How Big Is Big - The Scope of Water Rights Suits under the McCarran Amendment

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INTRODUCTION

The federal government claims vast quantities of water in connection with the national forests and parks, Indian reservations, and other land holdings in the Western states.¹ As a result of this massive federal presence, almost any comprehensive allocation of water resources in the West must involve the United States' water claims. Recognizing this reality, in 1952 Congress enacted the McCarran Amendment,² which authorizes suits against the United States to determine the water rights of all parties claiming water from “a river system or other source.”³ Since

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¹ See PUBLIC LAND LAW REVIEW COMMISSION, ONE THIRD OF THE NATION'S LAND 141-55 (1970). This report noted:

Federal lands are the source of most of the water in the 11 coterminous western states, providing approximately 61 percent of the total natural runoff occurring in the region. Most of this runoff comes from land withdrawn or reserved for specific purposes. Forest Service and National Park Service reservations contribute about 88 and 8 percent, respectively, of the runoff from public lands and more than 59 percent of the total yield from all lands of those states. Other public lands, such as the vast acreages administered by the Bureau of Land Management, do not contribute much to the overall yield of western streams, but are so situated that they influence water quality.

Id. at 141; see also WATER RESOURCES COUNCIL, THE NATION'S WATER RESOURCES 1-6, 3-3-1 (1968).

² The amendment was enacted as § 208 of the Department of Justice Appropriation Act, 1953, ch. 495, 66 Stat. 556, 560 (codified at 43 U.S.C. § 666 (1982)).

³ The McCarran Amendment reads:
enactment of the McCarran Amendment, the United States has been joined as a defendant in a number of "general stream adjudications" throughout the Western states.4

Water rights suits conducted under the McCarran Amendment raise a number of issues concerning how broad the scope of the adjudication must be for jurisdiction over federal water rights to attach. These issues include the hydrological reach of the suits, the parties who must be joined, and the water interests that must be determined. In view of the ubiquitous nature of federal water rights, and of the expense and time needed to conduct comprehensive water rights adjudications, these questions are of vital concern in the West.

This Article begins by describing the basic mechanics of Western water law and general stream adjudications conducted pursuant to the McCarran Amendment, including an overview of five Western states' approaches to the comprehensiveness issue. The Article then examines the issue of how comprehensive proceedings under the Amendment must be for jurisdiction over federal water rights to attach. The Article first addresses hydrological comprehensiveness, i.e., the McCarran Amendment's requirement that an adjudication embrace "a river system or other source."5 Second, the Article analyzes the extent to which certain classes of water uses must be included in the adjudication. Finally, the Article examines whether the unique navigation servitude of the United States is the kind of water use that Congress intended to subject to judicial determination under the McCarran Amendment. In short, the Article argues that, with carefully marked exceptions, the McCarran Amendment's mandate of all-inclusiveness is a necessary condition to the

(a) Joinder of the United States as defendant; costs
Consent is given to join the United States as a defendant in any suit (1) for the adjudication of rights to the use of water of a river system or other source, or (2) for the administration of such rights, where it appears that the United States is the owner of or is in the process of acquiring water rights by appropriation under State law, by purchase, by exchange, or otherwise, and the United States is a necessary party to such suit. The United States, when a party to any such suit, shall (1) be deemed to have waived any right to plead that the State laws are inapplicable or that the United States is not amenable thereto by reason of its sovereignty, and (2) shall be subject to the judgments, orders, and decrees of the court having jurisdiction, and may obtain review thereof, in the same manner and to the same extent as a private individual under like circumstances: Provided, that no judgment for costs shall be entered against the United States in any such suit.

(b) Service of summons
Summons or other process in any such suit shall be served upon the Attorney General or his designated representative.

(c) Joinder in suits involving use of interstate streams by State
Nothing in this section shall be construed as authorizing the joinder of the United States in any suit or controversy in the Supreme Court of the United States involving the right of States to the use of the water of any interstate stream.


4. As used in this Article, a general stream adjudication means a proceeding in which the inter sese rights of all claimants to a water source are judicially ascertained.

statute's consent to suit against the United States and that this mandate should be vigorously policed by the courts.

I

APPROPRIATIVE RIGHTS, RESERVED RIGHTS, AND GENERAL STREAM ADJUDICATIONS UNDER THE MCCARRAN AMENDMENT

A. Appropriative Versus Reserved Water Rights

1. Appropriative Water Rights

To understand why the McCarran Amendment was necessary and how it affects water rights in the Western United States requires understanding how these rights are acquired and determined. In seventeen Western states, the acquisition of the right to use water is principally governed by the appropriation doctrine, which requires the application of water to some beneficial use. The main early uses of water in the arid West were irrigation, beginning with the Spanish colonists of the Southwest, and mining in California.

Since the nineteenth century, when the appropriation doctrine took shape, courts in the Western states have recognized the concept of beneficial use as the core of the appropriative water right. Beneficial use usually is defined as the use of such a quantity of water, when reasonable intelligence and reasonable diligence are exercised in its application for a lawful purpose, as is economically necessary for the use. The application of water to soil for irrigation remains the most common beneficial use under the appropriation doctrine, although mining, domestic uses, power generation, and other functions are also recognized.

Two of the most important features of appropriative rights are: (1) they may be abandoned or forfeited through non-use; and (2) their

6. The 17 Western states are: Alaska, Arizona, California, Colorado, Idaho, Montana, Nebraska, Nevada, New Mexico, North Dakota, Oklahoma, Oregon, South Dakota, Texas, Utah, Washington, and Wyoming.
8. Id. § 15.1.
9. See Weaver v. Eureka Lake Co., 15 Cal. 271, 275 (1860); Coffin v. Left Hand Ditch Co., 6 Colo. 443, 447 (1882); Creek v. Bozeman Water Works Co., 15 Mont. 121, 128, 38 P. 459, 460-61 (1894); Barnes v. Sabron, 10 Nev. 217, 233 (1875). The beneficial use concept has been embodied in the constitutions or statutes of all, or nearly all, Western states. See, e.g., COLO. CONST. art. XVI, § 6; N.M. STAT. ANN. § 75-5-1 (1978).
10. 1 R. CLARK, supra note 7, § 19.2, at 86.
11. Id. § 19.3, at 89.
12. See 5 R. CLARK, supra note 7, § 413.1 (1972). Strictly speaking, abandonment requires a showing of intentional relinquishment while forfeiture does not require a showing of intent. Id. On the distinction between abandonment and forfeiture of an appropriative water right, see generally In re Drainage Area of Bear River in Rich County, 12 Utah 2d 1, 361 P.2d 407 (1961).
relation to other water rights is set by a priority date, i.e. the date when the water was first applied to a beneficial use.\textsuperscript{13} This priority entitles the water right owner to a certain amount of water even where the flow is insufficient for the water needs of others whose priority dates are junior to the first user.\textsuperscript{14} In most Western states, priority is fixed at the time an application is filed for a permit. Some states, however, determine priority by the first substantial act that leads to diversion and use of water.\textsuperscript{15} The significance of priority is summed up by the maxim “[f]irst in time is first in right.”\textsuperscript{16}

In sum, an appropriative water right is a creature of state law, founded on the concept of beneficial use and including a priority date based on actual use subject to divestment as a result of non-use. Actual use is the hallmark of an appropriative right, determining both the extent of the right and its priority in relation to other water claimants.

2. Reserved Water Rights

In contrast to appropriative rights, reserved rights are based upon federal law. They do not derive from actual use, but instead are tied to an intent (usually implied from historical materials) to reserve water for existing and future uses.\textsuperscript{17} Under the reserved rights doctrine, when the United States withdraws its land from the public domain and reserves it for a particular federal purpose, such as a national forest, the federal government, by implication, also reserves unappropriated water to the extent necessary to accomplish the purpose of the reservation.\textsuperscript{18} In this manner the United States acquires a reserved right in unappropriated water, which vests on the date of the reservation and is superior to the rights of later appropriators.\textsuperscript{19} Significantly, and in contrast to appropriative rights, reserved rights are not lost through non-use; they vest on the date of the reservation.\textsuperscript{20} The doctrine of reserved water rights is based

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\item 13. 1 R. CLARK, supra note 7, § 51.6.
\item 14. 5 id. § 410.1, at 118 (1972); see also Gunnison-Fayette Canal Co. v. Gunnison Irrig. Co., 22 Utah 2d 45, 448 P.2d 707 (1968).
\item 15. 1 R. CLARK, supra note 7, § 51.6. Although, as noted in the text, the appropriative rights system is the preeminent means of allocating water under state law in the West, under the “California Doctrine” in effect in varying forms in nine Western states, both riparian and appropriative rights are recognized. 5 id. § 401.2(A), at 11 (1972). Under the riparian doctrine, owners of land adjacent to sources of water are entitled to the reasonable use of the ordinary flow of water along or through their lands. 1 id. § 51.2–3 (1967). The western states using this “mixed” system are California, Kansas, Nebraska, North Dakota, Oklahoma, Oregon, South Dakota, Texas, and Washington. 5 id. § 420, at 322 n.3 (1972).
\item 16. 5 id. § 410.1, at 118 (1972).
\item 19. Id.
\item 20. Arizona, 373 U.S. at 600.
\end{itemize}
on the commerce clause,\textsuperscript{21} which permits federal regulation of navigable waters, and the property clause,\textsuperscript{22} which gives Congress the power to regulate federal lands.\textsuperscript{23} In addition to national forests, the reserved rights doctrine applies to Indian reservations and other federal enclaves. It includes water rights in navigable and non-navigable water sources.\textsuperscript{24} The potential amount of federal reserved rights in the West is, therefore, formidable.\textsuperscript{25}

\textbf{B. The McCarran Amendment}

With federal lands accounting for about sixty-one percent of the watershed in the eleven coterminous Western states,\textsuperscript{26} conflicts between federal reserved rights and state-granted appropriative water rights are inevitable. One of Congress' major purposes in enacting the McCarran Amendment was to allow federal rights to be determined along with state rights and, thereby, to achieve an equitable and orderly allocation of water in times of shortage.\textsuperscript{27} Recognizing this, courts have interpreted

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  \item \textsuperscript{21} U.S. CONST. art. I, § 8, cl. 3.
  \item \textsuperscript{22} Id. art. IV, § 3, cl. 2.
  \item \textsuperscript{23} Cappaert, 426 U.S. at 138.
  \item \textsuperscript{24} Id.
  \item \textsuperscript{25} See supra note 1. For example, the Supreme Court decree in \textit{Arizona} awarded Indian reservations located along the Colorado River approximately 900,000 annual acre-feet and over 79,000 acre-feet per year for non-Indian federal enclaves, including the Havasu Lake National Wildlife Refuge, the Imperial National Wildlife Refuge, and the Lake Mead National Recreation Area. \textit{Arizona}, 376 U.S. at 344-46.
  \item \textsuperscript{26} City and County of Denver, 656 P.2d at 8-9. The Senate Report on S. 18, which, with amendments, ultimately became the McCarran Amendment, contains this statement of the Amendment's objective:
    
    In the administration of and the adjudication of water rights under State laws the State courts are vested with the jurisdiction necessary for the proper and efficient disposition thereof, and by reason of the interlocking of adjudicated rights on any stream system, any order or action affecting one right affects all such rights. Accordingly, all water users on a stream, in practically every case, are interested and necessary parties to any court proceedings. It is apparent that if any water user claiming to hold such right by reason of the ownership thereof by the United States or any of its departments is permitted to claim immunity from suit in, or orders of, a State court, such claims could materially interfere with the lawful and equitable use of water for beneficial use by the other water users who are amenable to and bound by the decrees and orders of State courts. Unless Congress has removed such immunity by statutory enactment, the bar of immunity from suit still remains and any judg-
the waiver of sovereign immunity in the Amendment to encompass determinations of reserved water rights, including rights held on behalf of Indian tribes. 

In enacting the McCarran Amendment to remove the immunity of the United States from state quantification of federal water rights, Congress was concerned with avoiding "piecemeal adjudications," i.e. separate suits to determine the water interests of parties using water from the same source. In pursuing these purposes, Congress was aware of the potential for conflict if the United States sought to have its own water rights determined separately from other interests.

1. Jurisdiction over McCarran Amendment Proceedings

Much of the litigation surrounding the McCarran Amendment in federal courts has focused on which forum—federal or state—is appropriate for the general stream adjudications contemplated by the statute.


30. Despite the statement made in the text regarding quantification, at least one court has exempted the United States from quantifying a certain type of federal reserved right. In Avondale Irrig. Dist. v. North Idaho Properties, Inc., 99 Idaho 30, 39-41, 577 P.2d 9, 18-20 (1978), the court ruled that, in a state court water adjudication, the United States could claim the entire natural flow of certain streams to serve National Forest purposes without quantifying its claim in cubic feet per second or acre-feet, even though a state statute required such a numerical determination. The Avondale court grounded its decision on the supremacy of the reserved rights principle and on the possibility that application of the state law requirement "might result in a change in the nature and scope of the water rights reserved to the United States pursuant to federal law." Id. at 40, 577 P.2d at 19.


32. See Departments of State, Justice, Commerce and the Judiciary Appropriations for 1953: Hearings on H.R. 7289 Before the Subcommittee of the Committee on Appropriations, 82nd Cong., 2d Sess. 1349 (1952) (testimony of Phillip Perlman, Solicitor General); Adjudication of Water Rights: Hearings on S. 18 Before a Subcommittee of the Committee on the Judiciary, 82nd Cong., 1st Sess. passim (1951) [hereinafter Hearings: Adjudication of Water Rights].

33. The battle over which forum—state or federal—should determine federal and Indian water rights had strong policy overtones. On the federal and Indian side, there was a concern among some that state courts might abridge federal interests. This concern was not without historical underpinnings. See, e.g., McClanahan v. Arizona State Tax Comm'n, 411 U.S. 164, 168 (1978) (quoting Rice v. Olson, 324 U.S. 786, 789 (1945) ("[T]he policy of leaving Indians free from state jurisdiction and control is deeply rooted in the Nation's history"); see also infra note 46. On the state side, there was a desire to undertake general stream adjudications in state court to address state concerns. See infra text accompanying notes 50-52.
In *Colorado River Water Conservation District v. United States*, the United States filed suit in federal court in Colorado seeking a determination of water rights claimed by the United States on its own behalf and on behalf of certain Indian tribes. Shortly thereafter, one of the defendants attempted to join the United States under the McCarran Amendment in state court water proceedings. The Supreme Court held that the McCarran Amendment had not divested the federal courts of jurisdiction; rather, the effect of the Amendment was to allow concurrent state jurisdiction over controversies involving federal water rights. However, the Court also ruled against exercise of concurrent federal jurisdiction, deciding that the federal water rights should be resolved in state court proceedings.

Clearly, the Court's statement in *Colorado River* that concurrent jurisdiction exists under the McCarran Amendment is of limited value to those seeking federal jurisdiction. However, *Colorado River* does illustrate the tension between Congress' consent to jurisdiction in both state and federal courts on the one hand and its desire to avoid a multiplicity of water rights adjudications on the other. According to the Court, the decisive factor militating against maintaining the United States' action in federal court was the policy of the McCarran Amendment of avoiding piecemeal adjudications of water rights.

The latest Supreme Court pronouncement on general stream adjudications under the McCarran Amendment is *Arizona v. San Carlos Apache Tribe*, in which the Court extended the rationale of *Colorado River* by deciding that the federal district courts in Montana and Arizona properly declined to adjudicate Indian reserved water rights when the United States was sued concurrently in state court proceedings encompassing those same rights.

Although the *San Carlos Apache Tribe* decision generally was

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34. 424 U.S. 800 (1976).
35. *Id.* at 804-06. The Colorado state court proceedings were maintained pursuant to the Water Rights Determination and Administration Act, COLO. REV. STAT. §§ 37-92-101 to 37-92-602 (1973 & Supp. 1987).
36. The federal courts have jurisdiction in cases where the United States is plaintiff. 28 U.S.C. § 1345 (1982).
38. *Id.* at 817-20. Among the factors that the Court considered were the avoidance of piecemeal adjudication and:

(a) the apparent absence of any proceedings in the District Court, other than the filing of the complaint, prior to the motion to dismiss . . . (b) the extensive involvement of state water rights occasioned by this suit naming 1,000 defendants, (c) the 300-mile distance between the District Court in Denver and the court in *[Water] Division 7*, and (d) the existing participation by the Government in *[Water] Division 4, 5, and 6 proceedings*

*Id.* at 820.
39. *Id.* at 819-20.
41. The Arizona state court proceedings were conducted pursuant to *ARIZ. REV. STAT.*
viewed as a victory for proponents of state court adjudication of federal water rights, the opinion dispensed a warning to the state courts that they could lose their jurisdiction to determine federal rights if their procedures were not fitted to the task of conducting a McCarran Amendment general stream adjudication, or if they lacked jurisdiction to hear particular classes of federal water rights. Significantly, the Court noted that there remained in the cases before the Court challenges "to the adequacy . . . [of the Arizona and Montana proceedings] to adjudicate some or all of the rights asserted in the federal suit[s]." The Court pointedly noted that the federal courts in Montana and Arizona "should, if the need arises, allow whatever amendment of pleadings not prejudicial to other parties [that] may be necessary to preserve in federal court those issues as to which the state forum lacks jurisdiction or is inadequate."

Thus, although the Supreme Court in *San Carlos Apache Tribe* gave a green light to state court adjudications of federal water rights under the McCarran Amendment, at the same time the Court put the states on notice that shortcomings in their adjudication schemes could land federal water rights back in a federal forum. Perhaps the major shortcoming

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*San Carlos Apache Tribe* also held that the disclaimers of jurisdiction over Indian lands contained in the Arizona and Montana Enabling Acts, Act of June 20, 1910, ch. 310, 36 Stat. 577 (Arizona); Act of Feb. 22, 1889, ch. 180, 25 Stat. 676 (Montana), did not disable the courts of those states from determining Indian water rights. 463 U.S. at 563-65.


43. The Court in *San Carlos Apache Tribe* did not resolve whether, as a matter of state constitutional law, Montana and Arizona had jurisdiction over Indian property, including rights to water; the Court deferred to the state supreme courts on this issue. 463 U.S. at 561. The state supreme courts subsequently held, to no one's great surprise, that their constitutions presented no bar to adjudication of Indian water interests. See United States v. Superior Court, Maricopa County, 144 Ariz. 265, 273-77, 697 P.2d 658, 666-70 (1985); *State ex rel. Greely v. Confederated Salish & Kootenai Tribes of the Flathead Reservation*, 712 P.2d 754, 758-62 (Mont. 1985).

44. *San Carlos Apache Tribe*, 463 U.S. at 570 n.20.

45. *Id*. The Court also left open the question of whether the proper procedure in such cases was to stay the federal suit or to dismiss the suit without prejudice. *San Carlos Apache Tribe*, 463 U.S. at 570 n.21. On remand, the Ninth Circuit chose to stay the suits. *Northern Cheyenne Tribe v. Adsit*, 721 F.2d 1187 (9th Cir. 1983).

In the wake of the *San Carlos Apache Tribe* decision, both the Arizona and Montana Supreme Courts rejected challenges to the facial adequacy of the two states' respective water adjudication statutes. *See Superior Court, Maricopa County*, 144 Ariz. at 278-81, 697 P.2d at 671-74; *Greely*, 712 P.2d at 762-68. Neither of these decisions pronounced whether the state adjudication statutes were adequate as applied. See, e.g., *Greely*, 712 P.2d at 768.

46. In a related vein, the Court in *San Carlos Apache Tribe* emphasized that any state court decision alleged to abridge Indian reserved water rights would, if brought for review before the Supreme Court, receive "a particularized and exacting scrutiny commensurate with the powerful federal interest in safeguarding those rights from state encroachment." *San Carlos Apache Tribe*, 463 U.S. at 571. It is interesting to speculate whether this statement amounts to a promise by the Court to grant certiorari if Indian reserved rights allegedly are abridged.
troubling the court was the failure of water adjudications to encompass enough water rights, i.e., that piecemeal adjudications would result.\textsuperscript{47}

The United States presently is a defendant in several general stream adjudications throughout the West, most of which are pending in state courts.\textsuperscript{48} The comprehensiveness issues canvassed below lurk in several of these suits and, as the Supreme Court warned in \textit{San Carlos Apache Tribe}, could result in a loss of jurisdiction by the adjudicating state courts over the United States.

\textbf{C. The Comprehensiveness of State Water Adjudication Statutes}

Western states have enacted statutes enabling, and in some cases mandating, general stream adjudications. Some of the resulting suits are of daunting scope.\textsuperscript{49} Given the expense and trouble of undertaking these complex proceedings, the question arises as to why a state would ever bring a general stream adjudication.

For one thing, many states' records of water use entitlements are incomplete and otherwise unreliable. Ideally, a general stream adjudication ranks and quantifies all rights to a stream, enabling the state to administer water rights efficiently and effectively.\textsuperscript{50} A related reason for mounting general stream suits (viewed with suspicion by some) is to quantify the many undetermined federal reserved rights that hang over the heads of water users whose claims are based on state law.\textsuperscript{51} Finally, states may hope to gain an advantage over other states in future Supreme Court original jurisdiction litigation for the apportionment of interstate streams.\textsuperscript{52}

Most Western states have general stream adjudication schemes that,


\textsuperscript{48} Currently, the United States has been, or may soon be, joined in water rights adjudications under the McCarran Amendment in Arizona, Colorado, Idaho, Montana, Nevada, New Mexico, Oregon, Utah, Washington, and Wyoming. See, e.g., \textit{San Carlos Apache Tribe}, 463 U.S. at 564; \textit{Colorado River}, 424 U.S. at 807-13.

\textsuperscript{49} See, for example, the adjudications described infra note 136.

\textsuperscript{50} For an account of the problem of uncertain water rights in the Montana context, see Stone, \textit{Are There Any Adjudicated Streams in Montana?}, 19 MONT. L. REV. 19 (1957).

\textsuperscript{51} This reason has been acknowledged by the states themselves. See, e.g., Brief for the State of Arizona \textit{et al.} at 6, Arizona v. San Carlos Apache Tribe, 463 U.S. 545 (1983) (No. 81-2147).

to varying degrees, are founded upon a permit system administered by a state administrative agency. In these states, a state agency usually lays the groundwork for the adjudication by conducting some sort of investigation into existing water uses and rights. The investigation is followed by court proceedings in which water rights are judicially confirmed. The only exception to this rule is Colorado, where water rights are perfected by making a claim and obtaining a decreed right from a court. Thus, most Western states' water rights systems allow all water users to exploit the resource under a permit issued by the state, using general stream adjudications to confirm and rank all of these users' inter sese water rights.

There are considerable differences in the reach of state general stream adjudications. Some states attempt to determine virtually every imaginable water right within the state's boundaries, while others expressly exclude whole categories of water interests, including some that are essential to the determination of inter sese rights. The remainder of this section illustrates these different approaches.


The terms of the McCarran Amendment require that a general stream adjudication be conducted by a court, not by an administrative agency. The Amendment states:

[i]consent is given to join the United States as a defendant in any suit (1) for the adjudication of rights... where... the United States is a necessary party to such suit. The United States, when a party to any such suit... shall be subject to the judgments, orders, and decrees of the court having jurisdiction, and may obtain review thereof... [provided that] no judgment for costs shall be entered against the United States in any such suit.


Nonetheless, as noted in the text, the initial stages of a general stream adjudication are often managed by a state administrative agency, which may be necessary given the technical expertise required to investigate water right claims. For example, under the Oregon system, the Director of the Department of Water Resources investigates claims, holds hearings, and makes a determination of all rights, which is filed in a circuit court where interested persons may file exceptions and where a final court decree is entered, subject to appellate review. See Or. Rev. Stat. § 539.010-150 (1987). See generally F. Trelease & G. Gould, Cases and Materials on Water Law 173 (4th ed. 1986). It is not clear whether the McCarran Amendment consents to joining the United States in the proceedings before the Director of Water Resources, a nonjudicial forum.

55. C. Meyers, supra note 53, at 407-08.

1. Arizona

Arizona's general adjudication statute provides for the judicial determination of the "rights of all persons to use water in any river system and source." The critical phrase "river system and source" is defined as "all water appropriable under § 45-141 and all water subject to claims based upon federal law." Thus, reference must be made to section 45-141 and federal water law to divine the scope of the adjudication.

The Arizona statutory definition of appropriable waters, while fairly broad in its coverage, appears to exclude at least one variety of appropriable water: percolating groundwater. Despite this exclusion of state law rights in percolating groundwater, identical claims based on reserved rights of the United States would be covered by the Arizona general stream adjudication provisions.

Arizona's statute gives the Director of Water Resources a substantial role in determining the scope of adjudications. It requires the Director to "assist the court in determining the scope of adjudication by recommending portions of the river, its tributaries and any other relevant sources subject to the adjudication." It also commands the Director to

58. Id. § 45-251, subd. 1; see also id. § 45-252, subd. A. At present Arizona is undertaking two large adjudications under this statute. The most massive is In re the General Adjudication of All Rights to Use Water in the Gila River System and Source, Nos. W-1 to W-4, Consol. (Ariz. Super. Ct. Sept. 9, 1988) [hereinafter In re Gila River] (order regarding percolating groundwater), an action to determine rights to water within the watersheds of the Salt, Verde, Upper Gila, and San Pedro rivers. Approximately one million potential claimants have been notified in this suit. The state is also attempting to adjudicate the Little Colorado River watershed, which includes a large portion of the vast Navajo Indian Reservation, in In re the General Adjudication of All Rights to Use Water in the Little Colorado River System and Source, No. 6417 (Ariz. Super. Ct., Aug. 15, 1988) (ordering the Arizona Department of Water Resources to prepare a hydrographic survey report for both basins).
60. The Arizona water code defines appropriable water as "[t]he waters of all sources, flowing in streams, canyons, ravines or other natural channels, or in definite underground channels, whether perennial or intermittent, flood, waste or surplus water, and of lakes, ponds and springs on the surface." Id. § 45-141, subd. A. Under Arizona law, the only underground waters subject to appropriation are subterranean waters with defined bed and banks, and sub-flow (i.e., underground water that is hydrologically connected to a surface stream and that, when pumped, will appreciably diminish the flow of the stream). Maricopa County Mun. Water Conservation Dist. Number One v. Southwest Cotton Co., 39 Ariz. 65, 95-96, 4 P.2d 369, 380 (1931). These two categories do not include percolating groundwater. Percolating groundwater is water that passes through the ground beneath the surface of the earth without a definite channel, and without forming a part of the body or flow of any watercourse, surface or underground. BLACK'S LAW DICTIONARY 1427 (5th ed. 1979) ("percolating waters").
61. ARIZ. REV. STAT. ANN. § 45-253, subd. 2 (1987). The Arizona Supreme Court has limited the Director's discretion under the statute by stating that "[t]he director's duties [under the Arizona general adjudication scheme] are confined to factual analysis and administrative aid." United States v. Superior Court, Maricopa County, 144 Ariz. 265, 280, 697 P.2d 658, 673 (1985). This would appear to prevent the director from making legal determinations in the first instance concerning the proper scope of the action in light of the McCarran Amendment.
identify and serve notice of the proceedings on "all reasonably identifi-
able potential claimants," a directive that presumably includes both
those applying for and those holding permits to appropriate water.62

2. Colorado

Colorado's system of water adjudication is unique; the adjudication
process substitutes for a permit system.63 Instead of applying to a state
agency for a permit, persons appropriate water resources first and then
seek a "determination of a water right" in court.64 Colorado defines a
water right as a right to use water "by reason of the appropriation of the
same."65 The state is divided into seven water divisions and each division
has a water judge who considers all "water matters."66

One feature of Colorado's present and past adjudicatory system that
has generated controversy under the McCarran Amendment is the sup-
plemental nature of the proceedings. Monthly "resumes" of water rights
applications are published and sent to interested persons, those persons
are given the opportunity to object to the applications, and the applica-
tions are adjudicated by a referee and ultimately by a water judge.67 The
referee only rules on applications filed in the previous month,68 and the
water judge reviews the referee's protested rulings.69 The division engi-
neer publishes a tabulation of all water rights in the division every four
years and the tabulation may be protested in hearings before the water
judge.70

The United States challenged the Colorado system of continuous ad-
judication as it is conducted under the current adjudication statute.71 In
United States v. District Court, Water Division No. 5,72 the United States
claimed that because the adjudication provided by the Act did not en-
compass all rights on a stream, Colorado could not invoke the McCarran
Amendment's consent to adjudication of federal water rights. The

63. See C. MEYERS, supra note 53, at 407-08. The Colorado Water Right Determination
and Administration Act of 1969 governs McCarran proceedings. See COLO. REV. STAT.
65. Id. § 37-92-103(12) (1973). Under Colorado law, non-tributary groundwater is not
appropriable. Id. § 37-92-102(1). Non-tributary groundwater is underground water that is
not hydrologically connected, or is minimally connected, to a surface stream. Id. § 37-90-
103(10.5) (Supp. 1987). Nonetheless, the determination of rights to such water is a "water
matter" over which the water courts have exclusive jurisdiction. Southwestern Dev. Co. v.
68. Id. § 37-92-302(3)(a).
69. Id. § 37-92-304 (Supp. 1987).
71. Id. §§ 37-92-101 to 37-92-602.
72. 401 U.S. 527 (1971).
Supreme Court dismissed these objections, stating that the Colorado procedure was sufficient because it eventually reached all claims, even if on a month-by-month basis.73

3. Idaho

Idaho's general adjudication scheme is probably the most painstaking attempt to conform to the commands of the McCarran Amendment, but it still excludes significant water uses from its proceedings.74 The state's Director of Water Resources may initiate a general adjudication of "any water system" in the state,75 and is directed to begin the first steps of adjudicating "within the terms of the McCarran Amendment... the water rights of the Snake River basin."76

In line with this directive, Idaho currently is conducting an adjudication of the Snake River system, and issues of how comprehensive those proceedings must be have been the focus of litigation.77 The statement of purpose of the Snake River adjudication statute suggests an intent to conduct as comprehensive a proceeding as possible.78 However, this declaration goes on to exclude rights from the adjudication. Under the Idaho plan, the court, on petition of the Director of Water Resources, may exclude from the action (1) that part of the Snake River main stem79 forming the boundary between Idaho and the states of Oregon and Washington (i.e. the lower Snake River),80 and (2) water rights for domestic and stock watering uses.81 The statute also directs a third exclusion: that previously adjudicated tributaries of the lower Snake River be omitted from the action "unless the United States, or other parties whose

73. Id. at 529. Similarly, in United States v. District Court for Eagle County, 401 U.S. 520 (1971), the United States argued that the supplemental adjudication process was not sufficient for a McCarran proceeding because only those who claimed water rights acquired since the last adjudication of that water district were before the court. The earliest priority date decreed in such an adjudication must, therefore, be later than the last priority date decreed in the preceding adjudication. Id. at 525. The Supreme Court rejected this position as "extremely technical," and stated that "the whole community of claims is involved" in the proceeding. Id.


75. Id. § 42-1406(2) (Supp. 1988).

76. Id. § 42-1406A(1).

77. The provision declares that "[e]ffective management in the public interest of the waters of the Snake River basin requires that a comprehensive determination of the nature, extent and priority of the rights of all users of surface and groundwater from that system be determined." Id.; see also id. § 42-1401A(6) (defining "general adjudication"), (13) (defining "water system" as incorporating the term "river system or other source" as used in the McCarran Amendment).


79. The main stem is the main channel of a stream.

80. See IDAHO CODE § 42-1406A(1)(a), (3) (Supp. 1988).

81. See id. §§ 42-1406A(1)(c), (2)(d), 1408(4)(d), 1420(1)(a).
consent is necessary, refuse to consent to the jurisdiction of the district court to adjudicate all federal or Indian water rights claims pursuant to the McCarran Amendment."\textsuperscript{82}

In addition to these exceptions for the Snake River, Idaho permits other water rights to avoid general stream adjudications, the most salient of which are unperfected appropriative rights held under the state's permit system.\textsuperscript{83} However, Idaho has taken pains to harmonize its permitting system with general stream suits. All claimants to water rights based on an application or permit on the date the adjudication commences need not file a claim unless the water resources director requires otherwise.\textsuperscript{84} If a permit application is approved during the initial stages of an adjudication, the permit holder must be notified of the proceedings and allowed to file a claim therein.\textsuperscript{85} Actual notice of the general adjudication is widely disseminated, making it likely that permit applicants and holders will learn of the action.\textsuperscript{86}

The Idaho adjudication law also exempts rights based upon federal law from the claims-filing requirement if they have priority dates later than the onset of the adjudication proceeding.\textsuperscript{87} Idaho provides supplemental adjudications for persons acquiring water interests with a priority date subsequent to the decree in the general stream suit, and also for claimants whose uses were exempt from filing claims in the earlier adjudication.\textsuperscript{88}

4. Montana

At first glance, the Water Use Act provisions governing Montana's ambitious statewide stream adjudication appear to be completely comprehensive, requiring "all persons claiming a right" within the state to

\textsuperscript{82} Id. § 42-1406A(3)(b). The three exclusions of § 42-1406A noted in the text were the subject of In re Snake River. See infra notes 120-36 and accompanying text.

\textsuperscript{83} IDAHO CODE § 42-1421(1) (Supp. 1988). The Idaho statute expressly safeguards water rights claims and permit applications or permits from being forfeited for not filing a claim in the general adjudication. Id. § 42-1420(b), (c).

\textsuperscript{84} The Director may allow each holder of a permit or license to appropriate water from the stream system being adjudicated, who filed proof of beneficial use after the adjudication began, to file a notice of claim. Id. § 42-1409(9).

\textsuperscript{85} Id. § 42-1421(1). Licensees (i.e. persons possessing perfected appropriative rights under the permit code), whose licenses predate the installation of the adjudication, must file a claim. Id. § 42-1421(2). Section 42-1421 also contains additional measures for meshing the permit system with an ongoing adjudication; e.g., decrees of rights in the suit are conditioned on a later showing of beneficial uses under the permitting statutes. Id. § 42-1421(3); see also id. § 42-1421(4) (Director of Water Resources retains jurisdiction over the permits and licenses involved in the water rights suit).

\textsuperscript{86} See id. § 42-1408A, especially § 1408A(2) (requiring notice by mail to all property owners within boundaries of the water system at issue).

\textsuperscript{87} Id. § 42-1420(1)(d).

\textsuperscript{88} Id. § 42-1405(2). Compare the latter provision with the Colorado system of supplemental adjudication, discussed supra notes 63-73 and accompanying text.
file a claim for the right according to statutorily mandated procedures. 89

On closer examination, however, it appears that Montana, wisely or not, has exempted certain categories of water interests from its adjudications. Only claims for "existing rights" must be filed, 90 and the latter term is defined as "a right to the use of water which would be protected under the law as it existed prior to July 1, 1973." 91 Thus, the adjudication excludes all rights that came into being after that date, regardless of their size or impact on other users. Furthermore, the statute expressly exempts claims for livestock and individual uses based on instream flow or groundwater sources, although such claims may be submitted voluntarily. 92 Although the Montana adjudication statute encompasses federal reserved rights, the actual determination of these rights is suspended while negotiations concerning the rights are conducted with the Montana Reserved Rights Compact Commission. 93

An elaborate permit system has been instituted for the post-July 1, 1973 rights excluded from the water right determination proceedings. 94 The Montana statute attempts to integrate general stream adjudications of pre-July 1, 1973 rights with the permitting system in several ways. Notice of an application for a permit may be given to interested persons, presumably including parties claiming pre-July 1, 1973 water rights in the same area in the general stream adjudication. 95 In addition, a permit issued prior to "a final determination of existing rights" in the general stream adjudication is merely provisional and "subject to that final determination." 96

90. Id. § 85-2-221.
91. Id. § 85-2-102(8).
92. Id. § 85-2-222. This provision also exempts from the filing requirements claims for rights in the Powder River Basin that were filed in previous water determination proceedings.
93. Id. § 85-2-217; see id. §§ 2-15-212, 85-2-701.
94. See id. §§ 85-2-301 to 85-2-331.
95. The Montana statute provides for publication of notice of a permit application in a newspaper of general circulation in the area of the source, as well as service by mail to certain persons (including appropriators, permit applicants, or permit holders) who, according to the records of the Department of Natural Resources and Conservation, may be affected by the proposed appropriation. Id. § 85-2-307(1)(a), (b). The Department is also given the discretion to serve notice of an application upon any state agency or other person the Department believes "may be interested in or affected by the proposed appropriation." Id. § 85-2-307(1)(c). The notice provisions do not appear to require service on all persons in the general stream adjudication who claim water from the source for which an appropriation is sought. Thus, at least with respect to notice, the Montana statute's meshing of the adjudication and permit regimes is imperfect.
96. Id. § 85-2-313. This section also warns that "[t]he amount of the appropriation granted in a provisional permit shall be reduced or modified where necessary to protect and guarantee existing rights determined in the final decree" resulting from the general stream proceedings. Id.; see also id. § 85-2-312(1) (making all permits subject to final determination of existing rights).
5. **Oregon**

The main Oregon statute dealing with water adjudications provides for the determination of certain rights in surface waters vesting prior to February 24, 1909. Adjudications begin with proceedings before the Director of Water Resources, whose determinations are reviewable in the Oregon circuit court. General stream adjudications under the principal Oregon adjudication statute exclude groundwater rights as well as any interests acquired in surface waters from February 24, 1909 to the present. Instead, another set of statutes provides for independent adjudication of the relative rights to groundwater resources, paralleling the procedures employed in the determination of pre-February 24, 1909 surface water rights.

There is no specific statutory authorization for a general stream adjudication of rights acquired in surface waters between February 24, 1909, and the present. However, surface water rights have been subject to a permit system since 1909. The Oregon permit regime generally

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97. OR. REV. STAT. § 539.010-240 (1987). Oregon law recognizes pre-February 24, 1909 rights based on the application of water to a beneficial use by riparian proprietors or their predecessors in interest "provided, such use has not been abandoned for a continuous period of two years." Id. § 539.010. The law also authorizes the Director of Water Resources, on his own motion or upon the petition of "one or more appropriators of surface water from any natural water course in this state," to make a determination of such pre-February 24, 1909 interests. Id. § 539.021.

Oregon also provides for general stream adjudications under provisions specifically relating to irrigation companies and federal reclamation projects. See id. § 541.080, .310, .320.

98. Id. § 539.021-150. In January 1976, the state formally initiated proceedings to determine water rights in the Klamath Basin. Personal communication, Margaret Crow, Staff Attorney, Lands and Natural Resources Division, United States Department of Justice, Washington, D.C. The state intends to adjudicate all pre-February 24, 1909 rights based upon state law as well as all federal and Indian reserved rights within the basin. Id. The federal courts have already decided some legal issues regarding the federal claims in the Klamath adjudication, including ruling that the Klamath Indian Tribe has an aboriginal right to water for purposes of hunting and fishing with a time immemorial priority date. United States v. Adair, 723 F.2d 1394, 1414 (9th Cir. 1983), cert. denied, 467 U.S. 1252 (1984).

99. OR. REV. STAT. § 537.670-695 (1987). Curiously, Oregon’s groundwater general adjudication statutes appear to provide for wider actual notice of the proceedings than the adjudication provisions for pre-February 24, 1909 surface rights. In the initial stages of a groundwater adjudication, the state’s Director of Water Resources must deliver actual notice to each person or public agency that the Director’s records indicate is "a claimant to a right to appropriate ground water of the ground water reservoir or any surface water within the area in which the ground water reservoir is located." Id. § 537.670(2) (emphasis added).

By contrast, in an adjudication of pre-February 24, 1909 surface rights, the Director is only required to give actual notice by registered mail to claimants of pre-February 24, 1909 appropriative rights who have filed registration statements under section 539.240 of the Oregon Revised Statutes. Id. § 539.040(2). Under this provision, many users of water from the surface stream at issue, or from groundwater hydrologically connected to that stream, are not required to receive actual notice of the adjudication. However, notice by publication is required in every county in which the stream is located. Id. § 539.040(1). Despite the foregoing, the state claims to have served actual notice of the proceedings on all riparian landowners and permit holders within the basin. Personal communication, Margaret Crow, supra note 98.

100. OR. REV. STAT. § 537.110-.330 (1987).
does not require notice of a permit application to be given to other persons claiming water from the source at issue, although the statutes prohibit appropriations that conflict with existing rights.101

The foregoing review of representative state adjudicatory systems shows that states have addressed the comprehensiveness issue in varying ways. Some states (e.g., Oregon) have omitted large categories of rights from adjudications, and at least one state (Colorado) has judicially purported to ascertain virtually every water right within its borders in one perpetual process. No doubt the variety of approaches to the task of determining water interests is a predictable and salutary effect of our federal system. Nonetheless, the McCarran Amendment, as explained below, requires state water suits to achieve a certain breadth to activate Congress' consent to suit against the United States.

II

THE SCOPE OF GENERAL STREAM ADJUDICATIONS

A. The Significance of Comprehensiveness to a General Stream Adjudication

The decisional law has settled that, in principle, the McCarran Amendment requires a "comprehensive" proceeding, ideally one in which all water claimants are joined and all rights to the use of water are finally decreed. In Dugan v. Rank,102 certain claimants to water rights along the San Joaquin River below Friant Dam in California sued the United States and other parties in federal court to enjoin the storage and diversion of water at the dam. The Supreme Court held that the McCarran Amendment did not authorize joinder of the United States as a party because not all claimants to water rights in the river were joined, no relief was requested as between claimants, and priorities among parties were not to be determined.103

In United States v. District Court for Eagle County,104 the Supreme Court held that the "all-inclusive" McCarran Amendment consented to the adjudication of federal reserved rights, even though the Amendment makes no express mention of such rights.105 In Colorado River Water Conservation District v. United States and San Carlos Apache Tribe, the Court acceded to state court jurisdiction over Indian reserved rights despite the time-honored role of the federal courts in safeguarding Indian

101. Id. § 537.160(1).
103. Id. at 617-19; accord Metropolitan Water Dist. v. United States, 830 F.2d 139, 144 (9th Cir. 1987), cert. granted, 108 S. Ct. 1572 (1988); Nevada v. United States, 279 F.2d 699, 701 (9th Cir. 1960); Miller v. Jennings, 243 F.2d 157, 159 (5th Cir. 1957), cert. denied, 355 U.S. 827 (1957); California v. United States, 235 F.2d 647, 663 (9th Cir. 1956).
104. 401 U.S. 520 (1971).
105. Id. at 524.
rights against the incursions of hostile state governments and their citizens. The Court was led to these extensions of state court jurisdiction by its finding that Congress intended the McCarran Amendment to foster the adjudication of all water rights in a water source, without exception. To exclude Indian rights from the statute's sweep would, in the Court's phrase, "enervate the Amendment's objective" of securing all-encompassing determinations.

B. The Practical Importance of Comprehensiveness

General water rights adjudications have practical consequences. The United States has often objected that certain adjudications were not inclusive enough to satisfy the McCarran Amendment. One may reasonably ask why the federal government should care whether a general stream adjudication reaches every water use from a stream system or other water source. Three reasons may explain the federal position.

Most importantly, a decree of the United States' water rights is reduced in value to the extent competing water users are not parties to the proceedings that resulted in the decree. If a class of water users is absent from the adjudication and therefore not bound by the decree's constraints, then the United States, or any other user whose rights are embodied in the decree, may have to pursue separate actions at considerable expense and trouble to enjoin members of that class from infringing on the right decreed. In this respect, a general stream adjudication is analogous to an action to quiet title to land. A judgment quieting title

107. San Carlos Apache Tribe, 463 U.S. at 564; Colorado River, 424 U.S. at 810.
110. For example, in In re Gila River, the United States contended that under the McCarran Amendment, all groundwater users must be included in the suit in those basins in which the federal government has claimed reserved rights to groundwater. United States' Response to the City of Chandler, et al. Motion to Exclude All Wells from the General Adjudication and the United States' Cross-Motion for Summary Judgment at 6, In re Gila River, Nos. W-1 to W-4, Consol. (Ariz. Super. Ct. Mar. 21, 1988).
111. See Nevada v. United States, 463 U.S. 110 (1983). In Nevada, the Supreme Court characterized the general stream adjudication that resulted in the Orr Ditch decree in Nevada, United States v. Orr Ditch Co., Equity No. 3, slip op. (D. Nev. 1913), as "an equitable action to quiet title, an in personam action." Nevada, 463 U.S. at 143. The Court added:
to Blackacre cannot really be said to "quiet" the question of title if potential claimants to the parcel are not bound by the court's decree.

This concern is especially pressing for parties who claim significant water interests throughout the geographical scope of the adjudication. The exclusion of a class of water uses (such as Montana's exemption for livestock and individual uses based on instream flow or groundwater sources)\textsuperscript{112} may not upset the average party to a water adjudication. However, from the perspective of a claimant with statewide water claims, such as the United States or a public utility, such de minimis uses may add up to a significant proportion of scarce water resources.\textsuperscript{113}

The second reason for the United States' concern with the scope of McCarran Amendment proceedings is that because the Amendment waives the sovereign immunity of the federal government,\textsuperscript{114} the United States is the logical party to insist on adherence to the statute's terms (as the federal government understands them). The federal government, like any entity in its right mind, does not as a general matter enjoy being sued. This is especially understandable in the case of general stream suits, which are prolonged and expensive affairs for all concerned.\textsuperscript{115}

Finally, an element of fairness may explain the United States' insistence on comprehensive adjudications. In the face of the United States'

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As we have already explained, everyone included in Orr Ditch contemplated a comprehensive adjudication of water rights intended to settle once and for all the question of how much of the Truckee River each of the litigants was entitled to. Thus, even though quiet title actions are in personam actions, water adjudications are more in the nature of in rem proceedings. Nonparties such as the subsequent appropriators in these cases have relied just as much on the Orr Ditch decree in participating in the development of western Nevada as have the parties of that case.

Id. at 143-44.

\textsuperscript{112} MONT. CODE ANN. § 85-2-222 (1987); see infra notes 154-69 and accompanying text.

\textsuperscript{113} See infra notes 163-66 and accompanying text.

\textsuperscript{114} See supra note 3.

\textsuperscript{115} On the gargantuan scope of McCarran Amendment suits, see infra note 136. Congress indicated its concern with the fiscal burden of general stream actions on the United States when it provided in the McCarran Amendment that "no judgment for costs shall be entered against the United States in any such suit." 43 U.S.C. § 666(a) (1982).

The Montana statewide water adjudication provides one example of the expense of McCarran proceedings to the federal treasury. One federal agency in that state, the Forest Service, submitted an affidavit in 1987 to the Montana Water Court concerning the costs it had incurred in connection with objections filed by the United States to 841 water claims that might adversely affect Forest Service interests in 24 basins. The affidavit recited in part:

Over 200 Forest Service employees have been involved in reviewing the Temporary Preliminary Decrees, investigating claims and providing evidence since the first Temporary Preliminary Decree was issued. Of these approximately seven spend all or a major part of their time working on aspects of this adjudication. The cost to the government has been in excess of one million dollars of direct cost some of which is attributable to Forest Service's own claims. Other costs, such as management overhead, have been incurred but are not traceable through our budget process.

Affidavit of Ronald L. Russell, Regional Hydrologist, Northern Region, at 2, In re the Adjudication of the Existing Rights to the Use of All the Water, Both Surface and Underground, Within All Water Basins in the State of Montana, No. WC-88-1 (Montana Water Court Dec. 1, 1987).
contentions to the contrary, the Supreme Court ruled in *Eagle County, Colorado River*, and *San Carlos Apache Tribe* that federal and Indian reserved rights were not exempt from the McCarran Amendment's generous embrace.\(^{116}\) It therefore seems only appropriate that all state law water rights also should be adjudicated in McCarran Amendment proceedings. To conclude otherwise would result in a discriminatory statute that targets all classes of federal rights for determination but permits state-created rights to slip through the adjudication net, an intent with no basis in the Amendment or its legislative history.\(^{117}\) In addition, it is unfair to require the United States publicly to disclose its water claims, and the arguments supporting those claims, without compelling other parties to make similar disclosures.

**C. Aspects of Comprehensiveness**

As state trial courts conducting general stream adjudications have learned, the McCarran Amendment's requirement of comprehensive adjudications is more easily declared than implemented. For example, just what is a "river system or other source"?\(^{118}\) for McCarran Amendment jurisdiction purposes? May rights to groundwater be adjudicated separately? Must every water user—including users of relatively insignificant amounts of water for domestic and similar purposes—be joined in the suit? Is it necessary to join parties to previous water decrees? What about persons who appropriate water under state law during the pendency of the general stream adjudication—must they be joined as soon as they attempt to appropriate the resource? Is a water use such as the federal government's constitutionally grounded power over navigation a use that Congress intended to be determined under the McCarran Amendment? These issues are analyzed below under the rubrics of hydrological comprehensiveness, water use comprehensiveness, and the special case of the United States' commerce power in navigable streams.

**1. Hydrological Comprehensiveness**

The McCarran Amendment consents to joinder of the United States in suits to determine water interests in "a river system or other source."\(^{119}\) Neither the statute nor its legislative history define this critical phrase. Arguably, to promote the Amendment's purpose of facilitating comprehensive adjudications (and thus avoid a multiplicity of suits regarding the same water), this language should be construed to encom-

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116. See *supra* notes 104-08 and accompanying text.
117. See, e.g., 97 CONG. REC. 12,947-48 (1951) (Senator McCarran's comments on the need for "all owners or claimants of water rights on a given stream [to] be joined in a suit for the adjudication of water rights").
119. *Id.*
pass as much of a river or other water source as possible. However, this approach presents practical problems. A river system could, as in the case of the Colorado River, encompass numerous tributaries in several states. It is also a waste of limited judicial resources to adjudicate an entire river basin when only one tributary within that basin is overappropriated and in need of a determination of inter sese water rights. Thus, a balance must be struck between the comprehensiveness required by the McCarran Amendment on the one hand, and the practicalities of complex litigation on the other.

a. Surface Water Comprehensiveness: The Snake River Experience

There are occasions when it may seem impractical or burdensome to some parties to include an entire river or other surface water source in a general stream adjudication. This is the situation in the Snake River adjudication currently under way in Idaho.120 Under the Idaho water rights adjudication statute,121 a state district court is required to issue a commencement order which, among other things, “defines the boundaries of the system within the state to be adjudicated.”122 In formulating the commencement order for the Snake River, the district court faced two issues with respect to the river system boundaries: (1) whether the court could exclude the lower Snake River basin from the adjudication while maintaining jurisdiction, and (2) whether already adjudicated tributaries could be excluded.123

As to the first issue, the court focused on the question of whether the McCarran Amendment required the lower Snake River124 to be included in the suit.125 Based upon its reading of United States Supreme Court precedents126 and the legislative history of the McCarran Amendment,127 the court determined that the lower Snake River must be included to obtain jurisdiction over federal water rights.128 In the court’s view, to permit the adjudication to proceed without considering federal, Indian,
and all other water rights in the lower reaches of the Snake River basin would result in "bifurcated" proceedings, one of the "evils" sought to be avoided by the McCarran Amendment. The court's formulation, once a state has chosen to adjudicate a particular river and its tributaries, the entire river and its tributaries must be encompassed within the suit; otherwise, jurisdiction over federal and Indian water interests would be undermined.

The court in In re Snake River took an equally strict view of the McCarran Amendment's mandates with respect to the second issue, i.e., whether previously adjudicated tributaries must be encompassed in the adjudication. The court concluded that the Amendment required every effort to be made to include each and every party claiming a water right in the Snake River basin. Excluding several tributaries on the basis of previous decrees could only result in duplication and confusion, confounding the purposes of the federal statute.

129. Id. at 23.
130. Id. at 24. The court also determined that, apart from the McCarran Amendment, the state adjudication statute as well as the policies behind the statute supported the inclusion of the lower Snake River basin in the adjudication. Id. at 24-26; see Idaho Code § 42-1406A (Supp. 1988).
132. For example, problems could result from exclusion of a previously adjudicated tributary if a conflict later arose between users on the tributary and users on the main stem. A main stem user, for instance, might claim not to be bound by the decree of rights on the tributary because he or she was not a party to the adjudication of rights on the tributary. Such a claim could lead to additional litigation regarding the respective rights of users on the tributary and users on the main stem. This untoward situation would be avoided by conducting a comprehensive adjudication of the rights of all users, including those claiming from the previously adjudicated tributary and the main stem. See generally id. at 29.
133. In deciding that the adjudicated tributaries must be included, the court also relied on a provision of the Idaho adjudication statute that requires adjudicated tributaries to be included in the suit if the United States otherwise refuses to consent to jurisdiction under the McCarran Amendment. See Idaho Code § 42-1406A(3)(b) (Supp. 1988). The United States had refused to consent to jurisdiction if the tributaries were excluded on the ground that this exclusion would violate the McCarran Amendment's comprehensiveness mandate. In re Snake River, No. 39,576, slip op. at 27.

Several irrigation and water districts that use water from some of the previously adjudicated tributaries (the Boise and Weiser Rivers) petitioned the Idaho Supreme Court for review of the district court's decision, alleging that previously adjudicated sub-basins need not be included in the Snake River adjudication. On October 13, 1988, the Idaho Supreme Court rejected the petition, holding that the McCarran Amendment requires the adjudication of all the claims of those who use the water of a river system within a state, including all tributaries, adjudicated or not. In re the General Adjudication of Rights to the Use of Water from the Snake River Basin Water System, Nos. 17,267, 17,275, slip op. (Idaho Oct. 13, 1988). The court's analysis was not especially involved; the opinion simply notes the comprehensiveness requirement as shown in the Act's legislative history and subsequent court decisions and concludes that all users must therefore be joined. Id. at 14.

What is of special interest is that the court gave short shrift to the irrigation and water districts' contention that less than all of the Snake River system in Idaho could be adjudicated as an "other source" under the McCarran Amendment. The court interpreted "other source" to refer to sources other than a river system, such as lakes or ground waters. Id. at 16-17.

The lone dissenter made the case for excluding the tributaries on the basis that owners of
The state trial court's decision in *In re Snake River* is generally consistent with Supreme Court precedents establishing that the McCarran Amendment requires all-embracing determinations of water rights.\textsuperscript{134} Although it could be argued that the Idaho court's decision went beyond the requirements of the McCarran Amendment in terms of hydrological comprehensiveness,\textsuperscript{135} the court's approach is nonetheless defensible on practical grounds. It would be a needless expenditure of judicial resources for a state court to spend several years conducting a general stream adjudication, only to have a reviewing court determine that the trial court lacked jurisdiction over federal and Indian water rights because the suit was not sufficiently comprehensive from the standpoint of hydrology.\textsuperscript{136} The strict approach exemplified by the state court in *In re Snake River* avoids this possibility. In other words, better safe than sorry.

**b. Groundwater Comprehensiveness: Arizona Wells**

Just as there is the question of "horizontal" comprehensiveness of a general stream suit with regard to surface waters, courts are faced with the issue of "vertical" comprehensiveness, i.e., whether an adjudication of water rights within a given area must include rights to groundwater within that area.

In Arizona, the groundwater question arose in *In re Gila River* when valid water rights on the previously adjudicated tributaries are protected by res judicata. The dissenter remarked: "A water user having a valid state judicial decree in his pocket . . . [will] not necessarily [be] a necessary party. Else, why, one might ask, what has he gained by having once successfully litigated, if into litigation once again he will be forced?" *Id.* at 18-19 (footnote omitted) (Bistline, J., dissenting).


\textsuperscript{135} See infra text accompanying notes 144-52.

\textsuperscript{136} This is similar to what occurred in the drawn-out litigation that culminated in the Supreme Court's decision in *Dugan*. The action was filed in 1947 and was described by the Court as "costly and protracted." *Dugan*, 372 U.S. at 614. The trial lasted over 200 days, filled 30,000 pages of record and generated hundreds of orders. *Id.* at 614 n.3 (citing numerous opinions issued in the litigation). The lengthy saga of this case was capped by the Court's pronouncement in 1963 that because all of the claimants to water rights along the river were not joined as parties in a general stream adjudication, the McCarran Amendment did not consent to the suit against the United States. *Id.* at 618-19. Because there was no other ground for jurisdiction, the Court ordered the case dismissed. *Id.* at 626.

A more recent example of the mammoth scope of a general stream adjudication is offered by Wyoming's effort to adjudicate the water rights of the Big Horn River system and source. In February 1988 the Wyoming Supreme Court issued its decision on the reserved water rights claims of the Wind River Indian Reservation within the Big Horn watershed. *See In re the General Adjudication of All Rights to Use Water in the Big Horn River System and All Other Sources, State of Wyoming, 753 P.2d 76 (Wyo. 1988), cert. petition filed sub nom. Wyoming v. United States, 57 U.S.L.W. 3161 (U.S. Aug. 18, 1988) (No. 88-309) [hereinafter In re Big Horn River]. The special master signed the 451-page Report Concerning Reserved Water Right Claims by and on Behalf of the Tribes in the Wind River Reservation in that case on December 15, 1982, following four years of conferences and hearings involving more than 100 attorneys, transcripts of over 15,000 pages, and more than 2,300 exhibits. *Id.* at 85.
various cities moved to exclude wells from the suit,\textsuperscript{137} arguing that the state court lacked jurisdiction over groundwater users who are not pumping from either subflow or underground channels.\textsuperscript{138} In response, the United States contended that under the McCarran Amendment, all groundwater users must be included in the suit in those basins where the federal government has claimed reserved rights to groundwater; otherwise, a decree of federal reserved water rights would not bind all groundwater pumpers.\textsuperscript{139} In support of its position, the United States cited instances of off-reservation pumping by non-Indians that have depleted available groundwater under the Gila Bend, Schuk Toak, Papago, Salt River, and Gila River Indian Reservations in Arizona.\textsuperscript{140}

If, under Arizona statutory and decisional law, percolating groundwater is excluded from the adjudication, the Arizona scheme may be insufficiently comprehensive to satisfy the McCarran Amendment. Pumpers of such water, if exempted from the adjudication, could affect the exercise of reserved rights of the United States in such groundwater.\textsuperscript{141} If the United States sought to protect its rights against these users, additional litigation would be necessary, thereby contradicting the


\textsuperscript{138} \textit{Id.} at 2. Arizona law limits the scope of the adjudication to "all water appropriable under § 45-141 and all water subject to claims based upon federal law." \textit{ARiz. REV. STAT. ANN.} § 45-251, subd. 4 (1987); see supra notes 57-60 and accompanying text. Because the definition of appropriable water in section 45-141 has been held not to subsume percolating groundwater, see supra note 60, the cities maintained that pumpers of such water should be exempt from adjudication.

\textsuperscript{139} See United States' Response to the City of Chandler, \textit{et al.} Motion to Exclude All Wells from the General Adjudication and the United States' Cross-Motion for Summary Judgment, at 11-12, \textit{In re} Gila River.

\textsuperscript{140} \textit{Id.} at 6-7.

\textsuperscript{141} There is considerable support for the proposition that the reserved rights doctrine extends to groundwater. In Cappaert v. United States, 426 U.S. 128 (1976), the Supreme Court decided that the 1952 reservation of the Devil's Hole National Monument carried with it water rights in unappropriated appurtenant water sufficient to maintain the level of an underground pool to preserve its scientific value (which included the presence of a rare species, the Devil's Hole pupfish). The Court ruled that the United States could protect the water from subsequent diversion, whether the diversion was of surface water or groundwater. \textit{Id.} at 143. Other authorities recognize that federal reserved rights in groundwater exist. See, e.g., Colville Confederated Tribes v. Walton, 460 F. Supp. 1320, 1326 (E.D. Wash. 1978), \textit{aff'd in part and rev'd in part}, 647 F.2d 42 (9th Cir. 1981), \textit{cert. denied}, 454 U.S. 1092 (1981). See generally Meyers, \textit{Federal Groundwater Rights: A Note on Cappaert v. United States}, 13 \textit{LAND \\& WATER L. REV.} 377 (1978).

Despite the foregoing, the Wyoming Supreme Court recently has ruled that the reserved water rights doctrine does not apply to groundwater, thereby denying the Wind River Indian Reservation such rights. \textit{In re} Big Horn River, 753 P.2d 76, 99 (Wyo. 1988), \textit{cert. petition filed sub nom.} Wyoming v. United States, 57 U.S.L.W. 3161 (U.S. Aug. 18, 1988) (No. 88-309). The Wyoming court's decision is vitiated by its acknowledgement that "[t]he logic which supports a reservation of surface water to fulfill the purpose of the reservation also supports reservation of groundwater." \textit{Id.}
aim of the McCarran Amendment. If all wells (i.e., not only wells pumping percolating groundwater) were excluded from the suit, the problem would be all the more aggravated.

c. A Suggested Approach to Hydrological Comprehensiveness

The strict approach exemplified by the state district court's ruling in In re Snake River has much to commend it because it avoids piecemeal adjudication. However, there is no sound reason for requiring that general stream adjudications under the McCarran Amendment always embrace an entire river (main stem and all tributaries) within a state's jurisdiction. In some circumstances, a state should be able to confine an adjudication to a specific tributary, creek, lake, or other water body that may be a part of a larger hydrologic system.

There is some precedent for allowing adjudications limited to a discrete water body, even if that body is linked to a larger system. General stream adjudications involving federal water rights have been maintained for water sources as limited as a single creek.

Although not McCarran

142. Indeed Congress, in its deliberation over the McCarran Amendment, specifically was aware of the duplication involved in adjudications of nonfederal parties' rights followed by an action by the United States to confirm its own rights. See supra note 32 and accompanying text.

143. The court in the In re Gila River adjudication has issued a ruling denying the cities' motion to exclude all groundwater wells from the adjudication and ruling that all groundwater wells that "significantly" diminish or affect federal reserved rights should be included in the determination of rights. See In re Gila River, Order at 21-23, 25 (Sept. 9, 1988).

The court ruled that there is no comprehensiveness requirement in the McCarran Amendment that compels the adjudication of percolating groundwater in proceedings under the Act. Id. at 8-9, 23. Nonetheless, the court recognized that some pumpers of underground water, including percolating groundwater, might diminish federal reserved interests in surface water and groundwater because of the hydrological connections between different sources of water. Id. at 21, 24. The court apparently acknowledged that federal reserved rights can apply to groundwater. Id. at 19-20, 24. The court relied on Cappaert as authority for adjudicating any groundwater claims that have a significant impact on federal water rights. Id. at 18-20. The court also ruled that wells pumping percolating groundwater that do not significantly affect federal rights should be catalogued (apparently for informational purposes), but not adjudicated. Id. at 10, 23.

In re Gila River can be faulted for denigrating the comprehensiveness requirement of the McCarran Amendment. One problem with the "significantly diminishes" rule devised by the court, see id. at 21, is that it opens up the question of what degree of impact on a federal reserved right must be present to be "significant." It is easy to imagine a groundwater pumper and the federal government differing on this matter. One advantage of a per se rule mandating the joinder of all wells in the adjudication is that a court need not delve into the "significantly diminishes" inquiry.


145. See, e.g., Spokane Tribe v. Anderson, 736 F.2d 1358 (9th Cir. 1984). Spokane Tribe was initiated under 28 U.S.C. § 1345 (1982) by the United States on its own behalf and as trustee for the Spokane Tribe of Indians. Spokane Tribe, 736 F.2d at 1360. The United States and the intervening tribe sought an adjudication of all water rights in Chamokane Creek, its tributaries and groundwater basin. Id. at 1361. Chamokane Creek originates north of the reservation, flows south along its eastern boundary, and then leaves the reservation by dis-
Amendment actions, these suits lend support to the view that general stream adjudications, including those under the McCarran Amendment, may be restricted to a component (such as a tributary stream) of a larger hydrological system, as long as the entire component (e.g., the entire tributary stream) is included.

The McCarran Amendment itself supports confining general stream adjudications. The Amendment does not require that an adjudication include portions of a water body that cross state or international boundaries. For example, in Eagle County, the Supreme Court noted that no suit by any state could possibly include all of the water rights in the Colorado River, which runs through or touches many states. The Court concluded that "river system" must be read as embracing only that part of a system that lies within a state's boundaries. This result is entirely logical, because a state court would not have jurisdiction over out-of-state water claimants. Therefore, to require joinder of all users on an interstate stream would defeat Congress' intent that general stream adjudications be conducted in state as well as federal courts.

The best rule of thumb is to permit adjudications under the McCarran Amendment that encompass entire tributaries or other water sources, even if these sources are part of a greater hydrological network. However, once a state elects to adjudicate the main stem of a river system, such as the Snake in Idaho, the state should be required to include the entire river with all its tributaries in the suit. Under this approach, a state would have the option of confining a general stream adjudication to a specific creek or other water body that may be in special need of an adjudication, without having to initiate a lawsuit embracing the larger river system of which that creek or other water body is a part. This formulation respects the McCarran Amendment's strictures while taking into account the burdens of maintaining a general stream adjudication.

charging into the Spokane River, which in turn flows into the Columbia River, which empties into the Pacific Ocean. *Id.*

Colville Confederated Tribes v. Walton, 647 F.2d 42 (9th Cir. 1981), *aff'd in part and rev'd in part* 460 F. Supp. 1320 (E.D. Wash. 1978), *cert. denied*, 454 U.S. 1092 (1981), involved a general stream adjudication for the No Name Creek basin, including the creek and an underground aquifer. *Id. at 45.* Like Spokane Tribe, Colville Confederated Tribes was not a McCarran Amendment proceeding but was initiated by the Colville Confederated Tribes and the United States to "enjoin Walton, [a] non-Indian owner of allotted lands, from using surface and ground waters in the No Name Creek basin." *Id. at 44.* The stream system in Colville Confederated Tribes was so minor that it had no name until the suit, when the attorneys christened it "No Name Creek."

146. See United States v. District Court for Eagle County, 401 U.S. 520, 523 (1971).

147. *Id.*

148. As it happens, interstate streams are commonly involved in general stream adjudications. For example, the Snake River main stem involved in *In re Snake River* crosses into Oregon for a short distance and then forms the boundary between Oregon and Washington on one side and Idaho on the other.
This approach should not be extended to groundwater hydrologically connected to surface water. Groundwater should be included in an adjudication of related surface waters, and vice-versa. Because of the relationships between the two sources of water, any attempt to adjudicate surface and groundwater in separate proceedings invites multiple suits.\footnote{149} Even if groundwater is unconnected to any surface water body, it still should be included as part of a McCarran proceeding if it is subject to claims of the federal government. Otherwise, in a given watershed, the United States will be put to the task of establishing its rights to some waters in the general stream suit and vindicating its rights to unconnected groundwater in separate proceedings, contrary to the goal of the McCarran Amendment of abolishing piecemeal determinations of water interests.\footnote{150}

Concededly, the view that a valid McCarran proceeding may involve a small tributary within a larger stream system, as long as the whole tributary is embraced in the suit, is arguably repugnant to the McCarran Amendment's goal of avoiding piecemeal, duplicative litigation. Water users in other parts of the stream system may have a very real interest in the determination of rights in a tributary. For example, users on the main stem downstream from a tributary may have their water rights affected by a determination that users on the tributary possess senior rights to large quantities of water in the tributary.

But under the rule espoused above, courts could retain sufficient flexibility to take care of this problem. Rather than requiring the adjudication of entire river systems in every case, courts can take other steps to avoid duplicative litigation. Courts should use their discretion, if the state adjudication statute allows, to expand the scope of the adjudication to include any streams or other sources that the court has reason to believe may give rise to litigation in the future if not adjudicated now.\footnote{151} To determine when future litigation is possible, courts should give wide notice of limited adjudications, including all persons who may have an interest in the waters within the basin, and liberally permit their intervention in the action so as to bind as many parties as possible to the final decree.\footnote{152}

\footnote{149} The Supreme Court has noted that as a general matter "[g]roundwater and surface water are physically interrelated as integral parts of the hydrologic cycle." Cappaert v. United States, 426 U.S. 128, 142 (1976) (quoting C. Corker, Groundwater Law, Management and Administration xxiv (National Water Commission Legal Study No. 6, 1971)).

\footnote{150} In contravention of the unitary principle of the McCarran Amendment, Oregon's water rights adjudication statutes provide for separate proceedings solely to determine rights to groundwater. See OR. REV. STAT. § 537.670-695 (1987); see also supra note 99.

\footnote{151} The state engineer or equivalent agency may be the source of such information. See, e.g., ARIZ. REV. STAT. ANN. § 45-256 (1987) (providing that the Director of the Department of Water Resources shall provide "technical assistance . . . in all aspects of the general adjudication with respect to which the director possesses hydrological or other expertise").

\footnote{152} To bind parties to a water rights decree, the notice to them of the proceedings must
2. Water Use Comprehensiveness

While it is solidly established that McCarran Amendment proceedings must be hydrologically comprehensive, whether all water uses must be determined in the adjudication remains an open question. The underlying logic of the McCarran Amendment and cases interpreting it suggest an affirmative answer, although this presents practical difficulties. The following sections discuss whether McCarran Amendment adjudications must encompass small uses, and whether such adjudications must encompass uses initiated after a certain date.

a. Small Uses

The adjudication statutes of some Western states exclude (or allow for the possibility of excluding) certain relatively modest water uses from the general requirement of filing a claim and obtaining a determination of water rights. For example, the Montana water rights adjudication law exempts "[c]laims for existing rights for livestock and individual as opposed to municipal domestic uses based upon instream flow or groundwater sources." Similarly, the Idaho statute gives a trial court discretion to exclude relatively small domestic and stock watering uses from an adjudication.

Despite the McCarran Amendment's directive that adjudications be comprehensive, there are arguments supporting the exclusion of small uses. From the states' point of view, it is not sound public policy to require users of de minimis amounts of water to subject themselves to the vagaries of a full-blown general stream adjudication. The cost of serving and adjudicating these rights is out of proportion to the benefits to be derived therefrom.

Nonetheless, it is difficult to justify the omission of any class of water uses from a McCarran suit, particularly on legal grounds. Decisions interpreting the McCarran Amendment suggest that all uses, regardless of magnitude, must be included. In Dugan v. Rank the Court stated that for there to be state jurisdiction over federal water rights, the

be, as a matter of due process, "reasonably calculated . . . to apprise interested parties of the pendency of the action and afford them an opportunity to present" their position. Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 314 (1950). Generally, this means that individual service, by mail or otherwise, is required to hold persons to a decree. Notice by publication in such situations is not sufficient. See Schroeder v. City of New York, 371 U.S. 208, 212-13 (1962); 6 R. CLARK, supra note 7, § 532.1, at 523-31 (1972).


156. Also, it may be politically troublesome for a state to join users of minor amounts of water in a general stream adjudication because those users may, understandably, resent being sued by the state and summoned to prove relatively insignificant water rights.
McCarran proceeding must be "a case involving a general adjudication of 'all of the rights of various owners on a given stream.'" In United States v. District Court for Eagle County, the Supreme Court approved the Colorado adjudicatory process for McCarran suits because it ultimately encompassed all water uses, even though it did so in stages. In In re Snake River several parties suggested that domestic and stock water uses should be omitted from the adjudication. The state trial court disagreed, ruling that the McCarran Amendment requires all parties and all claims, including domestic and stock water uses, before the court in order to efficiently and justly adjudicate the river system or source.

On a practical level, as well, the exemption of large numbers of relatively small water uses from an adjudication could adversely affect the water rights of those who are parties to the adjudication. Unless this category of uses is included in the final water rights decree, there will be a quantity of unaccounted-for water in the water source which, in the aggregate and in times of water shortage, could impinge on the judicially confirmed rights of other users and lead to further legal actions. This possibility is of special concern to users with water interests throughout a state, such as utility companies and the United States, because these statewide, so-called minimal uses could add up to a substantial quantity of water.

In In re Snake River, for example, the Idaho Department of Water Resources estimates that small domestic and stock watering claims will total about two-thirds of the approximately 185,000 claims in the Snake

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158. 401 U.S. 520 (1971).
159. In Eagle County, the Court decided that a supplemental adjudication of the Eagle River and its tributaries in the Colorado courts was sufficient because the suit involved "the whole community of claims." Id. at 524-25. In United States v. District Court for Water Div. No. 5, 401 U.S. 527 (1971), the Court approved of the Colorado proceedings on the ground that "[t]he present suit, like the one in the Eagle County case, reaches all claims, perhaps month by month but inclusively in the totality." Id. at 529 (emphasis added).
160. Under Idaho law, the de minimis domestic and stock watering uses at issue are defined as follows:

(5) "Domestic Use" means the use of water for homes, organization camps, public campgrounds, livestock, and for any other purpose in connection therewith, including irrigation of up to one-half (1/2) acre of land, if the total use is not in excess of thirteen thousand (13,000) gallons per day. Domestic use shall not include water for multiple ownership subdivisions, mobile home parks, commercial or business establishments.

(12) "Stock Watering Use" means the use of water solely for livestock or wildlife where the total use is not in excess of thirteen thousand (13,000) gallons per day.

162. Id. at 32-33.
River Basin—or about 125,000 claims. Assuming that each of these de minimis claims amounted to the statutory maximum of 13,000 gallons per day, they would aggregate to around five percent of the total thirty-six million acre-feet average annual discharge of the Snake River as it leaves Idaho. In a dry period, when this percentage would rise, small water uses would come into direct conflict with other uses in the basin. Nonetheless, small domestic and stock watering uses are not now regulated by Idaho's mandatory permit system, with the exception of surface water uses initiated after 1971.

On the other side of the coin lies the trouble and expense of actually adjudicating thousands upon thousands of minor water uses which, as a practical matter, no one may wish to oppose. According to testimony in In re Snake River, the judicial determination of all aspects of every de minimis domestic and stock water claim would expend over seventy-five person-years of effort, costing the state in excess of three million dollars.

There may well be means of easing the administrative headaches associated with adjudicating a multitude of small uses. One possibility is processing de minimis water uses separately, perhaps after the more significant water uses have been adjudicated. Most small domestic and

164. See supra note 160.
165. Testimony of David B. Shaw, supra note 163, at 6. Mr. Shaw also stated that actual domestic and stock water use was likely to be significantly less than the statutory maxima and would total less than one-half percent of the annual discharge of the Snake River as it leaves the state. Id.
166. See IDAHO CODE § 42-113 (Supp. 1988) (permit not required for instream watering of livestock); id. § 42-201 (permit required for water uses initiated after 1971); id. § 42-227 (permit not required for domestic wells).
167. Testimony of David B. Shaw, supra note 163, at 7.
168. As a matter of case management, general stream adjudications often will require that the proceedings be conducted in phases. The Supreme Court has declared that "actions seeking the allocation of water essentially involve the disposition of property and are best conducted in unified proceedings." Colorado River Water Conservation Dist. v. United States, 424 U.S. 800, 819 (1976) (quoting Pacific Live Stock Co. v. Oregon Water Bd., 241 U.S. 440, 449 (1916)). However, in actual practice "unified proceedings" may translate into segmented proceedings involving different classes of water rights conducted under the aegis of a single court.

A prime example of this reality is the treatment of federal reserved rights, which may require proof of elements, such as intent to reserve for a particular purpose and practicably irrigable acreage, which have little or nothing to do with proving a right under state appropriation law. See, e.g., Arizona v. California, 373 U.S. 546, 601 (1963) (requirements for establishing and quantifying a federal reserved water right). Because of the differences in the nature of federal reserved rights and appropriative water rights under state law, it will almost certainly be necessary to adjudicate the reserved rights in separate proceedings within the context of the larger general stream adjudication. This was done in the Wyoming state court adjudication of the Big Horn River basin. That litigation consisted of three phases: (1) Indian reserved water rights, (2) non-Indian federal reserved water rights, and (3) state water rights evidenced by a permit or certificate. See In re Big Horn River, 753 P.2d 76, 85 (Wyo. 1988), cert. petition filed
similar uses are so noncontroversial that if they are claimed, no party is likely to object, thus allowing the determination of these rights with a minimum of effort on the part of the court or parties. Another means of easing the administrative burdens involved in construing comprehensiveness strictly is for the parties to stipulate to standard amounts for small domestic and like uses to facilitate judicial review of such claims.\textsuperscript{169}

\textit{b. Uses Perfected Before a Certain Date}

State systems vary in the degree to which their adjudication and permit regimes are integrated. In some states, general stream adjudications are limited to water uses perfected before a certain date. For example, the Montana adjudication statute limits the proceedings to "existing rights" vested before July 1, 1973.\textsuperscript{170} The Montana Water Use Act sets up a permit system for post-July 1, 1973 water rights.\textsuperscript{171} Under Oregon's statute, water rights vested or initiated prior to February 24, 1909 may be determined in proceedings before the state Water Resources Director, subject to judicial review.\textsuperscript{172} Post-1909 appropriations are subject to a permit regime.\textsuperscript{173} Idaho exempts all claimants to water rights based on an application or permit from filing a claim in an adjudication unless the Director of Water Resources orders otherwise, and omits from the claims filing requirement rights based on federal law with priority dates later than the commencement of the adjudication.\textsuperscript{174}

Strictly speaking, such statutes do not comport with the McCarran Amendment mandate that water rights proceedings include all water uses because they exempt water uses perfected after a given date or, as in the case of Idaho, they omit permit holders as a group. The Supreme Court has indicated, however, that a water rights adjudication may sat-

\textsuperscript{169} For example, the Montana rules for examining water right claims set forth flow rate and volume guidelines for domestic and stockwatering uses. See, e.g., Montana Supreme Court Water Right Claims Examination Rules, Rule 3.III.(2)(a) (flow rate guideline for domestic use is 35 gallons per minute); Rule 4.IV.(3)(a) (volume guideline for wells and other listed sources for stock watering is 1.5 acre-feet per stock tank or point of use). Under the Montana system, if a claimed use exceeds the guideline, the Department of Natural Resources and Conservation shall investigate the claim. See, e.g., Rule 3.III.(3) (regarding claimed domestic use flow rate and volume).

\textsuperscript{170} See supra notes 89-91 and accompanying text.

\textsuperscript{171} See supra notes 94-96 and accompanying text.

\textsuperscript{172} See supra notes 100-01 and accompanying text.

\textsuperscript{173} See supra note 100 and accompanying text.

\textsuperscript{174} See supra notes 85-88 and accompanying text.
isfy the McCarran Amendment's strictures even though rights are adjudicated on a month-by-month or supplemental basis, as long as all rights are eventually determined in the proceeding.\textsuperscript{175} The underlying rationale of \textit{United States v. District Court for Water Division No. 5} and \textit{United States v. District Court for Eagle County}\textsuperscript{176} suggests that a cutoff point is acceptable as long as all water rights in the state are eventually fixed either through adjudication or through a permitting system. Even the most comprehensive water rights decree, once entered, cannot determine rights that have yet to be created; it would border on sophistry to suggest that this circumstance renders an adjudication insufficiently comprehensive under the McCarran Amendment.\textsuperscript{177}

One manner of reconciling the comprehensiveness required by the McCarran Amendment with the practical need to have a cutoff date is to provide that an adjudication scheme may be restricted to water rights existing at or before the effective date of the water adjudication statute, as long as rights perfected after that date are administered in some workable manner, such as through a permit system.\textsuperscript{178} However, if a state delays

\begin{itemize}
\item \textsuperscript{175} See \textit{supra} notes 71-73 and accompanying text.
\item \textsuperscript{176} \textit{United States v. District Court for Water Div. No. 5, 401 U.S. 527 (1971)}; \textit{United States v. District Court for Eagle County, 401 U.S. 520 (1971)}.
\item \textsuperscript{177} The Colorado general stream adjudication process is one solution to the problem of cutoff dates. The Colorado system is an ongoing proceeding in which water claimants may file for judicial recognition of their rights at any time. \textit{See COLO. REV. STAT. § 37-92-302 (1973 & Supp. 1987)}; \textit{see also supra} notes 63-70 and accompanying text. However, under the Colorado "postponement doctrine," rights applied for in a given calendar year generally are junior to rights applied for in any previous calendar year. \textit{United States v. Bell, 724 P.2d 631, 643-44 (Colo. 1986); COLO. REV. STAT. § 37-92-306 (1973 & Supp. 1987)}. This obviously spurs claimants to make their claims as soon as possible. \textit{Eagle County and Water Div. No. 5} sanctioned the Colorado method of determining water rights. \textit{See supra} notes 71-73 and accompanying text.
\item \textsuperscript{178} Nonetheless, it is doubtful that the Colorado regime of continuous adjudication of water rights is the only kind of proceeding comporting with the McCarran Amendment. \textit{See Arizona v. San Carlos Apache Tribe, 463 U.S. 545, 569-70 (1983)}, which approved deference to state court adjudications conducted pursuant to Arizona and Montana adjudication statutes.
\item \textsuperscript{178} This solution poses its own vexing problems. The coexistence of a general stream adjudication and a permit system raises issues of reconciling rights decreed in the adjudication with appropriations perfected after the cutoff date. In \textit{Nevada v. United States, 463 U.S. 110 (1983)}, the United States Supreme Court resolved such a conflict against the United States. In \textit{Nevada}, users appropriated water from the Truckee River in 1944 after entry of the \textit{Orr Ditch} decree, \textit{United States v. Orr Ditch Co., Equity No. 3, slip op. (D. Nev. 1913)}, which awarded water rights to the Pyramid Lake Indian Reservation and the Newlands Reclamation Project. \textit{Nevada, 463 U.S. at 116-18, 143}. In 1973, the United States initiated an action seeking additional rights in the Truckee River for the reservation. \textit{Id. at 118}. The defendants in the latter suit asserted res judicata, contending that the United States was precluded by the \textit{Orr Ditch} decree from litigating this claim. \textit{Id. at 119}. In particular, one group of defendants had appropriated water from the Truckee subsequent to, and in reliance on, the \textit{Orr Ditch} decree. \textit{Id. at 144}. The Court decided that these defendants were entitled to benefit from the res judicata bar, even though they were not parties to the \textit{Orr Ditch} proceedings, on the ground that the subsequent appropriators "have relied just as much on the \textit{Orr Ditch} decree in participating in the development of western Nevada as have the parties of that case." \textit{Id. According to the Court, any other holding would "make it impossible ever finally to quantify a reserved water}
initiating a general stream adjudication for an unreasonable period, and thereby excludes large numbers of water claimants in the basin because their rights were initiated after the effective date, the state's adjudicatory process will be vulnerable to attack under the McCarran Amendment. Under this criterion, the Montana cutoff date—July 1, 1973—would pass McCarran Amendment muster, while the Oregon date—February 24, 1909—would fail.

Regardless of which cutoff date is chosen, states should carefully integrate their water permit schemes with the general stream adjudication process to forestall challenges to the comprehensiveness of their adjudications under the McCarran Amendment. Otherwise, states are open to the charge that their systems spawn duplicative litigation.179 Specifically, it is critical that, to the widest extent practicable, parties to the adjudication be given notice of permit applications and permit applicants be given notice of pending adjudications respecting the same water source. In this manner, all water users would be bound by the decree resulting from the judicial proceedings, as well as by the permits.180

III
THE NAVIGATION SERVITUDE OF THE UNITED STATES

The foregoing analysis of the scope of water rights adjudications under the McCarran Amendment suggests a preference for state procedures that sweep every conceivable water use in a river basin into the judicial hopper. There are credible indications, however, that at least one use of water—the United States' navigation servitude—is not subject to the McCarran Amendment's broad reach.

The Supreme Court has never addressed the question of whether water uses under the navigation power are among the "rights to the use of water" that fall within the scope of the McCarran Amendment's consent to suit.181 However, the Court has emphasized that any waiver of sovereign immunity in a statute such as the Amendment "cannot be implied but must be unequivocally expressed."182 Furthermore, the Court has stated that statutes waiving sovereign immunity should be construed

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179. For example, a permit holder could allege that he was not bound by the decree of rights in the adjudication and attempt to use water that was awarded to parties in the court proceedings, and thereby generate additional litigation over the respective rights of the permittee and the parties to the suit.

180. To satisfy the demands of due process, persons with interests adverse to a permit application or claim in the adjudication should receive actual notice (e.g., by mail) as opposed to publication notice. See supra note 152.


narrowly. Thus, it is necessary to examine the McCarran Amendment and its legislative history to ascertain whether Congress intended to include navigation-related claims in its consent to adjudications of federal water rights. Before doing so, though, the nature of the navigation servitude must be understood.

A. The Nature of the Navigation Servitude

The federal government’s power to regulate navigation, although sometimes described as a “servitude” or an “easement,” is a power based upon the commerce clause of the United States Constitution, rather than a property right held by the United States. The navigation power is a right of the United States “to control, improve and regulate” navigation. As such, the United States may exercise this power without the payment of compensation even if, as a result, the use of water rights recognized under state law is defeated.

Once Congress authorizes a project pursuant to its power to improve navigation, the fact that the project serves other, “incidental” purposes, such as hydropower, does not require the payment of compensation for the taking of stream flow. As a general rule, the courts will not review Congress’ decision that a project is necessary for improving navigation. It has been held, however, that in exercising the navigation servitude, Congress must clearly state its intent to use the exercise of the servitude to supersede water rights protected under state law.

183. See United States v. Sherwood, 312 U.S. 584, 590 (1941) (waivers of sovereign immunity must be strictly interpreted).
186. U.S. CONST. art. 1, § 8, cl. 3.
188. Lewis Blue Point Oyster Cultivation Co. v. Briggs, 229 U.S. 82, 87-88 (1913).
191. Twin City Power, 350 U.S. at 224; Chandler-Dunbar, 229 U.S. at 72; 2 R. CLARK, supra note 7, § 101.2(B) (1967).
B. The Intent of the McCarran Amendment

1. The Language of the Statute

The terms of the McCarran Amendment appear to require the United States to submit only those federal claims to water that are based on a claim of ownership, as opposed to those claims based on the exercise of a constitutionally based power. While the Amendment subjects the United States to suit "for the adjudication of rights to the use of water of a river system or other source" (in the language following clause (a)(1))—language which on its face could be interpreted to include the navigation power—it also consents to suit "where it appears that the United States is the owner of or is in the process of acquiring water rights by appropriation under State law, by purchase, by exchange, or otherwise" (in the words following clause (a)(2)). The emphasized language refers to proprietary interests, not to a constitutionally grounded power such as the navigation "privilege." Accordingly, a fair construction of the McCarran Amendment is that it only subjects to adjudication those water interests of the United States held in a proprietary manner.

Consistent with this gloss on the Amendment, and despite the Supreme Court's admonition that the language of the Amendment is "all inclusive," no court has held that the United States' nonproprietary water uses are within the ambit of the Amendment. Thus, while reserved water rights are subject to adjudication, the navigation power generally remains immune to judicial determination because it is an authority exercised in a sovereign capacity.

United States v. District Court for Eagle County parsed the McCarran Amendment in a manner suggesting that the "proprietary" nature of the rights listed in section (a) of the Amendment does not limit the "all

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194. Id.
195. Id. (emphasis added).
197. The United States may hold the same property both as owner and as sovereign. The Supreme Court has recognized that "the [federal] government has, with respect to its own lands, the rights of an ordinary proprietor, to maintain its possession and to prosecute trespassers. It may deal with such land precisely as a private individual may deal with his farming property." Camfield v. United States, 167 U.S. 518, 524 (1897); accord Kleppe v. New Mexico, 426 U.S. 529, 540 (1976). Although Camfield and Kleppe speak of ownership of real property, the principle logically applies to water rights held by the United States. Thus, reserved water rights are held by the United States in a proprietary capacity. By contrast, the navigation servitude is a constitutionally grounded power that the United States does not hold as property.

The conclusion that the United States holds water rights as owner as well as sovereign finds support in a recent California Supreme Court decision, which held that the United States owns riparian water rights under California law on National Forest lands. In re Determination of Rights to Water of Hallett Creek Stream System, 243 Cal. Rptr. 887, 888, 892-94 (1988).

inclusive” characterization of the United States’ water rights.\textsuperscript{199} However, insofar as both clauses of section (a) are parts of the same statutory scheme, it is reasonable to consider the nature of the rights enumerated in the second clause to ascertain the scope of the consent to suit contained in the first clause.\textsuperscript{200} This approach gains some support from the \textit{Eagle County} decision itself.\textsuperscript{201}

2. \textbf{The Purpose and Legislative Background of the McCarran Amendment}

The aims and legislative history of the McCarran Amendment lend credence to the conclusion that the statute covers only “rights to the use of water” claimed by the United States in a proprietary capacity—be it under state or federal law—and therefore does not subsume the navigation power. The underlying policy of the McCarran Amendment, as divined by the Supreme Court from the legislative history, focuses on the need to include the extensive water rights held by the United States as owner in determining water rights.\textsuperscript{202} The Senate Report on S. 18, the bill that, with minor modifications, became the McCarran Amendment, stressed that if a water user claiming to hold a water right were exempt from a water adjudication “by reason of the ownership thereof” by the United States or its agencies, the federally held rights could “materially interfere with the lawful and equitable use of water for beneficial use by the other water users.”\textsuperscript{203}

It may be asserted that requiring the United States to submit water

\begin{footnotesize}
\footnote{199. Id. at 524. Section (a) of the McCarran Amendment reads in relevant part as follows: Consent is given to join the United States as a defendant in any suit (1) for the adjudication of rights to the use of water of a river system or other source, or (2) for the administration of such rights, where it appears that the United States is the owner of or is in the process of acquiring water rights by appropriation under State law, by purchase, by exchange, or otherwise, and the United States is a necessary party to such suit. According to \textit{Eagle County}, the language following (2) does not qualify the language following (1). \textit{Eagle County}, 401 U.S. at 523-24.}

\footnote{200. See 2A N. Singer, Sutherland Statutory Construction § 46.05 (4th ed. 1984). The waiver of sovereign immunity to suits “for the administration of such rights” conferred by section (a) of the McCarran Amendment has been interpreted to apply to proceedings to enforce or administer a water rights decree entered after a general stream adjudication. South Delta Water Agency v. United States, 767 F.2d 531, 541 (9th Cir. 1985); United States v. Hennen, 300 F. Supp. 256, 263 (D. Nev. 1968); Federal Youth Center v. District Court of Jefferson County, 195 Colo. 55, 60, 575 P.2d 395, 398 (1978).}

\footnote{201. \textit{Eagle County}, 401 U.S. at 524 ("'The administration of such rights' in § 666 (a) (2) [the language following (2)] must refer to the rights described in [the language following] (1) for they are the only ones which in this context 'such' could mean.").}


\footnote{203. Id. at 810 (quoting S. REP. NO. 755, supra note 27, at 4-5); see also Hearings: \textit{Adjudication of Water Rights}, supra note 32, at 25-26, 32, 33 (testimony of Glenn G. Saunders, representing the National Reclamation Association), 49 (statement of Merl B. Peek, Assistant Secretary-Manager, National Reclamation Association).}
\end{footnotesize}
use claims concerning the navigation power would not advance the intent of the Amendment because that power, in principle, is always superior to water rights derived from state law. 204 Nonetheless, even if the navigation power is insulated from control by states in general stream adjudications, there are reasons why a state might want to require the United States to file claims for navigation purposes in a McCarran proceeding. For one thing, such filings could serve an informational purpose for other water users. 205 Also, by federal legislation, the otherwise dominant navigation power has been subordinated to certain kinds of state law water rights in connection with specific water projects in the Western states. 206 A state might want to include navigation uses in a decree of water rights to be able to police this statutorily created preference for state law rights.

Apart from the language of the McCarran Amendment, there are other signs in the legislative materials that point away from an intent to subject uses under the navigation power to determination in water suits. While the key Senate Report itself does not expressly refer to the navigation power, neither does it reflect an intent to submit the exercise of that power to adjudication. Instead, the Report refers to the Western states’ control over allocation of non-navigable waters within their borders. 207 Rather than take note of federal projects using water pursuant to the navigation servitude, the Report reiterated the obligation of the government to condemn any water required for reclamation projects. 208 These references to non-navigable waters and reclamation projects in the legislative history suggest that Congress was not concerned with exercises of the navigation servitude when it enacted the McCarran Amendment.

The only reference to the navigation power in the Senate Report is in a letter from the Interior Department opposing S. 18, which stated that the United States was the “owner” of a number of water rights, including the navigation interest. 209 While this letter might support the

204. See supra text accompanying note 189.

205. Indeed, one proposed version of the McCarran Amendment would have required the United States to list all of its water claims within two years of the statute’s effective date to serve informational purposes. See infra notes 211-12 and accompanying text.

206. See infra notes 223-26 and accompanying text.

207. S. REP. No. 755, supra note 27, at 3, 4.

208. Id. at 6. This reference was to a portion of the Senate committee’s response to the concern expressed by Senator Magnuson that S. 18 could be used to delay or block multiple-purpose projects such as the Hells Canyon project on the Snake River. See id. at 6, 9. The reference was to projects authorized under the reclamation statutes and not to exercises of the navigation power. See United States v. Gerlach Live Stock Co., 339 U.S. 725, 739 (1950) (Congress intended to treat Friant Dam as a reclamation project and condemn state law water rights rather than assert the navigation authority).

209. The letter recited in relevant part:

The interests of the United States in the use of the waters of its river systems are so many and varied that a full enumeration of them could not be made without a great deal of careful study. It is enough, I hope, for present purposes to exemplify these interests [sic] by pointing to those which it has under the commerce clauses of the Constitution [and other types of water interests that were listed]. Since the United
contention that the McCarran Amendment includes the navigation “interest” within its scope, the thrust of both the crucial Senate Report and the Senate hearings on S. 18 is contrary to such an interpretation. In addition to the Report’s focus on the United States’ claim to water rights in a proprietary capacity, the document proposed a new section for S. 18, including language implying that the navigation power was not intended to be affected by the McCarran Amendment.210 This proposed section, submitted by Senator Magnuson, would have required all federal agencies, within two years from the effective date of the Act, to file with the Secretary of the Interior a list of all the agencies’ water claims.211 This catalogue of federally claimed water rights was intended to be “most helpful in the future administration and adjudication on questions of water rights.”

Although the section proposed by Senator Magnuson did not appear in the statute as enacted, and the reason for its omission is open to speculation, it would seem to be a reliable indicator of the kinds of federal “water rights” with which the McCarran Amendment was concerned.213 The proposed section listed a wide spectrum of water uses but omitted navigation, flood control, and watershed improvement, all of which are aspects of the navigation servitude.214 However, the list does include fish and wildlife, hydroelectric power, and other uses that may be “incidental” purposes of a navigation improvement project.215

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210. See supra note 27, at 8 (emphasis added). The reference to interests under the constitutional commerce power presumably includes the navigation servitude.

211. Id. at 1.

212. Id. at 1-2.

213. Both the proposed section and the Amendment as enacted deal with one central concern: the uncertainty surrounding the water rights of the United States and the disruptive effect that this uncertainty had on other water users. See Colorado River Water Conservation Dist. v. United States, 424 U.S. 800, 810-11 (1976).

214. See Oklahoma ex rel. Phillips v. Guy F. Atkinson Co., 313 U.S. 508, 525, 533-34 (1941) (flood protection and watershed development can be controlled through the use of the commerce power); Lewis Blue Point Oyster Cultivation Co. v. Briggs, 229 U.S. 82, 87-88 (1913) (navigation power is the right of the United States to control, improve, and regulate navigation).

The hearings on S. 18 were somewhat more specific in their reference to the navigation servitude and the exclusion of this power from the coverage of the bill, although the navigation power still was addressed only sporadically. As with the Senate Report, the focus at the hearings was on the water rights claimed by the United States in its proprietary capacity, principally under state law. At several points, the hearing record indicates Congress' intent that S. 18 would not affect the navigation servitude. The National Reclamation Association, a main proponent of the legislation, submitted a statement supporting the bill and analyzing its provisions as part of the record. Given the paucity of evidence on the navigation servitude, the written statements of the National Reclamation Association are entitled to some credence as reflecting the understanding of the participants at the hearings. The Association's statement noted that "use for navigation or the control by the United States over navigable waters in the West is an issue not involved in S. 18." This politically influential group also stated that it did not anticipate a conflict between navigation and state law beneficial uses of water, but that if there were such a problem the appropriative uses should prevail.

During the hearings there also were references to the 1944 Flood Control Act, which were probably directed to the O'Mahoney-Milli-

217. This emphasis on rights claimed by the United States pursuant to state law is reflected in the language of the Amendment as well. See 43 U.S.C. § 666(a) (1982).
218. It may be significant that the subcommittee conducting the hearings on S. 18 notified the Departments of Justice, Interior, Agriculture, and Defense, as federal agencies potentially affected by the legislation, of the hearings on S. 18. Hearings: Adjudication of Water Rights, supra note 32, at 1. The Department of Defense was notified apparently because of water claims it was making for military installations, and not because of the Army Corps of Engineers' role in implementing the navigation servitude. Id. at 7, 8-9. The Department of Defense, including the Department of the Army, which supervises the Corps of Engineers' functions related to the navigation power, sent no representative to the hearings. Id. at 1. The foregoing suggests that neither Congress nor the executive branch viewed S. 18 as touching the navigation power.
219. Id. at 49-54.
220. Although the navigation servitude was mentioned tangentially at several additional points in the course of the hearings, none of these statements clearly shows an understanding that the navigation power was included or excluded. See id. at 12, 43, 79.
221. Id. at 50, 54. The National Reclamation Association proposed a "declaration of policy" for S. 18 that reaffirmed the "full sovereignty and jurisdiction of the various States over the ownership and distribution of their underground and surface waters" with the exception of "those particulars in which such exercise and control is in express and direct conflict with the authority of the United States." Id. at 22. This is probably a veiled reference to the navigation power and suggests that the navigation servitude was outside the scope of the McCarran Amendment.
222. Id. at 54. There is a federal statutory basis for giving priority to some state law water uses over the navigation power. See infra notes 223-26 and accompanying text.
ken Amendment, section 1(b) of that Act. The O'Mahoney-Milliken Amendment subordinates the navigation power to particular classes of state law water rights in connection with certain water projects in the Western states. There may have been an assumption in Congress during 1951 that, because the 1944 Act protected state law beneficial water uses, there was no need to submit navigation uses to adjudication under S. 18.

C. Whether Water Uses Pursuant to the Navigation Servitude Must be Claimed in McCarran Proceedings

As described above, both the language of the McCarran Amendment and its legislative history indicate that Congress never expected the United States to submit its navigation powers to adjudication. The Supreme Court’s characterization in United States v. District Court for Eagle County of section (a) of the Amendment as “all inclusive” intimates a contrary answer. However, as described above, the policy of the statute as well as its terms and legislative history reflect the belief that only water rights actually “owned” by the United States in a proprietary capacity may be included. Indeed, a contrary conclusion could lead to disturbing results. If the McCarran Amendment were to subject federal claims of water use under the navigation power to state court adjudication, presumably a state court could deny or restrict federal uses; otherwise, there would be little point to requiring submission of the federal claims. It is firmly established, however, that even the federal courts will not review the need for a congressionally authorized project with a navigation purpose. If Congress intended to change judicial practices

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226. The O'Mahoney-Milliken Amendment provides:

The use for navigation, in connection with the operation and maintenance of such works herein authorized for construction, of waters arising in States lying wholly or partly west of the ninety-eighth meridian shall be only such use as does not conflict with any beneficial consumptive use, present or future, in States lying wholly or partly west of the ninety-eighth meridian, of such waters for domestic, municipal, stock water, irrigation, mining, or industrial purposes.

Id. This language has been interpreted to mean that, in the operation of projects authorized by the Act, the use of water for navigation will be subordinate to present and future beneficial consumptive uses, and that the assertion of the overriding federal navigation power shall not destroy state-created water rights without compensation. Turner v. Kings River Conservation Dist., 360 F.2d 184 (9th Cir. 1966). As the court in Turner stated, “in other words, irrigation ditches will never be closed to supply water to float barges.” Id. at 192 (quoting Trelease, Water Rights of Various Levels of Government—States' Rights vs. National Powers, 19 Wyo. L.J. 189, 196 (1965)).
228. Thus, while federal reserved rights claimed in conjunction with navigation projects probably are subject to McCarran Amendment general adjudications, claims based only on the navigation power, such as many flood control improvements, probably are not.
229. Arguably, the claims for navigation uses could serve a useful informational purpose even though the court could not cut back the claims.
to permit state courts to perform such a substantive review, a clearer sign of congressional intent would be expected than is contained in the 
McCarran Amendment.\textsuperscript{231} It thus appears that uses of water by 
the United States pursuant to the navigation servitude are not within the 
ambit of federal uses subject to McCarran Amendment general stream 
adjudications.

While excluding navigation uses from general stream adjudications 
may be the proper general rule, applying this rule will no doubt raise 
difficult issues. Even if "pure" navigation uses (for instance, floating 
barges) are not subject to court determinations, and the United States 
need not file claims for such rights except for informational purposes, 
water uses that are "incidental" to, but under the aegis of, the servitude 
(such as hydropower, flood control, and watershed development) pose 
more difficult questions.\textsuperscript{232} Based on the legislative history of 
the Amendment, an argument can be made that some of these uses should be 
determined in McCarran Amendment proceedings.\textsuperscript{233} However, 
the Amendment does not sanction interference by courts with the exercise of 
the commerce power. For example, a state court in a general stream 
adjudication could not rule that a congressionally authorized water use 
(such as hydropower) incidental to a navigation improvement project 
was not recognized by state law and, thus, should not be decreed to the 
United States. Any court decision having this effect would be open to 
challenge.\textsuperscript{234}

Moreover, that the O'Mahoney-Milliken Amendment subordinates 
the navigation servitude to specified state law beneficial water uses\textsuperscript{235} 
does not mean that there is no need to protect navigation uses from 
general stream adjudications. First, the O'Mahoney-Milliken Amendment 
does not advance all state law water rights over the servitude, only those 
"beneficial consumptive use" rights specified in the statute.\textsuperscript{236} Other 
beneficial nonconsumptive uses under regimes of state law, such as power 
generation, fish and wildlife preservation, and recreation, are not pro-

\begin{footnotesize}
\textsuperscript{231} Chandler-Dunbar Water Power Co., 229 U.S. 53, 64, 72 (1913); 2 R. Clark, supra note 7, § 101.2(B) (1967).
\textsuperscript{232} Amendment of statutes by implication is disfavored. United States v. Welden, 377 U.S. 95, 103 n.12 (1964); 1A N. Singer, supra note 200, § 22.13.
\textsuperscript{233} See cases cited supra note 190.
\textsuperscript{234} As supra note 211 makes clear, the proposed section of S. 18 listed classes of federal 
water uses, thereby suggesting the kinds of water rights claimed by the federal government that 
the McCarran Amendment intended to submit to judicial ascertainment in general stream 
adjudications. Included in this list were fish and wildlife, hydroelectric power, and other uses 
that may be incidental purposes of a navigation improvement project. This enumeration of 
uses did not, however, include navigation, flood control or watershed improvement, which are 
uses covered by the navigation power.
\textsuperscript{235} See supra note 230 and accompanying text.
\textsuperscript{236} See supra note 226 and accompanying text.
\end{footnotesize}
tected by the O'Mahoney-Milliken Amendment. Second, the Amendment only applies to projects authorized by the Flood Control Acts.

In deciding whether the United States should file claims for water uses pursuant to the navigation power, it is also relevant whether the state water adjudication statute requires the United States to file for such interests. In at least one state, Montana, the statute does not expressly require the United States to file for uses for "true" navigation purposes; again, it is a closer question with regard to incidental uses in a multiple-purpose project, such as hydropower, fish and wildlife, and recreation. If the McCarran Amendment has not consented to determination of navigation-related uses, sovereign immunity and the supremacy clause compel the conclusion that a state law requiring adjudication of navigation uses cannot bind the United States.

The conclusion that some or all of the United States' interests under the navigation servitude are exempt from McCarran Amendment suits may seem anomalous given the requirement that such adjudications be all-encompassing for jurisdiction over federal water rights to attach. This result is consistent, however, with the statute's focus on proprietary rights rather than on governmental powers. Even without jurisdiction over the navigation servitude, states can achieve the goal of orderly administration of water rights without subjecting constitutionally based governmental powers to general stream suits.

237. See 1 R. CLARK, supra note 7, § 19.3(C); see also Spillway Marina, Inc. v. United States, 330 F. Supp. 611, 612 (D. Kan. 1970) (holding that recreational use of water for a marina was not among the "beneficial consumptive uses" protected by the O'Mahoney-Milliken provision), aff'd, 445 F.2d 876 (10th Cir. 1971).


239. The Montana water adjudication statute requires the United States to claim any right to the use of water that would be protected by law prior to July 1, 1973, with certain exceptions not relevant here. MONT. CODE ANN. § 85-2-212 (1987). The statute's definition of "beneficial use" does not expressly include navigation, although it encompasses other uses that may be incidental to a navigation improvement project, such as fish and wildlife and power production. Id. § 85-2-102(2).

240. U.S. CONST. art. VI, § 2. Without the consent to joinder contained in the McCarran Amendment, no plaintiff can hale the United States into court in a general stream adjudication.
IV
CONCLUSION

In 1952, Congress enacted a statute that enabled nonfederal water users to obtain a judicial determination of the sizeable federal water interests in the Western states. As interpreted by the courts, that consent to suit contained the important qualification that consent was given only when such suits determine all of the water rights of all of the water users in the entire stream system. The navigation power of the United States is a special exception to the mandate of all-inclusiveness.

As the citizens of several states are now discovering, the comprehensiveness required to obtain jurisdiction to determine federal water rights may well be burdensome, especially when many uses are involved. Recognizing this burden, courts should interpret the McCarran Amendment to allow jurisdiction over federal rights even where the adjudication involves a tributary of a larger stream system, so long as notice is given, when necessary, to other users in that system and intervention is liberally allowed. Another mechanism courts could use to relieve the burden inherent in comprehensive adjudications is to allow small, noncontroversial uses, such as individual domestic claims, to be processed separately, particularly where the parties are willing to stipulate to standard allowances. By tailoring the scope of general stream adjudications through such techniques, courts can achieve a reasonable balance between the federal interest in avoiding a multiplicity of water rights suits and the need for a workable water rights system.

Beyond these limited exceptions, however, the practical and political difficulties of conducting truly all-encompassing adjudications do not excuse noncompliance with the conditions the McCarran Amendment places on jurisdiction over federal water rights. Given the extent of federal water rights in the western United States, any other rule would obviate the very equitable and orderly allocation of water the McCarran Amendment was meant to achieve.

Some states may find that the value of an all-inclusive adjudication of water interests is outweighed by its costs, at least in the near term. Still, in those cases where general stream adjudications proceed to final decree, the goal of certainty regarding water rights that spurred passage of the McCarran Amendment is approached, with the result that water allocations in the future will rest on a more secure legal footing.

242. See supra note 27.