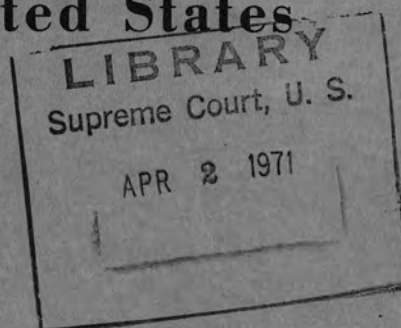


Supreme Court of the United States

OCTOBER TERM, 1970



Docket No. 87

In the Matter of:

UNITED STATES,

Petitioner

vs.

DISTRICT COURT IN AND FOR THE
COUNTY OF EAGLE, STATE OF COLORADO,
et al.

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C O N T E N T S

ARGUMENT OF:

PAGE:

WALTER KIECHEL, JR., ESQ.
On behalf of Petitioner

4

KENNETH BALCOMB, ESQ.
On behalf of Respondent

24

1 IN THE SUPREME COURT OF THE UNITED STATES

2 OCTOBER TERM, 1970

3 -----
4 UNITED STATES, :

5 Petitioner :

6
7 vs. :

No. 87

8
9 DISTRICT COURT IN AND FOR THE
10 COUNTY OF EAGLE, STATE OF COLORADO,
ET AL., :

11 Respondent :
12 -----

13 Washington, D.C.

14 Tuesday, March 2, 1971

15 The above entitled matter came on for
16 discussion at 10:35 a.m.

17 BEFORE:

18 WARREN E. BURGER, Chief Justice
19 HUGO L. BLACK, Associate Justice
20 WILLIAM O. DOUGLAS, Associate Justice
21 JOHN M. HARLAN, Associate Justice
22 POTTER STEWART, Associate Justice
23 BYRON R. WHITE, Associate Justice
24 HENRY BLACKMUN, Associate Justice
25

1 APPEARANCES:

2

3

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

9

10

11 KENNETH BALCOMB, ESQ.
12 Glenwood Springs, Colorado
13 On behalf of Respondent

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P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We'll proceed now with argument in No. 87, United States against the District Court of Eagle County, Colorado. Mr. Kiechel, you may proceed whenever you're ready.

ARGUMENT OF WALTER KIECHEL, JR., ESQ.

ON BEHALF OF PETITIONER

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

This case comes from the Supreme Court of Colorado, and presents 2 questions important to the proper administration and conservation of the water resources of Colorado and nationally.

First, whether Congress, by enacting the so-called (McCaren) Amendment, codified in 45 USC 666, intended to consent to a suit against the United States for adjudication of its water rights, in one of 70 water districts of the State of Colorado.

And secondly, whether in the absence of any expressly stated intent to subject reserved rights of the United States, two state court adjudication, such intent can be implied.

I plan to discuss preliminarily and briefly the nature of water adjudication to the west and specifically the proceeding here involving Colorado, then address the threshold

1 question of the application of the rule of this Courts opinion
2 in Dugan v. Rank, 372, US, holding that the consent applied
3 only to general adjudications, then discuss the legialative
4 history of the consent statute, and lastly, the nature and
5 extent of reserved water rights and the ability of the state
6 courts of Colorado to adjudicate them.

7 Historically, water rights were judicially determined
8 in the western states by a quiet title action initiated by one
9 or more water users. The other claimants to water rights on the
10 stream system were joined, each party affirmatively presented
11 its claim and contested the claims of others.

12 And this proceeding resulted in a determination by
13 quantity and priority of the rights of the parties inter sese.
14 There has developed, in most of the western states, statutory
15 modifications of this proceedure, whereby the State Engineer,
16 or some other official, initiates the proceeding and presents
17 the evidence in first instance, but in essence, it remains the
18 same.

19 A determination by the Court of all the rights of all
20 the parties on the stream system inter sese. This proceeding
21 was initiated in 1967 in Water District 37, which, at that time,
22 was one of 70 Water Districts of the State of Uolorado. These
23 Districts are established on watershed lines. District No. 37
24 being the watershed of the Eagle River, the Eagle River being
25 a tributary of the Colorado River.

1 This was a supplemental proceeding, there being a
2 number of adjudications in Water District 37 over the years.
3 The first one over 80 years ago, and the last one as recently
4 as 1966, the year before the instant proceeding was initiated.

5 Now a significant attribute of a supplemental proceed-
6 ing under Colorado law, is that the earliest priority decreed
7 in such an adjudication must be later than the last priority
8 date decreed in the preceding adjudication. Or stated other-
9 wise, all rights awarded in a new supplemental proceeding, such
10 as the one before the Court, are necessarily junior, by oper-
11 ation of Colorado law, to those decreed in previous adjudications.

12 This supplemental proceeding was initiated by the
13 Colorado River Water Conservation District, which asks for an
14 adjudication and decree of certain of its claimed water rights,
15 other claimants appeared, and the Conservation District sought
16 to join the United States as a party.

17 The United States moved to have itself dismissed,
18 asserting, among other things, that this was not the type of
19 proceeding to which this Congress has consented. The motion was
20 denied by the District Court of Colorado for Eagle County, and
21 the United States sought a Writ from the Supreme Court of Colo-
22 rado to prohibit the District Court from asserting jurisdiction
23 over the Supreme Court of Colorado determined that the motion
24 to dismiss was properly denied and rendered an extensive opinion
25 in which it held first, that Congress had intended to include

1 the water adjudication procedure of Colorado among the suits
2 to which it had consented.

3 Secondly, the Colorado Supreme Court had held that
4 notwithstanding this Courts interpretation of the consent statute
5 in Dugan v. Rank, that the statute permits joinder of the United
6 States in a supplemental proceeding involving only a tributary
7 watershed.

8 With respect to reserve water rights of the United
9 States, the Colorado Supreme Court strongly suggested that
10 the United States had no water rights in Colorado, except those
11 arising under state law.

12 The court said that the decisions of this Court, in-
13 cluding Arizona v. California in 373 US, were not determinative
14 indeed, the Colorado Supreme Court said that the only decision
15 that might be determinative of this question was one of its
16 own, and that if it, the Colorado Supreme Court, determined tha
17 that the United States has reserve rights in Colorado streams,
18 that that decision would, that determination would require the
19 overruling of its previous decision.

20 And in that previous decision, upon which the Colorado
21 Supreme Court relies, and refers to in the course of its op-
22 inion, the Colorado Supreme Court had said that by admitting
23 Colorado into the Union, with a provision in its Constitution
24 declaring unappropriated waters within the state to be the
25 property of and subject to appropriation by the people of the

1 state, that the United States lost any rights to assert water
2 rights in Colorado, except those acquired by appropriation
3 subject to state law.

4 And in its ultimate holding, here for review, the
5 Colorado Supreme Court held that whatever water rights the
6 United States has, such rights, including reserve rights can
7 be recognized and adequately adjudicated by the Colorado District
8 Court.

9 Q The Colorado Court didnot undertake to de-
10 cide whether or not the United States did or did not have
11 reserve rights, did it?

12 A That is correct, it did not.

13 Q Is that question necessary to reach in this
14 case?

15 A Yes, Your Honor, if the, with respect to
16 the Congressional intent of the application of the consent
17 statute, it is necessary to decide whether those rights were
18 included within the waiveroof sovereign immunity, that Congres
19 enacted in McCarran Amendment.

20 Q Now as a matter of construction of the
21 McCarran Act?

22 A Yes, Your Honor. And---

23 Q Some of these water rights are rights of
24 appropriation, are they not?

25 A Yes, Mr. Justice Douglas, that's quite

1 correct.

2 Q The United States is an appropriated---

3 A It is, indeed.

4 Q Roughly what percentage?

5 A I wouldn't know the percentage, the record
6 of the case shows that many of the water rights of the United
7 States arise on national forests, and those are claimed as
8 reserve rights.

9 Others are appropriative rights by other agencies
10 of the federal government. I suppose that the great majority
11 of the water rights claimed by the United States in Water
12 District 37 are reserve rights.

13 Q Insofar as the statute is concerned A (2)
14 would seem to explicitly cover rights gained by appropriation,
15 wouldn't it?

16 A Yes, sir. Yes, indeed, that is our position
17 that the statute was intended to cover the rights of --- of
18 state law. And that was the specification of the terms of the
19 statute.

20 Q Do I understand that you are, even so the
21 state court has no jurisdiction?

22 A We say that because, with respect to rights
23 acquired under state law, this is not a general adjudication in
24 the terms of this Courts rule in Dugan v. Rank.

25 In that case, if Your Honor, please, it involved part

1 of the San Joachim River of California, and there the Court
2 of Appeals for the Ninth Circuit had dismissed the United
3 States as a party, the United States having been joindd there
4 under the authority of the consent statute 43 US 666.

5 Q Well that's just a matter of who was a
6 necessary party.

7 A No, sir it's a matter of the scope of the
8 proceeding to which Congress intended the United States could
9 join.

10 The Ninth Circuit had said, and I'm quoting from
11 this Courts opinion in 372 US 617, this Court stated that, "We
12 go directly to the question of joinder of the United States
13 as a party. We agree with the Court of Appeals on this issue
14 and therefore do not consider the contention at length."

15 Now the Court of Appeals had said that the type of
16 suit Congress had in mind was a quasi-public proceeding known
17 as a general adjudication of a stream system.

18 One in which the rights of all claimants on a stream
19 system, as between themselves, are ascertained and officially
20 stated. And---

21 Q What's wrong with this particular proceeding
22 under that view?

23 A It is---

24 Q You think just because it presents --- ?

25 A In part, Your Honor. It's neither a river

1 system, a general adjudication geographically, not is it a
2 general adjudication with respect to having all parties before
3 the Court.

4 Q Let's assume that the Eagle River is a
5 river system, which you don't think it is.

6 A Not within the contemplation of the consent
7 statute.

8 Q Yes, but even with respect to the Eagle
9 River system, you think this is not a general adjudication?

10 A No, Your Honor, Mr. Justice White. The
11 reason that I state it is not a general adjudication is that
12 not all of the parties are before the Court, having rights,
13 furthermore, the Colorado law, which bars the assertion and
14 decree, has not barred the assertion but has barred the decree
15 of any earlier rights, that is, rights earlier than the sup-
16 plemental proceeding, precludes the general adjudication.

17 It prevents a party joined in the supplemental pro-
18 ceeding in 1967 from asserting its priority of 1905, as many
19 of the rights of the United States are in this case.

20 Q Let's put aside reserved rights, let's just
21 talk about the United States appropriated rights. In the Eagle
22 River.

23 A Yes, Your Honor.

24 Q Do you still think the same thing?

25 A The Supreme Court of Colorado said that

1 their lower courts have the plenary power to accomodate the
2 award of earlier priority as to, asserted in a supplemental
3 proceeding.

4 Q In an appropriated right.

5 A Well, they said it as to both.

6 Q Well, let's---

7 A Your question is addressed to appropriated
8 rights, and I was responding to it. So that if the Supreme
9 Court of Colorado is correct, and they gave no specific direc-
10 tion or instruction to the lower court, they just said that,
11 that the local court can accomodate, somehow, and modify or
12 ammeliorate this provision of Colorado law which says no priority
13 earlier than the supplemental proceeding, then, if Water Dis-
14 trict 37 were a river system in the terms of the statute, then
15 the state acquired rights, or the rights acquired under state
16 law could be adjudicated, in my opinion, assuming that all
17 parties that had rights were joined. All parties on that
18 river system.

19 And this is not the nature of this proceeding, Mr.
20 Justice White. I think that outside of the Colorado Conservation
21 District, that is one of the intervenors, the zinc company,
22 and several other claimants, that certainly it's far from hav-
23 ing before the Water District Court, the Court for Eagle County
24 all the claimants in the Eagle system.

25 Q Well that pretty well makes a shambles out

1 of the whole statute, doesn't it? In terms of consent. Can
2 you imagine one where at the outset that every single party
3 known to man might possibly be there?

4 A That is --- yes, I can imagine one, Mr.
5 Justice White. That is the traditional adjudication. That is
6 the way in which water rights in the West have been historically
7 determined, to have all the parties before it.

8 And I say that that was the type of adjudication
9 that Congress had in mind. This is very clear from the Senate
10 report which is referred to in the Courts opinion in Dugan v.
11 Rank. The Senate report 755, which was the report by which the
12 Senate Judiciary Committee reported favorably the McClaren Bill.

13 And that report shows unmistakably that it was this
14 general adjudication in which all parties were present, that
15 was the type that Congress had in mind in their consent.

16 Q But you're going also to our view, I sup-
17 pose, that this isn't a general adjudication because the Eagle
18 River is a tributary.

19 A I do argue that, Your Honor.

20 Q So to qualify to the statute you have to
21 have the entire Colorado River system?

22 A I say that to qualify under the statute,
23 in this Courts view in Dugan v. Rank, you would have to have
24 all of the tributaries and the main stream of the Colorado
25 River---

1 Q And all of the people---

2 A In the state of Colorado.

3 Q And all of the people on the eastern slope
4 that are taking advantage of the Colorado River?

5 A If they're claimants to water rights, on
6 the Colorado River, yes.

7 Q Especially if somebody is claiming earlier
8 date, they'd have to have all of them, too?

9 A If they are claiming rights to use water
10 from the Colorado River or its tributaries in the state of
11 Colorado, yes, I believe that that is within this Courts decision
12 in Dugan v. Rank.

13 Q There wouldn't be a court room big enough to
14 hold the lawyers, then, would there?

15 A Well, Mr. Justice Douglas, water right ad-
16 judications are by nature prolonged, cumbersome, and multi-
17 party. This is nothing new.

18 Congress had this certainly in mind when they en-
19 acted the consent statute.

20 Q But when some state comes along and attempts
21 to modernize its statutes and its adjudications to make some
22 sense out of them, do you think Congress, do you think this
23 consent just ends? this consent for just one single type of
24 adjudication, and that's it?

25 A Well, when you use the word one single type,

1 I would agree that it is the general type, the historic type
2 the, of determinations judicially, of water rights which Congress
3 was consenting.

4 Q Well you don't suggest that the present
5 Colorado system is unconstitutional, do you.

6 A I'm not making any argument to that effect.
7 But I was answering your question as to Congressional intent,
8 and I think that not only the Senate report, the discussion
9 on the floor, all of those things with respect to the legis-
10 lative history of the Amendment show that Congress
11 had in mind the traditional type of water adjudications, had
12 in mind rights acquired under state law.

13 Q If the United States is claiming water
14 under state law, purportive rights, and it wants to assert it,
15 assert those rights, you nevertheless say that the United States
16 can just sit back and use the water and until and unless it
17 wants to go into a court and establish those rights there's
18 nothing anybody can do about it.

19 A I say, if Your Honor please, that if the
20 United States is to be joined in an adjudication under the
21 consent statute, that the prerequisites of that joinder must
22 be satisfied by those who are joined.

23 Q How about my question? Do you believe that
24 the United States---

25 A No, Mr. Justice White, I don't think there's

1 any defiance by the United States.

2 Q I'm not suggesting defiance, I'm just say-
3 ing that until and unless you want to go to Court you can just
4 use the water.

5 A Well, if we're talking about rights under
6 state law, still, and I would suggest that those Congress had
7 in mind could be adjudicated, in a state court.

8 Q Well, yes, but---

9 A And I responded to your earlier question
10 by saying that if the Eagle River were a river system, and if
11 the Colorado District Court could accomodate this bar date, that
12 I saw no reason why the United States couldn't be joined, and
13 be required to assert its rights acquired by appropriation
14 under state law, and be subject to the decree of the state
15 court of Colorado.

16 Q Meanwhile the United States could just use
17 the water --- without anything more, until and unless
18 Colorado institutes a proceeding qualifying, under your statute
19 the United States---

20 A Well, I'm not sure that that, there's no
21 lack of water adjudications past and in process in the state
22 of Colorado. The Water Colorado Conservation District sought
23 to bring the United States in this case so that it is a matter
24 at the instance of the Plaintiff, or the Petitioner, to join
25 the United States, and if in the absence of joinder, or in the

1 absence of satisfaction of the requirements of the statute,
2 the United States is not a party to these proceedings, then---

3 Q Does the United States know what its claims
4 are, its appropriated claims are? Under state law? I suppose
5 it does.

6 A Yes, they're many, and they have them
7 assembled, and I believe that the United States---

8 Q Do you have any idea what reserved rights
9 you're claiming?

10 A Yes, Your Honor. This is set forth in the
11 record of the case, and the record shows that---

12 Q Would these reserved claims mean whatever
13 you may need in the future?

14 A The reserve right doctrine says that the
15 quantum of the right is that amount of water necessary to ful-
16 full the purposes of the reservation. Arizona v. California.

17 Q And that would be as far as you could go
18 in quantifying your reserve right claim.

19 A No, Mr. Justice White, they can be quanti-
20 fied. There is nothing saying that they cannot be quantified.
21 The record shows on page---

22 Q Well, that's all right.

23 A I have the reference to the record---

24 Q That's all right.

25 A It shows that the record, as I said in earl-

1 ier answer to Mr. Justice Douglas, that most of the rights to
2 be asserted in Water District 37 are reserve rights on national
3 forests. But with respect to your question as to whether they
4 can be quantified, they can be quantified.

5 Q Well when, if you win this case, how would
6 the United States plan to establish their reserve rights?
7 Just by, would you bring some proceeding---

8 A They are established, no, there would be
9 no contemplation of establishment, they are, by operation of
10 the doctrine and the rule of law, established by the creation
11 of the reservation, but as far as the quantification, consider-
12 able effort has been done to an inventory and catalogue of
13 those rights, and they are determined by amount and location---

14 Q But that would just be by administrative
15 action---

16 A Yes.

17 Q You would never anticipate subjecting, or
18 submitting those quantifications to a court.

19 A Not as party defendant joined under 42 USC
20 666, because we think there is no authority to do so.

21 Q Well, I understand that, but you would
22 never anticipate either yourself taking these claims to court---

23 A There have been instances in which those
24 rights have been asserted affirmatively by the United States
25 as Plaintiff, but---

1 Q But in Colorado specifically, in this Dis-
2 trict specifically, you would have no plans to precipitate any
3 judicial proceeding to clarify the amount of your reserve right.

4 A Well, when you say no plans, there is
5 considerable activity of inventorying the rights, the Department
6 of Justice made certain proposals to the public Land Law Re-
7 view Commission with respect to a means by which these rights
8 can be more, in a more orderly way, identified and quantified.

9 Q Administrated.

10 A No, the proposals of the Department of
11 Justice which are reflected in the Public Land Law Review
12 Commission in its report shows that an administrative determin-
13 ation which would be subject to judicial review, but not
14 within this consent statute.

15 I would want to make one qualification of my earlier
16 question, which I do not change, that they can be quantified,
17 but there is always a certain open endedness or flexibility
18 to a reserve right because of the nature of it.

19 Inherent in that right, is the need , or the re-
20 quirement to meet the purposes, to fulfill the purposes of
21 the reservation. And that by definition includes a certain
22 flexibility in the right.

23 Q Mr. Kiechel perhaps you said it and I missed
24 it, but let me ask you. Since the passage of the McCarran
25 Amendment, has the government ever been in the posture it's now

1 in, in this case in a state court?

2 A Yes, Your Honor.

3 Q Where you've participated and not raised
4 jurisdictional objections?

5 A Well, we are participating, have participated
6 in a number of water adjudication proceedings, in some, perhaps
7 all, we have raised certain jurisdictional defenses, but they
8 have been, the problems in those instances, in other states,
9 I might say, have been overcome and the United States had ad-
10 judicated and has presented for adjudication its rights pursuant
11 to this statute.

12 Q How do you waive your sovereign immunity?
13 The McGarran Act doesn't permit it.

14 A Can we?

15 Q How could you?

16 A We can not. That is quite correct.

17 Q But the Chief Justice has just asked the
18 question have you participated in some of these proceedings.

19 A Well, there have been determinations, well,
20 we have, as I indicated earlier, as Plaintiff in the celebrated
21 (Colbrook) case in southern California, but with, in response
22 to your question, Mr. Chief Justice, there have been determin-
23 ations by the State Court---

24 Q With your consent.

25 A Over our objection---

1 Q Over objection.

2 A That it was a river system. And in that
3 case there was not this problem of adjudicating and going back
4 and giving a true priority to our rights acquired under state
5 law.

6 In fact, I think one of the amicus briefs, the state
7 of Washington, presents its litigation program, a number of cases
8 that it has brought in that state, in which the United States
9 has been joined pursuant to this statute. And they include
10 one of the decrees which shows that the state court recognized
11 the reserve right, and decreed it, in certain quantity, with
12 the provision, a proviso that if at a later time there should
13 be additional need for additional water to fulfill the purposes
14 of the reservation this was the contemplation of the decree.

15 Q And your position from your standpoint
16 then is beyond the jurisdiction of the state court?

17 A We took no appeal from that decision of
18 the lower Washington Court, Your Honor.

19 Q I know, but your view is --- that that
20 court was without jurisdiction to adjudicate your reserve
21 rights.

22 A Reserve rights were not involved in that
23 case.

24 Q I thought you said that the court did
25 take, did recognize the reserve rights.

1 A Yes, you're quite right, I'm sorry.

2 Q Your position here, that that court had
3 no jurisdic tion to reach reserve rights,---

4 A That is correct.

5 Q Even if you consented because you have no
6 power to consent.

7 A That is correct.

8 Q But the Washington State adjudications did
9 not entail the entire Columbia River system---

10 A No, indeed, sir. They did entail what was
11 determined to be a river system, the Chillowist Creek river
12 system, but there was not this problem in that case, in that
13 state of the bar date of the priority, and I might say, Mr.
14 Justice Blackmun, in all candor, I thiink that the United
15 States, and I want to admit that they have asserted reserve
16 rights in state court adjudications becuae this Court has
17 not spoken on this matter and until that determination is made
18 that an abundamce of --- as an advocate does those rights are
19 asserted, notwithstanding our position here.

20 And I might say in further answer to your question
21 that we are very concerned about the statements of the Supreme
22 Court of Colorado which go at the existence of reserve rights
23 in the state of Colorado. And we are asking this Court to
24 declare, to reaffirm the reserve right doctrine with specific
25 application to the state of Colorado.

1 Q I don't see how we're required to do it
2 in this case, even if we held for you. All we'd have to say is
3 if there were reserved rights there's no jurisdiction --- .

4 Aq Well, if Your Honor please, the Supreme
5 Court of---

6 Q It would be easy for you to get the issue
7 here, if you wanted to, not easy for us, but---

8 A Well, we've asserted---

9 Q --precipitate some litigation.

10 A We've asserted and made known those re-
11 serve rights, they are before the Court. Those are rights
12 which we will assert in Water District 37 if we're required
13 to proceed.

14 Q I know, but if you win the case, that
15 reserve right is out of the case.

16 A That's correct.

17 Q And if you're worried about that issue,
18 you, if you wanted to establish, why you could easily have it
19 established by an affirmative action, precipitating the liti-
20 gation yourself.

21 A I don't know how easily, but it could be
22 done as a party Plaintiff, yes.

23 The legislative history of the Act is common to both
24 of these cases, and I will treat it in the later case, as my
25 time has expired.

1 Q Very well, Mr. Kiechel. Mr. Balcomb.

2 ARGUMENT OF KENNETH BALCOMB, ESQ.

3 ON BEHALF OF RESPONDENT

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

6 My client, the Colorado River Water Conservation
7 District is a state organization, by statute, obligated to
8 protect the waters of the Colorado River for the state of
9 Colorado, that is, the waters of the Colorado River and its
10 tributaries within the state.

11 And it was in pursuit of this goal that I, as Counsel
12 for the District, in the adjudication proceedings, in Water
13 District No. 37, caused the United States of America to be
14 served, because, as is indicated, they not only have substantial
15 what I would call rights under state law, but substantial rights
16 that they denominate as reserved rights.

17 Now this Water District No. 37, encompasses the entire
18 Eagle River and its tributaries and is a rather substantial
19 stream. You might say small by comparison to the Colorado River
20 as a whole, nonetheless, is a compact adjudicational admin-
21 istration unit.

22 It is, incidentally, included within the area that
23 is involved in the second case, No. 812, the Division 5 case,
24 by reason of subsequent Colorado law amendments.

25 Q I wonder if it could be disturbing to you if

1 you could state at least for my benefit in capsule form what
2 you concieve to be the issue.

3 A I view the main and principle issue in
4 this case, Your Honor, to be whether or not the state courts
5 in state adjudicatory proceedings have jurisdiction over the
6 United States if they comply with the service requirements of
7 the McLaren Amendment.

8 Q A question of jurisdiction?

9 A Yes, sir. Which we deemed was granted by
10 the McLaren amendment over the United States upon compliance
11 with that Act.

12 As to whether you have to break this out, and I do
13 not believe you have to do, between the classes of rights the
14 United States says it claims, we do not believe this to be
15 necessary, because once you're over the jurisdictional problem,
16 it looks like to me it was the intent of the Act to catch all
17 rights.

18 Otherwise, there was no point in joining the United
19 States at all. If they only have to bring in part of their
20 bucket of water, the balance of the bucket of water still being
21 hidden, the whole purpose of the Amendment is lost,
22 I believe.

23 Q Your claim rests on the Amendment?

24 A The claim of jurisdiction does, yes, sir.

25 I would like to touch briefly, in at least partial

1 response to some of the questions asked by Mr. Justice White
2 on just exactly what an adjudication is under Colorado law.

3 And if I correctly understand the laws of the other
4 involved states, primarily the 17 western arid and semi-arid
5 states, Colorado has a really somewhat different system in the
6 balance, or had, at least, under the 1943 Act, and it was purely
7 judicial, --- not an involvement of a state officer in it.

8 Nonetheless it was a state sponsored or a, the Pac-
9 ific Livestock Case decided by this Court said was a quasi-jud-
10 icial proceeding, sponsored by the public, quasi-public.

11 At the time that the . . . Amendment was passed by
12 I would say, though I don't know this precisely that of the
13 70 Water Districts referred to by Counsel, probably all but
14 2 or 3 had already had but not one, the original proceeding,
15 possibly had half a dozen others or more denominated supplemen-
16 tray adjudications.

17 And I just don't believe it can be possible that
18 Congress intended in passing this law, knowing full well that
19 all the states that it recognized had long had this type of
20 system intended to waste its time by passing an amendment which
21 would not allow the joining of the United States because the
22 proceedings were denominated as in this case supplemental.

23 Now the subject matter of an adjudication proceeding
24 is not people, it is the river itself. The race is the water.
25 It is a kind of an action in rem, and it is a continuing action

1 because its purpose is to establish in order of priority the
2 rights of those persons and entities claiming the right to
3 use water out of the particular stream involved.

4 So though you use supplementary when you start an
5 action similar to the one that was started in Eagle County in-
6 volved here, nonetheless, in terms, in addition to, a contin-
7 uation of the original proceeding commenced in that county
8 a great many years before, and serves as the method and the
9 means of not only quantifying the water right, but putting it
10 on the water rights ladder in its proper order.

11 And that is all, if I correctly read the Pacific
12 Livestock case, that any western water adjudication proceeding
13 does. It's established under the appropriation doctrine, it's
14 attempts to establish a comprehensive expeditious, economical
15 scheme to provide for the fixing of water rights and their
16 distribution, it determines who is first and who is last,
17 it provides all the way through it for at least if not initially
18 in the final appeal to the court to establish all these rights.

19 Now, questions have been asked of Counsel for
20 the United States regarding of whether or not the United
21 States---

22 Q Was there a general adjudication prior to
23 this proceeding --- water --- ?

24 A Yes, thereewas, yes, sir. I drafted the
25 petition, I should know, but my guess would be as early as 1885.

1 And there were probably 10 or 12 supplementary
2 after that.

3 Q I see, and has the United States been party
4 to any of those?

5 A Not in Water District 37 to my knowledge,
6 YourHonor.

7 Q Although it had appropriated rights surely
8 before this supplemental --- .

9 A Yes, it did, but I doubt that they go back
10 prior to 1900.

11 Q But they were, why wouldn't they have
12 been --- in supplementals?

13 A Some of the supplemental proceedings that
14 were after the passage of the McLaren Amendment? Well, it
15 wasn't until, as we view it, at least as I ---

16 Q Your---

17 A Sir?

18 Q Ten or 12 supplementals in this proceeding?
19 Since 1885?

20 A Yes, and more, I'm not even sure of that.

21 Q Why was not the United States joined in
22 any of them?

23 A Until 1952 they could not be joined, because
24 they had not raised sovereign immunity.

25 Q Could now have, after 1952?

1 A I don't believe that the people of most
2 of the western states that were initiating, starting this
3 kind of a proceeding could have been particularly concerned
4 about this so called reserve right problem until this Court
5 announced that decision.

6 Q How about appropriated rights? Apparently
7 there had never been any adjudication of the appropriative
8 rights of the United States --- --- ---.

9 A This is correct, Your Honor.

10 Q There has been some adjudication since
11 1952, in the state courts, why wasn't the United States joined
12 in those proceedings?

13 A Well, under the Colorado system, primarily
14 the person or the applicant delivers the adjudication proceeding
15 might not even be conscious of the Amendment or have
16 any concern about the rights of the federal government.

17 It is the people more interested in protecting the
18 over-all state rights who, after Arizona v. California, realized
19 that the government in Colorado could, if she pursued her ap-
20 proach that was used in Arizona v. California, dry up the river.
21 It's just as simple as that.

22 And so they began then to be concerned and to worry
23 about whether the United States should be brought in.

24 Q I take it that in the supplemental pro-
25 ceeding after 1952 brought by some person to establish his

1 right, which I take it is what happened---

2 A Yes, sir.

3 Q ---people, other people who weren't served
4 are not bound? Or not?

5 A Yes, they are bound. They have limitation
6 statutes that compel to be binding.

7 Q If you win this case, would the United
8 States be bound by all of the supplemental adjudication since
9 1952?

10 A I would say if Your Honor is asking me to
11 make a strict guess, that I would say no. I might observe that---

12 Q Why not?

13 A This problem is raised by the United States
14 itself, and not by anyone else. And citing the previous Ari-
15 zona v. California case, to the Supreme Court of Colorado, they
16 said we have never been a party in the action. The United States
17 says you can't bind us until you have been properly parties, and
18 therefore the prior proceedings cannot cut off the right of
19 the United States.

20 And as I understand the discretion of this problem
21 by Mr. Justice (Groves) of the Colorado Supreme Court. He was
22 reciting, in effect the position of the parties. He only made
23 one decision for the Court, and that was that Colorado Courts
24 are capable of adjudicating water rights of the United States
25 just like anybody else.

1 He didn't reach the question of whether or not they
2 could add a prior decree but added that they probably could.
3 A variety of questions he mentioned in passing but he didn't
4 necessarily reach them.

5 Now, I would like to, if I could, touch very briefly
6 on some of the cases in which, in one way or another, the United
7 States has been involved affecting water rights on particular
8 streams in particular states, and whether or not they took
9 this attitude that they now take in this one.

10 If I correctly understand the Washington brief, I
11 believe that I do, page 10 of the Washington brief, in re
12 Chiliwist Creek in Okannogan County is cited, and it is in
13 case to which Counsel has referred. It is just one of nine
14 streams in which the State of Washington has caused the United
15 States to be joined, and their names would indicate to me that
16 they are certainly no larger or more prominent than the Eagle
17 River, in re Bonaparte Creek, in re Harvey Creek, in re Magee
18 Creek, and this kind of a matter, and in only one of those
19 does the United States raise the question of whether or not
20 a river system was involved, raised this before the United
21 States District Court for the Eastern District of Washington,
22 and apparently lost the matter on remand.

23 The other case mentioned by Counsel involves Utah,
24 there have been several there, the most principal case invol-
25 ving this particular section is the in re (Griminer) case

1 decided by Judge (Chilson) and the question there is whether
2 the United States Federal District Court had jurisdiction to
3 conduct adjudication for the benefit of the United States,
4 rather than this question of the stream system being involved.

5 Now we have kind of I beleive exhausted the brief
6 this problem of what the statute intended to cover at the time
7 of its passage, we think it very clear as has been indicated
8 by answers to questions here that it was intended to be allowed
9 if the Uneted States had one appropriative righton the stream
10 to join the United States with any actions

11 Certainly as a minimum this is what the McCarran
12 Ammendment was intended to reach.

13 Q Mr. Balcomb, I don't believe I've heard
14 either Counsel as yet speak specifically of the language of the
15 McCarran Ammendment, and I have in mind the language reading
16 "Water rights by appropriation under state law by purchase, by
17 exchange, or otherwise." I'm interested in those words "or other-
18 wise" unless unless you tell me that they are of no significance
19 whatsoever.

20 A I believe at the time, Your Honor, that
21 this particular act was passed, this question about the util-
22 ization of the word "reserved" in connection with water rights
23 was not in too common parlance. Not even the government itself.

24 It had come up only as an implied reservation, in con-
25 nection with Indian reservations and was not considered to be

1 particularly serious.

2 I do think that it was the intention of the Congress
3 in passing the McCarran Amendment in utilizing the word "other-
4 wise" was to avoid a long listing of such things as condemnation,
5 a variety of subjects and certainly was not intended by the use
6 of that word to exclude reserved rights, it was, I believe,
7 intended to catch everything.

8 Q So that you do feel the words "or other-
9 wise" have significance in the present context?

10 A Yes, sir, and they certainly did at the
11 time in the mind of the Department of Interior witnesses who
12 testified as well as the Department of Justice witnesses who
13 testified who pointed out that this language that you're using
14 is a general waiver and if the --- will have to prove that
15 point all of our rights, our Indian rights, our military
16 rights, things of this nature, and they then did not call them
17 reserved rights, they were specific by naming those rights, and
18 I think that the lawyers from Justice and from the Interior
19 Department show very clearly that they were concerned that the
20 waiver was too broad, and in both letters made the suggestion
21 that the waiver should be confined to state appropriative
22 rights.

23 And as the Committee report 755 notes, they considered
24 this and rejected it. Considering that the---

25 Q Was there any particular episode that gave

1 rise, gave impetus to the statute of the McCarran Amendment?

2 A As I understand the legislative history,
3 Your Honor, it was a combination apparently, of circumstances
4 an inability in Senator McCarrans home state to properly admin-
5 ister a little stream called the Quinn River, which had some
6 75 rights adjudicated out of it, 3 of which
7 the government had purchased, there was the two pending cases
8 in the United States District Court, one of them which has
9 not been in judgement, concerning the Truckee and the Carson
10 River and the rights of the Union, and the reclamation project
11 there, which apparently ---.

12 There was the Fallbrook cases which the government
13 mentioned that were bothering young Senator Nixon, and Senator
14 Woland, there was a variety of these kinds of things, even
15 the Colorado Senators mentioned the problem that existed in
16 connection with the Blue River which has been pending in the
17 United States District Court for the District of Colorado.

18 Q Then the opposition to the legislation
19 came from the Executive Branch, the Justice Department, and
20 the Department of Interior, it also came in the Congress from
21 such people as Congressman Moody, what would explain---?

22 A I think he, his warning to Congress of the
23 step that they were about to take exemplifies their thought,
24 that it covered all water rights, does not relate it to expense
25 items which --- the government, or anything like that, it was

1 considered by the people who sponsored the absolutely necessary
2 through certainty into the field of water rights in the West.

3 Q And the opposition from Congress came
4 from those who were concerned about the expense that might
5 be caused to the Justice Department?

6 A That's correct. You'd have to have a
7 District Attorney in every county in the western United States.

8 I might say your suggestion of course well why
9 doesn't this Court give the Justice Department and the
10 other federal agencies time to make a list and put it some-
11 where? --- 1952 this was part of the legislation in rejected.
12 And they've had 18 years since then --- this suit was really
13 growing, and they haven't made the list yet, until they were
14 brought into Court.

15 And when they were brought into Court, as the
16 Appendix indicates they were able to detail with particularity
17 their uses, not only appropriative but also reserves within
18 the area of the Eagle River.

19 I wanted to touch, if I might, briefly upon some
20 11 to 12 or 13 cases, at least that we've been able to find
21 the reported decisions, that relate to or refer to this
22 particular Section 666.

23 Counsel has mentioned the older one, I believe it has
24 been in this Court for direct decision on it. There were 2 cases
25 at the time, that's Dugan v. Rank.

1 And I would like to call the Courts attention to
2 the fact that every time this Court of the Circuit Court for
3 the Ninth Circuit, or for practical matters, any other court,
4 has held that 666 does not confer jurisdiction, that it was
5 not a quasi-public suit that was involved, it was a request
6 for declaratory relief, injunctions, sometimes an --- class
7 action, and the court said in every circumstance that is not
8 what's involved, becuae it is not the quasi-pvblc proceeding
9 called a general adjudication in ---.

10 And the only case that --- reaches this point is the
11 very first one on the list, and that's the in re (Griminer)
12 case that Judge Christensen decided in Utah.

13 And he thoroughly discusses the legislative fhistory,
14 finds that it was intended that the United States be joined,
15 does not concern himself with a difference in kinds of rights,
16 but merely said go back to the state court, they have the
17 machinerey, I've noted that sometimes in an adjudication in
18 Utah they go on for years, and there are thousands of people
19 involved and the federal court just doesn't have time to take
20 care of this.

21 It's got to go back to the state court that has
22 appropriate machinery.

23 I'd like to touch on another point, it is this atti-
24 tude of the government today and the attitude that has changed
25 over the years at various times, and brings, I think, monumental

1 confusion for the other departments of the government that
2 don't know what to do. the --- regulations concerning what they
3 are to do change time and again, various, it ends up that if
4 enough space is not held into this action, there's only one
5 kind of right that must be acquired according to state law,
6 and that would be your reclamation rights, by reason of Section
7 (a).

8 I think that the principle problem is is not whether
9 or not a reserved right exists, but if it does in fact exist,
10 what occasion, when does it reserve?

11 Q What is the derivation of reserved rights?

12 A What is the derivation?

13 Q Yes.

14 A I believe it commenced with rivers, and
15 progressed there through various Indian reservation matters
16 until finally culminating in Arizona v. California.

17 Q The Colorado Supreme Court has said there
18 isn't such thing as a reserved right, hasn't it? Or Not?

19 A No, sir, I don't --- opinion.

20 Q You don't?

21 A No.

22 Q You don't so read the prior opinion?

23 A the --- case below? No, sir I do not, In
24 fact I think that Justice (Groves) refused to reach the opin-
25 ion.

1 Q Yes, but how about a prior case? In the
2 Colorado Supreme Court, to which your colleague here referred.

3 A Stockman v. Leddy? As reaching the reser-
4 ved right question? That reached the date of appropriation
5 question, I believe, Your Honor.

6 The reserved right question, to my knowledge, has
7 not been reached in Colorado.

8 Q And your idea would be that the reserved
9 right question is relative to anything else should be submitted
10 in a proceeding like is now before the Court, and that it
11 should go in through the state courts, you agree that's a
12 federal question, don't you?

13 A Whether or not there is a reserved right?

14 Q Yes.

15 A I do .

16 Q And subject to review here?

17 A Subject to review here, and that's the
18 right of the government, if the Colorado Courts as they're
19 afraid will not follow the law, but I submit that I suggest
20 that the Colorado courts will follow the law, both federal
21 and state law.

22 Q ---the determination of reserved rights,
23 it would extend that any federal court could get into it, I
24 gather under your submission. It would be only this Court
25 under review of the Colorado Supreme Court. If there were an

1 adjudication of a reserved right issue---

2 A That's the way I read the statute, yes,
3 Your Honor.

4 Q Did your pleadings in this case, take
5 the position or have your clients take the position that the
6 United States has no reserved rights?

7 A Have I --- I have not, no sir.

8 In fact as I give recognition to them, I only inquire
9 as to what the quality is, and what is the date.

10 Q Do you think they're subject to date? Do
11 you think they're subject to the Colorado appropriation law?

12 A Yes, sir. I don't think there's any dif-
13 ference, just because you denominate legislation between that
14 and the --- appropriations.

15 Q So you don't think there's really any
16 reserved rights, that---

17 A I don't think---

18 Q ---that's any different from appropriative
19 uses.

20 A That's correct. I think that the United
21 States would be entitled to the extent that it can show its
22 right to whatever date it was that they---

23 Q And it might be a right subordinate to some
24 other right, is that it?

25 A It might be subordinate to some, but came

1 into existence ahead of those rights of the United States.

2 Q So you could---

3 A ---it would be senior to the others.

4 Q You 're just saying that the United States
5 either has appropriative rights in Colorado law, or it doesn't.
6 And reserved rights are no different from any other rights.

7 A What I'm trying to say, Your Honor, is that
8 I recognize that the United States does have appropriative
9 rights under state law, and likewise has appropriative
10 rights under federal law. ---you choose to call it reserved
11 rights under federal law.

12 Those are implied. They have to be found.

13 Q Do you agree or disagree with the adjudi-
14 cation in Arizona v Colorado, these so-called reserved rights?

15 A Do I agree with them?

16 Q Yes.

17 A I don't know anything about the facts as
18 to quality, but I certainly agree with the theory---

19 Q That's what I mean.

20 A Yes, sir I don. I don't think I have very
21 much choice in that regard, anyway.

22 Q Well, I mean is it a principle that you
23 think would generally apply, in this litigation.

24 A I think that---

25 Q The point is that I'm after, is the setting

1 aside of the Indian reservation carried with it implication
2 the right to use water, because otherwise you wouldn't have
3 a viable reservation.

4 A We agree with that whole heartedly, Your
5 Honor.

6 Q And yet I gather from what you answered
7 me earlier, it may be even as to those rights there are super-
8 ior rights.

9 A Unquestionably if the Indian reservation
10 were --- on the forest was withdrawm in 1900, and there were
11 a variety of water rights acquired thereto, they would be like-
12 wise entitled to a priority date. That is the appropriation
13 system.

14 Q And you say reserve rights can't override
15 that?

16 A They can't go back at when they came into
17 existence, Your Honor, that is what I say.

18 Q But the governments claim is to the contrary.

19 A I don't believe so, no---

20 Q You don't think so.

21 A No, becuae the government's claiming 1905
22 not 1877.

23 Q Appropriation right couldn't override a
24 reserve right? I mean the government sets aside and then the
25 appropriators come in. Sets aside a federal tract like the White

1 River course.

2 A I agree with the position that the govern-
3 ment takes that they're entitled to show their --- and go back
4 to it. Unquestionably. And to the extent that this takes out
5 other appropriative rights I guess that's just the way the game
6 is played, but that's the purpose of the system.

7 But do you say that when the government sets aside
8 a national forest or something else or a new Indian reservation
9 that its appropriative right is limited by what it actually
10 is using then, or can the right expand as the need expands in
11 the future?

12 A I think I can answer the question in this
13 way, Your Honor, it was about 1897, I believe, that the
14 Organic Act set up the forests, and largely they were timber
15 reserves and they were specifically for the purpose of timber.

16 Now I would say in that original withdrawal, this is
17 the purpose for which the water was drawn, and whatever the
18 United States could show it needed for this purpose, it would
19 be entitled to reserve.

20 Q That's it?

21 A Yes, sir. The 1960, I believe it was, the
22 act concerning multiple use of federal lands when they dumped
23 all these other things in on top of it as a purpose for the
24 forest.

25 And it might be a court would hold that as to some of

1 these rights the United States claims they would have to come
2 clear up to 1960.

3 Q So the reserved right in your book would have
4 no open end?

5 A No what, Your Honor?

6 Q No open end, it would n't be open ended to
7 cover future need, except to the extent that there was water
8 available.

9 A I can certainly understand that some of
10 them would be so deminimous that there would be no point in
11 wasting time, but the governments in a better position to say
12 then we, what that's going to be. That's the problem.

13 Q Nobody knows what these reserve rights are.

14 q A I think they don, Your Honor, they were
15 perfectly able to list them in Eagle County.

16 Q I know, but in terms of cubic feet per se-
17 cond, is what---

18 A They were able to do that there, also.

19 They spoke of the general reserve rights and then
20 spoke of these things that they were going to claim specifically
21 which as I view it is a double claim for the same---

22 Q They have never been adjudicated, have
23 they?

24 A Sir?

25 Q They have never been adjudicated, have

1 they?

2 A No, sir. They have not offered them for
3 adjudication. And that's all we ask them to do, and all we
4 ask this Court to do, is direct them to do so.

5 Q Is to do what?

6 A To direct the government to offer its
7 claims for adjudication. And as is indicated, if the Colorado
8 courts, the Utah Courts, the Washington courts, go astray this
9 Court is still here to straighten that problem out.

10 But I don't think it's fair to assume that state
11 courts are not going to follow federal law. When they are
12 specifically enjoined to follow it.

13 Q Well, then if they don't I suppose that
14 there are ways of dealing with that problem, aren't there?

15 A Yes, sir. If it's --- I deal with variance.
16 What is right and what is wrong? Is it wrong to allow the
17 government to stand out here and with this open ended mortgage,
18 or is it right to make them go ahead and bring that open end-
19 ed mortgage into court and declare their rights?

20 It's an equitable way to proceed, as I view it. I
21 might mention, that my time is about to expire, that there is,
22 I will have an opportunity, of course after Mr. Kiechel
23 speaks concerning 1812, that there is an amazing similarity
24 between these cases, and I think that the result probably
25 should be the same.

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Thank you very much.

Q Thank you, Mr. Balcomb, thank you, Mr.
Kiechel, 87 is submitted.