In the

Supreme Court of the United States

Colorado River Water Conservation District, Et Al.,

Petitioners,

v.

United States Of America

Respondent.

No. 74-940

Mary Akin, Et Al.,

Petitioners,

v.

United States Of America,

Respondent.

No. 74-949

Washington, D. C.
January 14, 1976

Pages 1 thru 49

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IN THE SUPREME COURT OF THE UNITED STATES

COLORADO RIVER WATER CONSERVATION DISTRICT, ET AL., Petitioners,	:	
v.	:	No. 74-940
UNITED STATES OF AMERICA, Respondent.	:	
MARY AKIN, ET AL., Petitioners,	:	
v.	:	No. 74-949
UNITED STATES OF AMERICA, Respondent.	:	

Washington, D. C.

Wednesday, January 14, 1976

The above-entitled matter came on for argument at 1:48 p.m.

BEFORE:

WARREN E. BURGER, Chief Justice of the United States
WILLIAM J. BRENNAN, JR., Associate Justice
POTTER STEWART, Associate Justice
BYRON R. WHITE, Associate Justice
THURGOOD MARSHALL, Associate Justice
HARRY A. BLACKMUN, Associate Justice
LEWIS F. POWELL, JR., Associate Justice
WILLIAM H. REHNQUIST, Associate Justice
JOHN P. STEVENS, Associate Justice

APPEARANCES:

KENNETH BALCOMB, ESQ., Delaney & Balcomb, P.O. Drawer 790, Glenwood Springs, Colorado 81601, for the petitioners.

HOWARD E. SHAPIRO, ESQ., Assistant to the Solicitor General, Department of Justice, Washington, D. C. 20530, for the respondent.

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I N D E X

P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear argument in 74-940, Colorado River Water Conservation District against the United States and the consolidated case.

Mr. Balcomb, you may proceed when you are ready.

ORAL ARGUMENT OF KENNETH BALCOMB ON BEHALF OF PETITIONERS

MR. BALCOMB: Mr. Chief Justice, and may it please the Court: These two petitions here consolidated arose out of one case below in the United States District Court, some of the petitioners joining in all of the petitions here and some separately, and of course have by the Court been consolidated.

All petitioners involved join in the opening brief here, in the reply brief, and have agreed that this one argument will suffice for all.

At Appendix D in the petition in 74-490, the last page, 41-A, was a small map which shows a large portion of western Colorado, that is western Colorado west of the Continental Divide, and was intended to show in relief Water Division No. 7.

QUESTION: That was the same as has been furnished us now on the bench, isn't it? Aren't these identical?

MR. BALCOMB: With this exception, we have asked the clerk to distribute xerox copies of it upon which we have roughly superimposed the boundaries of Water Divisions 4, 5, and 6.

QUESTION: I see.

MR. BALCOMB: To emphasize and illustrate some later discussion.

The entire geographic area of Colorado west of the Continental Divide is tributary to the Colorado River, and this, of course, includes that area in Water Division No. 7.

Since the 1971 decisions in this Court in Eagle County and Water Division No. 5, the United States has been proving up on its claims of all nature and from whatever source they might have been derived, including their reserve rights in Water Divisions 4, 5, and 6 and the water courts in those divisions. They have not, however, done so to date in Water Division No. 7.

If the Court will remember, in 1969 the Colorado legislature abandoned the water district method of adjudication of water-- there were then some 70 water districts -- and established seven divisions for such purpose, each division embracing for practical purposes major water sheds or major tributary water sheds to a major river. The 1969 Act in pertinent part is reproduced as Appendix C at page 42 of the petition for certiorari in 74-949, which was made by the State of Colorado and others.

I have the feeling that neither in 1971 nor to date does the Solicitor General's office clearly understand the present adjudicatory statute in Colorado, that is, the 1969 Act,

because when it went into effect on July 1, 1969, the water courts were open for business on a continuing basis, as contrasted to the previous law requiring an affirmative action of opening an adjudication in a particular water district. So the United States could have filed its claims in middle 1969 in Water Division 7,and certainly after this Court's decision in Eagle County and Water Division 5 could have been expected so to do.

Instead, on November 14, 1972, the United States filed what can only be denominated as a quiet title action in the United States District Court for the District of Colorado asserting the claims of the United States as to waters of the San Juan River naming almost 1,000 other users and unknown number of unknown persons. The claims, such as in Water Districts 4, 5, and 6, are varied and include national monuments, force, appropriate rights under State law, and finally claims on behalf of the Southern Ute and the Ute Mountain Ute Indian Reservation.

Very promptly thereafter, in December of 1972, the United States was served pursuant to the McCarran Amendment in Water Division No. 7 proceedings, whereupon, they filed claims similar in nature, except as to the Indian reservation claims, as to their rights on the Dolores River, which is the other principal tributary arising in Water Division 7 to the Colorado River.

All petitioners here move to dismiss the Federal court

action, which the district court did orally from the bench, referring specifically to the intent of [illegible] McCarran and to the two previous unanimous decisions of this Court in Eagle County and Water Division 5. The district court found that it should apply comity and abstention because Colorado had a well-defined and workable system relating to the questions at hand developed over 100 years. The U.S. had been served and under McCarran that was all that was required, a point I think that was admitted on Monday in connection with the Pupfish case by the Solicitor General's office.

The solution to be granted by the Federal court will be piecemeal only and would result in a duality of adjudication within one water division.

QUESTION: What did the district court do?

MR. BALCOMB: Sir?

QUESTION: What did the district court do?

MR. BALCOMB: It dismissed.

QUESTION: Well, that's more than just abstention. They dismissed the case.

MR. BALCOMB: They dismissed, I believe, on the grounds of comity.

QUESTION: And with the idea that any Federal claims to water rights would be submitted to the State court.

MR. BALCOMB: Yes, sir.

QUESTION: I mean, even any claims that were

controlled by Federal law.

MR. BALCOMB: Yes, sir, as they are doing in 4, 5, and 6.

QUESTION: That's what the two cases held, Eagle and Water District. Eagle and Water District contemplated that Federal claims be submitted to the State proceedings.

MR. BALCOMB: In the State court by Federal law.

QUESTION: Right.

MR. BALCOMB: And the district court below so found they must apply Federal law.

In effect, they followed what we believe the rule in Burford that if a State regulatory system was involved, that it was up to the State to see that the regulation was proper.

But the real basis for his decision was the impracticability of assuming jurisdiction, and his complete oral opinion is set forth in 74-94 petition at 17-A.

The Court of Appeals' opinion is set forth in the petition, in that same petition, 74-79, 74-790, at 1-A, The Court of Appeals' opinion cannot be said to be at very great disparity with the district court and did not rule that jurisdiction was Federal, or was exclusive in the Federal court, or the State court for that matter, but substituted in its own opinion a disagreement as to the result of abstention and ignored comity entirely.

We cannot help but feel that this Court had already

settled this problem that is again before it. The Government has brought us back and has raised additional points which namely attempt to reargue in the application of McCarran to the Federal reserve right which the Court has already ruled upon, effectively again attempting to again raise the possibility that fair treatment will not be accorded them in the State court, which this Court has already ruled emphatically on, just dismissed that problem out of hand, and are using, we feel, the problem of separate Indian reserve water rights as a springboard to take all Federal cases, Federal reserve rights and adjudicatory rights, back into the Federal court which this Court effectively dropped them out of.

QUESTION: But in Eagle the Government was a defendant, wasn't it, Mr. Balcomb?

MR. BALCOMB: The defendant?

QUESTION: Yes. And here the Government is a plaintiff.

MR. BALCOMB: In the sense that a person is a defendant in a water matter, yes, sir.

QUESTION: But they were a main defendant in the Eagle case.

MR. BALCOMB: In this case?

QUESTION: In the Eagle case.

MR. BALCOMB: No, but they are also defendants in the Water Division 7 case pending now in the --

QUESTION: That's the new one. That's the one that was filed after the Federal ..

MR. BALCOMB: Yes.

QUESTION: But in the proceeding that was going on before the Federal case was filed, it was not a defendant. It could have gone in and filed its claim, but it was not a defendant.

MR. BALCOMB: That's correct.

But our point is that they have been putting into effect in Water Division 7 a dual system of adjudication.

QUESTION: Yes, but the United States has another claim, I take it, that whatever Eagle said about reserve rights and submitting them to a State court, whatever it said doesn't apply where Indian water rights are involved.

MR. BALCOMB: Yes, sir, but they jumped over that problem themselves when they filed not only claims for the two Indian reservations but the whole shooting match, including adjudicatory rights, rights they acquired under State law. Had they confined themselves to Indian, that might be one problem, although we think it still would have been in violation of McCarran. But they didn't do that. They only took one river.

QUESTION: But you have that special problem in here even if the adjudicatory right -- even if certain United States rights should be submitted to State courts, the United States

says that the Indian rights should not be.

MR. BALCOMB: It's our position, and I think this was admitted by, as I say, the Solicitor General's office at the pupfish case that Nevada could still commence an action under McCarran in Nevada and make the United States come in and --

QUESTION: Yes, but that didn't involve Indian rights.

MR. BALCOMB: No, but they could still make them come in. So we filed an action now in Water Division 7 and we say they should automatically file all their claims, because that's what this Court said in Eagle.

QUESTION: Even if the United States agreed with you about all the rights except Indian rights, they don't agree with you about Indian rights.

MR. BALCOMB: I agree, but then if they --

QUESTION: And Eagle didn't have Indian rights.

MR. BALCOMB: Eagle excluded Indian rights. In fact, I think the United States wanted them included, anticipating they would very possibly win that case and they wanted all the reserve rights covered by the win, and they lost.

QUESTION: They did.

MR. BALCOMB: The point here, we believe, has been conclusively decided, as I said, and I think so also did the district court in its oral opinion. The Court of

Appeals did not disagree with that, but merely said that the district court should not have abstained, and as I say, ignored the problem of Federal-State relationship, the federalism theory that is recognized in comity.

We disagree with the conclusion, obviously, of the Court of Appeals and think they should be reversed for all of the practical considerations used by the district court, and he used that word --

QUESTION: You are suggesting that even were they right on classical abstention, there being no constitutional questions, that even on that basis there was no reason to abstain. Nevertheless, comity principles require deference to the State proceedings.

MR. BALCOMB: But we think also that abstention could have been used as a ground and --

QUESTION: I gather even -- of course, there is no constitutional --

MR. BALCOMB: Sir?

QUESTION: There is no constitutional question to be avoided by abstention here, is there?

MR. BALCOMB: No.

QUESTION: But there would be Federal questions. I mean abstention, you usually abstain to let State questions be decided, not Federal questions, and reserve rights are Federal questions.

MR. BALCOMB: Yes, but we have a specific statute here.

QUESTION: That's something else again. I agree with that.

QUESTION: I was just trying to get why it was -- from what you said, I thought you were suggesting that even if you are wrong, that abstention may have been -- at least comity should have led them to defer to the State courts.

MR. BALCOMB: Your State regulatory system, he had numerous other claimants of water involved and a very complicated situation which --

QUESTION: Especially as in the McCarran Act.

MR. BALCOMB: Yes. And you have a special Federal statute authorizing the State court to proceed.

QUESTION: Then there was an ongoing basin adjudication in the Colorado courts, but the United States was not a party defendant at the time it filed its suit.

MR. BALCOMB: They had not been served under McCarran, and I think a very similar situation as far as this is concerned was in Pacific Live Stock where the Federal court stopped its action and let the State court proceed. And it was an adjudication proceeding.

QUESTION: But they were served in a State suit soon after the Federal court suit was filed.

MR. BALCOMB: I think it was approximately the 15th of December they were served and --

QUESTION: And it was before anything substantial had happened in the Federal court.

MR. BALCOMB: I think five defendants were served and there never has been one shred of evidence taken, and those defendants were the State bodies, an important part of which are missing.

QUESTION: You haven't cited, I believe, our opinion last term in Hicks v. Miranda where the Court held that in the comity situation of Federal courts deferring to State constitutional adjudications even though the Federal court proceeding commenced first, if nothing much had happened in the Federal court proceeding, the Federal court should still defer to the State.

MR. BALCOMB: I believe we cite it at page 27 of our opening brief, your Honor.

QUESTION: Oh, I apologize. I didn't realize it. Pardon me. You are absolutely right. I was reading across the wrong line.

QUESTION: In any event, you don't like the race to the courthouse aspect that the Solicitor General --

MR. BALCOMB: I think as a doctrine it's frowned upon, and in this particular --

QUESTION: Hicks had a criminal case in a State court and this is civil, but you have the McCarran Act wholly aside from Younger v. Harris and cases like that. You've got

the McCarran Act that says the Federal Government should litigate its interests in the State court.

MR. BALCOMB: I didn't want to go into it, of course, because it's our position that no matter what the Federal reserve right is, it should have been adjudicated in the State court, and as soon as service is made they must start their proceedings in the State court. Realizing from the position of the Government they were going to go into that question, we then attempted to revisit in our reply brief a little bit of McCarran, but it was exhaustively covered, as the Court will remember, in the briefs in Eagle County, all of the legislative history.

I think it can be unquestionably said that, first of all, Mr. McCarran was concerned very much about Indians in all of the hearings that were held. "Indian" is not appearing on every page but certainly were considered again and again and again and considered to be included by the Justice Department, by the Department of the Interior, by the OMB reporting for the President, everybody, and we have made citations in our reply brief to that effect.

Second of all, we believe that when this Court acted on the cases, they thought that Indians were involved in the Federal reserve rights. The Indians themselves thought so, as our brief would indicate, because in the 1971 what I call Kennedy hearings that they were concerning various Indian rights,

a great hue and cry was made about the fact that Eagle County and Water Division 5 covered the Indian water rights. And the Court will remember that some of the Indians themselves thought so because they filed a novel piece of paper in a big red binder in which they wanted to express an interest in the case and suggested this Court had no jurisdiction because they had covered Indians by the decisions. And all the way up to now, up to the last hearings, the Indians have been sure that they were covered, until all of a sudden when the last Government brief and the amici brief for the Indians was filed herein, they raise other defenses than that.

As I say, that's the Government's defense to this problem. It's not our -- we didn't want to reargue McCarran, we didn't think it was necessary, we didn't think this Court should have to bother with it again. And we think this is merely a guise to try to get the adjudication of Federal reserve rights back in the Federal courts if they can beat us to the courthouse.

QUESTION: May I ask you. I notice you recite that the United States in filing its reserve rights included national forests.

MR. BALCOMB: Yes, sir.

QUESTION: Tell me how you -- I take it what they are saying is that,if you want to analogize to putting something to beneficial use, once you have taken something from the

public domain, you've automatically announced your intention of using whatever water you need for that purpose.

MR. BALCOMB: Yes, sir. We have no quarrel with that.

QUESTION: Now, what kind of a water right do you claim for a national forest?

MR. BALCOMB: They are claiming the esthetic value of flowing streams, the right to control headgate diversions or storage of water on national forests to make --

QUESTION: I take it you don't have any quarrel with the idea that the Federal Government in a national forest can keep the States from covering up the national forest with a dam. I'm not sure you --

Go ahead. You say they can claim to maintain the level of the flowing stream.

MR. BALCOMB: Yes, sir, and to require a bypass for fishery purposes, for esthetic purposes, and all of that, of a certain quantity.

QUESTION: But as far as beneficial use of water is concerned.

MR. BALCOMB: They claim those to be beneficial uses under Federal --

QUESTION: I know, but it isn't a consumptive use at allfor a national forest.

MR. BALCOMB: Only to the extent that it might create a little evaporation which is of benefit also.

QUESTION: Yes, but under, I suppose, on navigable streams, if there is going to be a dam, it's going to be approved by the -- who does it have to be approved by?

MR. BALCOMB: The Department of Agriculture, Forest Service. You have to get a special use permit.

QUESTION: They have to do that even without a water right.

MR. BALCOMB: That's correct. Many structures were built before the special use thing came into existence, and the United States is claiming a right to antedate the law.

QUESTION: I suppose if there was some proposal to divert water from one water shed to another and lower the level of the flowing stream through a national forest, there might be a complaint.

MR. BALCOMB: Yes, sir, and that, of course, is one of the problems they are having in the lower court, because this is exactly what Twin Lakes is doing and exactly what the city and County of Denver is doing, and Colorado Springs, and so forth. And they are litigating this in the lower courts. How it's going to come out I don't know. It's been four years in progress.

There is an awful lot of them. I could describe to you the printout that the Forest Service alone filed on the right of a national forest. It was approximately an inch thick, and I don't know how many rights it contains. When you

totaled it all up, it amounted to about a thousand acre feet of water and a hundred/second feet of direct flow presently in use. It covers a variety of things like stock watering holes and the like.

Well, as I indicated, we would like to see the district court judgments reinstated, and it's at 20-A in our petition, for the totality of the reasons expressed under abstention or by comity as the district court said, which I think also is very similar to the language used by Mr. Justice Douglas in his opinions in the Eagle County and Darrell case.

QUESTION: You argued those cases.

MR. BALCOMB: Sir?

QUESTION: You were here in those two cases, both of them.

MR. BALCOMB: Yes. And won them.

QUESTION: Unanimously.

MR. CHIEF JUSTICE BURGER: Mr. Shapiro.

ORAL ARGUMENT OF HOWARD E. SHAPIRO ON BEHALF OF RESPONDENT

MR. SHAPIRO: Mr. Chief Justice, and may it please the Court: I think the issue in this case is narrow. It's whether the district court should have dismissed the United States' complaint for determination of its water rights and those of its Indian wards.

The merits of the Federal reserve rights doctrine are

not before the Court. This is a question of Federal jurisdiction.

QUESTION: Mr. Shapiro, the merits of that pupfish claim that your colleague, Mr. Randolph, argued on Monday were before us, and there may be some spillover, at least in the minds of some of us, between the two. I notice on page 7 of the Government's brief that the Government asserts apparently a reserve right, a water claim by reason of reservation of the San Juan National Forest, which as I recall is a huge area in southwestern Colorado.

Now, what's the nature of the Government's reserved right claim when it's talking simply about a national forest?

MR. SHAPIRO: The basic claim is for stock watering, camp sites, the preservation of streams as water sources for wildlife, et cetera. The demands, the total demands, of the national forest for water in that context are relatively narrow. In fact, there is a study which was prepared in 1969 for the use of the Public Land Law Review Commission which is described at page 844 of Dean Trelease's case book on Water Law, 1974 edition, and it points out that even if you take all of the Government's Federal reserve rights as of 1969 --

QUESTION: You mean all the rights it claimed?

MR. SHAPIRO: All rights, the Indian rights -- well, the entire range of Federal reservations -- you come out with a percentage of something like, well, 2.2 million acre feet out

of 363 million acre feet that arise in the eleven Western States where most of the water comes from, and that amounts to less than 1 percent of the total.

Now, I should say in candor that there is a problem about shale oil because if shale is developed, the water demands are going to be high in the shale areas. But I understand the Federal Government has indicated to the companies that will exploit that they are going to have to get their own appropriated rights under State procedures.

Now, returning to this case --

QUESTION: I doubt if even the Government would have the nerve to go in and say that because we remove certain property from the public domain and made it a national forest, we intended at the time to reserve enough water to develop shale.

MR. SHAPIRO: I think that's right, your Honor, although there is a reservation -- there are some reservations, may be reservations, which were put aside as shale oil reservations.

QUESTION: That may be. That's different.

MR. SHAPIRO: That is different. And that really gets us down to what the reserved rights doctrine is about. I might as well state it very briefly. It's always qualified by the purpose of the reservation. And really what we are seeking in this case is relatively narrow. What our complaint

asks is that the Federal court determine three things affirmatively for the United States:

Number one, it determine the purpose of the various Federal reservations we have alleged in our complaint. I think examination of that complaint which is set forth in the petition for cert will show that all except perhaps two of the claims are reserved rights claims.

QUESTION: It might help me if -- you would be here making the same argument, I take it, even if you had been served as a defendant in a State adjudication prior to the beginning of the Federal suit, and even if you had filed your claims, as Eagle said you had to do in that litigation, you would still be here saying you could file in the Federal court and have the Federal court adjudicate the three questions that you were about to tell us.

MR. SHAPIRO: Not quite, your Honor. If we were made a party in a McCarran Act proceeding before we filed in the Federal suit, then the State court would have jurisdiction, and Eagle County and Water Division 5 make that clear, with one exception. I must state the exception.

QUESTION: Indian water rights.

MR. SHAPIRO: Right.

QUESTION: You say the McCarran Act doesn't reach Indian water rights at all, the State courts have no jurisdiction whatsoever to adjudicate Indian water rights.

MR. SHAPIRO: Or perhaps qualifying it another way, even if McCarran waives immunity for Indian rights, it would waive it only in Federal courts. Well, the McCarran Act on its face doesn't restrict itself to State courts, State or Federal.

QUESTION: You don't have any authority for that I guess.

MR. SHAPIRO: What? That it would apply to Federal courts as well?

QUESTION: No, that the McCarran Act didn't intend them to --

MR. SHAPIRO: To reach Indian rights? I think I do have authority for it. Perhaps I should turn to it, although our position is that you don't need to reach it in this case if you agree with our contention --

QUESTION: I know.

MR.SHAPIRO: Let's turn to it now.

QUESTION: You just say because you got to the courthouse first, the Federal court can go ahead.

MR. SHAPIRO: That's part of the argument.

QUESTION: Even though nothing had happened in the Federal court of substance.

MR. SHAPIRO: That's right, which is not much different than any other plaintiff who has a choice of a forum, Federal or State, who chooses a Federal forum.

QUESTION: This goes beyond that proposition. It is that they not only can, but the Federal court must proceed.

MR. SHAPIRO: That's right, in the circumstances here because none of the considerations of the abstention doctrine and comity doctrine clash.

QUESTION: We have gotten close to, but have never really faced up to whether Younger v. Harris is going to apply in a civil --

MR. SHAPIRO: That's right. The closest you have come is with the nuisance litigation involving obscenity in cases like Huffman v. Pursue last year.

QUESTION: Quasi-criminal, so to speak.

MR. SHAPIRO: I beg your pardon?

QUESTION: Quasi-criminal, or a case in which the State was a party.

MR. SHAPIRO: But this is quite different because here is a situation in which you have traditional concurrent jurisdiction. There is no question of --

QUESTION: But this is different also because you have the McCarran Act which states a preference for the United States litigating its claims in a comprehensive proceeding in the State court.

MR. SHAPIRO: On the face of the statute no preference is declared. All it says -- and we set it forth in our brief at page 3. I mean the operative words, the crucial words are

simply "consent is hereby given to join the United States as a defendant in any suit," whether general adjudication of water rights, or their administration.

QUESTION: Simply a waiver of sovereign immunity.

MR. SHAPIRO: Simply a waiver of sovereign immunity.

QUESTION: You now have been named in a State case.

MR. SHAPIRO: That's right.

QUESTION: You are now a party to the adjudication in Water District No. 7, and you have submitted your claims there except your Indian claims.

MR. SHAPIRO: No. What we have submitted in Water District 7 are only the claims --

QUESTION: Only your adjudicative claims under the State --

MR. SHAPIRO: No. Only the claims on the Dolores River. If your Honors will look at the map --

QUESTION: Why is that?

MR. SHAPIRO: Because the Dolores River --

QUESTION: I know, but why are those the only ones that you submitted?

MR. SHAPIRO: Those are the only ones we have submitted because the Dolores River is geographically separate from the tributaries of the San Juan which all run through the Indian reservations. We have tried to put all our claims with respect to the tributaries of the San Juan in one proceeding.

The Dolores is geographically separate. The only claims we have on the Dolores, which runs to the Northwest, are claims, I think, for the western part of the forest.

QUESTION: I will confine it to the Dolores, then. You still think you are entitled to go ahead in the Federal court on the Dolores.

MR. SHAPIRO: No. Only on the San Juan.

QUESTION: Did you file -- is your Federal court case only on the San Juan?

MR. SHAPIRO: Yes, your Honor.

QUESTION: I see. All right.

MR. SHAPIRO: That's all we brought.

QUESTION: In other words, the Ute reservations --

MR. SHAPIRO: No, no. The Federal claim -- the complaint is for all of the tributaries of the San Juan -- Well, perhaps your Honors ought to look at our map which is in the back of our brief.

QUESTION: Well, this is a pretty good map.

MR. SHAPIRO: We wanted to show the Indian reservations because --

QUESTION: You are accepting the Eagle decision as conclusive on the Dolores situation.

MR. SHAPIRO: We are accepting Eagle as conclusive on the right of the State courts to make us a party.

QUESTION: Well, they start it. You have no Federal

proceeding pending, no Federal court proceeding pending on the Dolores.

MR. SHAPIRO: That is right.

QUESTION: So when the State proceedings were brought, you were made a party. That precluded your starting any Federal proceedings in light of the McCarran Act.

QUESTION: And Eagle.

MR. SHAPIRO: Well, subject perhaps to an argument about removal which is not here and is somewhat complicated, we have --

QUESTION: While I have you interrupted, Mr. Shapiro, I don't quite understand. There is a State proceeding on the San Juan pending, too, is there not?

MR. SHAPIRO: Well, as Mr. Balcomb has explained, under Colorado procedure there is always a State proceeding. It's a continuous proceeding month by month, and Water Division 5 explains that in the totality you will get to a total --

QUESTION: And this is Water Division 7 and every month there is a State proceeding.

MR. SHAPIRO: Every month there is a new set of new claims where people can come in and ask for new permits.

"Permits" are the wrong word in the Colorado practice.

QUESTION: Your Federal case precedes what?

MR. SHAPIRO: It precedes our joinder in that proceeding.

QUESTION: Right.

QUESTION: Just precedes your joinder in that proceeding.

MR. SHAPIRO: Yes.

QUESTION: But it was a pending State procedure.

MR. SHAPIRO: In the sense that --

QUESTION: The U.S. had not been joined.

MR. SHAPIRO: In the sense --

QUESTION: What did you do with the second sentence of the McCarran Act? The United States, when a party to any such suit, shall (1) be deemed to have waived any right to plead that the State laws are inapplicable where the United States is not amenable thereto by reason of its sovereignty and shall be subject to the judgments, orders, and decrees of the court having jurisdiction, and so forth.

What is there in that statute which suggests that your position is different with respect to the application of that sentence if you started your proceeding before you were joined, your Federal proceeding before you were joined?

MR. SHAPIRO: The difference is that the Federal court has now obtained jurisdiction over the United States.

QUESTION: No, no, I am asking, Mr. Shapiro, what is in the McCarran Act that says that your position is any different?

MR. SHAPIRO: From being joined as a defendant.

QUESTION: Right.

MR. SHAPIRO: The language is limited to the waiver of sovereign immunity where we are a defendant. That's all it refers to.

QUESTION: Where we are a party. Where a party.

MR. SHAPIRO: No. What it says is the United States when a party to such suit shall be deemed to have waived any right to plead that State laws are inapplicable or that the United States is not amenable thereto by reason of its sovereignty.

We don't claim that we can't be made a party in the State proceeding under sovereign immunity. What we are saying is that we can proceed in the Federal court for the affirmative determination of our claims.

QUESTION: And may the State court proceed simultaneously?

MR. SHAPIRO: The State court can certainly proceed with respect to determination of the rights of the non-Federal parties, that is,the rights of parties other than the United States.

QUESTION: As to the United States it may not proceed.

MR. SHAPIRO: The affirmative claim of the United States should be determined in the Federal court.

QUESTION: If your Federal suit didn't involve Indians at all and you had filed your suit to settle your rights

in the San Juan Basin, and then you were joined in the State proceeding, you would be making exactly the same argument you are making.

MR. SHAPIRO: Yes. That is correct.

QUESTION: How about subparagraph (2) on page 3 of your brief, the one Mr. Justice Brennan was just referring to, "shall be subject to the judgments, orders, and decrees of the court having jurisdiction, and may obtain review thereof." That doesn't indicate that you can exempt yourself from that if you have filed a case in the United States court.

MR. SHAPIRO: Well, it's the usual situation of adjusting the relationship between two courts having jurisdiction.

QUESTION: You say priority in time or the traditional rule of --

MR. SHAPIRO: Let me use an illustrative case which I think is dispositive. In Markham v. Allen, which was a suit by the United States for the determination of its claims on behalf of the Alien Property Custodian to the estate of a deceased alien, the State court had complete jurisdiction over the res of the estate. The Federal Government sued in Federal court for a determination under the Trading With the Enemy Act as to its interests in that property. And this Court when this case reached it noted that there was the issue, there was the res in both courts. And it said that the

interest of the United States in that res could be determined in the Federal court even though the State court had jurisdiction.

Well, that's very much what we are involved with here. There is always a continuous proceeding going on in the Colorado courts over the rivers there. But at the same time, we are suggesting that the interest of the United States can be determined in the Federal court subject to later integration in the State proceedings.

QUESTION: If you win here on this case, I presume Colorado water lawyers can go back the day our mandate comes down and join the United States as parties in each of the basin adjudications and then that argument that you just made would not be available to you in a subsequently commenced suit in the United States District Court for the District of Colorado.

MR. SHAPIRO: That's right. What would happen -- well, this goes into Colorado procedure, but in effect we could walk into the -- after the Federal court decrees the rights that we are concerned with, it said, the United States is entitled to priorities of 1868, 1875, 1932 with respect to reservations X, Y, and Z, and the Indian rights, and it says that the purpose of the reservations are agriculture, forestry, and so on. And the third thing it says is you get so many acre feet at quantifies it.

We take that decree in our hand and we are either

brought into the Colorado court, which is most likely, or we go in and we present it and say, "Tabulate this into your overall basin adjudication."

Now, that actually has happened. There is a case which is mentioned in our complaint, the Morrison Ditch decree, entered in 1932 with respect to some Indian water rights. It was adjudicated in Federal court long before McCarran, of course. When the process of tabulation, which is now going on in Colorado, began, the State engineer in his tentative tabulation included that Federal decree. And this is simply an application of the general rule that a Federal decree determining in personam rights is to be given full faith and credit in a State proceeding, and that the ordinary rules of res judicata apply.

QUESTION: What should be the disposition if the United States Attorney in Colorado tomorrow decides to file a case in the federal district court for adjudication of the Government's rights on the Dolores River?

MR. SHAPIRO: In that instance, I think that since the priority of filing in what is essentially an in personam proceeding is in the State court. There would be a substantial ground for the Federal --

QUESTION: Then Judge Finesilver should dismiss even in --

MR. SHAPIRO: Right. On the ground priority of filing.

QUESTION: Is there any question, Mr. Shapiro, that Congress could alter the rule on priority of filing? And is there not a question here whether in the McCarran Act the Congress has altered that rule?

MR. SHAPIRO: There is a question but there is also an answer. And the answer lies in what Senator McCarran himself characterized this statute as doing. In Eagle County there is a quotation of it. It's in his letter to Senator Magnuson in the report. He assured the Senator, he assured everybody on the floor that the only purpose of this legislation is to waive the sovereign immunity of the United States, permit the joinder in general adjudications. It didn't command the dismissal of affirmative suits by the United States. There is no fallout from the statute beyond that.

Now, I really have to turn very briefly to the question of the Indian rights because it has been asserted that the Indian rights issue was adjudicated in the Eagle County case. I don't see how that could be when there were no Indian rights before the court. There were no claims involving Indian rights at all. Instead the rights involved concerned non-Indian claims.

QUESTION: Certainly Justice Douglas' language when he speaks of reservedrights and mentions the Indian claims involved in Arizona v. California suggested he didn't see any difference between Indian claims and other reserved right claims.

Isn't that a fair statement?

MR. SHAPIRO: I think that since the question wasn't before the Court, I don't know whether it can be said to be fair when no one really litigated it.

QUESTION: Well, it certainly isn't a holding, and maybe you can say that if someone had asked him or asked the other people to join the opinion, are you sure you want to do this in view of the Indian rights, they would have come to a different conclusion. But the intimation of the language for whatever it's worth is that there is no difference as among reserved rights for purposes of the McCarran Act.

MR. SHAPIRO: I would argue that since the issue wasn't here, at most it would have to be oversight because of the way Indian rights are treated. There is a very firm rule that State jurisdiction over Indian rights is not recognized except when expressly granted by Congress, even when there is a waiver of sovereign immunity.

Now, there is a case called United States v. Minnesota which involves -- which we have cited in our brief -- which involves a statute that permitted the condemnation under State law of Indian allotteed land, and a suit to condemn was brought in the Minnesota State courts. And when that case reached this Court, the Court held it's true the condemnation proceeding can go forward, there is a waiver of immunity to that extent, but it has to be brought in the Federal court.

Now, that principle is well known to the Congress. You will not find a word in this statute. You will not find a word in the legislative history by any of the proponents of the legislation indicating that they thought that Indian rights were to be swept into the State courts.

And then finally, just after, 13 months after this statute, Congress passes P.L. 280 which sets up a procedure by which Indian rights can be brought before the State courts if the States will follow the method set forth in --

QUESTION: But that's general civil procedure. That was no reference specifically to water rights.

MR. SHAPIRO: That's my point. There was a reference to water rights. They expressly excluded water rights of Indians for which the United States was trustee. That's 13 months later. I don't see how it can be said that this statute where there is no mention of it, somehow swept Indian rights in.

QUESTION: Your Federal court suit involves more than Indian rights, does it?

MR. SHAPIRO: Much more.

QUESTION: Much more. And suppose without the Indian rights you can't succeed with this argument.

MR. SHAPIRO: I was only addressing the Indian rights by loosing -- your Honor.

QUESTION: Suppose you lose on the Indian rights and

you lose on the whole works. But may you, even if you are properly in the Federal court for Indian rights, drag in everything else?

MR. SHAPIRO: No question. We have the same --

QUESTION: What do you mean "no question"?

MR. SHAPIRO: No question, because we are simply asserting affirmative claims --

QUESTION: What I am trying to suggest is if you are foreclosed from asserting any but Indian rights in your Federal court procedure, because you have Indian rights involved may you squeak in other things that otherwise you couldn't bring in the Federal court?

MR. SHAPIRO: I don't think the Indian rights themselves, of themselves, create any additional jurisdiction in the Federal court, no, I don't mean to assert that. Our argument is there is no question we can assert non-Indian rights in Federal courts simply because there is jurisdiction under 28 U.S.C. 1345 and under 1331.

QUESTION: I guess I haven't made myself clear. What I am trying to get, if you are wrong in the non-Indian rights and they have to be adjudicated in the State proceeding, may you nevertheless insist that the Federal court decide the non-Indian rights because you are properly in the Federal courts on the Indian rights?

QUESTION: Sort of appended jurisdictional

idea, I gather. Is that right?

QUESTION: Or maybe because you cannot merely adjudicate the Indian rights without knowing what the other rights are.

MR. SHAPIRO: Well, it has been argued that if you are going to adjudicate a stream, it is helpful to have as many of the rights as possible asserted at the same time.

QUESTION: On that basis, you should be in the State court, Mr. Shapiro.

MR. SHAPIRO: No. I am stating the assertion, but in fact it's perfectly possible to do the contrary. For example, a water rights proceeding separates two kinds of claims. One can be an affirmative claim and saying, "Determine my priority and my quantity,"and you can come in as a defendant saying, "He's not entitled to his priority and his quantity."

Now, the plaintiff's side of it doesn't have to be adjudicated all at one time, as Division 5 recognized. You can do it piecemeal as long as they are ultimately integrated in the totality. And what we suggest is what I suggested under Markham v. Allen. Doing it this way is not inconsistent with the McCarran Amendment. The basic purpose of the McCarran Amendment is to get the United States out from behind sovereign immunity, to get it to assert its claims. We are doing that.

QUESTION: What happened to the removal provision in the --

MR. SHAPIRO: The removal provision was removed. There was an express -- in Senator McCarran's view there was an express reference to removal which would have permitted the United States to remove the --

QUESTION: And had its claimed litigated in the Federal court if it wanted to.

MR. SHAPIRO: By removal, where it was a defendant. But, of course, the elimination of the removal provision doesn't in itself indicate that the United States couldn't be a plaintiff. In fact, this is recognized in the one extensive discussion of removal --

QUESTION: I know, but if the State proceeding is going on, it certainly indicated that maybe there is some preference to have the Federal Government go ahead and adjudicate its rights in the State court rather than the Federal.

MR. SHAPIRO: Well, it's just as consistent, I think, to say that --

QUESTION: You wouldn't suggest that if it was a party to the State court proceeding that it could then successfully file and prosecute the Federal case.

MR. SHAPIRO: I think there are circumstances in which we could remove if we otherwise come within existing statutes governing removal, 1441(a), and that may have been in Congress' mind as well. We haven't got it. There is an argument for removal which is not presented in this case, but

it essentially is that when the United States is asserting Federal water rights claims in its plaintiff capacity, it's made a defendant in a general adjudication and asked, "What are your Federal water rights claims? State them affirmatively." It's really an involuntary plaintiff. If it's an involuntary plaintiff, there is jurisdiction in the Federal court under 28 U.S.C. 1345 and under 1331 with respect to the Federal claims. That's removable under 1441(a). So there is an argument which isn't here.

QUESTION: We certainly wasted a lot of time in Eagle then.

MR. SHAPIRO: No. What we were arguing over in Eagle essentially was whether the statute permitted reserved rights of a non-Indian nature to be adjudicated under McCarran. Now, that's over with. We know that. But we can still bring our claims affirmatively in the Federal courts.

QUESTION: But Eagle isn't really over with if you are right about your right to remove.

MR. SHAPIRO: Well, I think after the Federal affirmative adjudication following the removal, we would still come back to the State court with our decree.

QUESTION: Which would have been settled outside of the State court system. I mean, that's no burden on the Government certainly.

MR. SHAPIRO: Neither is it a burden on the State

court system.

QUESTION: Except that it denies to the State court system the right to do the adjudication which one might fairly say the McCarran Act intended be done there.

MR. SHAPIRO: McCarran doesn't indicate anything about the affirmative adjudication. It simply makes us amenable to suit as a defendant. Of course, if -- well, it makes a great deal of sense, I think, to recognize that you are going to have to separate out in the State court proceedings the Federal claims in any event. What's happened in Eagle on remand is interesting. In Divisions 4, 5, and 6 the cases have been consolidated, then they have been set before a single special referee and they will be reviewed by a single water judge, so that they have had to create a separate Federal proceeding inside the State proceeding.

Now, the Federal suit is exactly that, it's what's going on now in the Pyramid Lake case, United States v. Nevada, which was remanded by this Court to the -- not remanded, but we were referred to the district court to bring our suit there. That's exactly what's going on here now.

Now, the Federal suit does that. It makes it possible to have review of our affirmative claims in the Court of Appeals. It takes care of the Indian problem, because the Federal court in an affirmative suit clearly has jurisdiction over the Indian problem, and it's possible to integrate the

whole thing, the whole Federal decree, back into the State proceeding.

Now, if you start with the proposition that since 1789 the United States had the right to bring its affirmative claims in Federal court and its Indian claims in Federal court and you recognize that there is not State court jurisdiction over the Indian claims in any event, then it makes a great deal of sense for us to bring these claims affirmatively in the Federal tribunal, recognizing that we will ultimately integrate them into the State court proceeding.

QUESTION: Always subject to the McCarran Act.

MR. SHAPIRO: The McCarran Act is the spur, your Honor. But we are in effect in the position of one who is told either bring your claims out affirmatively so they can be determined and adjudicated and quantified, or you will be brought into the State courts or perhaps the Federal courts because I think the Act applied to both, to have them adjudicated. So what we have done here is to get up off our chairs and affirmatively assert what our water rights are.

QUESTION: Nothing you just said suggests that the Congress could not allow the determination, adjudication of the Indian rights in State courts.

MR. SHAPIRO: Congress certainly could if it affirmatively chose to do so.

QUESTION: Again, I suggest, that is what we have got

to decide is the effect of the McCarran Act, as to Indian rights or anything else.

MR. SHAPIRO: Well, certainly that aspect of the McCarran Act, if you wish to reach it, does have to be decided because the matter is of tremendous importance to the Indian.

Now, in this connection, as one final point to be made aside from Public Law 280, which I mentioned, even the most recent full-scale study of Indian water rights and national water rights generally, the National Water Commission report suggested that because of doubts over what the impact of the McCarran Amendment was on Indian rights, that really the Indian rights ought to be adjudicated in Federal court. Now, this is a body of experts which is listening to all the arguments about this question, and that body concludes that the Indian rights should be adjudicated in a Federal court, even if other rights are adjudicated in a State court, because of the Indians' concern over being subjected to State court jurisdiction. That shows two things, not only the Indians' concern, but also the fact that you don't need to have every affirmative claim asserted in the same court as long as ultimately for purposes of administration, all of the adjudicated rights, the affirmatively adjudicated rights, are integrated in a single proceeding.

Now, I don't think it would serve any purpose to argue about the abstention doctrine. The traditional doctrine

just doesn't apply to this case. We are not dealing with uncertain State law, which is what abstention is about. We are not dealing with constitutional questions. We are not dealing with an attempt to review a State administrative determination. So we can put abstention aside.

Now, that leaves us with comity. But there is nothing in the comity doctrine that has ever been extended this far. You would have to find that somehow McCarran has a fallout, a shadow around it that requires that the United States not be allowed to sue affirmatively.

Thank you very much.

MR. CHIEF JUSTICE BURGER: Very well.

Mr. Balcomb, do you have anything further?

REBUTTAL ARGUMENT OF KENNETH BALCOMB ON BEHALF OF PETITIONERS

MR. BALCOMB: If I may, your Honor. I will try to be as short as possible.

QUESTION: Mr. Balcomb, before you start, can I put a question to you if you will answer during your few minutes.

If a State property owner should seek a declaratory judgment against the United States on some water question, could such an action be entertained by the Federal court.

MR. BALCOMB: Declaratory judgment?

QUESTION: Yes.

MR. BALCOMB: Yes, sir.

QUESTION: It could be entertained by the Federal court.

MR. BALCOMB: I would say yes, sir.

I just want to remark on two or three minor items. Well, maybe some of them are not so minor because they are important. The National Water Commission recognized that Eagle and Water Division 5 covered Indian water rights and recommended that Congress do something about the problem. The Justice Department recognized that as late as 1955 and suggested to the Indians at hearings that they should go to Congress and get something done about the problem.

QUESTION: That is to limit the determination of their rights to Federal court procedures?

MR. BALCOMB: Yes, sir.

QUESTION: That's what they suggested?

MR. BALCOMB: That's what they suggested. And major Indian water lawyers have recognized that Eagle County and Darrell cover the situation as far as Indian water rights are concerned and that Congress should do something about it, and Congress has done nothing. And we submit that if they interpret it that way, why should not this Court agree with them when I think it did in the first place.

In answer to one of the questions which related to what happened to the removal provision in the original Act, it was removed at the request of the Justice Department. And

now the Justice Department is asking Congress to put it back in, because almost every case they have attempted to remove that's filed in the State court initially is bounced back by the Federal court. One was just bounced back to the State court by the New Mexico United States District Court the other day. There is a copy of it in the back of our reply brief.

The shale reservation, there are two different problems involved here. The Government is making a claim for water supposedly reserved in connection with the naval oil shale reservation. That is the only one of the Federal claims that has not yet been tried below. When it will be set up I don't know. And it does represent a large quantity of water.

There was some attempt made in connection with the lease of tracts, Colorado A and Colorado B, recently, as well as the Utah tracts,to say that there was a water right in connection with them. But what Interior finally said was, no, it is just like an oil and gas well. If you drill an oil and gas well and hit water on public lands, it belongs to us. And that's in all the leases. And that's the way they interpreted the oil shale problems out on the regular public domain where the only limitation was the right to file claims.

I want to call the Court's attention to the relief asked by the Government in the complaint. They want a special Water Master, which is not necessary. They want a special administrator to control the stream, separate and apart from the

State system. And they want every single property owner already in the decree to be enjoined from violating the Federal court decree when they already have an administrative system set up to take care of that problem.

Now, I don't know if I have made myself clear about the proposition that the Water Judge in Water Division No. 7 has jurisdiction over -- simultaneous jurisdiction over -- both the San Juan and the Dolores Rivers, and that everybody on both the San Juan and the Dolores Rivers is bound by whatever he finally decides in connection with the water rights. And the consequences of this reflect itself, as this Court is aware, at Leefair, Arizona, where the division is made between the upper basin waters and the lower basin waters. So it becomes very important to bind everyone in litigation.

I might add that -- and maybe counsel is not aware of this -- the Morrison decree, though entered in Federal court, has been administered by the State Engineer of Colorado.

QUESTION: Would you be here arguing if there had never been a suit filed against the United States, if they had never been named a party to the State proceeding?

MR. BALCOMB: Would we be here? I am afraid I have to take the position that I would not be because McCarran would not be applicable.

QUESTION: And except for McCarran, this suit in the Federal court could and should go ahead.

MR. BALCOMB: Might be going right ahead.

QUESTION: Yes.

MR. BALCOMB: If referring -- and one of the Justices read a part of the McCarran Amendment to counsel. He calls specifically to the fact that the United States is not amenable thereto. In other words, the United States can't plead that it's not amenable thereto on account of its sovereignty. And I want to emphasize the word "sovereignty," because if their way to that which is one of the strongest principles, they certainly would have to be talking about everybody, as I view the matter.

I want to also call the Court's attention, without taking up too much of the Court's time, that in the reply brief, at page 28, in the letter that came down from the Director of the Bureau of the Budget speaking for the President of the United States that appears in the archives and is referred in a footnote, referring to section 208, the italicized language, the complaint was there made as it was made by the Justice Department and by Interior, that if that provision is left in the Appropriations Act, national parks, Indian reservations, power installations, military and Atomic Energy establishments, and irrigation projects are only a few of the interests that would be affected by the McCarran Amendment. They all knew what it was intended to cover.

QUESTION: Mr. Balcomb, could I ask you, what about

the Indian tribes and Indians within reservations who have fee title to their property?

MR. BALCOMB: I believe those are primarily the Pueblos in New Mexico and most of those cases have been in Federal court.

QUESTION: Do you think that the State courts have jurisdiction? Could you name the Indian tribes and individual Indians as defendants in your State proceeding?

MR. BALCOMB: In my State court State proceeding? There are two tribes. (Inaudible) in the reservation water --

QUESTION: Have you named them as defendants?

MR. BALCOMB: The Southern Utes and the -- we haven't done anything except serve the United States and ask them to come forward and lay out their claims like anybody else.

QUESTION: You think that by binding the United States you bind the tribes.

MR. BALCOMB: They have the title, like they have the title to the forest and title to the military reservations.

QUESTION: Yes, but how about -- what would you think if there were patented property inside the reservations?

MR. BALCOMB: If they had some patented property, as I say that might compare to the Pueblo situation.

QUESTION: What about it then?

MR. BALCOMB: I don't know if that is true or not, but

if it is true, the Government has to name them, too.

QUESTION: How do you bind them, though? How do you bind them?

MR. BALCOMB: Our proceeding?

QUESTION: How do you bind the Indian who owns some property and owns some water in connection with it, or they think they do?

MR. BALCOMB: If McCarran is applicable, you bind them by serving the United States, your Honor, I believe.

QUESTION: The old Candelaria case, in 271 U.S. says that the only way to bind the Indians is by serving the Government, I believe. It's not res judicata in a later action by the Government on behalf of the Indians if you haven't served the United States the first time.

QUESTION: That may be so, but my question is: Do you bind the Indians by serving the United States?

MR. BALCOMB: Yes, sir.

QUESTION: You hope.

MR. BALCOMB: The last thing I want to call to is the recitation, everybody has recited it, including Mr. Justice Douglas in Eagle County, and everybody seems to [illegible] attempt[illegible] to ignore it when they discuss what adjudication is. It's at page 5 of our reply brief, it comes out of the Senate report on the McCarran Amendment, and it says, quote, leaving part of it out:

"...in a suit wherein it is necessary to adjudicate all of the rights of the various owners on a given stream. This is so because unless all of the parties owning or in the process of acquiring water rights on a particular stream can be joined as parties defendant, any subsequent decree would be of little value."

In other words, the McCarran Amendment would be out the window.

Thank you very much.

MR. CHIEF JUSTICE BURGER: Thank you, gentlemen.

The case is submitted.

[Whereupon, at 2:45 p.m., the argument in the above-entitled matter was concluded.]