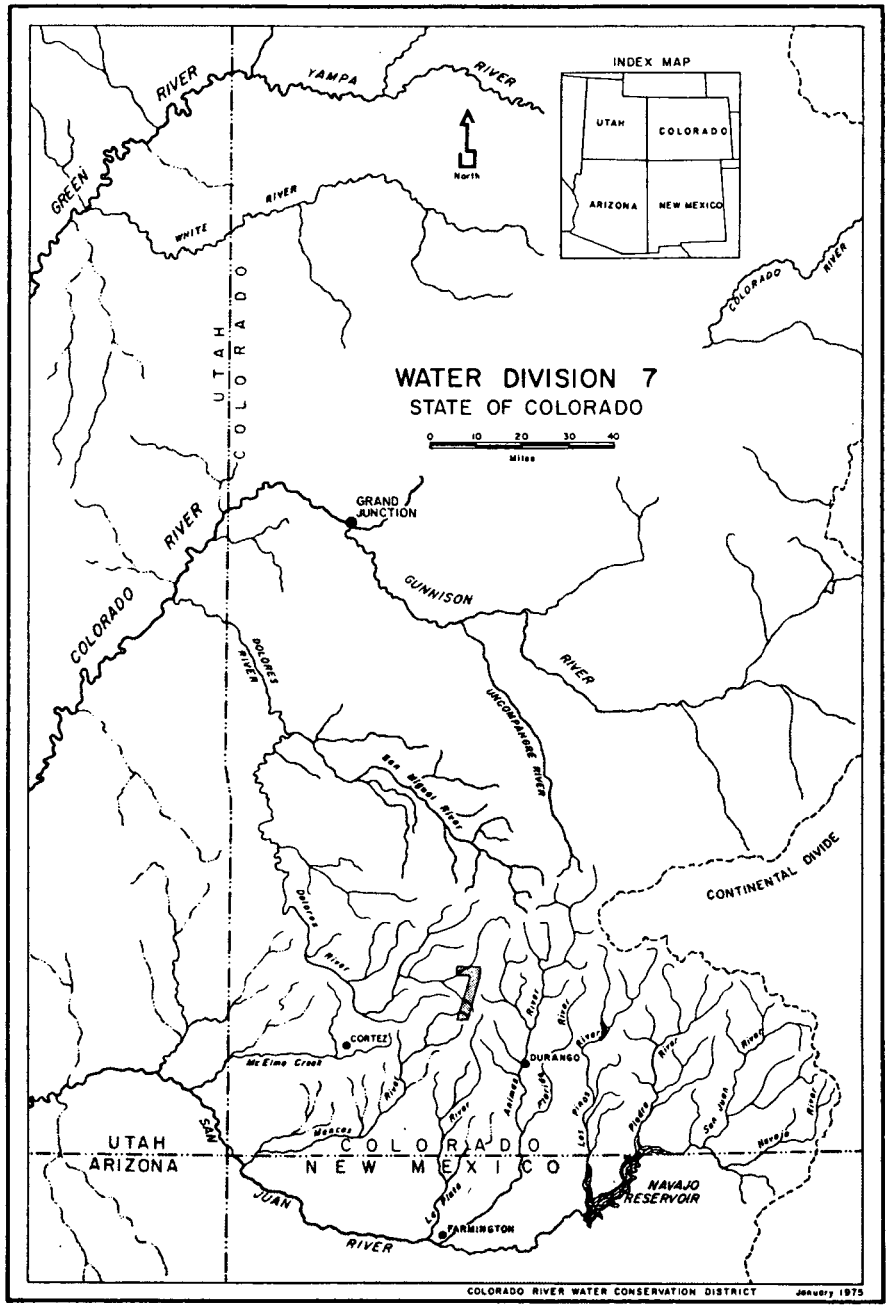
[79] 424 U.S. at 817, *quoting* Kerotest Mfg. Co. v. C-O-Two Fire Equip. Co., 342 U.S. 180, 183 (1952) and *citing* Columbia Plaza Corp. v. Security Nat'l Bank, 525 F.2d 620 (D.C. Cir. 1975).

[80] 424 U.S. at 817.

APPENDIX


INDEX MAP
UTAH
COLORADO
ARIZONA
NEW MEXICO
North
WATER DIVISION 7
STATE OF COLORADO
0 10 20 30 40
Miles
GREEN RIVER
YAMPA RIVER
WHITE RIVER
COLORADO RIVER
UTAH
COLORADO
GRAND JUNCTION
GUNNISON RIVER
COLORADO RIVER
DOLORES RIVER
UNCOMPAHGRE RIVER
CONTINENTAL DIVIDE
CORTEZ
DURANGO
FARMINGTON
NAVAJO RESERVOIR
SAN JUAN RIVER
UTAH
ARIZONA
COLORADO
NEW MEXICO
COLORADO RIVER WATER CONSERVATION DISTRICT
January 1975