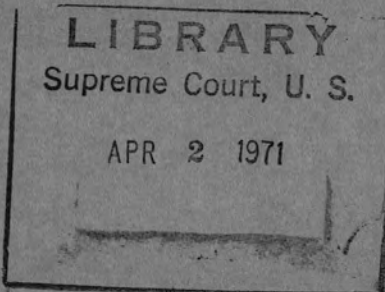


# Supreme Court of the United States

OCTOBER TERM, 1970



In the Matter of:

UNITED STATES

Petitioner

Docket No. 812

vs.

THE DISTRICT COURT IN AND FOR THE  
WATER DIVISION NO. 5, STATE OF  
COLORADO, et al.

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Place Washington, D. C.

Date March 2, 1971

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C O N T E N T S

ARGUMENT OF:

PAGE:

WALTER KIECHEL, JUR. ESQ.  
On behalf of Petitioner

4

KENNETH BALCOMB, ESQ.  
On behalf of Respondent

21

REBUTTAL ARGUMENT OF:

WALTER KIECHEL, JR. ESQ.  
On behalf of Petitioner

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\*\*\*\*\*

IN THE SUPREME COURT OF THE UNITED STATES  
OCTOBER TERM, 1970

UNITED STATES,

Petitioner

vs.

No. 812

THE DISTRICT COURT IN AND FOR THE  
WATER DIVISION NO. 5, STATE OF  
COLORADO, ET AL.,

Respondent

Washington, D.C.

Tuesday, March 2, 1971

The above entitled matter came on for  
argument at 11:35 a.m.

BEFORE:

WARREN E. BURGER, Chief Justice  
HUGO L. BLACK, Associate Justice  
WILLIAM O. DOUGLAS, Associate Justice  
JOHN M. HARLAN, Associate Justice  
WILLIAM J. BRENNAM, JR. Associate Justice  
PORTER STEWART, Associate Justice  
BYRON R. WHITE, Associate Justice  
HENRY BLACKMUN, Associate Justice

1 APPEARANCES:

2  
3 WALTER KIECHEL, JR., ESQ.  
4 Land and Natural Resources Division  
5 Department of Justice  
6 Washington, D.C.  
7 On behalf of Petitioner

8  
9 KENNETH BALCOMB, ESQ.  
10 Glenwood Springs, Colorado  
11 On behalf of Respondent

12 \*\*\*\*\*



P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We'll hear arguments next in No. 812, United States against the District Court of Eagle County of Water Division No. 5. Mr. Kiechel, you may proceed whenever you're ready.

MR. KIECHEL: Mr. Chief Justice and may it please the Court.

Under the Colorado Water Right Determination and Administration Act of 1969, the 70 water districts were replaced with 7 water divisions, Water division 5 included the area drained by the Colorado River and its tributaries excluding the Gunnison River, and this includes the former water district 37, in the Eagle River Watershed.

In February of last year the Attorney General received by mail a paper signed by the Water Clerk of Water Division 5, directed to all persons interested in water applications in that division and supplying a list of water right applications filed in that office.

The paper concluded with the statement that the recipient had until the last day of March, 1970, that was the month thereafter that he received the notice, to file with the Water Clerk a verified statement of opposition to any such application.

Similar notices have been received by the At-

1 torney General listing Water Right Applications filed during  
2 each month thereafter in Water Division 5, and in Water Div-  
3 isions 4 and 6 as well.

4 In response to the 1969 December 1969 notice the  
5 United States filed a motion to quash, this was denied, the  
6 writ was applied for in the Colorado Supreme Court which was  
7 denied.

8 As in the Eagle County case affected by the proceed-  
9 ings in Water Division 5 are federal water rights of two  
10 types, appropriative rights acquired under state law, and  
11 the reserved and other rights based on federal law.

12 Because of its size, Water Division 5 contains a  
13 multitude of federal rights to demonstrate their magnitude and  
14 nature we have prepared a map on which has been delineated the  
15 boundaries of Water Division 5, and shows the various federal  
16 reserved areas within that Division 5.

17 The four national parks or forests thereof, in green,  
18 the Naval Oil Share REserve in black, the national park, part  
19 of the Rocky Mountain National Park on that side of the  
20 divide in red---

21 Q Would you mind waiting until we get the  
22 map?

23 A I'm sorry, sir.

24 Q While we're waiting will you give some  
25 thought to, then suggest any reason why the Colorado Courts

1 will not follow federal law, if that's part of the --- of  
2 your position.

3           A           Yes. Your Honor, we are concerned about  
4 the opinion of the Colorado Supreme Court to that extent. In  
5 that respect. To the extent that the Colorado Supreme Court  
6 discussed the question they said that the decisions of this  
7 Court reviewing Winters v. United States, in 1908 which an-  
8 nounced the reserved right doctrine, Federal Power Commission  
9 v. Oregon, 349 and Arizona v. California in 1963, 373, were  
10 not determinative of the question.

11           Q           Would that determination of the Colorado  
12 Supreme Court be reviewable here at the instance of the United  
13 States?

14           A           Yes, Your Honor, I believe it is.

15           Q           So you do get a review in a federal Court,  
16 here.

17           A           Yes, our position is that this is reviewable  
18 and the Supreme Court which held that the decision, in effect  
19 the Supreme Court of Colorado said that when this matter was  
20 presented to them that they would decide it on the basis of  
21 Colorado law.

22                   And they referred to the Stockman v. Leddy case  
23 which Justice White referred to, in their opinion and said  
24 that they would have to overrule that decision if they found  
25 that there were reserved rights of the United States in the

1 state of Colorado.

2 Q Well do you think Leddy purported to  
3 say what federal law was?

4 A Well, Leddy---

5 Q Or just that under Colorado law there  
6 were not---

7 A Leddy relies upon the enabling of the  
8 Congress---

9 Q I see.

10 A And it---

11 Q If the United States didn't reserve any  
12 thing---

13 A They said that by admitting Colorado into  
14 the Union with a constitutional provision, a state consti-  
15 tutional provision that said that all water rights of the  
16 state of Colorado were the property of the people and subject  
17 to appropriation under state law, that the United States is  
18 precluded from asserting a claim of reserved rights, within  
19 Colorado.

20 Our response to that, if Your Honor please, is that  
21 the enabling statute, requires in Section 4 that the people  
22 of the territory of Colorado recognize and disclaim any  
23 right to the public lands within that territory and recognize  
24 that that is a matter for the sole and exclusive dis-  
25 position of the United States.



1           This was a specific provision of the Enabling Act,  
2 and that act was, and that provision was referred to once again  
3 when the President proclaimed in his Presidential Proclamation  
4 after the Colorado Constitution was adopted that Colorado  
5 was a state.

6           So that we say that by this provision of the enabling  
7 act, Congress reserved to itself the right to the dispose of  
8 public lands, except for the school lands which were granted to  
9 the territory and certain other lands in specified am-  
10 ounts for public buildings.

11           And we say there, in furtherance of that,  
12 that thereafter, when the United States reserved from the  
13 public domain for a specified purpose, land it reserved as  
14 well it reserved the appurtant water rights, to fulfill the  
15 purposes of that reservation, and that carried with it the  
16 priority of the date of the creation of the reservation subject,  
17 and I wish to point out, subject to rights vested at the  
18 time of its creation.

19           The matter of the legislative history I would discuss,  
20 Mr Justice Harlan asked if there were some specific episode  
21 which triggered off the enactment of that statute. And I  
22 think Mr. Balcomb has referred to a specific episode which did.

23           It was a proceeding in the home state of Senator  
24 McCarran, the sponsor of the act, in Nevada on the Quinn River.  
25 And it involved a suit for administration of water rights, al-

1 ready having been adjudicated under state courts.

2 And there the United States had purchased, had  
3 applied by purchase certain water rights on the Quinn  
4 River. And this is the primary concern of Senator McCarran.

5 This is demonstrated by his statements on the floor  
6 of the Senate, the fact that he says it's to allow the United  
7 States its own right, or as a trustee, those were acquired  
8 for Indian purposes, to have a better right than the former  
9 owner, is not fair and just as to the other water users on  
10 the stream.

11 And of course the terms of the statute, I might  
12 point out refers to appropriation under state law, and in an  
13 appropriative right state, such as Nevada or Colorado, the  
14 state here involved, the only way a private citizen can ac-  
15 quire water right is by the application of the water to a  
16 beneficial use.

17 And that water right becomes fixed in amount and  
18 quantity by that act.

19 Another characteristic of an appropriative right is  
20 that it is subject to loss through abandonment or of non-  
21 use. Now considering the legal characteristics of an appropria-  
22 tive right, the second things of the McCarran Act, which I  
23 would refer the Courts attention to, is consistent with the  
24 first.

25 Only if the consent to sue is restricted to rights

1 acquired under state law. The second sentence of the McCarran  
2 Amendment says, "The United States, when a party to any  
3 such suit, one shall be deemed to waive any right to plead  
4 state law inapplicable, or that the United States is not amen-  
5 able, thereto by reason of its sovereignty, and thereto shall  
6 be subject to the judgments, orders, and decrees of the court  
7 having jurisdiction and may obtain review thereof, in the  
8 same manner and to the same extent as a private individual  
9 under like circumstances."

10 Q There is no provision in the statute, ob-  
11 viously, that relates reserve rights, makes an exception, or  
12 to use a different phrase, to appropriate rights stem from  
13 federal laws. Nothing in the statute of that kind.

14 Aq That is correct, Your Honor.

15 Q Was there any effort made to put in such  
16 language?

17 A There was not. The express terms of the  
18 statute refer to rights acquired under state law, appropriated  
19 under state law.

20 Q Then it has that catchcatch-all phrase,  
21 "or otherwise" .

22 A That's correct, Your Honor, but what I'm  
23 saying is that the terms of the statute by appropriation under  
24 state law, by purchase, exchange, or otherwise is the means  
25 by which a private individual can acquire the water right.

1 And it was that type of right which the United  
2 States had acquired in the Quinn River situation that Senator  
3 McCarran was concerned about being subject to adjudication  
4 or in that case, administration, by the state court of Nev-  
5 ada.

6 Q Of course, as was suggested earlier, how  
7 in argument at the time of the enactment of the McCarran Am-  
8 endment the concept of the reserved rights hadn't matured, or  
9 become quite so clarified as it is now, perhaps.

10 There had been the one case involving an Indian  
11 reservation, but the passage of that legislation long ante-  
12 dated the decision of this Court in Arizona v. California.  
13 Did it not?

14 A That is correct, Your Honor.

15 Q Primarily in that case--

16 A But the Winters v. United States was a  
17 landmark decision that this Court---

18 Q Having to do with Indian reservations.

19 A Yes indeed, and it was not until Arizona  
20 v. California that it was extended to other federal reser-  
21 vations.

22 But the concept of a right other than an appropria-  
23 tive right, a right arising by creation of a federal  
24 reservation was well known in the water law of the West at the  
25 time of the enactment of the McCarran Amendment



1           Now keeping in mind the intent of the sponsor, that  
2 is, Senator McCarran, to subject equally the federal government  
3 and private citizens to adjudication of water rights acquired  
4 under state law, and the express terms of the statute designed  
5 to carry out that intent, in sharp distinction and contrast,  
6 are reserve rights.

7           Reserved rights, as I have said arise by creation of  
8 reservations automatically. They don't require the application  
9 of water to use, the priority dates from the date of with-  
10 drawal, and applies to future as well as existing use.

11           And the, in summary with respect to the legislative  
12 intent, I would say that would be no --- provision in terms  
13 of the statute, in putting reserve rights, nor any specific  
14 intent by the sponsor of the amendment.

15           It follows that it was not within the contemplation  
16 of Congress that they be included within state court adjudi-  
17 cation.

18           Q           Excuse me. The section     that distinguish-  
19 es between the adjudication of rights and the administration  
20 of---

21           A           Yes?

22           Q           on the---

23           A           They provide for the joinder of the United  
24 Staates in either or both of those.

25           Q           It distinguishes between the two.

1 A Yes, Your Honor.

2 Q And on the adjudication part it says for  
3 the adjudication, that the United States may be enjoined in any  
4 suit --- rights of the use of the water or river system---.

5 Now would you think that that would be consent for someone  
6 to sue the United States in a federal District Court for a  
7 declaratory judgement as to whether or not the United States  
8 has any reserved rights in the Colorado River system?

9 A No, Your Honor, it's a two party suit,  
10 which---

11 Q Well, let's assume he has satisfied ---.  
12 He's brought in everybody in the state of Colorado, that is  
13 ---/

14 A I'm not suggesting that that's necessary,

15 Q I know, but let's assume that --- .

16 A Your question is whether if in a federal  
17 court---

18 Q Or any other court. A declaratory  
19 judgement---

20 A I like the hypothetical You mentioned  
21 because it does permit me to say that the federal District  
22 Court would of course apply ther reserved right as a matter  
23 of federal law.

24 Q I don't know, but how about consent to the  
-25 suit? Has the United States consented to that suit?

1           A           With respect to a single Plaintiff, single  
2 person asking that the rights of the United States be declared--

3           Q           ---serve as a defendant anybody that they  
4 think ought to be served. Including the United States. My  
5 question is does this statute give consent for such a suit?  
6 It seems like it would,       right in paragraph one, here.

7           A           If it's a general adjudication, if it  
8 does have the geographic and other characteristics of a  
9 general adjudication---

10          Q           You don't say that this at least determined  
11 the adjudication of rights part. You would n't say that the  
12 United States has not given consent to adjudicative reserve  
13 rights.

14          A           Oh, yes, I do. I think that the language  
15 of appropriation under state law applies to both the admin-  
16 istration and the adjudication parts of the statute.

17          Q           So you don't think that there would be  
18 jurisdiction in a federal court --- .

19          A           I     believe that the reserve rights were  
20 withheld by Congress, yes, Your Honor.

21          Q           Let me see if I get that. Then you take  
22 the language where it appears that the United States is the  
23 owner of or is about to --- more rights by appropriation under  
24 state law as modifying both the adjudication right and the  
25 administrative right.

1                   Q            You say what? That the legislative history  
2 supports that?

3                   A            Yes, Your Honor.

4                   Q            Well that's a crude way to constrct a  
5 statute, isn't it?

6                   A            No,---

7                   Q            It's talking about in paragraph 2, it  
8 says for the administration of rights where it appears the  
9 United States is the owner of or is in the process of acquiring  
10 rights by appropriation. Add that on to paragraph 1 and see  
11 where you get. For the adjudicaiton of rights to the use of  
12 the water of a river system. Where it appears that the United  
13 States is the owner of or is in the process of getting water  
14 rights.

15                   That doesn't make very    good sense, does it? Well,  
16 I won't take up your time.

17                   A            Yes, I think it does make sense. The adjud-  
18 ication of rights acquired under state law, or in the process  
19 of being acquired. My difficulty with your earlier question, Mr.  
20 Justice White, is that you characterize it as a declaratory  
21 judgement and I think that would not be a general adjudication  
22 because it would not permit the assertion of contesting of the  
23 water right.

24                   The---

25                   Q            At    least the point is that the govern-



1 ment is not lost this state could exercise jurisdiction ---.

2 A I beg your pardon?

3 Q Basically, why does the government really  
4 object to the state court exercising jurisdiction under this  
5 Act?

6 A Well, the procedure involved is not such  
7 that we think it permits a general adjudication. There just  
8 isn't, it just isn't within the terms of the type of proceeding  
9 to which Congress consented.

10 And we are also very concerned about the Supreme  
11 Court of Colorado and its opinion with respect to the  
12 existence of reserve rights, which as I pointed to on the  
13 map are a matter of great magnitude in both of these cases in  
14 Water Division 5, which certainly includes a great part of the  
15 area of that area of Colorado.

16 Q If it didn't recognize the United States'  
17 rights, then the United States could bring the case up here  
18 to us.

19 A Yes, Your Honor.

20 Q But what would be --- in that?

21 A Easier said than done, if I might suggest.  
22 I personally have been working with this statute since  
23 about the time of its enactment and this is the first time  
24 in which it has been able to bring it before this Court. The  
25 Green River decision Mr. Balcomb refers to was a remand decision

1 under the federal statute, a remand by a federal District Court  
2 to a state court is not reviewable by appeal or otherwise, so  
3 that the answer to your question is yes, it can be, Dugan v.  
4 Rank is probably the classic example of how long it takes.

5 That case was started on the San Joachim River in  
6 1947, lengthy proceedings were had, the United States was  
7 joined to the party. It went to the Court of Appeals and  
8 finally gets to this Court in 1963. And the court held that  
9 it was all for nought.

10 Nought having been jurisdiction over the United States.

11 Q Couldn't the United States have brought  
12 one of these Okanogan cases from the state of Washington here?  
13 Where it lost?

14 A The United States may bring a suit and  
15 does bring suits for quieting its right---

16 Q Under the Washington State procedure,  
17 suit, or in the eastern part of the state, as I remember.

18 A Yes, the United States could initiate a  
19 suit as party Plaintiff.

20 Q So if they were a party, and they lost  
21 in a state case, they could appeal to the Washington Supreme  
22 Court, then on here by Certiorari, couldn't they?

23 A Yes, Your Honor, as to that case, and in  
24 that case, that is correct, I agree.

25 The procedure in Colorado under the Water Division

1 system now is quite different. It has a monthly determination.

2 Monthly, these lists are rendered to the various  
3 interested persons, a person under the Colorado statute being  
4 defined to include the United States.

5 Now although the continued inability of the Colorado  
6 law to consider in a court rightful priorities is perhaps its  
7 most basic deficiency, it's by no means the only one.

8 When the matter of adjudicating federal water rights  
9 is considered, these deficiencies and the burdensome nature  
10 of the procedure can best be demonstrated by a consideration  
11 of the steps which I'd like to run over very quickly.

12 First, the Water Clerk, no later than the 5th of each  
13 month sends out this resume, and then he publishes it by the  
14 10th of that month. If anyone wishes to oppose a particular  
15 application within the resume, must file with the Water Clerk  
16 a verified statement of opposition, setting forth facts why  
17 it should not be granted, or it should be granted only condit-  
18 ionally.

19 By the last day of the second month following the  
20 month in which the application was filed, the Water Referee is  
21 Water Division 5, or a Water Division, then would start con-  
22 ducting a formal hearing investigates the truth of the  
23 application and the opposition, and within the month following  
24 the month in which the opposition was filed rules on the  
25 application.

1           This is mailed by the Water Clerk to all persons  
2 who filed either a statement or an opposition, and it becomes  
3 effective upon entry subject only to judicial review.

4           So that the statute notices only those parties who  
5 are interested in the applicaitons filed in a particular month,  
6 the only water rights that are before the Water Referee are  
7 those to which an application has been filed, and the only  
8 parties are those who must take an affirmative action to be  
9 heard, and so that even though the Referees procedures are  
10 extremely limited, and involove only a part of the water rights  
11 in the Water Division, the burden on the United States, I  
12 submit is tremendous.

13           Q           Is it in any different position than any-  
14 body else that has water rights?

15           A           Except it's bigger.

16           Within the two month period allowed by the statute  
17 the United States must investigate all of these water rights,  
18 within Water Division 5, and evaluate the impact of these  
19 applications and that monthly resume upon those water rights.

20           And that is a rather considerable task. And I submit  
21 that perhaps the United States, because of the shortage of  
22 time may be result to protective opposition, for lack of  
23 knowledge or time, and certainly this would not contribute to  
24 the orderly proceedute.

25           So that the new statute does provide certain compli-



1 cations.

2 Q Well resume arguments after lunch, Mr.

3 Kiechel.

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P R O C E E D I N G S

Afternoon Session

ARGUMENT OF WALTER KIECHEL, JR. ESQ.

ON BEHALF OF PETITIONER

(RESUMED)

MR. CHIEF JUSTICE BURGER: Mr. Kiechel?

MR. KIECHEL: I will reserve the remainder  
of my time.

Q Very well. Mr. Balcomb?

ARGUMENT OF KENNETH BALCOMB, ESQ.

ON BEHALF OF RESPONDENT

MR. BALCOMB: Mr. Chief Justice, and may  
it please the Court.

I think one of the most interesting and novel things  
about the second case is that we say that they are identical,  
and I think I can establish that the procedures involved in  
adjudication under the old and the new law are identical.

It is the presence or absence of the judgement below  
that is an opinion that can be interpreted. I don't believe that  
it's Judge (Darrrells) opinion to which I will refer later on,  
the trial judge that is here, I just believe it is Mr. Justice  
(Groves) opinion in K (7) that is probably the subject matter  
in the discussion here likewise.

It is interesting to note that under the old statute,

1 the primary objection to the government to being bound by  
2 the proceedings for at least their state adjudicatory rights  
3 related to the size of the stream system or source of the  
4 water.

5 And this, oddly enough, is the situation where it  
6 has never bothered them when they wanted to be Plaintiff, and  
7 now it only bothers them when they do not wish to articulate,  
8 and do not wish to qualify their rights.

9 There are several circumstances that I know of where  
10 the United States has come in, I could point to the ones, two  
11 in Nevada, one of which was before this Court on a separate  
12 point a week ago yesterday, to the extent that Certiorari  
13 was denied, that was the Carson River case in Nevada.

14 Q Have they ever brought one in Colorado?

15 A In Colorado? Yes, sir. They, about the  
16 time that the United States decided that they did not want to  
17 subject themselves to state adjudicating procedures, there was  
18 pending in the District Court for Summit County, located at  
19 Breckenridge, two parallel adjudication procedures, one to  
20 adjudicate rights for irrigation, and another one to adjudicate  
21 rights other than irrigation under the statute which proceeded  
22 the 1943 Act which brought those two kinds of things all into  
23 one action.

24 And then the Colorado Supreme Court ultimately held  
25 that the government had made a voluntary appearance in those

1 proceedings and could thereby be bound.

2           The United States elected to bring an action which  
3 in this, for lack of anything better to call it, in the nature  
4 of a quiet title action. In other words, assume an equity to  
5 determine the governments rights to a reclamation project,  
6 the Colorado --- project.

7           This had not, by then, been completely submitted to  
8 the Court at Breckenridge. Now the Blue River is a little bit  
9 larger than the Eagle River, but it's the same kind of a system  
10 and it ends up       by running into the Colorado River.

11           That would not have been, even under their system,  
12 a general adjudication, because they were very choosy about who  
13 they joined. They even considered --- involved northern Colorado  
14 the city and county of Denver, Colorado Springs, and every-  
15 one else who got into that action.

16           Q           How long ago was that?

17           A           The suit was initiated in about 1952, I  
18 believe, and went to decree by stipulation in 1955, and has  
19 been amended a couple of times since then,

20           ---the way it became a general proceeding was that  
21 the United States removed the then pending adjudication proce-  
22 dures from the Breckenridge Courts, in Summit County, and  
23 thereby brought in our view everybody on the Colorado River,  
24 even though it was said to be supplemental there, it was a  
25 supplemental general adjudication pending in Summit County,

1 they brought it into the federal court and thereby joined the  
2 users of the entire river and I'm satisfied that they considered  
3 that they had decrees for The Green Mountain Reservoir, that  
4 the Colorado --- systems, and the right to transport this  
5 water through the mountains.

6 Q Is that, that was tantamount to an asser-  
7 tion by them that the Colorado Court had jurisdiction,

8 A Yes, I believe so.

9 Q They recognize---

10 A ---by removal. And although nobody in Colo-  
11 rado seems to know the answer they appear at least in part  
12 still to be removed.

13 It has created a little bit of confusion.

14 Q You said a decree by stipulation. Is this  
15 to say settled? Is that case settled?

16 A Yes, sir, and the United States was given  
17 the right of initiation of construction --- 1935.

18 Q Mr. Balcomb, I asked before lunch, but I'd  
19 like to pursue just one question further. In connection  
20 with reserved rights which you seem so say, your mind is closed  
21 against, anyway, would the regular rules of appropriations  
22 apply to those reserved rights in terms of what kind of conduct  
23 it takes to cmoamount to an appropriation for beneficial use?

24 A You mean something open, ---, something  
25 of that nature, Your Honor? I judge not. I don't wish to quarrel



1 with Your Honor, about not liking the word reserved, I just  
2 say that it's another way of saying the initiation of a water  
3 right.

4 And in this case if I am interpreting it correctly,  
5 the Congress initiates the reserved right for an Indian reser-  
6 vation, a forest reservation, a wild life refuge by making  
7 the withdrawal of the land and the water.

8 Q Yes, but they aren't using the water for  
9 anything at the moment.

10 A Neither is the city and county of Denver,  
11 Your Honor. And they claim water rights that they don't expect  
12 to put into operation until the year 200---.

13 Q I've never heard that they -- that took  
14 some doing, didn't it?

15 A They got it done.

16 Q As far as the Western --- were concerned.

17 A Well, yes, in some respects. But there's  
18 nothing in the law which prohibits the acquisition of the right  
19 currently for use in the far distant future if you can show  
20 the need.

21 The eventual need; as the Colorado Supreme  
22 Court held, the Court could not question Denver's projection  
23 about population. Nor do I think that the trial Court really  
24 questioned the allegations and proof by the United States that  
25 of the eventual need for water on their reservation.

1 Q That would just be a matter, I suppose,  
2 to be properly governed by federal law?

3 A Yes, and in reality, I think they'd have  
4 little problem with most of them, because in almost every cir-  
5 cumstance, the water and the water right involved are totally  
6 within the federal reservation.

7 You would have to have their permission to do any-  
8 thing anybody else did, here with it, and they have complete  
9 control.

10 As I say, the objection in 87, relating to size of  
11 the water course, and yet in every situation, for practical  
12 purposes except Arizona v. California, where the United  
13 States has been involved, there has been almost a comparable  
14 water course involved, and created no real problem to them  
15 there.

16 In the instant case it seems to relate to how much  
17 trouble they would be put to to read a monthly resume and  
18 appear once every 60 days, if indeed they have to. That it's  
19 kind of an administrative rather than judicial proceeding,  
20 and not within the contemplation of the amendment.

21 I would observe that---

22 Q Mr. Balcomb, could I ask you another  
23 question, please? If the United States wanted to remove, let's  
24 assume that you're right about this.

25 A Yes, sir.

1 Q The United States then wanted to remove  
2 the case to the federal Court.

3 A There are several decisions in whichin  
4 some cases they held that the right of removal was not pre-  
5 sent, in some they said the right of removal was exercised as  
6 a premature exercise, but might come back after a clear fed-  
7 eral question arises in the state court---

8 Q What if it's a reserved right that you're  
9 arguing about? The United States asks to have removed the ad-  
10 judication of its federal right to water.

11 A In think it was in some of these cases.  
12 The in re (Grainer) case in Utah, went back on remand  
13 by judge Christensen because he felt more under the threat of  
14 comity than anything else, I think, the Colorado State Court  
15 had the proceedings adjudicate it there, if the Untied States  
16 found it could not get fairness with regard to some of its  
17 rights, then it might move it --- back.

18 Q On the face of the statute it is a remova-  
19 ble issue, isn't it?

20 A On the face of the statute it is.

21 Q Yes.

22 A If you study the legislative history, you  
23 might draw an opposite conclusion, but on the face of the stat-  
24 ute it is not forbidden. I'll say that.

25 Q There was a removable provision inthe bill,

1 in one state, at least---

2 A Yes, sir, and I think in that connection  
3 the Special Assistant Attorney General testifying about it  
4 pointed out that the difficulties involved for people on the  
5 far western slope to have to come clear to Denver, Colorado.

6 Q Yes.

7 A They thought then, the justice thought that  
8 the removable provision was bad.

9 Q Mr. Balcomb, what's your answer to the  
10 governments submission that both the adjudication and the admin-  
11 istration forces are qualified by the provision as to appro-  
12 priative rights?

13 A It speaks of the United States in two  
14 categories, I believe, one is the owner of the water rights,  
15 and the second category is the acquisition of these other  
16 methods in acquiring ownership of water rights.

17 And when the United States is owner, they can be  
18 joined.

19 Q Well, what I had reference to, though,  
20 is that, as I understand the argument, reserved rights are  
21 not embraced by the consent statute. And because I thought that  
22 your colleague argued that both cause one, the adjudication  
23 rights, and cause two the administration of such rights, are  
24 qualified by the provision where it appears that the United  
25 States is the owner of and is in the process of acquiring water

1 rights by appropriation, under state law.

2 A I think this does have a possible---

3 Q Do you agree with that?

4 A I agree with the governments position?

5 Q Yes.

6 A I think that it covers everything, is my  
7 position, Your Honor.

8 Q That it covers reserved rights, too?

9 A That's correct.

10 Q Whatever---

11 A ---name we might call it.

12 Q You say it covers everything. You mean  
13 both clauses one and two cover everything, or only clause one  
14 covers everything?

15 A Both of them.

16 Q You mean the consent statute covers both  
17 of them.

18 A Yes.

19 A That's what you're talking about.

20 A Yes, sir. It would do no good to require  
21 the United States to come in and adjudicate a reserved right  
22 if they then try to take out a priority which is the admin-  
23 istration system, and not be able to reach in the second --- .

24 Q Yes, but I thought the governments argument  
25 was that the adjudication of rights does not include the adjud-



1 ication of reserved rights.

2 A I know---

3 Q This, because the clause dealing with  
4 the administration of the rights, the government argues, is  
5 limited to water rights by appropriation under state law.

6 A Well the first one is meaningless. I think  
7 I read two circumstances: either the United States is the  
8 owner and there is an adjudication in progress or the United  
9 States is the owner and like in the --- situation, there is  
10 an administrative process.

11 Q Whatever the right is---

12 A Whatever the right might be, irrespective---

13 Q ---, appropriative, or anything else. What  
14 does the administration mean, what's the difference between  
15 adjudication and administration of rights?

16 A Adjudication as we understand it in the  
17 Western states is the legal court process through which you  
18 go to establish your position on the ladder of rights.

19 Q Your priority.

20 A Yes.

21 Administration is the physical act by the Division  
22 Engineer, the State Engineer or one of his employees opening  
23 and closing headgates, saying you can take your water now,  
24 your reservoir is full, the various items involved in the  
25 distribution of water.

1 Q This proceeding we have going here is  
2 to establish the rights.

3 A The rights, yes.

4 Q It's whether a right exists or not.

5 A That's correct.

6 Q This is an adjudicative---

7 A That's right. It determines only that  
8 you may turn so much water on at a certain time into your head-  
9 gate, if we reduce it simply to the irrigation thing.

10 And I might further say that if Congress had really  
11 thought well we should not adjudicate Indian rights, or we  
12 should not adjudicate Forest Service rights, it was too simple  
13 to say so.

14 Because it was called to their attention that  
15 over the 3 year period that this was involved again and again  
16 and again that by government witnesses, by letters to the  
17 committee each time concerned about the breadth of the waiver.  
18 They wanted it limited every time, and Congress ignored all of  
19 this and left it wide because I think Congress recognized that  
20 it was just as important to the citizens of those states  
21 that they have a certainty of water rights, and they could  
22 not have that certainty if the government wasn't there.

23 And likewise it was most important to the United  
24 States to have certainty as to its water rights. I think one  
25 of the examples of this, that I'd like to call the cCourts

1 attention to is a case which isn't mentioned too much by  
2 anyone, it's also captioned in re (Grimler) adjudication vs.  
3 the United States, and it's in the Supreme Court of Utah in 1965.

4 It answers in part this problem did the state court  
5 award you reserved rights and what did you do about it if they  
6 didn't.

7 This case is a successor to the federal court case  
8 cited by Judge Christensen when directed remand of the adjud-  
9 ication proceedings in Daggett County, Utah.

10 This is a relatively small area, also. In this  
11 proceeding after the United States got back in the state  
12 court, it had no reluctance to present for adjudication by  
13 the state court some 715 water rights. Oddly enough they were  
14 apparently the type of thing that is the spring for watering  
15 stock, matters of this nature, which, if we understand what  
16 they did in Eagle County in '87 are the subject of a reser-  
17 vation.

18 But they are there adjudicated as though they were  
19 state rights. At the very tail end of the proceedings they  
20 asked the trial judge to put some language into the decree ind-  
21 ication all of the rights which were awarded by virtue of this  
22 decree would be subject to the general unspecified reser-  
23 vation of the United States for the (Ashley) National Forest.

24 And the trial judge declined to do so. They took the  
25 matter to the Supreme Court of Utah, the Supreme Court of Utah

1 likewise declined to do so, pointing out that the United  
2 States had volunteered into the suit, in effect, by consenting  
3 to be sued, they had prooved up on 715 rights and they were  
4 not going to allow them to have an unarticulated, unspecified  
5 unquantified right.

6 They sat on top of the whole adjudication and made  
7 everybody elses rights uncertain. That is clearly what this case  
8 does hold, the United States did not elect to bring that to  
9 this Court, had they wished to change that result.

10 Q Mr. Balcomb, did the consent pass as it  
11 was introduced, or did it go through some modifications?

12 A there was some modification. There is  
13 the provision added to it that it does not consent to the  
14 joinder of the United States in suits between states, like  
15 so often happens in this Court.

16 There was first put in it, a tabulation which the  
17 government now talks about and then that was eliminated.

18 Q How about the first sentence, was that  
19 changed, or was that passed as it was introduced? That's  
20 the one with the consent given the join, 1) for adjudication  
21 and 2) for administration.

22 A Punctuation only was added, I believe.  
23 And that was the subject of a second report from  
24 the Senate committee.

25 Now the United States has said and brought with it

1 a map, but this is a tremendously big job, if you say that  
2 we've got to go and adjudicate that we've got to do, and as  
3 I said in my discussion that was brought out in connection  
4 with questions in my discussion in this matter of it costing  
5 money and being a big job was thoroughly discussed with the  
6 committee, and this was overlooked.

7 I submit, however, that irrespective of the size  
8 of the job, it's the obligation of the federal government in  
9 a situation of this nature for the benefit of all of its  
10 citizens to articulate, because the citizens need to know.

11 They can't develop a state without knowing what  
12 vast growth the United States may have now, to the water  
13 which arises in the states. And irrespective of size, they  
14 owe the obligation to the citizen to come in and tell him  
15 within his framework exactly what it is they hope to claim,  
16 and when they expect to claim it.

17 Q Do you have in Colorado any priorities  
18 other than time of appropriation. Do you have any priorities  
19 with respect to the type of use?

20 A They are all adjudicated for a purpose,  
21 as well as time and quantity.

22 Q But assume there's a conflict. I mean,  
23 the people for industrial use, against irrigation, or as against  
24 municipal use.

25 A The highest and best use by the Constitution



1 is domestic, the second is agricultural, the third, of course,  
2 is manufacture and industrial, it doesn't mean that a domestic  
3 user can go and take the water, he's got to condemn and pay for  
4 it.

5 Q Right.

6 A And---

7 Q Once it's adjudicated, they own it until  
8 somebody condemns it.

9 A That's right. I don't think the United  
10 States, Your Honor, though, is in quite that position, as  
11 Dugan would indicate.

12 Q No.

13 A In theory, they condemn at least domestic  
14 rights for agricultural purposes, on the basis of federal law  
15 was paramount.

16 Q I see---

17 A With which I would concur. They can do it.

18 I would like to conclude, if the Court please, with  
19 the, a comparison, so to speak, of the new statute, which I  
20 view to be identical for practical purposes to the '43 Act,  
21 and the '43 Act is characterized in Mr. Clark's work on water  
22 rights, as being the same Colorado system that's been in exist-  
23 ence since 1879 when it first started, in this fashion.

24 Court will remember Pacific Livestock, and in dis-  
25 cussing what a statute of this nature does, said that that

1 statute provided for notice, that is the Oregon statute, our  
2 statute provides for notice, it is as the proceeding ahead of  
3 it was, an in rem proceeding, still dealing with the stream,  
4 still putting on the ladder of appropriations an order of  
5 priority everybody's rights.

6 A sworn statement in the Oregon case was made, and  
7 that statement was open to the public, and opposition  
8 could be made as to that statement, that's the identical  
9 procedures we now have in our court, the statement is filed  
10 with the Water Clerk, and is referred to the Referee. You  
11 may protest it, you may have hearings, you may do all of those  
12 things.

13 The Board, In Oregon, made findings and referred  
14 the matter back to the Court. And in under our new statute,  
15 the Referee does this. In other words, the Referee---

16 Q What is this, is this an administrative  
17 proceeding? What is the Referee? Is he a judicial officer, or---

18 A Yes, sir. Yes He's appointed by the Code.

19 Q What is it, is he like a Master?

20 A I would say, yes, sir. It's a special  
21 proceeding, but it's nonetheless---

22 Q Who makes the final adjudication? The  
23 Judge?

24 A The Judge does.

25 Q I see.

1           A           He enters , there is a little bit of  
2 difference about this in Colorado, but primarily, he is sup-  
3 posed to enter semi-annually a Master Decree, covering all  
4 the matters of---

5           Q           Well how is the whole proceeding initiated?  
6 By something that is filed in the Court?

7           A           Someone goes in and files a claim, for  
8 lack of a better word, they ask for the determination of a  
9 water right.

10          Q           Where does he file it?

11          A           With the Water Clerk, who is a clerk of  
12 the court, and the court governs the whole division.

13          Q           Oh, he's the clerk---

14          A           ---of the Court.

15          Q           I see. So it's actually a proceeding that  
16 is initiated and progresses through the Court.

17          A           Yes.

18          Q           I see.

19          A           Of course, if there is a big fight below  
20 in the Referees hands he refers it back to the Court for  
21 determination, and whatever the Court does is to be done under  
22 our rules of civil procedure.

23          Q           When is it subject to removal of the federal  
24 court? The time the initial claim is filed with the Water  
25 Clerk?

1           A           I think as soon as United States could  
2 show that its rights are being interfered with.

3           Q           Yes.

4           A           And that the trial state court if it---  
5 might have to go ahead and handle it. They make the point,  
6 you understand, Your Honor, that the statute allows for protest  
7 but not for application. That is, the United States has no  
8 change to urge its rights.

9                   And this is strictly not true. The United States,  
10 anytime it wants to, under this proceeding, files its rights,  
11 and---

12          Q           In that proceeding?

13          A           In that year. With the same Clerk, and  
14 go before the same Referee and gets the same judged under the  
15 decree.

16                   And he will then insert, or direct the insertion of  
17 the state engineer of their rights, governed under the ladder  
18 of priority.

19                   And they have the           right of appeal. And every-  
20 one does to the State Supreme Court. In other words, we hav e  
21 a judicial system, and as I say, we have taken this onus  
22 burden of digging out the evidence off the court and giving  
23 it to the Referee to save the court time. Courts are far too busy  
24 to spend days and months on adjudication procedures.

25                   I would like to say, in final conclusion, that unless

1 there are other statements, that in a true sense of the word,  
2 as using Pacific Livestock, as used the word general adjudica-  
3 tion, as used in Dugan, and Miller v. Jennings and the like,  
4 there never really has been a true adjudication of water  
5 rights in Colorado or any of the other Western states when the  
6 United States is not a party.

7 And they have picked the word general, out of the  
8 opinions of this Court, and out of the opinions of other  
9 courts, and say that they don't have a general procedure there  
10 because they do not have everyone before them.

11 And the reason, if it please the Court, that  
12 everyone is not before them, is because the United States  
13 will not join. They're the one party these adjudication pro-  
14 cedures in Colorado and the United States, that keeps it from  
15 being a general adjudication.

16 And it keeps the certainty of water rights out of  
17 the law entirely, because, as they indicate, we have large  
18 areas which are shown on the map, and we're entitled to use  
19 the water certain ways, and we want to keep it a secret until  
20 such time as we decide to put it to work, and in the meantime  
21 no one else can do anything with the water at all with any  
22 certainty.

23 Thank you, Your Honor.

24 Q Thank you, Mr. Bailecomb. Mr. Kiechel,  
25 you have 7 minutes left.



1 REBUTTAL ARGUMENT OF WALTER KIECHEL, JR., ESQ.

2 ON BEHALF OF PETITIONER

3  
4 MR. KIECHEL: Thank you, Mr. Chief Justice.

5 Q What about this removal thing? Do you  
6 agree that it might be---

7 A There---

8 Q ---removed as quickly as Mr. Balcomb says ?

9 A I wish I could be as confident in saying---

10 Q Have you ever tried it?

11 A Yes, we have, Your Honor, it was tried  
12 in the in re Green River case, and there, in a lengthy opinion,  
13 Judge Christensen, in that court held it not to be removable.

14 There was, in the legislative history, as has been  
15 pointed out, a specific right of removal, which was stricken.

16 Q What were the rights claimed by the United  
17 States in that litigation?

18 A Those were rights, including reserved  
19 rights---

20 Q Including reserved rights.

21 A ---on federal forests, national forests.

22 And there has been, I can't, there have been certain  
23 cases removed, under this statute, but most of those have  
24 been where the government officers have been joined. Of course  
25 under the Federal Removal Statute, there is a fair right to

1 remove one in which a government officer is a party defendant.

2 With respect to the procedure in Colorado, the  
3 monthly procedure under the 1969 Act, Mr. Balcomb makes a  
4 point that it is subject to judicial review, and I would point  
5 out, however, that this requirement which is continued, or this  
6 prohibition, which is continued in Colorado law, where by  
7 no prior right, can be awarded in a supplemental, ongoing  
8 adjudication applies to the judge, as well as it does to the  
9 Referee.

10 And it's not just the burdensome nature of that month-  
11 ly procedure that is of concern with respect to the  
12 legislative intent on 666, it is relevant to that.

13 But it is the fact that it is more administrative  
14 than judicial. Now I think its quite clear that Congress in  
15 enacting the statute, saying that the United States could be  
16 joined had that in mind, a judicial proceeding.

17 And so I would say, with respect to that question  
18 about the conduct of the United States as Plaintiff, that  
19 what the United States does as Plaintiff is not despositive of  
20 the issue before the Court, that is, what kind of a proceeding  
21 Congress consented to the joinder of the united States as  
22 party defendant.

23 I will say, however, that in addition to that, that  
24 the United States found out the hard way about a general  
25 adjudication. That it did, in the Fallbrook litigation I referred

1 to earlier on the Santa Marguerita River, undertake to bring  
2 the kind of an action Mr. Justice White embodied in a ques-  
3 tion earlier.

4 That is an action against only the principal user,  
5 and it was there determindd, that this is not a 666 case,  
6 this is a case brought by the United States as a Plaintiff, but  
7 the Court of Appeal for the Ninth Circuit told us very loudly  
8 and clearly, that they way in which adjudication could be done  
9 was to join all water users on that water system and have a'  
10 contest a determination among all users.

11 Q Are you suggesting that we have to decide  
12 in this case whether the Colorado proceedute is a judicial  
13 or an administrative procedure?

14 A I'm saying---

15 Q In order to decide the --- consent statute.

16 A I'm saying, Mr. Justice Brennan, that  
17 Congress intended to consent to the joinder of the United  
18 States only in judicial proceedings.

19 Q Well, now, accepting that premise, are  
20 you suggesting that we have to decide whether this Colorado  
21 procedure, in this case was or was not a judicial procedure?

22 A Yes, I think that you can decide by  
23 reference to the Colorado Act, it is an administrative pro-  
24 ceedure.

25 Q But you're suggesting that we have to

1 decide whether it is or it isn't. A judicial proceeding.

2 A Yes, in---

3 Q If we accept your premise that Congress  
4 meant the consent statute to apply only in judicial pro-  
5 ceedings.

6 A Yes, Your Honor.

7 Q By what means would you think that you  
8 might prevail in one case, and not in the other? You might  
9 prevail in the case you're now arguing, and lose the other  
10 one.

11 A No, I think there are good and sufficient  
12 reasons, different reasons for prevailing in both cases,  
13 if Your Honor please, the first case as was discussed invol-  
14 ved the matter of the river system, that is not involved  
15 in the second case---

16 Q I realize that, but as far as the admin-  
17 istrative part of your argument is concerned, we regard  
18 this case as different from the other case.

19 A Well, I think that the common denomina-  
20 tor with respect to Colorado law, that is, that the Colorado  
21 Water Court, whether it be Water Division 5, or Water Dis-  
22 trict #37, cannot accord the United States its true priority,  
23 its rightful priority for its water rights, is a good and  
24 sufficient basis for concluding that Congress could not  
25 have intended to subject the United States to either such

1 procedure.

2 Q So in other words, putting my brother  
3 Harlan's question a little different way, if you prevail in the  
4 first case on the basic arguments, then you also prevail in  
5 the second case, and we need not reach any question of whether  
6 it's judicial or administrative. Right?

7 A Yes, Your Honor.

8 Q May I ask you to state exactly what the  
9 government has at stake if it loses this case?

10 A If the government loses---

11 Q If the government loses---

12 A This case---

13 Q What does it lose?

14 Q It loses the, under our view, the Colorado  
15 Supreme Court opinion, possibly its right to present, submit,  
16 and prove up on reserved rights of the United States.

17 Q You mean they could cut off your rights?

18 A That's quite strongly suggested by the  
19 Colorado Supreme Court.

20 Q That depends on what we hold as an opinion.

21 A Yes, Your Honor.

22 Q Mr. Balcomb didn't seem to think you would  
23 lose that right. He and you do not quite agree on the reading  
24 of the Colorado Supreme Court opinion of that---

25 A I'm quite concerned, if it please Mr. Chief



1 Justice that the Supreme Court of Colorado has referred to the  
2 reserved rights of the United States as mysterious and causing  
3 chaos and in other words which indicates certainly hostility  
4 toward those rights.

5 Q Well, they are rather mysterious.

6 A No, Your Honor, they are not.

7 Q Well they were until you sat down and quan-  
8 tified them.

9 A Well, they were quantified in Arizona v.  
10 California, and---

11 Q Well, I know, but could you find up until  
12 this time any quantification of your rights, what you say  
13 your reserved rights are in the Eagle River system?

14 A Well, sir,--- until there is a determination  
15 or science permits a determination of how oil shale can be  
16 recovered or how oil can be recovered b=ffrom shale in con-  
17 mercial quantities it's not known how much water will be  
18 required for that reserve.

19 Q Maybe mysterious isn't the word, but---

20 A Undetermined.

21 Q That's a very good example but it is a very,  
22 an unknown.

23 A Undetermined in certain instances.

24 Q That's right.

25 Q If they had used terms like "uncertain" and

1 "undetermined" in court, you wouldn't be quite as disturbed as  
2 by the invidious implications that you get out of mysterious,  
3 would you?

4 A I agree.

5 Q Very well, thank you, Mr. Kiechel, thank  
6 you Mr. Balcomb, the case is submitted.