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### The Legislative History of the McCarran Amendment: An Effort to Determine Whether Congress Intended for State Court Jurisdiction to Extend to Indian Reserved Water Rights

Dylan R. Hedden-Nicely

*University of Idaho, College of Law*, [dhedden@uidaho.edu](mailto:dhedden@uidaho.edu)

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#### Recommended Citation

46 *Envtl. L.* 845 (2016)

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THE LEGISLATIVE HISTORY OF THE MCCARRAN  
AMENDMENT: AN EFFORT TO DETERMINE WHETHER  
CONGRESS INTENDED FOR STATE COURT JURISDICTION  
TO EXTEND TO INDIAN RESERVED WATER RIGHTS

BY

DYLAN R. HEDDEN-NICELY\*

*The year 1976 marked a sea change in federal policy regarding the treatment of American Indian tribes and their water rights. In that year, the Supreme Court of the United States was called upon to determine the scope of the McCarran Amendment, a rider on a federal appropriations bill that waived the sovereign immunity of the United States in state court general stream adjudications “where it appears that the United States is the owner or is in the process of acquiring water rights by appropriation under State law, by purchase, by exchange, or otherwise.” The Supreme Court, in what has been called a “clear example of judicial legislation,” interpreted that language to grant state court jurisdiction for the determination of Indian reserved water rights. In so doing, the Court abandoned the “deeply rooted” federal policy of “leaving Indians free from state jurisdiction and control,” and has subjected the tribes to “hostile [state court] forums in which [the tribes] must be prepared to compromise their [water right] claims.”*

*The purpose of this Article is to examine the legislative history of the McCarran Amendment—the available Congressional Record, the Senate Report, as well as the Hearing Minutes—in an effort to ascertain whether it was Congress’s intent to include Indian reserved water rights within the scope of the McCarran Amendment.*

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\* Dylan R. Hedden-Nicely is a citizen of the Cherokee Nation and an attorney with Howard Funke & Associates, P.C. in Coeur d’Alene, Idaho. His practice focuses on the representation of Indian tribes and people in the areas of Native American natural resources and water law. Beginning in August 2017, he will be joining the faculty of the University of Idaho, College of Law as Associate Professor of Native American Law. He received his J.D., *magna cum laude*, from the University of Idaho, College of Law with an emphasis in Native American Law and Natural Resources & Environmental Law. He also earned an M.S. from the University of Idaho in Water Resources - Science and Engineering. The Author would like to recognize and thank Professor Ramirose Attebury for her tireless work in helping the Author to locate and acquire the legislative history of the McCarran Amendment. He would also like to thank Professor Barbara Cosens for graciously giving her time, comments on this Article, and her continued support.

*The legislative history indicates that “the McCarran Amendment was meant to be interpreted narrowly, not broadly.” It demonstrates that the Senators’ actual concern had not to do with federal reserved water rights but instead that the United States, acting in a proprietary rather than sovereign capacity, had been acquiring an ever-increasing number of state law water rights but was refusing to enter state court proceedings to either adjudicate or administer those rights. As the presense of the federal government increased in the river basins of the West, the proponents of the McCarran Amendment became increasingly alarmed that federal claims of sovereign immunity would effectively preclude state courts from enforcing state water law, thereby causing “the years of building the water laws of the Western States . . . [to] be seriously jeopardized.”*

*Far from a general waiver, the legislative history reveals that the sponsors of the McCarran Amendment intended to address only this narrow but politically explosive problem where the United States was claiming a “privilege of immunity that the original owner wouldn’t have.” Indian reserved water rights, which are reserved by the federal government in its sovereign capacity for the benefit of Indian tribes that have sovereign immunity independent of the United States, do not appear to have been considered or intended to be included by Congress as the McCarran Amendment was passed into law.*

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## I. INTRODUCTION

Between 1971 and 1983, the Supreme Court of the United States rendered three opinions that forever changed the legal landscape in Indian Country. In what has been called “a clear example of judicial legislation,”<sup>1</sup> the Court considered an obscure rider on an appropriations bill that came to be known as the McCarran Amendment,<sup>2</sup> and found that it allowed for state

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<sup>1</sup> Mary Wallace, *The Supreme Court and Indian Water Rights, in AMERICAN INDIAN POLICY IN THE TWENTIETH CENTURY* 197, 210 (Vine Deloria, Jr. ed., 1985).

<sup>2</sup> Act of July 10, 1952, Pub. L. No. 495, § 208, 66 Stat. 549, 560 (codified at 43 U.S.C. § 666 (2012)). In its entirety, the McCarran Amendment reads:

(a) Joinder of United States as defendant; costs

Consent is 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) Service of summons

Summons or other process in any such suit shall be served upon the Attorney General or his designated representative.

(c) Joinder in suits involving use of interstate streams by State

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.

court jurisdiction to determine federal and Indian reserved water rights.<sup>3</sup> In so doing, “[t]he Court reviewed a legislative history that is inconclusive at best and created a new federal policy.”<sup>4</sup>

The impact of the Court’s decisions cannot be overstated. The Supreme Court has long recognized a “deeply rooted” policy in the United States that Indian tribes and their rights are to be free from state court jurisdiction.<sup>5</sup> There is good reason for this: Indian tribes “owe no allegiance to the states, and receive from them no protection.”<sup>6</sup> Nowhere has this maxim been more pronounced than in the determination of reserved water rights.<sup>7</sup> The root of this treatment is that Indian tribes often have prior rights to water that has

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<sup>3</sup> See *infra* Part IV.

<sup>4</sup> Wallace, *supra* note 1, at 210.

<sup>5</sup> Rice v. Olson, 324 U.S. 786, 789 (1945).

<sup>6</sup> United States v. Kagama, 118 U.S. 375, 384 (1886).

<sup>7</sup> See, e.g., *In re the General Adjudication of All Rights to Use Water in the Big Horn River System (Big Horn I)*, 753 P.2d 76, 99–100 (Wyo. 1988) (reversing the finding of the Special Master that the purpose of the Wind River Reservation was to create a permanent homeland for Shoshone and Arapahoe Indians, and instead finding that the sole purpose of the reservation was agricultural, and that the *Winters v. United States*, 207 U.S. 564, 577 (1908), doctrine does not include any rights to the use of groundwater); *In re the General Adjudication of All Rights to Use Water in the Big Horn River System (Big Horn III)*, 835 P.2d 273, 279 (Wyo. 1992) (finding the Wind River tribes may not convert agricultural water rights to instream flow rights, despite United States Court of Appeals for the Ninth Circuit precedent expressly authorizing tribal changes in use, without complying with state law); Byers v. Wa-Wa-Ne, 169 P. 121, 128 (Or. 1917) (limiting the water rights of the Umatilla Tribes to water necessary for domestic and livestock water rights); State *ex rel. Martinez v. Lewis*, 861 P.2d 235, 248–51 (N.M. Ct. App. 1993) (awarding a water right for irrigated agriculture for just 2,322.4 acre-feet out of a claim by the Tribe of 17,750 acre-feet after imposing unprecedented market limits on certain crops used by the Mescalero Tribe in making its claim under the practicably irrigable acreage quantification standard); Wash. Dep’t of Ecology v. Yakima Reservation Irrigation Dist., 850 P.2d 1306, 1310 (Wash. 1993) (finding that although the Confederated Bands and Tribes of the Yakama Nation reserved a water right for fish with a time immemorial priority date, that right had been substantially diminished, and the Tribe was only entitled to a quantity for the “minimum instream flow necessary to maintain anadromous fish life in the river, according to annual prevailing conditions”) (the Yakima Nation renamed itself the Yakama Nation in the mid-1990s); *In re SRBA (Snake River Basin Adjudication)*, No. 39576, Subcase No. 03-10022, slip op. at 47 (Idaho Dist. Ct. Nov. 10, 1999) (finding the Nez Perce Tribe’s claims for instream flows for fish were inconsistent with the purpose of the Nez Perce Treaty of 1855, which guaranteed the Tribe the continued right of “taking fish at all usual and accustomed places,” as well as finding, despite federal court precedent to the contrary, that the Nez Perce Reservation had been diminished by an agreement between the United States and the Tribe in 1893); see also Robert H. Abrams, *Reserved Water Rights, Indian Rights and the Narrowing Scope of Federal Jurisdiction: The Colorado River Decision*, 30 STAN. L. REV. 1111, 1127 (1978) (examining the impact of state court jurisdiction on the determination of reserved water rights, and arguing the primary forum should continue to be federal courts because of the possibility of state bias, the tribal perception of state courts, the historical basis for special treatment of Indians, and the federal trust responsibility over Indian property); Scott B. McElroy & Jeff J. Davis, *Revisiting Colorado River Conservation District v. United States—There Must be a Better Way*, 27 ARIZ. ST. L.J. 597, 615 (1995); Michael C. Blumm et al., *The Mirage of Indian Reserved Water Rights and Western Streamflow Restoration in the McCarran Amendment Era: A Promise Unfulfilled*, 36 ENVTL. L. 1157, 1160 (2006) [hereinafter Blumm et al., *The Mirage of Indian Reserved Water Rights*]; Michael C. Blumm et al., *Judicial Termination of Treaty Water Rights: The Snake River Case*, 36 IDAHO L. REV. 449, 450–452 (2000).

long been used by non-Indian appropriators.<sup>8</sup> This creates conflict between tribal and non-Indian water users and the primary forum to resolve such conflict now rests in state courts that are “ill-equipped to deal with the political pressures arrayed against tribal efforts to reclaim water that ha[s] been used by the non-Indian community.”<sup>9</sup> This pressure can cause state courts to develop “strong incentives to discriminate against federal claims in favor of state and private uses.”<sup>10</sup> The ultimate outcome is that tribes are often forced “into hostile forums in which [they] must be prepared to compromise their claims.”<sup>11</sup>

The question this Article addresses is whether Congress intended for this tectonic shift in federal policy regarding Indian tribes. It will explore the language and legislative history of the McCarran Amendment in an effort to ascertain its true purpose.

That legislative history shows that “the McCarran Amendment was meant to be interpreted narrowly, not broadly.”<sup>12</sup> Indeed, the language of the McCarran Amendment, together with its legislative history, suggests that the true policy underlying the McCarran Amendment was to address a narrow but politically unacceptable issue that was occurring throughout the West leading up to the early 1950s: the rapidly expanding United States government was acquiring state law water rights at an unprecedented rate but was refusing to be joined to state court proceedings that were seeking to

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<sup>8</sup> Abrams, *supra* note 7, at 1146 n.217.

<sup>9</sup> McElroy & Davis, *supra* note 7, at 600.

<sup>10</sup> Abrams, *supra* note 7, at 1111.

<sup>11</sup> Blumm et al., *The Mirage of Indian Reserved Water Rights*, *supra* note 7, at 1161; *see, e.g.*, *United States v. State*, 23 P.3d 117, 125–29 (Idaho 2001) (finding no water right for the reservation of ninety-five islands within the Deer Flat National Wildlife Refuge for the purposes of maintaining riparian habitat and to foster isolation of migratory birds from predators, despite acknowledging “[b]y definition an island is surrounded by some amount of water”); *State v. United States*, 12 P.3d 1284, 1286–91 (Idaho 2000) (finding that Congress did not imply a federal reserved water right for either the wilderness portion or the nonwilderness portion of the Sawtooth National Recreation Area, despite its stated purposes to “assure the preservation and protection of the natural, scenic, historic, pastoral, and fish and wildlife values and provide for the enhancement of the recreational values associated therewith” (quoting Act of Aug. 22, 1972, Pub. L. No. 92-400, § 1(a), 86 Stat. 612, 612 (codified at 16 U.S.C. § 460aa(a) (2012))); *Potlatch Corp. v. United States*, 12 P.3d 1260, 1263–68 (Idaho 2000) (finding that the Wilderness Act, 16 U.S.C. §§1131–1136 (2012), reserved no water rights after having previously found the Wilderness Act had impliedly reserved all unappropriated flow (as of the creation of the areas) within Idaho’s three wilderness areas); *United States v. City of Challis*, 988 P.2d 1199, 1204–07 (Idaho 1999) (finding that the Multiple-Use Sustained-Yield Act of 1960, 16 U.S.C. §§528–531 (2012), which broadened the purposes for which the national forests are to be managed, did not reserve “new” water rights because the Multiple-Use Sustained-Yield Act did not create a new reservation of land); *United States v. Jesse*, 744 P.2d 491, 494–97 (Colo. 1987) (finding that Congress did not intend to reserve instream water rights for the purposes of securing sufficient water to furnish “a continuous supply of timber” for the San Isabel and Pike National Forests); *United States v. City and County of Denver*, 656 P.2d 1, 24–27 (Colo. 1982) (concluding that Congress did not intend to reserve “additional water for the existing national forests with a 1960 priority date for recreational and wildlife conservation purposes” pursuant to the Multiple-Use Sustained-Yield Act, despite its broadening the purposes for which national forests are to be managed).

<sup>12</sup> Wallace, *supra* note 1, at 210.

either adjudicate or administer those water rights. The proponents of the McCarran Amendment argued that the federal government's claim of sovereign immunity precluded state courts from either initiating an adjudication or administering previously decreed water rights that were subsequently acquired by the United States.<sup>13</sup> This, according to the proponents of the bill, effectively paralyzed the states' ability to enforce their water laws because "all the supposedly settled water rights [were] subject to review and reexamination," whenever "the United States appear[ed] in a watershed."<sup>14</sup> The upheaval caused by the federal government's actions created considerable anxiety that "the long years of travail through which the water laws of our Western States have passed [sic] . . . have been in vain."<sup>15</sup>

The sponsors of the McCarran Amendment believed the federal claim of sovereign immunity unfair because, in those circumstances where it had acquired water rights pursuant to state law, the United States was acting in a proprietary rather than sovereign capacity but nonetheless claiming a "privilege of immunity that the original owner wouldn't have."<sup>16</sup> It was this issue, which had nothing to do with Indian tribes whose rights are reserved by the United States in its sovereign capacity and who have sovereign immunity independent of the United States<sup>17</sup> that was front and center as the McCarran Amendment was considered and passed into law.

## II. THE FUNDAMENTALS: RESERVED WATER RIGHTS VS. STATE LAW WATER RIGHTS

A typical water user in the United States acquires his or her water rights pursuant to state rather than federal law. The history of this arrangement derives from a series of federal acts, which culminated with the Desert Land Act of 1877.<sup>18</sup> The Desert Land Act allowed for federally-owned public domain "desert lands" within certain states to be acquired by United States citizens.<sup>19</sup> However, the Act also contained the disclaimer:

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<sup>13</sup> S. REP. NO. 82-755, at 5 (1951).

<sup>14</sup> *A Bill to Authorize Suits Against the United States to Adjudicate and Administer Water Rights: Hearing on S. 18 Before a Subcomm. of the S. Comm. on the Judiciary, United States Senate*, 82d Cong. 22 (Apr. 25, Aug. 3-8, 1951) [hereinafter *Hearings*] (statement of Glen G. Saunders attorney representing the National Reclamation Association).

<sup>15</sup> *Id.* at 48 (statement of W.T. Mathews, Att'y Gen. of the State of Nevada).

<sup>16</sup> *Id.* at 8 (statement of Sen. Arthur V. Watkins (R-Utah)).

<sup>17</sup> COHEN'S HANDBOOK OF FEDERAL INDIAN LAW § 7.05[1][a] (Nell Jessup Newton ed., 2012) [hereinafter COHEN'S HANDBOOK]; see also *United States v. Lara*, 541 U.S. 193, 210 (2004) (holding that the Double Jeopardy Clause, U.S. Const. amend. V, cl. 2, did not preclude prosecution of the defendant by the federal government on the basis of his prior prosecution by the Spirit Lake Tribe because "the Tribe acted in its capacity of a separate sovereign"); *United States v. Wheeler*, 435 U.S. 313, 331 (1978) ("Indian tribes are 'distinct political communities' with their own mores and laws . . . which can be enforced by formal criminal proceedings in tribal courts as well as by less formal means.") (internal citations omitted).

<sup>18</sup> Ch. 107, 19 Stat. 377 (codified as amended at 43 U.S.C. §§ 321-323 (2012)).

<sup>19</sup> *Id.* § 1, 19 Stat. 377, 377 (codified as amended at 43 U.S.C. § 321 (2012)).

That the right to the use of water by the person . . . on or to any tract of desert land . . . shall depend upon bona fide prior appropriation; and such right shall not exceed the amount of water actually appropriated, and necessarily used for the purpose of irrigation and reclamation; and all surplus water over and above such actual appropriation and use, together with the water of all lakes, rivers, and other sources of water supply upon the public lands and not navigable, shall remain and be held free for the appropriation and use of the public for irrigation, mining, and manufacturing purposes subject to existing rights.<sup>20</sup>

Based upon this language, the United States Supreme Court determined that “following the act of 1877, if not before, all nonnavigable waters then a part of the public domain became *publici juris*, subject to the plenary control of the designated states.”<sup>21</sup>

All arid and semi-arid states in the West have adopted some form of the prior appropriation doctrine.<sup>22</sup> The prior appropriation doctrine is based upon the maxim that first-in-time is first-in-right: “[w]ater rights are ranked in the order that the right was acquired, and this priority schedule is used to distribute available water in times of shortage.”<sup>23</sup>

The basis of a water right under the prior appropriation doctrine is beneficial use.<sup>24</sup> The Supreme Court has described it this way:

[O]ne acquires a right to water by diverting it from its natural source and applying it to some beneficial use. Continued beneficial use of the water is required in order to maintain the right. In periods of shortage, priority among confirmed rights is determined according to the date of initial diversion.<sup>25</sup>

Thus, the quantity of appropriative rights is limited to the amount a person actually diverts and puts to a beneficial use.<sup>26</sup> Prior appropriation jurisdictions apply the “use it or lose it” rule, meaning the water right is subject to forfeiture for nonuse.<sup>27</sup> Finally, there is no shared shortage; in times of scarcity, the most senior user gets their entire quantity of water before the next most senior receives any water.<sup>28</sup>

Reserved water rights are different. Reserved rights are one of two exceptions to the general rule of state plenary authority over water rights.<sup>29</sup>

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<sup>20</sup> *Id.*

<sup>21</sup> *Cal. Or. Power Co. v. Beaver Portland Cement Co.*, 295 U.S. 142, 163–64 (1935).

<sup>22</sup> COHEN'S HANDBOOK, *supra* note 17, § 19.01[1]; A. DAN TARLOCK, *LAW OF WATER RIGHTS & RESOURCES* § 5:3 (2016).

<sup>23</sup> TARLOCK, *supra* note 22, § 5:32.

<sup>24</sup> *Colo. River Water Conservation Dist. v. United States (Colorado River)*, 424 U.S. 800, 805 (1976).

<sup>25</sup> *Id.*

<sup>26</sup> COHEN'S HANDBOOK, *supra* note 17, §19.01[1].

<sup>27</sup> *Id.*; TARLOCK, *supra* note 22, § 5:90.

<sup>28</sup> COHEN'S HANDBOOK, *supra* note 17, §19.01[1].

<sup>29</sup> *See United States v. Rio Grande Dam & Irrigation Co.*, 174 U.S. 690, 703 (1899) (“First, that, in the absence of specific authority from Congress, a state cannot, by its legislation, destroy the right of the United States as the owner of lands bordering on a stream, to the continued flow of its waters, so far, at least, as may be necessary for the beneficial uses of the government property.”). The second exception is the navigational servitude. *Id.* Acts governing



The basis for reserved water rights for Indian tribes are the treaties, executive orders, congressionally ratified agreements, and other operative documents that were negotiated between the United States and each Indian Tribe for the creation of Indian reservations.<sup>30</sup> Because reserved water rights are treaty rights, the United States and the tribes set them aside pursuant to their sovereign capacity.<sup>31</sup>

Most agreements between Indian tribes and the United States are entirely silent regarding water rights. This silence was first addressed in *Winters v. United States*.<sup>32</sup> That case involved the Fort Belknap Reservation, which was created by congressionally ratified agreement in 1888.<sup>33</sup> However, the agreement did not discuss water rights.<sup>34</sup> Shortly after the Reservation was created non-Indian irrigators began diverting water from the Milk River, which was a primary water supply for the Reservation.<sup>35</sup> In 1905, a drought caused water supply to diminish below the amount necessary to supply both the tribes and the non-Indian irrigators, causing the United States to bring suit.<sup>36</sup>

The non-Indian defendants argued that the silence in the Agreement as to water rights should be construed to mean that the tribes and United States did not intend for any water rights to be reserved along with the Fort Belknap Reservation.<sup>37</sup> They argued the tribes should get their water by appropriation pursuant to the laws of the State of Montana and that since the non-Indians had begun using the water first, they were the prior appropriators.<sup>38</sup>

The Court disagreed. It stated that “[t]he case, as we view it, turns on the agreement of May, 1888, resulting in the creation of Fort Belknap Reservation.”<sup>39</sup> The Court then found:

The Indians had command of the lands and the waters—command of all their beneficial use, whether kept for hunting, “and grazing roving herds of stock,” or turned to agriculture and the arts of civilization. Did they give up all this? Did they reduce the area of their occupation and give up the waters which made it valuable or adequate? . . . If it were possible to believe affirmative

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water and other rights on public lands do not extend to water use on federal reservations held by the United States. *Fed. Power Comm'n v. Oregon*, 349 U.S. 435, 446–48 (1955).

<sup>30</sup> COHEN'S HANDBOOK, *supra* note 17, § 19.03[1].

<sup>31</sup> E. DE VATEL, 3 THE LAW OF NATIONS OR THE PRINCIPLES OF NATURAL LAW 160 (James Brown Scott, ed., Charles G. Fenwick trans., Press of Gibson Bros. 1916) (1758) (“A treaty . . . is a compact entered into by sovereigns for the welfare of the state. . . . Treaties can only be entered into by the highest State authorities, by sovereigns, who contract in the name of the State.”).

<sup>32</sup> 207 U.S. 564 (1908).

<sup>33</sup> *Id.* at 567–68.

<sup>34</sup> COHEN'S HANDBOOK, *supra* note 17, § 19.02.

<sup>35</sup> *Id.*

<sup>36</sup> *Id.*

<sup>37</sup> *Winters*, 207 U.S. at 576 (“[I]t is contended, the means of irrigation were deliberately given up by the Indians and deliberately accepted by the Government.”).

<sup>38</sup> *Id.* at 568–69.

<sup>39</sup> *Id.* at 575.

answers, we might also believe that the Indians were awed by the power of the government or deceived by its negotiators. Neither view is possible.<sup>40</sup>

The Court applied the Indian law canons of construction to *imply* a water right despite no express language in the agreement:

By a rule of interpretation of agreements and treaties with the Indians, ambiguities occurring will be resolved from the standpoint of the Indians. And the rule should certainly be applied to determine between two inferences, one of which would support the purpose of the agreement and the other impair or defeat it.<sup>41</sup>

The Court found that “[t]he power of the Government to reserve the waters and exempt them from appropriation under the state laws is not denied, and could not be.”<sup>42</sup> Ultimately, the Court concluded that “the government did reserve them we have decided, and for a use which would be necessarily continued through years. This was done May 1, 1888.”<sup>43</sup>

*Winters v. United States* forms the basis for what is now known as the *Winters* doctrine. *Winters* rights are owned by the United States in trust for the tribes<sup>44</sup> and are determined pursuant to federal rather than state law.<sup>45</sup> The doctrine is one of *implied* rights; the intent to reserve water “is inferred if the previously unappropriated waters are necessary to accomplish the purposes for which the reservation was created.”<sup>46</sup> The doctrine originally applied only to Indian tribes but was subsequently applied to non-Indian federal reservations as well.<sup>47</sup> Critical to the legislative history discussion to come: since these rights were reserved pursuant to treaty, the United States reserved them in its sovereign rather than proprietary capacity.<sup>48</sup>

The primary difference between state law water rights and reserved water rights under the *Winters* doctrine is that “[u]nlike appropriation rights, reserved rights are not based on diversion and actual beneficial use. Instead, sufficient water is reserved to fulfill the purposes for which a reservation

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<sup>40</sup> *Id.* at 576.

<sup>41</sup> *Id.* at 576–77.

<sup>42</sup> *Id.* at 577.

<sup>43</sup> *Id.*

<sup>44</sup> *Id.*

<sup>45</sup> COHEN’S HANDBOOK, *supra* note 17, § 19.05[1].

<sup>46</sup> *Cappaert v. United States*, 426 U.S. 128, 139 (1976). *Cappaert* also held that reserved water rights may be expressed rather than implied. *Id.*

<sup>47</sup> *See id.* at 138, 141 (applying the doctrine of implied rights to a tract of land surrounding Devil’s Hole, a detached component of the Death Valley National Monument, to preserve a rare species of desert fish); *Arizona v. California*, 373 U.S. 546, 601 (1963) (recognizing that the doctrine of implied rights extends to National Recreation Areas and National Forests). Notice that the first time the *Winters* doctrine was applied to a non-Indian federal reservation was a full ten years after the passage of the McCarran Amendment. This important point begs the question of how the framers of the McCarran Amendment could have intended its scope to include something they did not know existed.

<sup>48</sup> COHEN’S HANDBOOK, *supra* note 17, § 19.03[4].

was established.<sup>49</sup> This necessarily includes water for current and future needs.<sup>50</sup> As a result, reserved rights “may be asserted at any time; and they are not lost through nonuse.”<sup>51</sup> Further, reserved rights, just like state law rights, have a priority date:

But the priority of reserved rights is no later than the date on which a reservation was established, which in the case of most Indian reservations in the West, is earlier than the priority of most non-Indian water rights. Thus, a reservation established in 1865 that starts putting water to use for agricultural purposes in 1981 under its reserved rights has, in times of shortage, a priority that is superior to any non-Indian water right with a state law priority acquired after 1865. For these reasons, Indian rights are generally prior and paramount to rights derived under State law.<sup>52</sup>

Because Indian reserved water rights are invariably prior to state law rights, the quantity Indian tribes are entitled to is potentially large, and because tribal rights “are often put to actual use long after appropriation rights are established, the exercise of tribal water rights has the potential to disrupt non-Indian water uses.”<sup>53</sup> As a result, “[t]o the extent that reserved rights can be narrowly construed, important state economic interests are served . . . . Thus, state judges in water rights adjudications will be under strong pressure to rule against the federal government’s reserved rights claims.”<sup>54</sup> This pressure creates a risk that “state courts may prove incapable of protecting the important federal policies that underlie the reserved rights doctrine and will deprive the United States and Indian groups of vital water rights.”<sup>55</sup> This existential threat to reserved rights is the reason for the “deeply rooted” federal policy “of leaving Indians free from state jurisdiction and control.”<sup>56</sup>

### III. SOVEREIGN IMMUNITY AND THE DETERMINATION OF INDIAN WATER RIGHTS BEFORE THE MCCARRAN AMENDMENT

Indian tribes, like the United States, enjoy sovereign immunity.<sup>57</sup> Sovereign immunity is a doctrine that precludes lawsuits against the

<sup>49</sup> *Id.* § 19.01[1].

<sup>50</sup> *Arizona v. California*, 373 U.S. at 601.

<sup>51</sup> COHEN’S HANDBOOK, *supra* note 17, § 19.01[1].

<sup>52</sup> *Id.* (footnote omitted). *But see*, *United States v. Anderson*, 736 F.2d 1358, 1362–63 (9th Cir. 1983) (restricting the priority date for some irrigation water rights appurtenant to certain lands within the reservation that had that had been sold to non-Indians and subsequently reacquired by the Tribe).

<sup>53</sup> COHEN’S HANDBOOK, *supra* note 17, § 19.03[1].

<sup>54</sup> *Abrams*, *supra* note 7, at 1131–32.

<sup>55</sup> *Id.* at 1131.

<sup>56</sup> *Rice v. Olson*, 324 U.S. 786, 789 (1945).

<sup>57</sup> *See Michigan v. Bay Mills Indian Cmty.*, 134 S. Ct. 2024, 2028 (2014) (“Among the core aspects of sovereignty that tribes possess . . . is the common-law immunity from suit traditionally enjoyed by sovereign powers.” (quoting *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58 (1978))); *Kiowa Tribe of Okla. v. Mfg. Techs., Inc.*, 523 U.S. 751, 760 (1998) (applying

sovereign absent its consent.<sup>58</sup> “The doctrine of tribal sovereign immunity is rooted in federal common law and reflects the federal Constitution’s treatment of Indian tribes as governments in the Indian commerce clause.”<sup>59</sup>

Only Congress may waive the sovereign immunity of the United States, and that waiver “cannot be implied but must be unequivocally expressed.”<sup>60</sup> Likewise, tribal sovereign immunity may only be waived by the tribal council or abrogated by Congress.<sup>61</sup> Congressional abrogation of tribal sovereign immunity once again “cannot be implied but must be unequivocally expressed.”<sup>62</sup> Similarly, a waiver of tribal sovereign immunity by a tribal council “must be ‘clear.’”<sup>63</sup>

The policy considerations supporting tribal sovereign immunity are manifold. Tribal sovereign immunity is “a necessary corollary to Indian sovereignty and self-governance.”<sup>64</sup> The doctrine protects treaty rights and

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tribal sovereign immunity to preclude suits against Indian tribes even for tribal conduct occurring off-reservation); *Oklahoma Tax Comm’n v. Citizen Band Potawatomi Indian Tribe of Okla.*, 498 U.S. 505, 509–10 (1991) (holding that a suit filed by Potawatomi tribe for an injunction against the Oklahoma Tax Commission did not waive the sovereign immunity of the Tribe with respect to counterclaim filed by the Commission to enforce its tax code); *Santa Clara Pueblo*, 436 U.S. at 58–59 (holding that the Indian Civil Rights Act, 25 U.S.C. §§ 1301–1341 (2012), did not abrogate tribal sovereign immunity for tribal members to sue their tribes in federal court over alleged civil rights violations); *Puyallup Tribe, Inc. v. Dep’t of Game of Wash.*, 433 U.S. 165, 173 (1977) (“[C]ertainly, the mere fact that the Tribe has appeared on behalf of its individual members does not affect a waiver of sovereign immunity for the Tribe itself.”); *United States v. U.S. Fid. & Guar. Co.*, 309 U.S. 506, 512–13 (1940) (finding prior decree affirming a cross-action against the United States acting as trustee for the Choctaw and Chickasaw Nations void and subject to collateral attack because neither the United States nor the Tribes had waived their sovereign immunity to a cross-action by initiating a lawsuit); *Turner v. United States*, 248 U.S. 354, 357–58 (1919) (“Like other governments . . . the Creek Nation was free from liability for injuries to persons or property due to mob violence or failure to keep the peace.”).

<sup>58</sup> COHEN’S HANDBOOK, *supra* note 17, § 7.05[1][a] (“Indian tribes are immune from lawsuits or court process in both state and federal court unless ‘Congress has authorized the suit or the tribe has waived its immunity.’” (quoting *Kiowa Tribe of Okla.*, 523 U.S. at 754)). A notable exception to this general rule is the *Ex parte Young* doctrine, which allows suits for specific relief against federal officials acting outside the scope of their authority or pursuant to an unconstitutional statute. *Ex parte Young*, 209 U.S. 123, 159–60 (1908). The Supreme Court has indicated the *Ex parte Young* doctrine may be applicable to tribal officials acting in their official capacity as well. COHEN’S HANDBOOK, *supra* note 17, § 7.05[1][a] (citing *Santa Clara Pueblo*, 436 U.S. at 59).

<sup>59</sup> COHEN’S HANDBOOK, *supra* note 17, § 7.05[1][a] (citing U.S. CONST. art. I, § 8).

<sup>60</sup> *United States v. King*, 395 U.S. 1, 4 (1969).

<sup>61</sup> *Kiowa Tribe*, 523 U.S. at 754 (“As a matter of federal law, an Indian tribe is subject to suit only where Congress has authorized the suit or the tribe has waived its immunity”).

<sup>62</sup> *Santa Clara Pueblo*, 436 U.S. at 58–59 (quoting *United States v. Testan*, 424 U.S. 392, 399 (1972)).

<sup>63</sup> *C & L Enters., Inc. v. Citizen Band Potawatomi Indian Tribe of Okla.*, 532 U.S. 411, 418 (2001) (quoting *Oklahoma Tax Comm’n v. Citizen Band Potawatomi Indian Tribe of Okla.*, 498 U.S. 505, 509 (1991)).

<sup>64</sup> *Three Affiliated Tribes of the Fort Berthold Reservation v. Wold Eng’g, P.C.*, 476 U.S. 877, 890 (1986).

resources, which the United States has a duty to protect.<sup>65</sup> Sovereign immunity serves as a critical shield that “protects tribes’ often weak economic foundations from erosion by eliminating costs associated with defending lawsuits; it is therefore critical to the development of strong tribal economics and other tribal and federal interests.”<sup>66</sup>

Sovereign immunity traditionally kept Indian tribes and their water rights out of state court. Before 1976, the United States would “proceed . . . as plaintiffs or . . . appear specially” in order to “evidence to the court the interest [of the United States].”<sup>67</sup> Ultimately, “the matter [would be] settled on the basis of stipulating [the federal] rights as they relate to all others,”<sup>68</sup> and “a decree is entered recognizing those interests.”<sup>69</sup> This process typically gave Indian tribes control of when and where its rights would be quantified.<sup>70</sup> It allowed tribes to develop the funding necessary to engage in a water rights adjudication.<sup>71</sup> Further, since these adjudications were not typically general adjudications, the number of parties involved was more manageable and

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<sup>65</sup> Andrea M. Seielstad, *The Recognition and Evolution of Tribal Sovereign Immunity Under Federal Law: Legal, Historical, and Normative Reflections on a Fundamental Aspect of American Indian Sovereignty*, 37 TULSA L. REV. 661, 688 (2002).

<sup>66</sup> *Id.* at 739.

<sup>67</sup> *Hearings*, *supra* note 14, at 3 (statement of William H. Veeder, Special Assistant to the Att’y Gen. of the United States).

<sup>68</sup> *Id.* at 3.

<sup>69</sup> *Id.* at 4.

<sup>70</sup> An unfortunate exception to this general proposition arises when the United States, against whom tribes do not have sovereign immunity, initiates lawsuits for the adjudication of tribal rights without the consent or participation of the tribes. For example, the United States initiated a federal court water rights adjudication in 1913 on behalf of both the Pyramid Lake Paiute as well as the Newlands Reclamation Project. *Nevada v. United States*, 463 U.S. 110, 116 (1983). The Pyramid Lake Paiute were not a party to the adjudication. The United States “claimed 10,000 cubic feet of water per second for the project and a claim to 500 cubic feet per second for the Reservation.” *Id.* 500 cubic feet per second was not sufficient for the Tribe’s needs, and it became apparent the United States favored its fiduciary obligations to the federal irrigation project over those of the Tribe. *Id.* at 116, 119, 141. Nonetheless, when the United States attempted to later claim additional water on behalf of the Tribe, the Supreme Court found it was barred by *res judicata*. *Id.* at 145. This case hails from a different era when the relationship between the United States and Indian tribes looked much different than today. It nonetheless underscores the many competing interests of the United States and the need for tribal involvement in water rights adjudications to adequately protect tribal interests.

<sup>71</sup> The fact that the water rights of an Indian tribe may be haled into state court at any time has drastic impacts on tribal economic development. Although the United States enters adjudications on behalf of the tribes, the national policies often take precedence over the needs of an individual tribe. Because of this, tribes are often compelled to hire their own legal counsel to ensure their rights and interests are adequately represented. However, it is “the policy of the Department of the Interior not to use federally appropriated funds to pay for private counsel to represent Indian tribes.” 25 C.F.R. § 89.40 (2015). Although there are exceptions to that policy, *id.* § 89.41, tribes typically pay a large portion of the costs to defend their water rights in state court. This places the tribes, often the poorest communities in the nation, in an impossible position. They can repurpose funds often earmarked for economic development to their water rights effort—assuming such funds exist—or they can rely upon the United States to sufficiently protect their rights.

could be litigated in less time and at less expense.<sup>72</sup> Most importantly, it allowed the tribes to make their case in federal court.

It was against the backdrop of this firmly entrenched precedent that the Supreme Court was asked to determine whether the scope of the McCarran Amendment included the reserved water rights of the United States and America's Indian tribes.

#### IV. THE SUPREME COURT'S INTERPRETATION OF THE MCCARRAN AMENDMENT

The Supreme Court's slow expansion of the McCarran Amendment took place over twelve years and three decisions. The process began with *United States v. District Court*<sup>73</sup> (*Eagle County*), wherein the Court found that non-Indian federal reserved water rights for the White River National Forest were included within the scope of the McCarran Amendment.<sup>74</sup> The Court's analysis turned on an examination of section (a) of the McCarran Amendment,<sup>75</sup> which states in part:

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<sup>72</sup> In comparison, general adjudications are massive undertakings. For example, Idaho's Snake River Basin Adjudication commenced in 1987, and the final unified decree was entered on August 25, 2014, and contained 158,591 water right decrees. Clive J. Strong, *SRBA Retrospective: A 27-Year Effort*, ADVOCATE, Nov./Dec. 2014, at 28, 28 (Idaho State Bar). Of those, about 130,500 partial decrees were based upon state law and about 15,000 were disallowed state law water rights and claims. *Id.* It also contained 1,346 water right decrees based upon federal law. *Id.* Importantly, approximately 11,700 additional federal law claims were disallowed. *Id.* In coming to this final decree, the court handled 43,822 contested cases, the Idaho Supreme Court issued 36 opinions, and the United States Supreme Court issued one opinion. *Id.* The SRBA is said to have been the fastest of its kind. Adjudications in Wyoming and Washington took approximately 37 years to determine 25,000 and 3,000 claims respectively. *Id.* Meanwhile, the Montana general stream adjudication, which commenced in 1979 and expects to include approximately 219,000 water right claims, is not expected to conclude until 2028. *Id.* at 29 n.2. Similarly, in Arizona, approximately 82,000 claims have been filed in the Gila River Adjudication, which commenced in 1974 and is currently about 33% completed. *Id.* at 29 n.3. Likewise, the Little Colorado Adjudication commenced in 1978 in Arizona state court, contains around 14,000 claims, and is approximately 55% complete. *Id.* The Arizona adjudications have been called a "procedural nightmare." McElroy & Davis, *supra* note 7, at 613. New Mexico has thirteen adjudications currently ongoing, all of which were commenced between 1956 and 1970. Strong, *supra* note 72, at 29 n.4.

<sup>73</sup> 401 U.S. 520 (1971). A companion case to *Eagle County* was *United States v. District Court (Water Division No. 5)*, 401 U.S. 527 (1971). However, the Court's analysis in that decision was limited primarily to referencing *Eagle County*. *Id.* at 529. Although additional issues were raised, they were limited to specific questions regarding Colorado's adjudication procedures.

<sup>74</sup> *Eagle County*, 401 U.S. at 522–23.

<sup>75</sup> *Id.* at 523–24. Both the United States and the respondents briefed the legislative history of the McCarran Amendment in *Eagle County*. The United States argued that the legislative history supported the conclusion that the Amendment only implicated state law water rights. Brief for Petitioner at 24–30, *Eagle County*, 401 U.S. 520 (No. 87). The respondents, on the other hand, argued the legislative history included *all* water rights owned by the United States, including reserved rights. Brief for Respondents and Intervenors at 11–39, *Eagle County*, 401 U.S. 520 (No. 87). The Respondent's arguments were based primarily upon: remarks regarding sections of the bill that were not ultimately adopted, statements made by the representatives from the Departments of Interior and Justice, as well as a remark made by Senator McCarran indicating that purpose of the Amendment was to provide certainty that all water rights in a particular basin were comprehensively determined. *Id.* Ultimately, the Supreme Court did not

Consent is 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.<sup>76</sup>

The Court began by splitting section (a)(1) from the remaining language in the Amendment and reading it in isolation. Although section (a)(1) does nothing more than define one of the two types of proceedings wherein the United States has waived its sovereign immunity—a general stream adjudication—the Supreme Court concluded the language “rights to the use of water of a river system” is broad enough to embrace ‘reserved’ waters.<sup>77</sup> Based upon this interpretation of section (a)(1), the Court concluded that the McCarran Amendment “would seem to be all-inclusive.”<sup>78</sup>

The Court then turned to section (a)(2). It read the remaining language as a single provision and then concluded “[t]his provision does not qualify § 666(a)(1), for (1) and (2) are separated by an ‘or.’”<sup>79</sup> However, just two sentences later, the Court concluded “‘the administration of such rights’ in § 666(a)(2) must refer to the rights described in [a](1) for they are the only ones which, in this context ‘such’ could mean; and, as we have seen, they are all-inclusive.”<sup>80</sup> In other words, the Court concluded that although the limiting language found after section (a)(2) did not apply to section (a)(1), the “all-inclusive” language found in section (a)(1) *expanded* the more limited language in section (a)(2).

This enabled the Court to reject the United States’ application of the doctrine of *ejusdem generis* to argue that the McCarran Amendment was only applicable to the adjudication of state law rights. *Ejusdem generis* applies “when specific words are followed by a general term such as ‘or otherwise’ and works to limit the objects encompassed by the general term to the same class as those specifically enumerated.”<sup>81</sup> The Supreme Court acknowledged that the terms “by appropriation under state law,” “by purchase,” and “by exchange,” “would normally be appropriative rights.”<sup>82</sup> As such, *ejusdem generis* should have required the term “or otherwise,” be limited to other forms of state law rights. However, the Court refused to apply *ejusdem generis* to section (a)(1) because, as they read it, section

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seem to rely upon *any* legislative history, opting instead to engage in a pure statutory construction analysis in coming to its conclusion that the McCarran Amendment included non-Indian federal reserved water rights.

<sup>76</sup> 43 U.S.C. § 666(a) (2012).

<sup>77</sup> *Eagle County*, 401 U.S. at 523.

<sup>78</sup> *Id.*

<sup>79</sup> *Id.* at 524.

<sup>80</sup> *Id.*

<sup>81</sup> James W. Dilworth & Frederic I. Kirgis, Jr., Comment, *Adjudication of Water Rights Claimed by the United States—Application of Common-Law Remedies and the McCarran Amendment of 1952*, 48 CAL. L. REV. 94, 110 (1960); see also NORMAN SINGER & SHAMBIE SINGER, 2A SUTHERLAND STATUTES AND STATUTORY CONSTRUCTION § 47.17 (7th ed. 2015).

<sup>82</sup> *Eagle County*, 401 U.S. at 524.

(a)(1) was not qualified by the language found after section (a)(2). This allowed the Court to conclude that, “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.’”<sup>83</sup>

*Eagle County* did not involve Indian water rights, but, just five years later the State of Colorado returned to the Supreme Court in *Colorado River Water Conservation District v. United States*<sup>84</sup> (*Colorado River*), to ask it to determine “whether the McCarran Amendment provided consent to determine federal reserved rights held on behalf of Indians in state court.”<sup>85</sup> The Court “conclude[d] that the state court had jurisdiction over Indian water rights under the Amendment.”<sup>86</sup>

In so determining, the Court did away with the confusing and convoluted statutory analysis from *Eagle County* and instead simply found that:

[*Eagle County*] held that the provisions of the McCarran Amendment . . . subject federal reserved water rights to general adjudication in state proceedings . . . More specifically, the Court held that reserved rights were included in those rights where the United States was ‘otherwise’ the owner.<sup>87</sup>

Now having apparently acknowledged that the “or otherwise” language did apply to section (a)(1) of the McCarran Amendment, the Court did not go back and analyze whether *ejusdem generis* should limit that general term to state law rights, consistent with the specific terms listed “by purchase” and “by exchange.”

While the Court acknowledged that “*Eagle County* . . . did not involve reserved rights on Indian reservations,”<sup>88</sup> it nonetheless failed to apply the “eminently sound and vital canon” of interpretation that ambiguities in federal statutes affecting Indian tribes are “to be liberally construed [with] doubtful expressions being resolved in favor of the Indians.”<sup>89</sup> That canon

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<sup>83</sup> *Id.*

<sup>84</sup> 424 U.S. 800 (1976).

<sup>85</sup> *Id.* at 809.

<sup>86</sup> *Id.*

<sup>87</sup> *Id.* at 810 (citing *Eagle County*, 401 U.S. at 524).

<sup>88</sup> *Id.*

<sup>89</sup> *Bryan v. Itasca County*, 426 U.S. 373, 392–93 (1976) (quoting *N. Cheyenne Tribe v. Hollowbreast*, 425 U.S. 649, 655 n.7 (1976) and *Alaska Pac. Fisheries v. United States*, 248 U.S. 78, 89 (1918)); see also *County of Yakima v. Confederated Tribes Bands of the Yakima Indian Nation*, 502 U.S. 251, 269 (1992) (“When we are faced with these two possible constructions [of a statute], our choice between them must be dictated by a principle deeply rooted in this Court’s Indian Jurisprudence: ‘[S]tatutes are to be construed liberally in favor of the Indians, with ambiguous provisions interpreted to their benefit.’” (second alteration in original) (quoting *Montana v. Blackfeet Tribe*, 471 U.S. 759, 766 (1985))); *N. Cheyenne Tribe*, 425 U.S. at 656 (reaffirming the “judicially fashioned canon of construction that these statutes are to be read to reserve Congress’s powers [to abrogate tribal rights] in the absence of a clear expression by Congress to the contrary”); *McClanahan v. Ariz. State Tax Comm’n*, 411 U.S. 164, 170–71, 174–75 (1973) (determining that unless expressly provided by Congress, state laws are generally not



did not apply in *Eagle County* because no tribe was involved but was necessary in *Colorado River*. However, the Court ignored this longstanding precedent and found that "viewing the Government's trusteeship of Indian rights as ownership, the logic of [*Eagle County*] clearly extends to such rights."<sup>90</sup>

The Court concluded that Congress intended for the McCarran Amendment to include Indian reserved water rights because the "underlying policy [of the McCarran Amendment] dictates a construction including Indian rights in its provisions."<sup>91</sup> The Court found the policy of the Amendment was to be "an all-inclusive statute concerning the adjudication of rights to the use of a river system . . . [t]his consideration applies as well to federal water rights reserved for Indian reservations."<sup>92</sup>

The Court could point to no express legislative history that indicated Congress intended for the Amendment's waiver to include Indian water rights.<sup>93</sup> Instead it pointed to a statement from the Senate report that indicated that "[i]n the administration and the adjudication of water rights under *State laws* . . . all water users on a stream, in practically every case, are interested and necessary parties to any court proceedings."<sup>94</sup> The Court ignored the plain language of the Senate report that clearly limited its scope to water rights acquired under state law. Instead, the Court argued that the "ubiquitous nature of Indian water rights in the Southwest," leads to the

applicable to Indians on a reservation, and any ambiguity should be interpreted in favor of the Indians); *Squire v. Capoeman*, 351 U.S. 1, 6-7 (1956) ("Doubtful expressions are to be resolved in favor of the weak and defenseless people who are the wards of the nation, dependent upon its protection and good faith." (quoting *Worcester v. Georgia*, 31 U.S. 515, 582 (1832))); *Carpenter v. Shaw*, 280 U.S. 363, 366-67 (1930) ("[I]n general tax exemptions are not to be presumed and statutes conferring them are to be strictly construed . . . the contrary is the rule to be applied to tax exemptions secured to the Indians . . . Such provisions are to be liberally construed"); *Alaska Pac. Fisheries*, 248 U.S. at 89 (stating as a "general rule[,] that statutes passed for the benefit of dependent Indian tribes or communities are to be liberally construed, doubtful expressions being resolved in favor of the Indians"); *Choate v. Trapp*, 224 U.S. 665, 675 (1912) (holding that statutory "construction . . . is liberal; doubtful expressions . . . are to be resolved in favor [of the Indians]").

<sup>90</sup> *Colorado River*, 424 U.S. at 810.

<sup>91</sup> *Id.*

<sup>92</sup> *Id.* (citation and internal quotation marks omitted).

<sup>93</sup> A review of the briefing in *Colorado River* demonstrates that although the United States analyzed the legislative history, it did not analyze whether the legislative history demonstrated that Congress intended for the McCarran Amendment to include reserved water rights held in trust for Indian tribes. Brief of the United States at 22-30, *Colorado River*, 424 U.S. 800 (Nos. 74-940, 74-949). Instead, the federal analysis of the legislative history primarily focused on the separate question of whether the McCarran Amendment precluded the United States from initiating water rights adjudications in federal court. *Id.* In contrast, the Colorado River Water Conservation District extensively briefed the legislative history of the McCarran Amendment, highlighting the few places in that history that indicated Indian reserved water rights were included within the Amendment's scope. Reply Brief for Petitioners at 15-30, *Colorado River*, 424 U.S. 800 (Nos. 74-940, 74-949). Those instances included the language of the Senate Report and the remarks of the Department of the Interior that the Supreme Court ultimately cited to support its conclusion that the McCarran Amendment included Indian reserved water rights.

<sup>94</sup> *Colorado River*, 424 U.S. at 810-11 (emphasis added) (quoting S. REP. NO. 82-755, at 4-5 (1951)).

conclusion that “a construction of the Amendment excluding those rights . . . would enervate the Amendment’s objective.”<sup>95</sup> The Court then concluded its analysis of the legislative history with a negative inference, stating that “the Senate report on the Amendment took note of a recommendation in a Department of the Interior report that no consent to suit be given as to Indian rights and rejected the recommendation.”<sup>96</sup> Based upon this scant legislative history, the Court concluded that the “underlying policy” of the Amendment “dictates a construction including Indian rights.”<sup>97</sup> A curious conclusion from a Court that, a few weeks later, would require “some [affirmative] mention” by Congress where “such a sweeping change in the status of tribal government and reservation Indians [is allegedly] contemplated by Congress.”<sup>98</sup>

The final case, *Arizona v. San Carlos Apache Tribe of Arizona*,<sup>99</sup> (*San Carlos Apache Tribe*) was decided seven years later. There, the Court addressed the question of whether “concurrent federal suits brought by [the San Carlos Apache Tribe and the Northern Cheyenne], rather than by the United States, and raising only Indian claims, [are] subject to dismissal under the doctrine of *Colorado River*?”<sup>100</sup> The Tribes and the United States made several arguments that a stay of their federal suit would not be appropriate:

- (1) Indian rights have traditionally been left free of interference from the States.
- (2) State courts may be inhospitable to Indian rights.
- (3) The McCarran Amendment, although it waived United States sovereign immunity in state comprehensive water adjudications, did not waive Indian sovereign immunity. . . .
- (4) Indian water rights claims are generally based on federal rather than state law.
- (5) Because Indian water claims are based on the doctrine of ‘reserved rights’ and take priority over most water rights created by state law, they need not, as a practical matter, be adjudicated inter sese with other water rights, and could simply be incorporated into the comprehensive state decree at the conclusion of the state proceedings.<sup>101</sup>

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<sup>95</sup> *Id.* at 811.

<sup>96</sup> *Id.* at 812.

<sup>97</sup> *Id.* at 810.

<sup>98</sup> *Bryan v. Itasca County*, 426 U.S. 373, 381 (1976). The Court in *Bryan* was asked to determine whether the Act of Aug. 15, 1953, Pub. L. No. 83-280, § 4, 67 Stat. 588, 589 (codified as amended at 28 U.S.C. § 1360 (2012)), granted congressional authorization for states to tax tribal trust lands. *Bryan*, 426 U.S. at 375. In determining that it did not, Justice Brennan, who also authored the Court’s decision in *Colorado River*, found that “the total absence of congressional intent [in either the text or legislative history of the Act of Aug 15, 1953] . . . has significance in the application of the canons of construction applicable to statutes affecting Indian immunities.” *Id.* at 381. Justice Brennan concluded that “some mention would normally be expected if such a sweeping change in the status of tribal government and reservation Indians had been contemplated by Congress.” *Id.*

<sup>99</sup> 463 U.S. 545 (1983).

<sup>100</sup> *Id.* at 549.

<sup>101</sup> *Id.* at 567–67.

The Court found that while “[e]ach of these arguments has a good deal of force . . . [they all] founder on one crucial fact: If the state proceedings have jurisdiction over the Indian water rights at issue here, as appears to be the case, then concurrent federal proceedings are likely to be duplicative and wasteful, generating ‘additional litigation through permitting inconsistent dispositions of property.’”<sup>102</sup>

Although the Court pointed out that “the fact that a federal suit was brought by Indians on their own behalf and sought only to adjudicate Indian rights should be figured into the balance,”<sup>103</sup> it nevertheless determined that adjudication of Indian rights in federal court “will be neither practical nor wise as long as it creates the possibility of duplicative litigation, tension and controversy between the federal and state forums, hurried and pressured decisionmaking, and confusion over the disposition of property rights.”<sup>104</sup> Ultimately, the Court found that “the most important consideration in any federal water suit concurrent to a comprehensive state proceeding,” was not its “deeply rooted” policy of “leaving the Indians free from state jurisdiction,”<sup>105</sup> but instead “must be ‘the policy underlying the McCarran Amendment’” of avoiding piecemeal litigation.<sup>106</sup>

Both the Tribe and the United States argued against this by pointing to a seemingly reasonable solution: the federal court can determine the Indian water rights while the state court determines the non-Indian federal rights and state law rights.<sup>107</sup> Once the Indian rights are determined, they could be incorporated into the final state decree.<sup>108</sup> In answer to this suggestion, the Court stated “[t]he problem with these scenarios, however, is that they assume a cooperative attitude on the part of the state courts, state legislatures, and state parties which is neither legally required nor realistically always to be expected.”<sup>109</sup> In other words, the Court implicitly reaffirmed its long held understanding that Indian tribes “receive . . . no protection” from the states or their courts.<sup>110</sup> However, rather than using this as a reason to narrowly construe state court jurisdiction over Indian tribes, as it normally would, the Supreme Court used it in this case as a reason *to liberally construe* state court jurisdiction to the detriment of the tribal parties.

The Supreme Court concluded by reiterating:

We also emphasize, as we did in *Colorado River*, that our decision in no way changes the substantive law by which Indian rights in state water adjudications must be judged. State courts, as much as federal courts, have a solemn obligation to follow federal law. Moreover, any state court decision alleged to

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<sup>102</sup> *Id.* at 567 (footnote omitted) (quoting *Colorado River*, 424 U.S. at 819).

<sup>103</sup> *Id.* at 569.

<sup>104</sup> *Id.*

<sup>105</sup> *Rice v. Olson*, 324 U.S. 786, 789 (1945).

<sup>106</sup> *San Carlos Apache Tribe*, 463 U.S. at 569 (quoting *Colorado River*, 424 U.S. at 820).

<sup>107</sup> *Id.* at 568.

<sup>108</sup> *Id.*

<sup>109</sup> *Id.* at 568–69.

<sup>110</sup> *United States v. Kagama*, 118 U.S. 375, 384 (1886).

abridge Indian water rights protected by federal law can expect to receive, if brought for review before this Court, a particularized and exacting scrutiny commensurate with the powerful federal interests in safeguarding those rights from state encroachment.<sup>111</sup>

The Court's decision that the "or otherwise" language in the McCarran Amendment includes reserved water rights was ultimately driven by its conclusion that the policy underlying the McCarran Amendment was to be an "all-inclusive statute concerning the adjudication of rights to the use of a river system"<sup>112</sup> in order to avoid piecemeal litigation.<sup>113</sup> However, the legislative history suggests the intent was for the McCarran Amendment to be much narrower in scope.

#### V. THE LEGISLATIVE HISTORY AND THE TRUE POLICY UNDERLYING THE MCCARRAN AMENDMENT

To support its ultimate conclusions in *Colorado River*, the Supreme Court relied upon two facets of the legislative history: statements from representatives of the executive branch and a single out-of-context statement from the Senate Report that "[i]n the administration of and the adjudication of water rights under State laws . . . all water users on a stream, in practically every case, are interested and necessary parties to any court proceedings."<sup>114</sup> However, this "legislative history . . . is inconclusive at best."<sup>115</sup> This alone should have directed a different result in light of the Supreme Court's "eminently sound and vital canon[s]"<sup>116</sup> that statutes affecting Indian tribes "be liberally construed, [with] doubtful expressions being resolved in favor of the Indians."<sup>117</sup> Furthermore, none of the legislative history cited by the Court contained any affirmative statement that Congress intended for the waiver to include reserved rights. One would expect at least "some mention . . . if such a sweeping change in the status of tribal government and reservation Indians had been contemplated by Congress."<sup>118</sup> However, most importantly, the legislative history—when considered as a whole—does not seem to support the Supreme Court's ultimate conclusions. Instead, it demonstrates that "the McCarran Amendment was meant to be interpreted narrowly, not broadly."<sup>119</sup>

The legislative history of the McCarran Amendment—often referred to as S. 18—can be broken into four component parts. First, the record

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<sup>111</sup> *San Carlos Apache Tribe*, 463 U.S. at 571.

<sup>112</sup> *Id.* at 550–51 (quoting *Colorado River*, 424 U.S. 800, 810 (1976)).

<sup>113</sup> *Colorado River*, 424 U.S. at 823.

<sup>114</sup> *Id.* at 810–12 (emphasis added) (quoting S. REP. NO. 82-755, at 4–5 (1951)).

<sup>115</sup> Wallace, *supra* note 1, at 210.

<sup>116</sup> *Bryan v. Itasca County*, 426 U.S. 373, 392 (1976) (quoting *N. Cheyenne Tribe v. Hollowbreast*, 425 U.S. 649, 655 n.7 (1976)).

<sup>117</sup> *Id.* (quoting *Alaska Pac. Fisheries v. United States*, 248 U.S. 78, 89 (1918)); *see also* cases cited *supra* note 89.

<sup>118</sup> *Bryan*, 426 U.S. at 381.

<sup>119</sup> Wallace, *supra* note 1, at 210.

contains information regarding a number of events that led to and precipitated the call for the development of the McCarran Amendment.<sup>120</sup> These events are important because they drove the development of the law, and therefore interpretation of the McCarran Amendment should be considered through the context of those events. Second, the Senate held three days of hearings, headed by Senator Arthur V. Watkins (R-Utah).<sup>121</sup> In addition to those hearings, the bill was debated on the floor of the Senate by Senator Pat McCarran (D-Nev.).<sup>122</sup> The hearings and the debate are rich with statements made by the Senators, as well as both the proponents and opponents of the proposed bill, which are very probative as to the purpose and intent behind the bill. Third, the Senate published a report on the proposed bill.<sup>123</sup> Finally, the executive branch, through the Department of Justice and Department of the Interior, provided their interpretation of the effect of the bill.<sup>124</sup> The executive branch's analysis of the bill is important because it was a primary factor in the Supreme Court's examination of the legislative history of the McCarran Amendment. It also exposes a tension between the executive branch and Senate in their respective interpretation of the McCarran Amendment.

#### *A. The Events that Led to the Call for Congressional Action*

The *Congressional Record* contains mention of three separate water controversies, all in the West, that seem to have precipitated the development of the McCarran Amendment. These controversies arose on the Quinn River in Nevada (Senator McCarran's home state), in several adjudications in Colorado, and in the Santa Margarita River watershed in California. Importantly, in all three cases, the United States had acquired state law water rights through either purchase or by appropriation under state law, and then proceeded to use its sovereign immunity to preclude any state court adjudication or administration of those rights. This irresponsible and unfair practice acted to paralyze the state courts' ability to control state law water rights in those basins, which created significant political backlash against the United States and likely resulted in Congress taking action and passing the McCarran Amendment.

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<sup>120</sup> See *infra* Part V.A.

<sup>121</sup> See *infra* Part V.B.1.

<sup>122</sup> See *infra* Part V.B.2.

<sup>123</sup> See *infra* Part V.C.

<sup>124</sup> See *infra* Part V.D.

*1. The Quinn River, Nevada: The United States Purchases State Law Rights but Refuses State Court Jurisdiction*

The Quinn River is a small intermittent river located in the northwestern portion of Senator McCarran's home state of Nevada.<sup>125</sup> It is approximately 100 miles long and has a drainage area of approximately 6,710 square miles.<sup>126</sup> However, the region is very arid and water is scarce in the Quinn River watershed. In 2015, the Quinn River had an average annual discharge of approximately eight cubic-feet-per-second (cfs), as measured at the United States Geological Survey Gage located near McDermitt, Nevada.<sup>127</sup> The flows drop to around two cfs between July and September.<sup>128</sup>

The relative scarcity of water in this watershed has long caused controversy.<sup>129</sup> An adjudication of the water rights in the basin commenced in 1907.<sup>130</sup> "Several years after the entry of the decree the United States, through the Bureau of Indian Affairs, Department of the Interior, United States Government, purchased certain lands and water rights on the Quinn River."<sup>131</sup> After the United States purchased these rights, a dispute arose regarding the decree:

[The Indian Service], as user of said three water rights and lands . . . was made party defendant by order of the State court. . . . The Indian service objected to the jurisdiction of the State court, notwithstanding its water rights had theretofore been adjudicated by that court, prior of course to the purchase thereof by the United States . . . .<sup>132</sup>

The United States removed the case to federal court, which held the sovereign immunity of the United States precluded state court jurisdiction.<sup>133</sup>

<sup>125</sup> U.S. Bureau of Land Mgmt., *Quinn River Valley 100K Quad*, [http://www.nv.blm.gov/LandRecords/map.php?quad=quinn\\_river\\_valley](http://www.nv.blm.gov/LandRecords/map.php?quad=quinn_river_valley) (last visited Nov. 19, 2016).

<sup>126</sup> U.S. Geological Survey, *Boundary Descriptions and Names of Regions, Accounting United and Cataloging Units*, [http://water.usgs.gov/GIS/huc\\_name.html](http://water.usgs.gov/GIS/huc_name.html) (last visited Nov. 19, 2016).

<sup>127</sup> U.S. Geological Survey, *USGS Surface-Water Annual Statistics for Nevada*, [http://waterdata.usgs.gov/nv/nwis/annual/?referred\\_module=sw&site\\_no=103530001&por\\_103530001\\_103017=2692792,00060,103017,2014,2016&year\\_type=W&format=html\\_table&date\\_format=YYYY-MM-DD&rdb\\_compression=file&submitted\\_form=parameter\\_selection\\_list](http://waterdata.usgs.gov/nv/nwis/annual/?referred_module=sw&site_no=103530001&por_103530001_103017=2692792,00060,103017,2014,2016&year_type=W&format=html_table&date_format=YYYY-MM-DD&rdb_compression=file&submitted_form=parameter_selection_list) (last visited Nov. 19, 2016) (U.S. Geological Survey Gage No. 103530001).

<sup>128</sup> U.S. Geological Survey, *USGS Surface-Water Monthly Statistics for the Nevada*, [http://waterdata.usgs.gov/nv/nwis/monthly/?referred\\_module=sw&site\\_no=103530001&por\\_103530001\\_103017=2692792,00060,103017,2014-07,2016-05&format=html\\_table&date\\_format=YYYY-MM-DD&rdb\\_compression=file&submitted\\_form=parameter\\_selection\\_list](http://waterdata.usgs.gov/nv/nwis/monthly/?referred_module=sw&site_no=103530001&por_103530001_103017=2692792,00060,103017,2014-07,2016-05&format=html_table&date_format=YYYY-MM-DD&rdb_compression=file&submitted_form=parameter_selection_list) (last visited Nov. 19, 2016) (U.S. Geological Survey Gage No. 103530001).

<sup>129</sup> *Hearings, supra* note 14, at 47 (statement of Mr. Mathews).

<sup>130</sup> *Id.*

<sup>131</sup> *Id.*

<sup>132</sup> *Id.* at 47–48.

<sup>133</sup> *Id.* at 48.

The case was remanded back to the state court and, as of the hearings on S. 18, “the action ha[d] not proceeded further.”<sup>134</sup>

A number of commenters have speculated that this controversy directly led to the drafting of the McCarran Amendment.<sup>135</sup> In the hearing on the bill, William H. Veeder, Special Assistant to the Attorney General of the United States—who was tasked with testifying against S. 18 on behalf of the Department of Justice—made the comment that “Mr. Skeen’s client in Nevada and he and I talked about that client a long time, and Mr. Skeen admitted he was a little worried about the statute of limitations in that case, and that is why he drew up the bill and submitted it to Senator McCarran for introduction. He is the one who drew the bill.”<sup>136</sup> The record also contains a letter from the Attorney General of the State of Nevada, W.T. Mathews, supporting S. 18 and providing information on the Quinn River situation.<sup>137</sup> Much of that letter was ultimately incorporated into the official Senate Report on S. 18.<sup>138</sup>

## 2. *The Colorado Adjudications: The United States Acquires State Law Water Rights Pursuant to the Reclamation Act but Refuses State Court Jurisdiction*

Starting in the late 1800s through 1969, Colorado’s practice was to adjudicate water rights on a rolling basis in seventy water districts.<sup>139</sup> Some of these districts contained federal irrigation projects that had been developed pursuant to the Reclamation Act.<sup>140</sup> Importantly, the Reclamation Act requires the United States to acquire water rights for irrigation projects pursuant to state law.<sup>141</sup> One such adjudication took place in the early 1940s in Colorado Water District Number 36, which is the district that includes the Blue River,<sup>142</sup> a primary source of Denver’s water supply.<sup>143</sup> Initially, the United States entered the case and filed claims.<sup>144</sup> However, it later withdrew

<sup>134</sup> *Id.*

<sup>135</sup> See, e.g., Dilworth & Kirgis, *supra* note 81, at 104.

<sup>136</sup> *Hearings, supra* note 14, at 14 (statement of Mr. Veeder). Interestingly, the record is not clear on who the fabled Mr. Skeen is. In fact, for someone credited with being the author of the McCarran Amendment, Mr. Skeen is markedly absent from history.

<sup>137</sup> *Id.* at 44–49 (statement of Mr. Mathews).

<sup>138</sup> Dilworth & Kirgis, *supra* note 81, at 104.

<sup>139</sup> Gregory J. Hobbs, Jr., *Colorado’s 1969 Adjudication and Administration Act: Settling In*, 3 U. DENV. WATER L. REV. 1, 3, 5–9 (1999).

<sup>140</sup> 43 U.S.C. §§ 371–616yyyy (2012).

<sup>141</sup> *Id.* § 383; see also *California v. United States*, 438 U.S. 645, 665 (1978) (“From the legislative history of the Reclamation Act of 1902 it is clear that . . . the Secretary would have to appropriate, purchase, or condemn necessary water rights in strict conformity with state law.”).

<sup>142</sup> *Hearings, supra* note 14, at 26 (statement of Mr. Saunders).

<sup>143</sup> Denver Water, *Water Supply*, <http://www.denverwater.org/SupplyPlanning/WaterSupply/> (last visited Nov. 19, 2016).

<sup>144</sup> *Hearings, supra* note 14, at 26 (describing the statement of Mr. Saunders). The record is not clear what claims were filed by the United States. However, the Bureau of Reclamation administers the Green Mountain Dam located on the Blue River for irrigation purposes, which is part of the Colorado-Big Thompson Reclamation Project. Bureau of Reclamation, *Green Mountain Dam*, <http://www.usbr.gov/projects/index.php?id=174> (last visited Nov. 19, 2016). That

from the state court proceeding and initiated a new suit in federal court.<sup>145</sup> Glenn G. Saunders, the attorney representing the National Reclamation Association before the Senate hearing, also represented parties that were “on the other side” of the United States in the Water District Number 36 adjudication.<sup>146</sup> He argued that:

The United States came into this proceeding, and the whole thing could have been decided so far as district 36 was concerned in that proceeding, but at a later time the Department of Justice . . . withdrew from the proceeding. Later the United States started a new proceeding of its own in the United States district court . . . .<sup>147</sup>

Mr. Saunders also highlighted the situation in Colorado Water District Number 51, which includes the Colorado-Big Thompson irrigation project.<sup>148</sup> Mr. Saunders stated that “the city and county of Denver has completely adjudicated water rights which run down south and over into Denver. Those water rights are completely adjudicated.”<sup>149</sup> Subsequent to that decree, the United States filed suit in federal district court seeking to

quiet the title of the United States for itself with reference to the city and county of Denver and others . . . and declare their respective rights subject and subordinate to the rights of the United States with respect to the Colorado-Big Thompson project, and forever enjoin them or any of them from encroaching upon or in any way interfering with those rights.<sup>150</sup>

According to Mr. Saunders, “the prayer of [the United States’] complaint . . . would stop us from exercising adjudicated rights. . . . In effect this complaint requires us to *relitigate* in the United States district court *every water right that we have adjudicated*.”<sup>151</sup>

### *3. Santa Margarita River, California: The United States Purchases State Law Water Rights and then Commences a Federal Court General Stream Adjudication*

By far, the controversy that received the most attention during consideration of S. 18 was the “socialistic growth”<sup>152</sup> of federal authority over water rights that “nearly caused a revolution” in the Santa Margarita

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dam was constructed between 1938 and 1943. *Id.* It is likely that the claims filed by the United States were for water rights appurtenant to this project.

<sup>145</sup> *Hearings, supra* note 14, at 26 (statement of Mr. Saunders).

<sup>146</sup> *Id.* at 26 (statement of Mr. Veeder).

<sup>147</sup> *Id.* at 26 (statement of Mr. Saunders).

<sup>148</sup> *Id.* at 30–31.

<sup>149</sup> *Id.*

<sup>150</sup> *Id.* at 31.

<sup>151</sup> *Id.* (emphasis added).

<sup>152</sup> Letter from George F. Yackey, Gen. Manager, Fall Brook Pub. Util. Dist., to the Fall Brook Pub. Util. Dist. (June 15, 1951), in *Hearings, supra* note 14, at 77.



watershed in the early 1950s.<sup>153</sup> According to the United States Geological Survey, the Santa Margarita River is a small intermittent stream with a drainage area of just 723 square miles above the gage located near Ysidora, California.<sup>154</sup> The recorded average annual flow of the Santa Margarita River has been as high as 337 cfs in 1993, and as low as 3.13 cfs in 2013.<sup>155</sup> The United States Geological Survey's mean monthly statistics indicate that the flow in the stream gets as low as 2.8 cfs in August and 2.3 cfs in September.<sup>156</sup>

The Santa Margarita River flows through Camp Pendleton, the "West Coast's Premiere Expeditionary Training Base" of the United States Marine Corps.<sup>157</sup> The United States purchased the Santa Margarita Rancho in the early 1940s for the purpose of developing a 135,000 acre base to house and train 28,000 marines.<sup>158</sup> As part of that purchase, the United States acquired state law water rights that had been previously decreed by a California state court.<sup>159</sup> Consistent with California law, the Rancho had been decreed a riparian right to 66.6% of the water in the stream while another major land owner was to receive the remaining 33.3%.<sup>160</sup> However, according to the *Saturday Evening Post*, the two large landowners, "respecting tradition so hoary that it amounts to common law in the State . . . , recognized the water rights of all the other farmers along the way."<sup>161</sup> As of 1951, the Santa Margarita serviced approximately 16,000 water users in addition to the Camp Pendleton Marine Base.<sup>162</sup>

Shortly after developing the base, the United States initiated a federal lawsuit where it "asked that its title be quieted to the water [of the Santa Margarita River]. It ask[ed] [for] 35,000 acre-feet, which . . . is probably in excess of the total water available in the stream."<sup>163</sup> This suit caused

<sup>153</sup> GLEN G. SAUNDERS, REFLECTIONS ON SIXTY YEARS OF WATER LAW PRACTICE 31–32 (1989).

<sup>154</sup> U.S. Geological Survey, *USGS Surface-Water Annual Statistics for the Nation*, [http://waterdata.usgs.gov/nwis/annual/?referred\\_module=sw&site\\_no=11046000&por\\_11046000\\_7845=2207600,00060,7845,1923,2016&year\\_type=W&format=html\\_table&date\\_format=YYYY-MM-DD&rdb\\_compression=file&submitted\\_form=parameter\\_selection\\_list](http://waterdata.usgs.gov/nwis/annual/?referred_module=sw&site_no=11046000&por_11046000_7845=2207600,00060,7845,1923,2016&year_type=W&format=html_table&date_format=YYYY-MM-DD&rdb_compression=file&submitted_form=parameter_selection_list) (last visited Nov. 19, 2016).

<sup>155</sup> *Id.*

<sup>156</sup> U.S. Geological Survey, *USGS Surface-Water Monthly Statistics for the Nation*, [http://waterdata.usgs.gov/nwis/monthly?referred\\_module=sw&site\\_no=11046000&por\\_11046000\\_7845=2207600,00060,7845,1923-03,2016-05&format=html\\_table&date\\_format=YYYY-MM-DD&rdb\\_compression=file&submitted\\_form=parameter\\_selection\\_list](http://waterdata.usgs.gov/nwis/monthly?referred_module=sw&site_no=11046000&por_11046000_7845=2207600,00060,7845,1923-03,2016-05&format=html_table&date_format=YYYY-MM-DD&rdb_compression=file&submitted_form=parameter_selection_list) (last visited Nov. 19, 2016).

<sup>157</sup> W. Rivers Conservancy, *Santa Margarita River*, <http://www.westernrivers.org/project-atlas/santa-margarita-river/> (last visited Nov. 19, 2016); U.S. Marine Corps, *Marine Corps Base Camp Pendleton*, <http://www.pendleton.marines.mil/> (last visited Nov. 19, 2016).

<sup>158</sup> *Hearings, supra* note 14, at 38 (statement of Rep. Samuel W. Yorty (D-Cal.)); Ed Ainsworth & Cameron Shipp, *The Government's Big Grab*, SATURDAY EVENING POST, Jan. 5, 1952, reprinted in 98 CONG. REC. 125 (1952).

<sup>159</sup> Ainsworth & Shipp, *supra* note 158, at 126.

<sup>160</sup> *Id.*

<sup>161</sup> *Id.*

<sup>162</sup> Stanley High, *Washington Tyranny: Another Case Study*, READER'S DIG., Dec. 1951, reprinted in 98 CONG. REC. 124 (1952).

<sup>163</sup> *Hearings, supra* note 14, at 38 (statement of Rep. Yorty). 35,000 acre-feet in a year amounts to an average flow of 48 cubic feet per second, year-round.

considerable political backlash. Two articles were read into the *Congressional Record* that best exemplify public sentiment regarding this adjudication. The first, found in the *Reader's Digest*, was entitled *Washington Tyranny: Another Case Study*.<sup>164</sup> The second was a *Saturday Evening Post* article entitled *The Government's Big Grab*.<sup>165</sup> The *Reader's Digest* article opened with the following story:

One day last April a United States marshal served a summons on Joe Hayes, an irrigation farmer living near Fallbrook, Calif. Hayes was informed that the Federal Government had laid claim to his privately owned water rights. The Government proposed to take over, without compensation, his entire water supply; and, to legalize this confiscation of his property, it had brought suit against him.<sup>166</sup>

The story went on to point out:

In addition to the farmers of the area, there are other defendants: The Fallbrook Methodist Church, which uses water for drinking purposes for its Sunday school; the Odd Fellows Lodge, which uses water in its kitchen and for the cemetery which it owns; the board of trustees of the Fallbrook Union High School; Ruth Lillie, who owns neither land nor water rights but uses water in her home in a Federal housing project; Mary Hubbard, a 90-year-old widow whose sole supply of water is brought in buckets by her neighbors.<sup>167</sup>

While, according to the *Saturday Evening Post* article, there were "helicopters bearing Government engineers and surveyors hovering over the land and frightening the farmers,"<sup>168</sup> the base was using its water "not only for thirsty Marines but for the maintenance of an 18-hole golf course . . . [and] for watering the crops of a number of commercial flower growers to whom the Navy has leased Government land."<sup>169</sup> The article argued the base didn't need the water from the Santa Margarita because "Pendleton's supply of water, most of it pumped from wells, is at present ample."<sup>170</sup> Finally, it argued that when water does become scarce, the "long-time answer to Camp Pendleton's water needs is not the Santa Margarita River at all but the Colorado [River]."<sup>171</sup>

Given this, the *Reader's Digest* article concluded that the suit was not about water rights but about setting "a revolutionary precedent."<sup>172</sup> Coming

<sup>164</sup> High, *supra* note 162.

<sup>165</sup> Ainsworth & Shipp, *supra* note 158.

<sup>166</sup> High, *supra* note 162, at 164.

<sup>167</sup> *Id.*

<sup>168</sup> Ainsworth & Shipp, *supra* note 158, at 125.

<sup>169</sup> High, *supra* note 162, at 124.

<sup>170</sup> *Id.*

<sup>171</sup> *Id.*

<sup>172</sup> *Id.* The fear of the local people and politicians was based, in large part, upon some verbiage that was included in the complaint. Specifically, the complaint asked "[t]hat this court declare and determine that all of the rights of the United States of America are *paramount* and superior to those of the named defendants by virtue of the riparian character of the lands above

to a similar conclusion, the *Saturday Evening Post* argued that "the Fallbrook case is also a matter of national consequence: if the Federal Government can, by sovereign authority, take California water, then it might, by the same reasoning and authority, take anything anywhere."<sup>173</sup> Both articles quoted Pennsylvania Representative John Saylor as saying "if this attempt succeeds . . . then the whole historic pattern of the United States is changed and there is no telling when they may move into the coal fields of Pennsylvania or the oil fields of Oklahoma or the ore fields of Michigan."<sup>174</sup> The article concluded that "there seem to be those in government who believe you can do whatever you want to do, providing you make it legal."<sup>175</sup>

It cannot be overstated the amount of political pressure that was brought to bear upon the United States Department of Justice in reaction to its decision to initiate the Santa Margarita Adjudication. The matter was debated on the floor of Congress,<sup>176</sup> and it was a major issue in the hearings on the nomination of A. Devitt Vanech—Mr. Veeder's supervisor—to be Deputy Attorney General of the United States.<sup>177</sup> Most importantly, it was an issue that arose several times in the hearings on S. 18. Representative Samuel W. Yorty (D-Cal.) made a point of appearing in support of S. 18:

I would very much like to see S. 18 enacted into law. I do not know, particularly where the Government is acting . . . [in] areas where only private rights were previously involved, the fact that the Government comes in and

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mentioned and the ownership of them by the United States." *Hearings, supra* note 14, at 40 (statement of Rep. Yorty) (emphasis added). The term "paramount" was very troubling to California residents because that term had also been used by the United States Supreme Court in *United States v. California*, 332 U.S. 19 (1947), in determining the United States has "paramount rights" to three-mile wide strip of submerged lands off the California Coast. *Id.* at 38-39. Californians, including the local United States Representative Samuel W. Yorty, were concerned that, fresh off its win in the United States Supreme Court, the United States was attempting to expand the Court's decision to water rights and other natural resources that had traditionally remained under state control. *Hearings, supra* note 14, at 42 (statement of Rep. Yorty). However, as clarified by Mr. Veeder:

when you sue a man, in a suit of this kind, you assert that your rights are superior and predominant, and that is really what suggests this issue.

You will observe that in California decisions—and that is the source of the word "paramount," as we use it—they refer to a riparian right as a "paramount" or a "predominant" right

....

In other words, there is no basis contended that the term "paramount" has anything whatever to do with sovereignty.

*Id.* at 58 (statement of Mr. Veeder). As, Mr. Veeder clarified, the United States used the word "paramount" "as a word of art in water law, and not as having anything to do with sovereignty, we assert a paramount right because we are the owners of a riparian right." *Id.* at 59.

<sup>173</sup> Ainsworth & Shipp, *supra* note 158, at 125.

<sup>174</sup> *Id.*; High, *supra* note 162, at 125.

<sup>175</sup> High, *supra* note 162, at 125.

<sup>176</sup> *E.g.*, 97 CONG. REC. 12,947-48 (1951); 98 CONG. REC. 120-29 (1952).

<sup>177</sup> *Hearings, supra* note 14, at 69-70 (statements of Sen. William F. Knowland (R-Cal.) and Sen. Richard M. Nixon (R-Cal.)).

precludes people from getting into court to establish what the Government rights are . . . it seems to me that where they are acting in lieu of former private owners, they should take the same disabilities as well as take the benefits.<sup>178</sup>

These three controversies made up the backdrop leading up to the hearings on the McCarran Amendment. Significantly, all of these cases involved federal ownership of state law rights rather than the reserved water rights of an Indian Tribe. The Quinn River case involved state law rights subsequently purchased by the United States; the cases in Colorado involved water rights acquired pursuant to state law as required by the Reclamation Act; and, like at the Quinn River, the Santa Margarita adjudication was for state water rights purchased by the United States. In these cases, the United States used its sovereign immunity to 1) preclude state court administration of a previously adjudicated decree; 2) refuse state court jurisdiction to adjudicate water rights the United States had acquired pursuant to state law; and 3) force either the adjudication or *readjudication* of previously adjudicated state law rights in federal court. The United States' refusal to join state court adjudication and administration proceedings forced state courts onto the horns of a dilemma. These courts could either determine the government was a necessary party as it did in the Quinn River watershed, thereby precluding the continuation of the action, or move on without the United States as it did in Colorado and risk that the federal government would later argue that *res judicata* did not apply and force a readjudication of rights already adjudicated by the state court. Each case acted to effectively preclude the states' courts from enforcing state water laws "[w]herever . . . the United States appears in a watershed,"<sup>179</sup> causing considerable concern that federal ownership of state water rights was threatening "the years of building the water laws of the Western States."<sup>180</sup> It was these types of controversies that were on the minds of the Senators as they developed, debated, and ultimately passed the McCarran Amendment.

### *B. The Hearings Before the Senate Subcommittee and Debate on the Floor of the Senate*

Senators McCarran of Nevada and Watkins of Utah were cosponsors of S. 18.<sup>181</sup> As cosponsors, these Senators were instrumental in the development and passage of the McCarran Amendment. The Supreme Court has said that, when analyzing the legislative history of a statute, "[i]t is the sponsors that we look to when the meaning of the statutory words is in doubt."<sup>182</sup> As such, Senators McCarran's and Watkins's understanding of the bill is particularly probative of the purpose and intent behind the McCarran Amendment. Senator Watkins's statements come from three days of hearings on the bill in

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<sup>178</sup> *Id.* at 43–44 (statement of Rep. Yorty).

<sup>179</sup> *Hearings*, *supra* note 14, at 22 (statement of Mr. Saunders).

<sup>180</sup> S. REP. NO. 82-755, at 5 (1951).

<sup>181</sup> 97 CONG. REC. 10,682 (1951).

<sup>182</sup> *Schwegmann Bros. v. Calvert Distillers Corp.*, 341 U.S. 384, 394–95 (1951).

the Senate Subcommittee of the Committee on the Judiciary of the United States.<sup>183</sup> Senator McCarran's statements came on the floor of the Senate during debate of the bill.<sup>184</sup>

*1. The Hearings on the McCarran Amendment Chaired by Senator Arthur V. Watkins*

The members of the Subcommittee of the Committee on the Judiciary of the United States Senate included Senator McCarran, Senator Watkins, and Senator Warren G. Magnuson (D-Wash.).<sup>185</sup> Senator Watkins was made cosponsor of the McCarran Amendment by unanimous consent<sup>186</sup> and was overwhelmingly the person that lead the hearings and drove the questioning of witnesses during the hearings on the bill.<sup>187</sup>

Senator Watkins understood state water law. He was a lawyer in his home state of Utah and served as the director of the Provo River Water Users Association.<sup>188</sup> Part of his duties as director included the organization of metropolitan water districts along the Wasatch front.<sup>189</sup> He also worked to develop the Deer Creek Reservoir Project, a component part of the Provo River Reclamation Project.<sup>190</sup>

More importantly, Senator Watkins understood how to abolish Indian treaty rights. As the Chairman of the Indian Subcommittee of the Interior Committee, he was the primary architect of the federal government's termination policy of the 1950s.<sup>191</sup> Undoubtedly, as Chairman of the Indian Subcommittee, Senator Watkins understood that Congress is presumed to be "fully aware of the means by which termination [of traditional Indian immunities] could be effected."<sup>192</sup> Further, he would have understood that congressional abrogation of Indian property rights will not be inferred but must instead be "plain and unambiguous" or "clear and plain."<sup>193</sup> This

<sup>183</sup> See *infra* Part V.B.1.

<sup>184</sup> See *infra* Part V.B.2.

<sup>185</sup> *Hearings*, *supra* note 14.

<sup>186</sup> 97 CONG. REC. 10,682 (1951).

<sup>187</sup> *Hearings*, *supra* note 14.

<sup>188</sup> R. WARREN METCALF, *TERMINATION'S LEGACY: THE DISCARDED INDIANS OF UTAH* 26 (2002).

<sup>189</sup> *Id.*

<sup>190</sup> *Id.*

<sup>191</sup> VINE DELORIA, JR., *CUSTER DIED FOR YOUR SINS* 62-69 (1988) (detailing Senator Watkins's involvement with the federal government's termination policy).

<sup>192</sup> *Bryan v. Itasca County*, 426 U.S. 373, 393 (1976) (quoting *Mattz v. Arnett*, 412 U.S. 481, 504 (1973)).

<sup>193</sup> *United States v. Santa Fe Pac. R.R. Co.*, 314 U.S. 339, 346, 353 (1941). This principle has been reaffirmed repeatedly. See, e.g., *Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172, 202 (1999) ("Congress may abrogate Indian treaty rights, but it must clearly express its intent to do so."); *United States v. Dion*, 476 U.S. 734, 739-40 (1986) ("What is essential is clear evidence that Congress actually considered the conflict between its intended action on one hand and Indian treaty rights on the other, and chose to resolve that conflict by abrogating the treaty."); *Washington v. Wash. State Commercial Passenger Fishing Vessel Ass'n*, 443 U.S. 658, 690 (1979) ("Absent explicit statutory language, we have been extremely reluctant to find congressional abrogation of treaty rights . . ."); *Menominee Tribe of Indians v. United States*,

requires the abrogation “be expressed on the face of the Act or be clear from the surrounding circumstances and legislative history.”<sup>194</sup> Given this, it is fair to expect at least “some mention” of Indian Tribes in the hearings on S. 18 if Senator Watkins intended for “such a sweeping change in the status of tribal government and reservation Indians” to take place.<sup>195</sup>

Just the opposite, the little discussion that did occur suggests the Senator intended the McCarran Amendment to have no impact on Indian water rights. The sole discussion regarding Indian tribes came in a dialogue regarding the Boulder Canyon Project Act<sup>196</sup> and Arizona’s attempts to have the United States Supreme Court apportion the water of the Colorado River.<sup>197</sup> Mr. Veeder argued that “[the Boulder Canyon Act] specifically provides that the largest user on the Colorado, the largest claimant on the Colorado River, is exempt from it the Indian service, the Indian rights.”<sup>198</sup> Earlier in the same proceeding Mr. Veeder highlighted “On Indian rights alone, I think there are something like . . . 1,000,000 acre-feet that they are claiming for Indian rights down there. . . . I hope the proponents of this legislation understand that this in our estimation has sufficient breadth to authorize that litigation.”<sup>199</sup> Senator Watkins dismissed this, stating “[a]ll right. They have taken care of whatever the Indians have, and they act in a trust capacity . . . for the Indians.”<sup>200</sup> Mr. Veeder responded, “[b]ut the fact remains that there is a million acre-feet of water the United States owns in there. It doesn’t matter how it owns it.”<sup>201</sup> In response, Senator Watkins stated, “[y]es, it does. It makes quite a difference how it owns it. That is the point. It owns it as trustee. The beneficiaries are the Indians and they have prior right to the United States.”<sup>202</sup>

This comment is the key to the proper construction of the McCarran Amendment. It exposes the confluence of the two themes that were ubiquitous throughout the hearings. First, it clarifies that the Senator wanted the applicability of the waiver to depend upon whether the United States was claiming to have a “privilege of immunity that the original owner wouldn’t have.”<sup>203</sup>

Second, it reveals that the Senator viewed the applicability of the bill to be limited to situations where the United States acts “in a proprietary position.”<sup>204</sup> He and other proponents of the bill repeatedly returned to the theme that when the United States ceases to act as a sovereign and steps

391 U.S. 404, 412 (1968) (“[T]he intention to abrogate or modify a treaty is not to be lightly imputed to the Congress.”).

<sup>194</sup> *Bryan*, 426 U.S. at 393 (quoting *Mattz*, 412 U.S. at 504–05).

<sup>195</sup> *Id.* at 373.

<sup>196</sup> 43 U.S.C. §§ 617–617v (2012).

<sup>197</sup> *Arizona v. California*, 373 U.S. 546, 550–51 (1962).

<sup>198</sup> *Hearings*, *supra* note 14, at 13 (statement of Mr. Veeder).

<sup>199</sup> *Id.* at 6.

<sup>200</sup> *Id.* at 13 (statement of Sen. Watkins).

<sup>201</sup> *Id.* (statement of Mr. Veeder).

<sup>202</sup> *Id.* (statement of Sen. Watkins).

<sup>203</sup> *Id.* at 8.

<sup>204</sup> *Id.* at 9.

into the shoes of a private appropriator by acquiring state law water rights, it should take the "disabilities as well as take the benefits" and acquire no better rights than any other appropriator.<sup>205</sup>

An overwhelming majority of Senator Watkins's comments reveal that the "policy underlying the McCarran Amendment"<sup>206</sup> was to address the issues that were occurring in places like the Quinn River in Nevada, the Santa Margarita in California, and the adjudications in Colorado. In each of these basins, the United States—acting in a proprietary manner—had acquired state law rights, but was subsequently refusing the jurisdiction of state courts to enforce those rights. Testifying on the Santa Margarita controversy, Representative Yorty pointed out that "any rights the Government has were acquired when they purchased the Santa Margarita Rancho along about 1940."<sup>207</sup> His comments cut to the core of the purpose of S. 18:

[W]hen [the United States] bought the Rancho Santa Margarita . . . whatever rights were pertinent to that ranch were based upon the private ownership, and the rights acquired by the private owners.

....

. . . [W]hy should the purchase of it by the United States . . . change the water rights to the extent of making it paramount to everybody else on the stream?<sup>208</sup>

Senator Watkins applied this same logic to scenarios similar to the Colorado experience where the United States had acquired water rights directly from the state rather than by purchase or exchange. Senator Watkins was frustrated that:

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<sup>205</sup> *Id.* at 44 (statement of Rep. Yorty); *see also id.* at 21 (statement of Mr. Saunders) ("[T]here is . . . a universal intent that the United States should have no special advantage or preference when it acted in its proprietary capacity as an appropriator in the arid West, the cloak of sovereign immunity . . . has prevented the fulfillment of this ideal."); *id.* at 49 (statement of Mr. Mathews) ("There can be no good reason why the water rights acquired by the United States for the proprietary and economic use of its departments should acquire any different status from water rights acquired by individuals . . ."); *id.* at 49 (statement of Merl B. Peek, Assistant Secretary-Manager, Nat'l Reclamation Ass'n) ("The water users of the West are aware that the special advantages or preferences accorded the United States in its acts of a proprietary nature with respect to the appropriation of water . . ."). One of the few places that indicate a contrary view was a single comment where Senator Watkins asked Mr. Veeder: "Suppose we amended the bill just to put the United States in the position that it waives its rights in cases where it was in a proprietary situation or trust relationship [pursuant to the Reclamation Act]." *Id.* at 9 (statement of Sen. Watkins). However, based upon the entire body of the legislative history, it seems the Senator ultimately concluded that an amendment was not necessary because he did not view S. 18 to amount to a general waiver of sovereign immunity. *See id.* at 14.

<sup>206</sup> *San Carlos Apache Tribe*, 463 U.S. 545, 570 (1983) (quoting *Colorado River*, 424 U.S. 800, 820 (1976)).

<sup>207</sup> *Hearings*, *supra* note 14, at 38 (statement of Rep. Yorty).

<sup>208</sup> *Id.* at 41.

The State has permitted [the United States] to file, in accordance with State law, applications to put this water to a beneficial use, and you are proceeding year after year and paying the fees. . . . You go as far as you can, get all the benefits out of the State law, and then when we get to this other point you can't be brought in.<sup>209</sup>

Senator Watkins went on to point out, "in all States where you have the doctrine of appropriation, you have State engineers and you file applications, the Federal Government has followed through the Bureau of Reclamation a uniform practice of filing the application just like any other applicant."<sup>210</sup> Ultimately, this led to the rhetorical question "why shouldn't the United States *in those circumstances* in that type of case be perfectly willing to go into the State court just as it has gone in before the State engineer and permit an adjudication?"<sup>211</sup>

A separate but related issue was the interrelationship between the proposed McCarran Amendment and the Reclamation Act. The record repeatedly refers to the term "trustee," which is also a term of art when referring to the relationship between the United States and Indian Tribes. However, in this case, it seems that, as pointed out by Senator Watkins, the term is referring to the relationship between the United States and individuals benefitting from the Reclamation Act:

It acts as the trustee, for instance, on the Provo River. It makes filings with the State engineer of Utah and buys water rights for the use of the Provo River project. . . . That is not actually in a sovereign sense. It is doing that in the capacity of trustee. If the beneficiary there were the actual owner, if you transferred them over, the beneficiary could be taken in and made a party, but the United States, standing in trust for these beneficiaries, can't be taken in.<sup>212</sup>

Senator Watkins highlights that the critical inquiry is 1) whether the United States is acting in a proprietary or sovereign capacity, and 2) whether the underlying beneficiary would have sovereign immunity in their own right.<sup>213</sup>

The National Reclamation Association took the same view. Speaking on their behalf, Glenn Saunders argued:

[T]here is a large body of law demonstrating a universal intent that the United States should have no special advantage or preference when it *acted in its proprietary capacity* as an appropriator . . . the cloak of sovereign immunity . . . has prevented the fulfillment of this ideal. S. 18 is a step in the direction of completing the requirement that the United States shall act as any other

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<sup>209</sup> *Id.* at 10 (statement of Sen. Watkins).

<sup>210</sup> *Id.* at 11.

<sup>211</sup> *Id.* (emphasis added). Senator Watkins returned to this questions several times throughout the hearings, earlier asking "[i]f you are going in the State and file applications and take advantage of State laws and whatever benefits come from it, then why shouldn't you go into State courts for adjudication?" *Id.* at 7.

<sup>212</sup> *Id.* at 9.

<sup>213</sup> *Id.*



appropriator . . . with respect to the limitations imposed by the appropriation system of water law which prevails in the arid West.<sup>214</sup>

The National Reclamation Association was a primary proponent of the McCarran Amendment because its members wanted “legislation be urged to strengthen the basic concept of section 8 [of the Reclamation Act] to require that the administration and distribution *of such appropriated waters* shall at all times be under the control, direction, and supervision of the established water officials and courts of the State.”<sup>215</sup> Accordingly, the National Reclamation Association urged Congress to, through a resolution, to pass a law:

That . . . the Congress of the United States [give consent that] the United States may sue or be sued in all suits necessary for the protection of the interests of the United States in water appropriation matters in the State courts of the State where such waters are appropriated and/or beneficially used . . . .<sup>216</sup>

Importantly, section 8, and the Reclamation Act as a whole, has nothing to do with reserved water rights. Further, the terms “appropriation” and “beneficially used,” both terms of art for the state law based prior appropriation doctrine, indicates the National Reclamation Association was referring to only water rights acquired under state law. It further clarified that its concern was that the United States had been purchasing state law rights and then refusing to go into state court to defend them. From its point of view:

[W]herever the United States becomes the proprietor of a water right in the western United States, all of the supposedly settled water rights are subject to review and reexamination in a court of the United States even though the validity of all the water rights in the area may have been theretofore fully determined by action of a State court. Such an upheaval may occur at any time that the United States appears in a watershed, either as an appropriator or as a purchaser of a water right, under the present state of the law.<sup>217</sup>

Speaking on behalf of the National Reclamation Association, Glenn Saunders argued that “[t]he only possible way that we can hold the United States to the observance of *our [state] laws* is to have them amenable to our courts.”<sup>218</sup>

Ultimately, Mr. Saunders argued that “[the] fundamental question here, the one thing we have been discussing, is the question of whether the United States, when it becomes an appropriator of water, should not follow through

<sup>214</sup> *Id.* at 21 (statement of Mr. Saunders) (emphasis added).

<sup>215</sup> *Id.* (emphasis added); 43 U.S.C. § 383 (2012). By its very terms, reserved rights are not considered.

<sup>216</sup> *Hearings, supra* note 14, at 21.

<sup>217</sup> *Id.* at 22.

<sup>218</sup> *Id.* at 29 (emphasis added). Recall that reserved rights are determined pursuant to federal rather than state law. *See supra* Part II.

all the way, just like any other private appropriator.”<sup>219</sup> He went on to highlight that “[S.] 18 is slanted at . . . this fundamental proposition that when the United States becomes an appropriator of water in a Western State it shall take on exactly the same status and burden as any private appropriator.”<sup>220</sup> He concluded that “we really believe is that the Federal Government, when it becomes an appropriator or an owner of water on any stream, should have to submit itself to exactly the same procedures as a private appropriator in the matter of appropriation.”<sup>221</sup>

To drive this point home, the Association submitted a summary of arguments:

- (1) Water rights are rights of beneficial use and are vested property rights.
- (2) Under Federal Acts of 1866, 1870, and 1877, the United States irrevocably and unconditionally surrendered its rights to the States to control the use of waters of the streams in the West.
- (3) The failure of the United States to submit to the jurisdiction of State courts . . . for the adjudication of appropriative rights . . . leaves such State administration over such streams incomplete; and, in fact, jeopardizes such State administration.<sup>222</sup>

For his part, Senator Watkins supported the Association’s point of view:

There are some phases of Government activity in relation to water rights that ought to be protected so that the United States would not be subject to waiver, forfeiture, abandonment and what not. Maybe that ought to be taken care of, but I have a strong feeling that we ought to have litigation in the direction that has been proposed by the [N]ational [Reclamation] [A]ssociation.<sup>223</sup>

Senator Watkins ultimately concluded that S. 18 didn’t constitute a general waiver but instead was proposed to address a very specific and narrow situation:

[I]f the United States is going to come in there and take advantage of the laws and acquire water rights in trust for private individuals, private corporations . . . the people of Utah are vitally interested in seeing that the United States goes the full distance, and not only claims all the assets that go along but takes a few of the liabilities and subjects itself to the courts there and has those rights determined. *You are not being hurt in any other capacity.*

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<sup>219</sup> *Hearings, supra* note 14, at 32.

<sup>220</sup> *Id.* at 25.

<sup>221</sup> *Id.* at 33.

<sup>222</sup> *Id.* at 50 (statement of Mr. Peek). Importantly, the Acts of 1866, 1870, and 1877 only apply to “sources of water supply upon the *public lands*.” Desert Land Act of 1877, ch. 107, § 1, 19 Stat. 377, 377 (emphasis added) (codified as amended at 43 U.S.C. § 321 (2012)). They are “not applicable to . . . reserved land and waters.” *Fed. Power Comm’n v. Oregon*, 349 U.S. 435, 448 (1955).

<sup>223</sup> *Hearings, supra* note 14, at 35 (statement of Sen. Watkins).

When you get into the field of becoming trustee for private individuals, then you ought to be willing to submit to the same jurisdiction the individuals would be if they owned the property and had the legal title as well as the equitable title.<sup>224</sup>

This history indicates that the proponents of S. 18, particularly Senator Watkins, sought to fix a problem that did not apply to the water rights of Indian tribes. The confluence of the two primary themes of the hearings that when the United States acts in a proprietary capacity and steps into the shoes of a private appropriator it should not be able to claim a "privilege of immunity that the original owner wouldn't have"<sup>225</sup> are themes only applicable to water rights acquired pursuant to state law. When the United States reserves water rights on behalf of Indian tribes it is doing so in its sovereign capacity.<sup>226</sup> Furthermore, Indian tribes, unlike private appropriators, enjoy sovereign immunity in their own right.<sup>227</sup> As such, when the inquiry is refocused on the reserved rights held in trust for the tribes the United States would not "be given a privilege of immunity the original owner wouldn't have."<sup>228</sup> Therefore, "[w]hen attention is shifted to those sources of water rights that are not available to the private users [e.g. reserved rights] . . . the applicability of the statute becomes extremely doubtful."<sup>229</sup>

## 2. Senator Pat McCarran's Statements on the Floor of the Senate

Senator McCarran was the original sponsor of the McCarran Amendment.<sup>230</sup> However, he is strikingly silent in the legislative history on the bill. He did not participate in the subcommittee hearings.<sup>231</sup> In fact, his only comments come in a letter to fellow Senator Warren G. Magnuson of Washington State<sup>232</sup> and a brief debate on the floor of the Senate. However, his comments on the floor of the Senate give a good outline regarding his view of the scope of the McCarran Amendment:

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<sup>224</sup> *Id.* at 14–15 (emphasis added).

<sup>225</sup> *Id.* at 8 (statement of Sen. Watkins).

<sup>226</sup> COHEN'S HANDBOOK, *supra* note 17, § 19.03[4]; *see also* DE VATTEL, *supra* note 31 at 160.

<sup>227</sup> *See cases cited supra* note 57.

<sup>228</sup> *Hearings, supra* note 14, at 8 (statement of Sen. Watkins).

<sup>229</sup> Dilworth & Kirgis, *supra* note 81, at 110.

<sup>230</sup> 97 CONG. REC. 10,682 (1951).

<sup>231</sup> *Hearings, supra* note 14.

<sup>232</sup> Letter from Senator Pat McCarran to Senator Warren G. Magnuson (Aug. 25, 1951), *in* S. REP. NO. 82-755, at 9–10 (1951). Senator Magnuson was concerned the McCarran Amendment could authorize "an individual or group, having water rights on [a] stream, bringing suit to adjudicate their respective rights—thereby preventing the Bureau of Reclamation from going ahead with the Hells Canyon Project while litigation is in process or pending." Letter from Senator Warren G. Magnuson to Senator Pat McCarran (Aug. 24, 1951), *in* S. REP. NO. 82-755, at 9. In response, Senator McCarran made clear that "S. 18 is not intended to be used for the purpose of obstructing the project of which you speak or any similar project and it is not intended to be used for any other purpose than to allow the United States to be joined in a suit where it is necessary to adjudicate all of the rights of various owners on a given stream." Letter from Senator Pat McCarran to Senator Warren G. Magnuson, *supra* note 232, at 9–10.

Mr. President, the purpose of the proposed legislation is to permit the United States of America to be joined as a defendant in any suit for the adjudication of rights to the use of water from any water source, or for the administration of such rights, where it appears that the United States is the owner, or is in the process of acquiring ownership of rights by appropriation under State law, and where there is a showing that the United States is a necessary party to such adjudication.<sup>233</sup>

Senator McCarran also laid out the policy issue the McCarran Amendment intended to address:

The State of New Mexico, the State of Nevada, the State of Idaho, the State of California—in fact, all the western arid and semi-arid States—are interested in the bill, because the Government of the United States, during the past 15 or 18 years, has acquired on the various natural streams of the West, holdings in real estate which was formerly taken up by private citizens and in connection with which they, as private citizens, diverted water from the natural streams and applied it to the land.<sup>234</sup>

From his view, this had created a jurisdictional vacuum in the West whereby the United States was stepping into the shoes of private appropriators by acquiring state law water rights but refusing be joined to state court proceedings for the determination and/or administration of those rights.

The necessity that all owners or claimants of water rights on a given stream be joined in a suit for the adjudication of water rights is conceded. . . .

Particularly in view of the fact that the United States has acquired its water rights from former owners who were subject to such suits, the committee is of the opinion that to allow the United States in its own right or as trustee to have a better right than the former owner is not fair and just to the other water users on the stream.<sup>235</sup>

Importantly, Indian tribes came up during debate on the McCarran Amendment on the floor of the Senate. However, they did not come up in the context of whether their water rights were within the scope of the Congressional waiver of sovereign immunity. Instead, Senator Dennis Chávez (D-N.M.) was asking about a portion of the bill that would later be removed that required the Department of the Interior to inventory all water rights claimed by the United States.<sup>236</sup> Senator Chávez wanted to know whether “Indian rights will also be integrated [into that inventory]?”<sup>237</sup> Senator McCarran replied with an unequivocal “No. All that the bill provides

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<sup>233</sup> 97 CONG. REC. 12,947 (1951) (statement of Sen. McCarran).

<sup>234</sup> *Id.* at 12,948.

<sup>235</sup> *Id.*

<sup>236</sup> *Id.* (statement of Sen. Dennis Chávez).

<sup>237</sup> *Id.*

is that the Interior Department shall be a repository of the rights that have been *acquired* and are held by the United States."<sup>238</sup> However, Senator Chavez went on to ask "[d]oes the Government claim those rights as the Government, or could it act as trustee, let us say, for a tribe of Indians?"<sup>239</sup> Senator McCarran replied that "[i]t could act as a trustee, I suppose. But, Mr. President, there is a deeper and more far-reaching purpose [to the inventory]."<sup>240</sup>

Unfortunately, the debate ended at this point without Senator McCarran explaining his view on this important point. Although it does not directly address the question of sovereign immunity, it does expose the Senator's state of mind vis-à-vis the interrelationship between the bill and Indian tribes. It clearly shows that Senator McCarran had not considered and did not believe the bill would include tribal water rights. As the Supreme Court has repeatedly found, "[t]he silence of the sponsors of amendments is pregnant with significance."<sup>241</sup>

Additionally, his statement regarding the United States "act[ing] as a trustee" should be viewed through the lens of Nevada's experience during the Quinn River Adjudication.<sup>242</sup> In that case, the Bureau of Indian Affairs had purchased land for the benefit of the Fort McDermitt Northern Paiute and Western Shoshone Tribes.<sup>243</sup> Along with that land, the Bureau acquired a number of state-issued water rights.<sup>244</sup> The Bureau refused to be joined to a state court adjudication to have those state-issued rights administered. In this unique instance, the government was acting as trustee for the Tribes but the water rights in question were not reserved rights. Instead, the Bureau had acquired state rights that would have otherwise been subject to state court jurisdiction.<sup>245</sup> Although it cannot be definitively said that this is the scenario Senator McCarran had in mind when making his comments on the floor of the Senate, it is consistent with the general policy he espoused that where "the United States has acquired its water rights from former owners who were subject to such suits" it was not "fair and just" to other water users "to allow the United States in its own right or as trustee to have a better right than the former owner."<sup>246</sup>

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<sup>238</sup> *Id.* (statement of Sen. McCarran) (emphasis added).

<sup>239</sup> *Id.* (statement of Sen. Dennis Chávez).

<sup>240</sup> *Id.* (statement of Sen. McCarran).

<sup>241</sup> Nat'l Labor Relations Bd. v. Fruit & Vegetable Packers & Warehousemen, Local 706, 377 U.S. 58, 66 (1964).

<sup>242</sup> 97 CONG. REC. 12,948 (1951) (statement of Sen. McCarran); *see also supra* Part V.A.1 (discussing the Quinn River Adjudication).

<sup>243</sup> Act of Jan. 17, 1936, ch. 7, 49 Stat. 1094.

<sup>244</sup> *Hearings, supra* note 14, at 47 (statement of Mr. Mathews).

<sup>245</sup> *Id.* at 47-48.

<sup>246</sup> 97 CONG. REC. 12,948 (1951) (statement of Sen. McCarran).

*C. The Senate Report*

The official Senate Report on the McCarran Amendment begins with a somewhat unhelpful statement regarding the official purpose of the McCarran Amendment:

The purpose of the proposed legislation, as amended, is to permit the joinder of the United States as a party defendant in any suit for the adjudication of rights to the use of water of a river system or other source or for the administration of such rights where it appears that the United States is the owner or is in the process of acquiring water rights by appropriation under State law, by purchase, exchange, or otherwise and that the United States is a necessary party to such suit.<sup>247</sup>

The statement of purpose is no more than a restatement of the language of the McCarran Amendment itself. As such, little information can be gleaned as to Congress's intent. However, the Report goes on to explain that "in order to understand the background of this legislation a résumé of some of the history and decisions relating to the law of water rights would be of help."<sup>248</sup> Importantly, the history and decisions the Report refers to address only the congressional deference to *state law* water rights on the public domain:

In 1877 the Congress, in the Desert Land Act of 1877, severed the water from the land, and the effect of such statute was thereafter that the land should be patented by the United States separate and apart from the water and that all nonnavigable water should be reserved for the use of the public under the laws of the States and Territories named in the act.<sup>249</sup>

The Report goes on to clarify "Congress was most careful not to upset, in any way, the irrigation and water laws of the Western States."<sup>250</sup> "It is therefore settled that in the arid Western States the law of appropriation is

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<sup>247</sup> S. REP. NO. 82-755, at 2 (1951).

<sup>248</sup> *Id.*

<sup>249</sup> *Id.* at 3 (internal citations omitted). The only place where Indians are specifically mentioned in the Senate Report comes on page four, wherein the drafters noted that

the [Supreme] Court said in a marginal note on page 164 of the opinion:

In this connection it is not without significance that Congress since the passage of the Desert Land Act, has repeatedly recognized the supremacy of State law in respect to the acquisition of water for the reclamation of public lands of the United States and lands of its Indian wards.

*Id.* at 4 (quoting *Cal. Or. Power Co. v. Beaver Portland Cement Co.*, 295 U.S. 142, 164 (1935)). However, the language of the statement clearly refers to water rights "acquire[d]" rather than "reserved." Further, it specifically limits the statement to water acquired under the reclamation laws, which expressly require the United States to acquire water rights under state law. Reclamation Act, 43 U.S.C. § 383 (2012).

<sup>250</sup> S. REP. NO. 82-755, at 3 (1951).

the law governing the right to acquire, use, administer, and protect the public waters as provided in each such State."<sup>251</sup>

According to the Senate Report, a primary basis for the McCarran Amendment is the Desert Land Act and Congress's deference to state water law.<sup>252</sup> However, Congress knew at the time the Report was published that the Desert Land Act expressly concerned only "sources of water supply upon the *public lands*."<sup>253</sup> Further, Congress understood the "familiar principle of public land law that statutes providing generally for disposal of the public domain are inapplicable to lands which are not unqualifiedly subject to sale and disposition because they have been appropriated to some other purpose."<sup>254</sup> Simply put, Congress understood that its deference to state water law did not apply to federal reservations of water.<sup>255</sup>

Further, the Senate Report expressly limited its scope to "acquired" water rights.<sup>256</sup> This language clarifies that the reach of the McCarran Amendment was intended to be limited to state law water rights because, even at the time of the McCarran Amendment's consideration in Congress, it was well settled that the United States does not typically acquire water rights on behalf of Indian Tribes. Rather, Indian Tribes impliedly *reserve* their rights pursuant to the operative documents that created each Indian reservation.<sup>257</sup>

It is worth remembering that "the report of the Senate Committee on the Judiciary on [S. 18] is based largely upon" a statement to the Senate drafted by W.T. Mathews, Attorney General for the State of Nevada.<sup>258</sup> As such, the Senate Report, and indeed, the intent of the Congress in passing the McCarran Amendment, should be considered from the perspective of the experience of western states in places like the Quinn River in Nevada. Through this lens, the portion of the Senate Report quoted by the Supreme Court in *Colorado River* comes into clearer view. That portion of the Senate Report, which is copied directly out of Mr. Mathew's statement, reads: "[i]n the administration and the adjudication of water rights under *State laws* . . . all water users on a stream, in practically every case, are interested and necessary parties to any court proceedings."<sup>259</sup> The actual text of Mr. Mathew's statement clarifies that the Quinn River controversy was "[a] most concrete example" of the type of problem the McCarran Amendment was

<sup>251</sup> *Id.* at 4.

<sup>252</sup> *Id.*

<sup>253</sup> Desert Land Act of 1877, ch. 107, § 1, 19 Stat. 377, 377 (codified as amended at 43 U.S.C. § 321 (2012)).

<sup>254</sup> *United States v. O'Donnell*, 303 U.S. 501, 510 (1938); *see also* *Scott v. Carew*, 196 U.S. 100, 109 (1905); *Mo., Kan. & Tex. Ry. Co. v. Roberts*, 152 U.S. 114, 119 (1894); *Wilcox v. Jackson ex dem. McConnel*, 38 U.S. (13 Pet.) 498, 499 (1839).

<sup>255</sup> *United States v. Rio Grande Dam & Irrigation Co.*, 174 U.S. 690, 703 (1899).

<sup>256</sup> S. REP. NO. 82-755, at 2, 4-6 (1951).

<sup>257</sup> *See supra* Part II.

<sup>258</sup> *Dilworth & Kirgis, supra* note 81, at 104.

<sup>259</sup> *Compare* S. REP. NO. 82-755, at 4-5 (1951) (emphasis added), *with Hearings, supra* note 14, at 47 (statement of Mr. Mathews).

intended to resolve.<sup>260</sup> That controversy arose after the United States purchased previously decreed state law water rights but refused to enter state court for the administration of those rights.<sup>261</sup> Because the United States was “a most necessary party . . . due to the interlocking nature of the adjudicated rights,” the United States’ refusal to join the administration proceedings precluded the state court’s ability to enforce the decree and, as of the date of Mr. Mathews’ statement, the “the action ha[d] not proceeded further.”<sup>262</sup>

It would seem that the McCarran Amendment was designed to address the inequity caused by the federal claim of immunity in situations like the Quinn River controversy. The problem was that “[t]he United States has acquired many lands and water rights in States that have the doctrine of prior appropriation,” and:

It is apparent that if any water user claiming to hold such right by reason of 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.<sup>263</sup>

The Report went on to highlight that:

If a water user [the United States,] possessing a decreed water right is immune from suits and proceedings in the courts for 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.<sup>264</sup>

Ultimately, the Senate concluded that “[w]hen these lands and water rights were *acquired from the individuals* the Government obtained no better rights than had the persons from whom the rights were obtained.”<sup>265</sup> This suggests that the scope of the waiver of sovereign immunity was intended to be limited to those situations where the United States was stepping into the shoes of private appropriators, because in those instances “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.”<sup>266</sup>

The Report concluded that “Congress has not removed the bar of immunity even in its own courts in suits wherein water rights *acquired under*

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<sup>260</sup> *Hearings, supra* note 14, at 47 (statement of Mr. Mathews).

<sup>261</sup> *See supra* Part V.A.1.

<sup>262</sup> *Hearings, supra* note 14, at 47–48 (statement of Mr. Mathews).

<sup>263</sup> S. REP. NO. 82-755, at 5 (1951).

<sup>264</sup> *Id.*

<sup>265</sup> *Id.* at 5–6 (emphasis added).

<sup>266</sup> *Id.* at 6.



*State law* are drawn in question. The bill (S. 18) was introduced for *the very purpose* of correcting *this* situation and the evils growing out of such immunity.<sup>267</sup>

*D. The Interpretation of the Departments of Justice and the Interior*

The Supreme Court in *Colorado River* stated the "legislative history demonstrates that... [i]t was unmistakably the understanding of proponents and opponents of the legislation that it comprehended water rights reserved for Indians."<sup>268</sup> However, the Court's analysis of the legislative history was limited to a single statement from the Senate report and that:

In the Senate hearings on the Amendment, participants for the Department of Justice and the Department of the Interior made clear that the proposal would include water rights reserved on behalf of Indians. In addition, the Senate report on the amendment took note of a recommendation in a Department of the Interior report that no consent to suit be given as to Indian rights and rejected the recommendation.<sup>269</sup>

Far from both the "proponents and opponents," the only entity that actually discussed the impact the McCarran Amendment may have on Indian water rights in any detail was the executive branch, which very clearly sought the defeat of the bill. The letter cited by the Supreme Court from Mastin G. White, Acting Assistant Secretary of the Interior,<sup>270</sup> is one of the only places in the legislative history where Indian reserved water rights were specifically mentioned:

The interests of the United States in the use of the waters of its river systems are so many and so varied... It is enough, I hope, for present purposes to exemplify these interests by pointing to those which it has under the commerce clauses of the Constitution; those which exist by virtue of the creation of Indian reservations under the doctrine of *United States v. Winters* or by virtue of the creation of, for instance, a national park; those which it has asserted by entering into international treaties; those which it may have by virtue of its present and prior ownership of the public domain... and those which it has acquired by purchase, gift, or condemnation from private owners.<sup>271</sup>

The Department of the Interior was concerned that "[s]ince the United States can be said, with varying degrees of accuracy, to be the 'owner' of

<sup>267</sup> *Id.* at 5 (emphasis added).

<sup>268</sup> *Colorado River*, 424 U.S. 800, 811 (1976).

<sup>269</sup> *Id.* at 810-12.

<sup>270</sup> *Id.* at 812 n.18 (citing Letter from Peyton Ford, Deputy Attorney Gen., U.S. Dep't of Justice, to Senator Pat McCarran (Aug. 3, 1951), in *Hearings, supra* note 14, at 66-67, and Letter from Mastin G. White, Acting Assistant Sec'y, U.S. Dep't of the Interior, to Senator Pat McCarran (Aug. 3, 1951), in *Hearings, supra* note 14, at 67-68).

<sup>271</sup> Letter from Mastin G. White to Senator Pat McCarran, *supra* note 270, at 67 (citations omitted).

rights of any or all of these types, it is clear to me that enactment of the bill could lead to a tremendous volume of unwarranted litigation.<sup>272</sup>

Mr. White went on to suggest an alternative approach:

[I]t seems to me to be proper for the United States to permit itself to be joined as a party . . . wherever—

(1) in the course of a [state court] general adjudication . . . it is made to appear . . . that the United States is a claimant of such right and is a necessary party to the proceeding; that the right is claimed for the direct benefit of persons who, if they were themselves the claimants, would be subject to the laws of that State with respect to the appropriation, use, or distribution of water; and that the right claimed by the United States exists solely by virtue of the laws of the State and is required, by a statute of the United States, to be established by an officer or employee thereof in accordance with said laws or has been or is being acquired by the United States from a predecessor in interest whose right depends upon its having been so established . . . .

....

The qualifications spoken of above which should, I believe, be attached to such a waiver of immunity are these: (a) The waiver should in all instances be limited to an adjudication of those rights of the United States which depend solely upon their having been acquired pursuant to State law and should not extend to those that exist independently of such law or to those which have existed for a state number of years (say, 6 years); . . . (e) the waiver should not extend to rights asserted by the United States for or on behalf of Indians.<sup>273</sup>

Mr. White's comments expose a tension between the intent of the Congress in developing the McCarran Amendment and the executive branch's interpretation of the bill's scope. As the Supreme Court correctly points out,<sup>274</sup> Mr. Veeder, the Department of Justice's representative at the hearings on S. 18, predicted that:

If we were sued we would have to prove our reclamation rights, our Indian rights, the Department of Defense 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 everyone in there or the decree will not be effective.<sup>275</sup>

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<sup>272</sup> *Id.*

<sup>273</sup> *Id.* at 67–68.

<sup>274</sup> *Colorado River*, 424 U.S. at 811–12 (citing *Hearings*, *supra* note 14, at 7 (statement of Mr. Veeder)).

<sup>275</sup> *Hearings*, *supra* note 14, at 7 (statement of Mr. Veeder).

Although Mr. Veeder's statement would prove prophetic, the record demonstrates the senators did not agree with his assessment of the McCarran Amendment's scope. The Supreme Court has "cautioned against the danger, when interpreting a statute, of reliance upon the views of its legislative opponents. In their zeal to defeat the bill, they understandably tend to overstate its reach."<sup>276</sup> Instead, "[i]t is the sponsors that we look to when the meaning of the statutory words are in doubt."<sup>277</sup> The legislative history demonstrates that the actual sponsors of S. 18 believed its scope was already limited to water rights acquired by the United States pursuant to state law where the United States was seeking to "be given the privilege of immunity that the original owner wouldn't have."<sup>278</sup>

Mary Wallace has pointed out that Congress's reaction to Interior's letter

can be construed in at least two ways. One, the letter served as notice to Congress that the statute could be construed to include reserved rights and Indian water rights. Thus, by not acting to limit waiver, Congress intended that these rights be included. Two, Congress thought the bill already expressed the narrow waiver proposed by the secretary and there was no need to change the language.<sup>279</sup>

Based upon the entire body of legislative history, it seems the latter interpretation more accurately reflects Congress's understanding that the scope of the McCarran Amendment was to be very narrowly tailored to address the specific problem that "[t]he United States Government has acquired many lands and water rights in States that have the doctrine of prior appropriation. When these lands and water rights were *acquired from the individuals* the Government obtained no better rights than had the person from whom the rights were obtained."<sup>280</sup> In other words, the legislative history indicates that since Congress's understanding was that the McCarran Amendment did exactly what the Department of the Interior was suggesting, no changes were needed to the language.<sup>281</sup>

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<sup>276</sup> Nat'l Labor Relations Bd. v. Fruit & Vegetable Packers & Warehousemen, Local 706, 377 U.S. 58, 66 (1964).

<sup>277</sup> Schwegmann Bros. v. Calvert Distillers Corp., 341 U.S. 384, 394-95 (1951).

<sup>278</sup> *Hearings*, *supra* note 14, at 8 (statement of Sen. Watkins).

<sup>279</sup> Wallace, *supra* note 1, at 211.

<sup>280</sup> S. REP. NO. 82-755, at 5-6 (1951) (emphasis added).

<sup>281</sup> Further, as pointed out by Professor Abrams, "Congress justifiably could have thought Indian rights exempt under principles of Indian law." Abrams, *supra* note 7, at 1118. "States have no power to regulate Indian affairs except that which is specifically granted by Congress." *Id.* at 1118 n.51. Professor Abrams goes on to point out that "subsequent acts of Congress indicate hostility to state jurisdiction over Indian rights." *Id.* at 1118. For this proposition, he cites the Senate report of 28 U.S.C. § 1362, which "vests original jurisdiction in the federal courts for certain types of suits brought by Indian tribes." Abrams, *supra* note 7, at 1118 n. 52 (citing S. REP. NO. 89-1507 (1966)). Abrams writes that the Senate found that "one reason for the act is the Indians' fear that state courts resolve their suits unfavorably." *Id.* (citing S. REP. NO. 89-1507, at 2). "The report also credits the federal courts with 'more expertise in deciding questions involving treaties with the Federal Government as well as interpreting the relevant

## VI. REVISITING THE LANGUAGE OF THE McCARRAN AMENDMENT

Through the lens of the legislative history, the language of the McCarran Amendment comes into sharper focus. The relevant portion of the McCarran Amendment reads:

Consent is 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.<sup>282</sup>

It was the “or otherwise” language that was seized upon by the Supreme Court when it determined that the McCarran Amendment included reserved rights held for the benefit of Indian tribes.<sup>283</sup> However, the intersection of basic statutory construction, the special rules of construction that apply specifically to Indian tribes, and the legislative history of the McCarran Amendment suggests a different result.

In finding the “or otherwise” element included Indian reserved water rights, the Court failed to apply “the principle of *ejusdem generis* that would have required the court to conclude the ‘or otherwise’ provision does not encompass the adjudication of water right having a source in the powers over navigation and over reserved lands.”<sup>284</sup> *Ejusdem generis* applies “when specific words are followed by a general term such as ‘or otherwise’ and works to limit the objects encompassed by the general term to the same class as those specifically enumerated.”<sup>285</sup> The question, therefore, is whether “water rights by appropriation under State law, by purchase, by exchange” form a specific class and, if so, whether reserved water rights would fit into that class.<sup>286</sup>

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body of Federal law that has developed over the years.” *Id.* He also points to the Act of Aug. 15, 1953, ch. 505, § 4, 67 Stat. 588, 589 (codified as amended at 28 U.S.C. § 1360 (2012)), “which further proves congressional hostility to state jurisdiction, since it granted certain states jurisdiction over disputes involving Indians if the states had jurisdiction over similar suits not involving Indians, but specifically prohibited state jurisdiction over Indian water rights.” Abrams, *supra* note 7, at 1118 n. 52.

<sup>282</sup> 43 U.S.C. § 666(a) (2012).

<sup>283</sup> *Colorado River*, 424 U.S. 800, 810–11 (1976).

<sup>284</sup> Wallace, *supra* note 1, at 211. It would perhaps be more accurate to suggest that the Court first rejected the application of *ejusdem generis* in *Eagle County* based upon its conclusion that the rights listed in section (a)(2) of the McCarran Amendment did not qualify section (a)(1) and then subsequently failed to apply the doctrine in *Colorado River* despite switching course and finding that “the Court [in *Eagle County*] held that reserved rights were included in those rights where the United States was ‘otherwise’ the owner.” *Colorado River* 424 U.S. at 810; see also *supra* Part IV (discussing the Supreme Court’s interpretation of the McCarran Amendment).

<sup>285</sup> Dilworth & Kirgis, *supra* note 81, at 110; see also NORMAN SINGER & SHAMBIE SINGER, 2A SUTHERLAND STATUTES AND STATUTORY CONSTRUCTION § 47.17 (7th ed. 2015).

<sup>286</sup> Dilworth & Kirgis, *supra* note 81, at 110 (citations omitted).

First, as pointed out by Dilworth and Kirgis, “[t]he specific terms in the first sentence of the McCarran Amendment . . . would seem to form a class.”<sup>287</sup> Each of the water rights listed are, by definition, water rights acquired under state law. The term “appropriate” in the water law context is derived from the prior appropriation doctrine, the primary state law water rights doctrine in the west. Moreover, although state law water rights are routinely purchased or exchanged, the Nonintercourse Act<sup>288</sup> significantly limits the ability to purchase or permanently exchange reserved water rights.<sup>289</sup> Indeed, as the Supreme Court highlighted in *Eagle County*, the Amendment “covers rights acquired by appropriation under state law and rights acquired ‘by purchase’ or ‘by exchange,’ which we assume would normally be appropriative rights.”<sup>290</sup>

Second, it is doubtful that reserved rights would fit into the class enumerated in the McCarran Amendment. Indeed, the United States does not acquire, appropriate, purchase, or exchange federal reserved water rights. Rather, federal reserved water rights are “reserved” by the United

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<sup>287</sup> *Id.* at 111. The doctrine of *ejusdem generis* is “inapplicable if the specific enumerations do not all fit into one definable class.” *Id.* at 110. They go on to highlight that the doctrine is also inapplicable where “the specific terms exhaust the class or if the statute shows an intent that the general term be not limited to the class.” *Id.* at 110–11. Neither of these are applicable to the McCarran Amendment. First, there is no language in the McCarran Amendment that would show an intent that the general term be expanded beyond the class of water rights specifically enumerated. Second, as Dilworth and Kirgis point out, the specific terms enumerated do not exhaust the class “since the acquisition of water rights through ownership of riparian lands is not enumerated,” and, as a result, it “would seem to be at least one further method of acquiring water rights available to the public.” *Id.* at 111. The widespread presence of the Santa Margarita River controversy in the legislative history provides evidence that Congress intended the “or otherwise” language to apply to riparian rights rather than reserved rights. See *supra* Part V.A.3. California is a dual prior appropriation-riparian water rights state. TARLOCK, *supra* note 22, § 5:11. However, most western states have abolished the riparian doctrine. Since Congress believed that the McCarran Amendment’s applicability “would in most instances be confined to those states in which the doctrine of prior appropriation is applicable,” it could be that Congress wanted to ensure that the McCarran Amendment would apply to riparian rights but, recognizing its limited applicability in the west, chose to include it in the more general “or otherwise” term. S. REP. NO. 82-755, at 2 (1951).

<sup>288</sup> Act of June 30, 1834 (Trade and Intercourse Act of 1834), ch. 161, § 12, 4 Stat. 729, 730–31 (codified at 25 U.S.C. § 177 (2012)).

<sup>289</sup> See COHEN’S HANDBOOK, *supra* note 17, §19.03[7][c] n.150 (“As a general proposition, the word ‘land’ in statutes of this type has been construed to include appurtenant waters.”); Richard B. Collins, *The Future Course of the Winters Doctrine*, 56 U. COLO. L. REV. 481, 489 (1985) (“Water rights are real property subject to the general restraint against alienation of tribal land.”). Notwithstanding the significant limitations on permanently alienating reserved water rights, there is ample precedent to support the long-term but nonpermanent leasing of reserved water rights, particularly Indian reserved water rights. See COHEN’S HANDBOOK, *supra* note 17, §19.03[7][a]–[b]. Another narrow exception to the general rule that reserved water rights may not be permanently alienated exists for so called *Walton* rights. See *Colville Confederated Tribes v. Walton*, 647 F.2d 42, 51 (9th Cir. 1981) (holding that since an allottee is entitled to a *pro rata* share of the Tribe’s irrigation water right, a subsequent non-Indian purchaser is entitled to a water right for the amount of water being used by the allottee plus any water the non-Indian puts to use within a reasonable amount of time after acquiring the property, up to the allotment’s *pro rata* entitlement).

<sup>290</sup> *Eagle County*, 401 U.S. 520, 524 (1971).

States when it removes land from the public domain.<sup>291</sup> Importantly, although the United States is able to acquire water rights pursuant to state law, the public at large is not able to reserve water rights under federal law.<sup>292</sup> Accordingly, “[e]ach of [the class] describes a method of acquisition available to the public at large as well as the Government. They give no inkling of intent to include governmental sources of water such as the navigation servitude or the power over reserved lands.”<sup>293</sup>

This argument becomes substantially more forceful when coupled with the Indian law canons of construction.<sup>294</sup> Although not applicable in *Eagle County*, these “eminently sound and vital canon[s]”<sup>295</sup> of interpretation should have taken center stage in *Colorado River* when the Court considered the issue of whether the McCarran Amendment included Indian reserved water rights. The canons require statutes affecting Indian tribes “be liberally construed [with] doubtful expressions being resolved in favor of the Indians.”<sup>296</sup> Put another way, the canons require that “statutes are to be read to reserve Congress’ powers [to abrogate tribal rights] in the absence of a clear expression by Congress to the contrary.”<sup>297</sup> Through this lens, the “or otherwise” language in the McCarran Amendment cannot be said to be a “clear expression by Congress” to abrogate tribal sovereignty over its water rights. At best, this language is ambiguous and its application to Indian water rights is doubtful.

This analysis of basic statutory construction, as well as the Indian canons of construction, is consistent with the legislative history of the McCarran Amendment. The events that precipitated the introduction of the McCarran Amendment involved only state law water rights that the United States had appropriated<sup>298</sup> or purchased.<sup>299</sup> Likewise, the hearings, debates, and the Senate Report on S. 18 all focused almost entirely on state law water rights that had been purchased<sup>300</sup> or appropriated consistent with state law.<sup>301</sup> In each case, the United States’ ownership, along with its claims of sovereign immunity, acted to preclude state court jurisdiction over state water law “[w]herever . . . the United States appears in a watershed,” subjecting “all the supposedly settled water rights . . . to review and reexamination in a court of the United States.”<sup>302</sup> Proponents of the bill feared that this would eventually

<sup>291</sup> *Cappaert v. United States*, 426 U.S. 128, 138 (1976); *Winters v. United States*, 207 U.S. 564, 577 (1908).

<sup>292</sup> *Cal. Or. Power Co. v. Beaver Portland Cement Co.*, 295 U.S. 142, 163–64 (1935).

<sup>293</sup> *See Dilworth & Kirgis*, *supra* note 81, at 111.

<sup>294</sup> *See cases cited supra* note 89.

<sup>295</sup> *Bryan v. Itasca County*, 426 U.S. 373, 392 (quoting *N. Cheyenne Tribe v. Hollowbreast*, 425 U.S. 649, 655 n.7 (1976)).

<sup>296</sup> *Id.* (quoting *Alaska Pac. Fisheries v. United States*, 248 U.S. 78, 89 (1918)); *see also cases cited supra* note 89.

<sup>297</sup> *N. Cheyenne Tribe*, 425 U.S. at 656.

<sup>298</sup> *See supra* Part V.A.2.

<sup>299</sup> *See supra* Part V.A.1, .3.

<sup>300</sup> *E.g., Hearings*, *supra* note 14, at 8 (statement of Mr. Veeder).

<sup>301</sup> *Id.* at 10 (statement of Sen. Watkins).

<sup>302</sup> *Id.* at 22 (statement of Mr. Saunders).

lead to nullification of "the years of building the water laws of the Western States."<sup>303</sup>

In contrast to state law water rights, the reserved rights of the tribes were "virtual[ly] absen[t]" from the legislative history on the McCarran Amendment.<sup>304</sup> As the Supreme Court has noted, "[t]his omission has significance in the application of the canons of construction . . . as some mention would normally be expected if such a sweeping change in the status of tribal government and reservation Indians had been contemplated by Congress."<sup>305</sup>

Just the opposite, Senator Watkins stated unequivocally "[y]ou don't have a general waiver in this"<sup>306</sup> and, in fact, the few places where the Senators did discuss Indian reserved water rights indicate they did not intend for them to be included within the scope of the bill. In response to the statement by the representative of the Department of Justice that S. 18 would include Indian water rights and that "[i]t doesn't matter how [the United States] owns [the water right]."<sup>307</sup> Senator Watkins responded by stating, "[y]es, it does. It makes quite a difference how it owns it. That is the point. It owns it as trustee. The beneficiaries are the Indians and they have prior right to the United States."<sup>308</sup>

Senator Watkins also noted that the bill aimed to eliminate "the privilege of immunity that the original owner wouldn't have."<sup>309</sup> These two statements read together are the key to a proper construction of the McCarran Amendment. The bill was aimed at water rights the United States can acquire when acting in its proprietary capacity similar to any other individual seeking a water right rather than its sovereign capacity, as it would when reserving land and water rights for some governmental purpose.<sup>310</sup> In the case of Indian tribes, the United States owns Indian reserved rights in trust for the tribes in its sovereign capacity and the tribes have sovereign immunity in their own right.<sup>311</sup> Therefore, in the circumstance where the reserved rights of Indian tribes are involved, the United States would not have a privilege of immunity that the beneficial owners would not otherwise have. Accordingly, "[w]hen attention is shifted" to reserved rights held for the benefit of Indian tribes, "the applicability of the statute becomes extremely doubtful."<sup>312</sup>

<sup>303</sup> S. REP. NO. 82-755, at 5 (1951).

<sup>304</sup> *Bryan v. Itasca County*, 426 U.S. 373, 381 (1976).

<sup>305</sup> *Id.*

<sup>306</sup> *Hearings, supra* note 14, at 14 (statement of Sen. Watkins).

<sup>307</sup> *Id.* at 13 (statement of Mr. Veeder)

<sup>308</sup> *Id.* (statement of Sen. Watkins).

<sup>309</sup> *Id.* at 8.

<sup>310</sup> COHEN'S HANDBOOK, *supra* note 17, §19.03[4].

<sup>311</sup> *Winters v. United States*, 207 U.S. 564, 577 (1908) *See* cases cited *supra* note 57 (discussing the sovereign immunity of Indian tribes).

<sup>312</sup> *Dilworth & Kirgis, supra* note 81, at 110.

## VII. CONCLUSION

The Supreme Court's decisions in *Eagle County, Colorado River*, and *San Carlos Apache Tribe* have had dramatic and detrimental consequences in Indian country. By allowing state courts to determine reserved water rights, the Court has moved away from the "deeply rooted" federal policy of leaving Indian tribes free from state court jurisdiction.<sup>313</sup> This has proven problematic because Indian tribes often have senior but unused water rights, and state courts are "ill-equipped to deal with the political pressures arrayed against tribal efforts to reclaim water that ha[s] been used by the non-Indian community."<sup>314</sup> As a result, tribes are now forced into "hostile" state court forums for the determination of their water rights "in which [they] must be prepared to compromise their claims."<sup>315</sup>

The Court's decision that the "or otherwise" language in the McCarran Amendment includes reserved water rights was ultimately driven by its conclusion that "[t]he clear federal policy evinced by [the McCarran Amendment] is the avoidance of piecemeal adjudication of water rights in a river system."<sup>316</sup> However, the legislative history indicates a different policy. One that was designed to address a narrow but unfair and politically untenable situation that was occurring throughout the west at the time: the United States was acquiring state law water rights and subsequently refusing to be joined to state court proceedings seeking to either adjudicate or administer those rights. Little in the legislative history of the McCarran Amendment indicates Congress intended to deviate from its deeply rooted policy of "leaving the Indians free from state jurisdiction."<sup>317</sup>

The legislative history is packed with events leading up to the introduction of the McCarran Amendment that exemplify the problem the McCarran Amendment seems to have been designed to fix. The United States was purchasing state law rights in places like the Quinn River in Nevada and the Santa Margarita River in California. Similarly, the government was appropriating water rights pursuant to state law consistent with the Reclamation Act throughout the west. Every instance discussed in the available legislative history involved the United States' acquisition of water rights pursuant to state law. The acquisition of these state law water rights by the United States was compromising the states' ability to manage water within their borders because federal claims of sovereign immunity was effectively precluding state court enforcement of state water laws. As a result, water users in the West were becoming increasingly alarmed that "the long years of travail through which the water laws of our Western States have passed [sic] . . . have been in vain."<sup>318</sup>

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<sup>313</sup> *Rice v. Olson*, 324 U.S. 786, 789 (1945).

<sup>314</sup> *McElroy & Davis*, *supra* note 7, at 599-600.

<sup>315</sup> Blumm et al., *The Mirage of Indian Reserved Water Rights*, *supra* note 7, at 1161.

<sup>316</sup> *Colorado River*, 424 U.S. 810, 823 (1976).

<sup>317</sup> *Rice*, 324 U.S. at 789.

<sup>318</sup> *Hearings*, *supra* note 14, at 48 (statement of Mr. Mathews).



Perhaps most illuminating are the statements of Senators McCarran and Watkins, cosponsors of the McCarran Amendment. Although the executive branch, through the Departments of Justice and the Interior, prophesized the McCarran Amendment could be interpreted as a general waiver, including the rights of Indian tribes, there is little evidence in the legislative history that indicates the Senators shared their view. The only statements made by the Senators regarding Indians signals they did not view the McCarran Amendment to include Indian reserved water rights.

Instead, the problem, according to Senator McCarran, was that

during the past 15 or 18 years, [the United States] has acquired on the various natural streams of the West holdings, in real estate which was formerly taken up by private citizens and in connection with which they, as private citizens, diverted water from the natural streams and applied it to the land.<sup>319</sup>

The McCarran Amendment was passed into law to address these water rights. Senator Watkins argued that

if the United States is going to come in there and take advantage of the laws and acquire water rights in trust for private individuals, private corporations . . . [it should go] the full distance, and not only claim[] all the assets that go along but takes a few of the liabilities and subject[] itself to the courts there and ha[ve] those rights determined. . . . When you get into the field of becoming trustee for private individuals, then you ought to be willing to submit to the same jurisdiction the individuals would be if they owned the property and had the legal title as well as the equitable title.<sup>320</sup>

The confluence of the basic rules of statutory construction, the canons of construction applied to Indian tribes, and the legislative history demonstrate that "the McCarran Amendment was meant to be interpreted narrowly, not broadly."<sup>321</sup> Indeed, the true policy underlying the McCarran Amendment seems to have had nothing to do with Indian tribes who have sovereign immunity independent of the United States or their rights, which are reserved by the United States in its sovereign capacity. Instead, the purpose of the bill was to address the problem that "Congress has not removed the bar of immunity . . . in suits wherein water rights *acquired under State law* are drawn in question."<sup>322</sup> The Senators wanted to make sure the United States accepted the "disabilities as well as . . . the benefits" of these rights.<sup>323</sup> The McCarran Amendment "was introduced for *the very purpose* of correcting *this* situation and the evils growing out of such immunity."<sup>324</sup>

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<sup>319</sup> 97 CONG. REC. 12,948 (1951) (statement of Sen. McCarran).

<sup>320</sup> *Hearings, supra* note 14, at 15 (statement of Sen. Watkins).

<sup>321</sup> Wallace, *supra* note 1, at 210.

<sup>322</sup> S. REP. NO. 82-755, at 5 (1951) (emphasis added).

<sup>323</sup> *Hearings, supra* note 14, at 44 (statement of Rep. Yorty).

<sup>324</sup> S. REP. NO. 82-755, at 5 (1951) (emphasis added).