GENERAL WATER-RIGHTS ADJUDICATION IN ARIZONA: YESTERDAY, TODAY AND TOMORROW

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I. ARIZONA'S GENERAL ADJUDICATION: AN OVERVIEW

In 1974, Arizona courts began the immense undertaking of adjudicating the conflicting water rights[1] to a majority of the State of Arizona's river systems.[2] In its final form, the adjudication conceivably could include all water in Arizona and all claimants to that water. The importance of such an

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1. ARIZ. REV. STAT. ANN. § 45-251(4) (Supp. 1984-1985) defines the water subject to general adjudications as "all water appropriable under § 45-131 and all water subject to claims based upon federal law." All water appropriable under § 45-131 is determined pursuant to the doctrine of prior appropriation. In Arizona v. California, 373 U.S. 546 (1963), the Supreme Court explained that under the doctrine of prior appropriation, "the one who first appropriates water and puts it to beneficial use thereby acquires a vested right to continue to divert and use that quantity of water against all claimants junior to him in point of time. 'First in time, first in right' is a shorthand expression of this legal principle." *Id.* at 555. Adjudication is discussed *infra* notes 114-19 and accompanying text.

2. On April 26, 1974, the Salt River Valley Water Users' Association (SRVWUA), invoking Arizona's statutory general stream adjudication procedure, filed a petition with the Arizona State Land Department to determine conflicting rights to the use of water in the Salt River above Granite Reef Dam, east of Phoenix and excluding the Verde River. SRVWUA filed a similar petition for the Verde River and its tributaries on February 28, 1976. On February 17, 1978, Phelps Dodge Corporation filed two petitions with the State Land Department: one determining the conflicting rights to the Gila River, and the other determining the conflicting rights to the Little Colorado River.

These original petitions were filed pursuant to the then-existing general adjudication procedures of ARIZ. REV. STAT. ANN. §§ 45-231 to -245 (1956). The Arizona legislature refined the general adjudication procedures in 1979 with the enactment of ARIZ. REV. STAT. ANN. §§ 45-251 to -260 (Supp. 1984-1985). Under the 1979 enactments, the Salt, Verde, and Gila adjudications were transferred to Maricopa County Superior Court from the State Land Department and were subsequently consolidated into one adjudication styled: *In re* the General Adjudication of All Rights to Use Water in the Gila River System and Source, Nos. W-1, W-2, W-3, W-4, Order of March 14, 1984 [hereinafter referred to as the *Gila Adjudication Order*] (The proceedings in the Gila River litigation will be referred to as the Gila Adjudication). The Little Colorado River adjudication was transferred to the Apache County Superior Court and styled: *In re* the General Adjudication to Determine All Rights to Use Water in the Little Colorado River System and Source, Cause No. 6417, May 29, 1985 (The proceedings in the Little Colorado River litigation will be referred to as the Little Colorado Adjudication). The Salt and Verde Rivers are the major tributaries to the Gila River. The Gila River drainage area covers more than one-half of the State of Arizona. The Little Colorado River's drainage area covers 19% of the state and 5,297 square miles in New Mexico.

adjudication is manifest. Water, in Arizona's arid climate, is essential to sustaining current lifestyles and ensuring future growth. A final determination of conflicting claims to Arizona's surface water will mean prosperity and growth for some claimants and a changed lifestyle for others. Because of its potential impact on all of Arizona's residents, the general adjudication of water rights in Arizona can be fairly characterized as the most important litigation in the state's history.

Arizona's general adjudication is more comprehensive than any prior water rights determinations. Early surface water-rights proceedings failed to integrate all claims into one overall prioritization of water rights in a given river.[3] No single action integrated all determined rights with all undetermined, but claimed, rights to water.[4] Most importantly, no state court had successfully adjudicated and integrated all the claims of Indian tribes living in Arizona.

II. JURISDICTIONAL CHALLENGES IN THE FEDERAL COURTS

The United States and the Indian tribes in Arizona are essential parties to a complete adjudication of surface water rights. Because Arizona's surface water rights are determined under a prior appropriation scheme,[5] the absence of any water users of a river system or source from an adjudication will allow only a partial adjudication of rights, subject always to the unadjudicated but prior rights of others.

The power of Arizona courts to determine the conflicting rights of all claimants to Arizona's water has been the subject of litigation between the parties to the adjudications for several years. Many of the Indian tribes[6] whose rights will be determined in the proceedings, and the United States on their behalf, objected to the Arizona state courts' exercise of jurisdiction[7]

3. *See, e.g.*, Hurley v. Abbott, Arizona Territorial Court, Cause No. 4564, filed March 10, 1910; Benson v. Allison, Maricopa County Superior Court, Cause No. 7589, entered Nov. 14, 1917 (Supplemental Decrees entered January 9, April 25, June 25 and September 1, 1918, May 22, 1919, March 8 and May 8, 1920 and June 10, 1923, Amendment of Decree entered November 13, 1919); United States of America v. Gila Valley Irrigation District, Globe Equity No. 59 (D. AZ. 1935).

4. The adjudications might result in a finding that long-established rights are inferior to unadjudicated rights. Moreover, previously established rights may be deemed lost due to forfeiture or abandonment. *See* ARIZ. REV. STAT. ANN. §§ 45-131(C), 45-189 (Supp. 1984-1985); Gila Water Co. v. Green, 29 Ariz. 304, 241 P. 307 (1925). At the conclusion of the general adjudications, anticipated to take as long as twenty years, Arizona's water supply will be allocated on a priority basis to claimants in the adjudications. It is anticipated, however, that adjudicated demands will exceed available supply several fold, requiring those with later priorities to cease their water usage.

5. ARIZ. REV. STAT. ANN. § 45-141 (Supp. 1984-1985). *See supra* note 1.

6. The adjudications concern several Indian tribes. The Navajo and Hopi Tribes are situated within the Little Colorado River watershed. The White Mountain Apache Tribe, San Carlos Apache Tribe, Payson Community of Yavapai-Apache Indians, Yavapai Prescott Indian Community, Camp Verde Indian Reservation, Ft. McDowell Mohave-Apache Indian Community, Salt River Pima-Maricopa Indian Community, Gila River Indian Community, San Xavier Tribe, Pasqua Yaqui Tribe, Papago Tribe, Gila Bend Indian Community, and Ak-Chin Tribe are situated on the Gila River watershed.

7. The tribes' distrust of state courts is notorious. The true basis for this distrust is known only to the tribes. In part, the distrust could stem from the perceived historical mistreatment of Indian interests in state court or from the perceived general racial bias against Indians. Whatever the basis of the distrust, its existence is undeniable. In two recent Supreme Court cases, the tribes, and the United States on the tribes' behalf, argued that state court hostility to Indian rights justified the Court's refusal to defer federal water rights cases in favor of concurrent state proceedings. Ari-

over Indian water rights.[8] The tribes' and the United States' attempts to defeat Arizona state-court jurisdiction over the water-rights adjudications threatened to cripple the adjudication process and render it worthless.

Although neither the United States Supreme Court[9] nor the Arizona Supreme Court[10] accepted their contentions, the tribes and the United States argued that section 20 of Arizona's Enabling Act,[11] art. XX, para. 4 of Arizona's Constitution (identical with section 20)[12] and treaties with the Apaches[13] and Navajos[14] forbade Arizona state courts from exercising jurisdiction over Indian water rights. Furthermore, the tribes and the United States contended that state proceedings under the McCarran Amendment[15] were inadequate and unconstitutional.

In response to this attack, the Salt River Valley Water Users' Association and Phelps Dodge Corporation, along with other parties in the pending

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zona v. San Carlos Apache Tribe, 463 U.S. 545, 566 (1983); Colorado River Water Conservation District v. United States, 424 U.S. 800, 813 (1976).

8. The tribes claim rights to water in Arizona on a variety of bases. The tribes claim "reserved" rights to water pursuant to the "*Winters* Doctrine." Under the *Winters* Doctrine, at the time a reservation is set aside, water rights are reserved to serve the purposes for which the reservation was created. *See* Winters v. United States, 207 U.S. 564 (1908). Additionally, the tribes claim rights to surface water appropriated under state law. *See* ARIZ. REV. STAT. ANN. §§ 45-131 to -156 (Supp. 1984-1985). The tribes also claim rights based on treaties and other federal law.

9. Arizona v. San Carlos Apache Tribe of Arizona, 463 U.S. 545 (1983). *See infra* notes 21-35 and accompanying text.

10. United States v. Superior Court, 144 Ariz. 265, 697 P.2d 658 (1985). *See infra* notes 46-73 and accompanying text.

11. Act of June 20, 1910, ch. 310, 36 Stat. 557, 569. This provision states in pertinent part:

> And said convention shall provide, by an ordinance irrevocable without the consent of the United States and the people of said State—
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> Second. That the people inhabiting said proposed State do agree and declare that they forever disclaim all right and title to the unappropriated and ungranted public lands lying within the boundaries thereof and to all lands lying within said boundaries owned or held by any Indian or Indian tribes the right or title to which shall have been acquired through or from the United States or any prior sovereignty, and that until the title of such Indian or Indian tribes shall have been extinguished the same shall be and remain subject to the disposition and under the absolute jurisdiction and control of the Congress of the United States . . . .

Id.

12. ARIZ. CONST. art. XX, para. 4. This provision states:

> The people inhabiting this State do agree and declare that they forever disclaim all right and title to the unappropriated and ungranted public lands lying within the boundaries thereof and to all lands lying within said boundaries owned or held by any Indian or Indian tribes, the right or title to which shall have been acquired through or from the United States or any prior sovereignty, and that, until the title of such Indian or Indian tribes shall have been extinguished, the same shall be, and remain, subject to the disposition and under the absolute jurisdiction and control of the Congress of the United States.

13. Apache Treaty, 10 Stat. 979 (1852).

14. Navajo Treaty, 15 Stat. 667 (1868).

15. 43 U.S.C.A. § 666 (West 1964). The McCarran Amendment provides:

> Suits for adjudication of water rights—Joinder of United States as defendant; costs
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> (a) 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

adjudication, contended that the McCarran Amendment eliminated any barriers to state-court jurisdiction for adjudicating Indian water rights. These parties also contended that the state proceedings were both constitutional and adequate, within the meaning of the McCarran Amendment, to determine all rights, including the tribes' rights, to the included river systems. The following decisions resolved many of the issues concerning Arizona state-court jurisdiction to adjudicate Indian water rights.

A. *Grants of and Barriers to State-Court Jurisdiction Over Indian Water Rights*

State-court jurisdiction to adjudicate Indian water rights is based on two essential elements. First, the state must have the authority to adjudicate the rights.[16] Second, the state must have jurisdiction over the person or entity holding the rights. A state court has jurisdiction over the United States because the McCarran Amendment waives the sovereign immunity of and authorizes joinder of the United States in comprehensive state, general water-rights adjudications. The United States Supreme Court, in *Colorado River Water Conservation District v. United States*,[17] held that state courts also have jurisdiction under the McCarran Amendment to adjudicate Indian water rights held in trust by the United States.[18]

In *Colorado River*, the Court reasoned that excluding Indian water rights from the operation of the McCarran Amendment, thus preventing state courts from adjudicating them, would enervate the Amendment's objective of allowing the joinder of all claimants, state and federal, in one comprehensive proceeding to determine conflicting claims.[19] Any other interpretation of the amendment would render it impossible for state courts to fashion a complete adjudication of water rights. Indian rights would re-

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

(c) 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.

Id.

16. Arizona courts have this authority pursuant to ARIZ. REV. STAT. ANN. §§ 45-251 to -260 (Supp. 1984-1985).

17. 424 U.S. 800 (1976).

18. The United States holds Indian water rights in trust. *See id.*

19. *Id.* at 811. In reaching this conclusion, the Court relied upon the following language from the Senate Report on the amendment:

> 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 the State courts.

S. Rep. No. 755, 82d Cong. 1st Sess. 2 (1951) at 4-5, *cited in* 424 U.S. at 811.

main undetermined and any adjudication determination would always be contingent upon the undetermined Indian rights.

The McCarran Amendment provides Arizona state courts with the power to adjudicate Indian water rights. The Indian tribes and the United States argued in *Arizona v. San Carlos Apache Tribe*,[20] however, that several additional barriers prevented Arizona state-court exercise of McCarran Amendment jurisdiction.

In *San Carlos*, the United States Supreme Court considered three separate consolidated appeals from the United States Court of Appeals for the Ninth Circuit.[21] Two of these consolidated appeals concerned Indian challenges to Arizona state-court jurisdiction over Indian water rights.[22] The Court in *San Carlos* addressed two issues:

> (1) What is the effect of the McCarran Amendment in those States which . . . were admitted to the Union subject to federal legislation that reserved "absolute jurisdiction and control" over Indian lands in the Congress of the United States?[23]
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> (2) If the courts of such States do have jurisdiction to adjudicate Indian water rights, should concurrent federal suits brought by Indian tribes, rather than by the United States, and raising only Indian claims, also be subject to dismissal under the doctrine of *Colorado River*?[24]

The first issue hinged upon the meaning and effect of the McCarran Amendment.[25] Before reaching this issue, the Court identified but declined to decide several state-law issues concerning state jurisdiction to adjudicate Indian water rights.[26] Instead, the Court considered "the federal Enabling Acts and other legislation, in order to determine whether there is a federal bar to the assertion of state jurisdiction in these cases."[27] Specifically, the

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20. 463 U.S. 545 (1983).

21. San Carlos Apache Tribe v. Arizona, 668 F.2d 1093 (9th Cir. 1982); Navajo Nation v. United States, 668 F.2d 1100 (9th Cir. 1982); Northern Cheyenne Tribe v. Adsit, 668 F.2d 1080 (9th Cir. 1982). In the consolidated appeals, the Ninth Circuit reversed district court decisions staying actions brought in federal court by the tribes and the United States to determine Indian water rights, in favor of concurrent state court general adjudications. *See In re* Determination of Conflicting Rights, 484 F. Supp. 778 (D. Ariz. 1980); Northern Cheyenne Tribe v. Tongue River Water Users Assoc., 484 F. Supp. 31 (D. Mont. 1980).

22. The *Adsit* case arose in Montana. *See supra* note 21.

23. San Carlos, 463 U.S. at 549. The *Colorado River* Court did not face this issue because, unlike most western states, Colorado had no "disclaimer" provision in its Enabling Act. Also, *Colorado River* differed from *San Carlos* because in *Colorado River* Indian tribes, rather than the United States, brought the actions to determine their own rights.

24. 463 U.S. at 549. For a discussion of *Colorado River*, see *supra* notes 17-19 and accompanying text. *See also* Abrams, *Reserved Water Rights, Indian Rights and the Narrowing Scope of Federal Jurisdiction: The* Colorado River *Decision*, 30 STAN. L. REV. 1111 (1978).

25. *See supra* notes 15-17 and accompanying text.

26. The Court said:

> [I]t should be obvious that, to the extent that a claimed bar to state jurisdiction in these cases is premised on the respective State Constitutions, that is a question of state law over which the state courts have binding authority. Because, in each of these cases, the state courts have taken jurisdiction over the Indian water rights at issue here, we must assume, until informed otherwise, that—at least insofar as state law is concerned—such jurisdiction exists.

San Carlos, 463 U.S. at 561.

27. 463 U.S. at 561. The Court noted that a majority of western states have enabling act provisions like those enacted for Arizona and Montana. *Id.* at 561 n.12.

Court considered whether the Montana and Arizona Enabling Acts[28] prohibited state-court adjudication of Indian water rights held in trust by the United States.

The Court reasoned that "the presence or absence of specific jurisdictional disclaimers has rarely been dispositive in our consideration of state jurisdiction over Indian affairs or activities on Indian lands."[29] The Court then held that "whatever limitation the Enabling Acts or federal policy may have originally placed on state-court jurisdiction over Indian water rights, those limitations were removed by the McCarran Amendment."[30] The Court concluded that to find the Enabling Acts a bar to state-court exercise of McCarran Amendment jurisdiction would defeat the legislative purpose of the Amendment, something the Court neither had the power nor the inclination to do.[31]

Addressing the issue of whether dismissal or stay of the federal actions brought by the tribes to adjudicate their rights was appropriate under the *Colorado River* doctrine,[32] the Court held that the tribes' claims had been properly deferred pending state-court general adjudications. The Court, however, admonished that not all federal water-rights suits must be dismissed.[33]

The Court remanded the actions to the Ninth Circuit,[34] which directed the district courts to stay the tribes' actions pending the conclusion of Arizona's general adjudication.[35] Thus, the Gila and Little Colorado River adjudications, which had been pending in Arizona state court since 1974 and 1978, respectively, were revived.

III. JURISDICTIONAL CHALLENGES IN ARIZONA STATE COURTS

After the Ninth Circuit stayed the tribes' federal actions, the tribes[36] and the United States renewed motions in the Superior Court of Maricopa

28. For pertinent portions of Arizona's Enabling Act, see *supra* note 11.

29. 463 U.S. at 562.

30. 463 U.S. at 564.

31. *Id.*

32. The Court based its decision on a principle different from traditional abstention doctrines. The basis on which the actions were deferred is called either the "wise judicial administration" doctrine or the *Colorado River* doctrine. *See Colorado River*, 424 U.S. at 817.

The principle of "wise judicial administration" is grounded on considerations favoring conservation of judicial resources and comprehensive disposition of litigation. *See* Kerotest Mfg. Co. v. C-O-Two Fire Equip. Co., 342 U.S. 180, 183 (1952). In *Colorado River*, the Supreme Court identified several factors it thought relevant to a consideration of wise judicial administration:

> (1) that the court first assuming jurisdiction over property may exercise that jurisdiction to the exclusion of other courts; (2) inconvenience of the federal forum; (3) desirability of avoiding piecemeal litigation; (4) the order in which the jurisdiction was obtained by the concurrent forums; (5) the apparent absence of any proceedings in the district court, other than filing the complaint, prior to the motion to dismiss; (6) the extensive involvement of state water rights occasioned by a suit naming numerous defendants; and (7) the existing participation of the parties in state court proceedings.

Colorado River, 424 U.S. at 818-20.

33. *See infra* notes 107-12 and accompanying text.

34. The Ninth Circuit's disposition of the Arizona cases on remand is discussed more fully *infra* notes 107-12 and accompanying text.

35. *Adsit*, 721 F.2d 1187.

36. Only the San Carlos and Tonto Apache Tribes appeared and urged dismissal of the Gila Adjudication.

County to dismiss the state court Gila adjudication.[37] The San Carlos and Tonto Apache Tribes and the United States urged a variety of grounds for dismissal of the state proceeding.[38]

The Honorable Stanley Z. Goodfarb, Maricopa County Superior Court, issued a sixty-two page order[39] rejecting all of the tribes' and the United States' arguments and affirming the state court's jurisdiction to determine Indian water rights.[40] Specifically, on the issue of Arizona state-court jurisdiction, Judge Goodfarb held that Arizona's constitutional disclaimer of right and title to Indian lands did not bar state-court jurisdiction over Indian water rights in a McCarran Amendment proceeding.[41] Further the court, rejecting the United States' and the tribes' arguments to the contrary, held that the assistance rendered by the Director of the Department of Water Resources to the court did not violate the due process clauses of either the Arizona or United States Constitutions.[42] Finally, the court rejected the tribes' and the United States' contentions that the action did not qualify as a "general adjudication"[43] and held that the adjudication statutes[44] did not contravene the Arizona Constitution.[45]

The United States and the San Carlos and Tonto Apache Tribes then filed petitions for special action[46] to the Arizona Supreme Court. The petitioners contended that Judge Goodfarb had erred on two grounds in failing to dismiss the Gila adjudication. First, they contended that article XX, par-

37. The San Carlos and Tonto Apache Tribes filed a motion in the Gila Adjudication, and the Navajo Tribe filed a motion in the Little Colorado Adjudication. The court order discussed herein refers only to the Gila Adjudication. The Navajo's motion was not ruled upon until after the Arizona Supreme Court decision in United States v. Superior Court, 144 Ariz. 265, 697 P.2d 658 (1985), resolved the issues raised in the motions. *See infra* notes 46-74 and accompanying text. The motions to dismiss the Gila Adjudication were initially urged prior to the Supreme Court's decision in *San Carlos* and consideration of the motions was stayed pending the decision.

38. The tribes and the United States urged the following grounds to defeat state court jurisdiction: 1) tribal sovereign immunity; 2) Arizona's constitutional disclaimer of right and title to Indian lands and acknowledgement of supreme Congressional jurisdiction over Indian tribes and property, ARIZ. CONST. art. XX, para. 4; 3) the failure of Arizona's adjudication to qualify as a comprehensive "general adjudication" within the meaning of the McCarran Amendment; 4) the treaty with the Apaches; and 5) the unconstitutionality of Arizona's general adjudication statutes, ARIZ. REV. STAT. ANN. §§ 45-251 to -260 (Supp. 1984-1985).

39. *Gila Adjudication Order, supra* note 2.

40. Judge Goodfarb also ordered a hearing to determine a schedule for service of process and filing of claims in the adjudication. *Id.*

41. *Id.* at 31.

42. *Id.* at 61. The tribes and the United States argued that the director was an institutional adversary of Indian-reserved rights and his involvement in the adjudications would create a conflict of interest, denying the tribes fundamental fairness. *See* U.S. CONST. amend. XIV; ARIZ. CONST. art. II, § 4. Under Arizona's adjudication procedure, the director is statutorily required to provide the superior court or the designated master with technical assistance. ARIZ. REV. STAT. ANN. § 45-256 (Supp. 1984-1985). The director's technical assistance results in a claim-by-claim report concerning water rights in a given watershed. *Gila Adjudication Order, supra* note 2, at 61.

43. The court noted that this issue had not been addressed by either the Ninth Circuit or the United States Supreme Court in *San Carlos. Id.* at 32. *See infra* notes 113-43 and accompanying text.

44. ARIZ. REV. STAT. ANN. §§ 45-251 to -260 (Supp. 1984-1985).

45. *Gila Adjudication Order, supra* note 2, at 39-52.

46. The petitions were filed pursuant to 17A ARIZ. REV. STAT. ANN. Special Actions, Rules of the Proc., Rule 1 (1973), and were styled: United States v. Superior Court, No. 17623-SA, and San Carlos Apache Tribe and Tonto Apache Tribe v. Superior Court, No. 17681-SA. *See* 144 Ariz. 265, 697 P.2d 658 (1985). The Supreme Court consolidated these actions for briefing, argument, and decision.

agraph 4 of Arizona's Constitution, the "disclaimer,"[47] prohibited Arizona state-court jurisdiction over Indian water rights because the disclaimer exclusively reserved Congress' traditional plenary power over Indian tribes and Indian property.[48] According to the petitioners, the Arizona courts could not exercise jurisdiction over Indian water rights until the disclaimer was amended through general referendum.[49] Second, the petitioners contended that the general adjudication procedure, including the technical assistance which the Director is statutorily required to provide to the court, violated various provisions of Arizona's Constitution,[50] including principles of due process.[51]

In *United States v. Superior Court*, a unanimous decision authored by Justice Stanley G. Feldman, the Arizona Supreme Court held that Arizona was not required to amend its constitution in order to exercise jurisdiction over Indian water rights, and that the general adjudication procedure was constitutional.[52] After tracing the historical,[53] procedural,[54] and legal[55] background of the controversy, the supreme court considered whether article XX, para. 4 of the Arizona Constitution was an impediment to state-court jurisdiction over Indian water rights.[56] The court reasoned that the answer to this question turned on the meaning of the disclaimer's wording that Indian lands "shall be, and remain, subject to the disposition and under the absolute jurisdiction and control of the Congress."[57] The tribes and the United States contended that the words "absolute jurisdiction and control" in the disclaimer meant "exclusive" federal jurisdiction and control.[58] The respondents contended that this language was merely an acknowledgment of the supremacy of federal law and of the authority of Congress over Indians and their reservation lands.[59]

The Arizona Supreme Court agreed with respondents, noting that the United States Supreme Court has never interpreted the "absolute jurisdiction and control" wording of the identical Enabling Act provisions as recog-

47. *See supra* note 12.

48. The tribes and the United States relied primarily upon the language of the disclaimer. ARIZ. CONST. art. XX, para. 4; *see supra* note 12. These parties also relied upon State v. Lohnes, 69 N.W.2d 508 (N.D. 1955), discussed *infra* at note 62.

49. The tribes and the United States argued that because the disclaimer was a constitutional provision, it could be amended only through popular vote. *See*, ARIZ. CONST. art. XXI, § 1.

50. The petitioners argued that the adjudication statutes were "special laws" in violation of ARIZ. CONST. art. IV, para. 2, § 19, violated the principle of separation of powers, ARIZ. CONST. art. III, and infringed upon the Arizona Supreme Court's rulemaking authority, ARIZ. CONST. art. VI, para. 5, § 5.

51. ARIZ. CONST. art. II, § 4.

52. 144 Ariz. 265, 277, 697 P.2d 658, 670 (1985).

53. *Id.* at 269-70, 697 P.2d at 662-63.

54. *Id.* at 270-71, 697 P.2d at 663-64.

55. *Id.* at 271-73, 697 P.2d at 664-66.

56. *Id.* at 273, 697 P.2d at 666.

57. ARIZ. CONST. art. XX, para. 4.

58. 144 Ariz. at 273-74, 697 P.2d at 667. The court also interpreted the tribes' and United States' argument to suggest that Arizona, when adopting article XX, para. 4 of the Constitution, forsook all state governmental authority over Indians or Indian lands. The court rejected this suggestion. *Id.* at 274, 697 P.2d at 667. *See infra* notes 60-61 and accompanying text.

59. To support this proposition, respondents relied upon, *inter alia*, Organized Village of Kake v. Egan, 369 U.S. 60 (1962); Francisco v. State, 113 Ariz. 427, 556 P.2d 1 (1976); Porter v. Hall, 34 Ariz. 308, 271 P. 411 (1928).

nizing a "cession"[60] of state jurisdiction and a recognition of exclusive federal jurisdiction and control over Indian lands.[61] The court next noted that while no case supported the petitioners' interpretation of the disclaimer,[62] decisions from New Mexico supported the respondents' interpretation.[63] The Arizona Supreme Court also found that Arizona decisions interpreting the same Enabling Act language in other contexts supported the conclusion that the word "absolute" in the disclaimer meant "undiminished" and not "exclusive" congressional jurisdiction.[64] The court reasoned that it was inappropriate to interpret the disclaimer as if it were a "simple contract."[65] Instead, the court preferred "the interpretation which best serves the purposes and objectives of federal law and federal policy, which we acknowledge as supreme in this area."[66] It found that the federal policy allowing state-court adjudication of Indian water rights was controlling.[67]

The court concluded:

> We hold, therefore, as a matter of state law, that article XX, [paragraph] 4 of the Arizona Constitution is not an impediment to a gen-

60. The court used the word "cession" in response to the tribes' and the United States' suggestion that Arizona had long ago relinquished any right to exercise control over Indians and Indian lands. *See supra* note 58 and accompanying text. The court cited numerous attempts by Arizona courts to exercise control over Indians and Indian lands as examples that Arizona "has steadfastly maintained that it has . . . authority in, on, and over Indian land." 144 Ariz. at 275 n.3, 697 P.2d at 668 n.3. Further, the court indicated that state power over Indians and Indian lands has two basic limitations: "[S]tate laws apply on reservations unless their application would impair rights granted, reserved or protected by federal law or would interfere with tribal self-government." 144 Ariz. at 276, 697 P.2d at 669. *See also* Mescalero Apache Tribe v. Jones, 411 U.S. 145, 149 (1973); Williams v. Lee, 358 U.S. 217 (1959).

The court concluded that "[a]pplication of state adjudicatory procedures to water claims" neither infringed upon tribal self-government nor "impair[ed] rights granted or reserved by federal law." 144 Ariz. at 276, 697 P.2d at 669.

61. 144 Ariz. at 274, 697 P.2d at 667. *See also* Arizona v. San Carlos Apache Tribe of Arizona, 463 U.S. at 562. The *San Carlos* Court noted: "[T]he presence or absence of specific jurisdictional disclaimers has rarely been dispositive in our consideration of state jurisdiction over Indian affairs or activities on Indian lands."

62. 144 Ariz. at 274, 697 P.2d at 667. The tribes argued that State v. Lohnes, 69 N.W.2d 508 (N.D. 1955), supported their interpretation of the disclaimer. It does not. Although *Lohnes* held that North Dakota must amend its constitutional disclaimer before exercising certain criminal law jurisdiction over Indians, the North Dakota Supreme Court refused to adopt the tribes' contention that the disclaimer conceded "exclusive" (versus "absolute") jurisdiction to the federal government. 69 N.W.2d at 513-17. In fact, the North Dakota court favorably cited several cases holding that the United States' jurisdiction over Indian relations, although supreme, was not exclusive. *Id.; see, e.g.*, State *ex rel.* Tompton v. Denoyer, 6 N.D. 586, 72 N.W. 1014 (1897). Moreover, the North Dakota court did not have the benefit of the United States Supreme Court's interpretation of identical federal Enabling Act language in *San Carlos*, 463 U.S. at 564. Significantly, *Lohnes* did not involve the assumption of McCarran Amendment jurisdiction. Because the McCarran Amendment is a special and a somewhat unique jurisdictional grant, all other state court attempts to exercise jurisdiction over the tribes or their property must be distinguished.

63. 144 Ariz. at 274, 697 P.2d at 667. See Jicarilla Apache Tribe v. United States, 601 F.2d 1116 (10th Cir.), *cert. denied*, 444 U.S. 995 (1979); State *ex rel.* Reynolds v. Lewis, 88 N.M. 636, 545 P.2d 1014 (1976), for cases determining that the New Mexico constitutional disclaimer, which is identical to Arizona's disclaimer, was not an impediment to state court jurisdiction over Indian water rights. New Mexico's disclaimer is found at N.M. CONST. art. XXI, § 2 (1978).

64. 144 Ariz. at 274, 697 P.2d at 667. *See* Francisco v. State, 113 Ariz. 427, 430, 556 P.2d 1, 4 (1976). The court rejected the tribes' argument that the history of the Enabling Act and disclaimer compelled the conclusion that the language of this provision reserved exclusive jurisdiction over Indian lands in the United States. 144 Ariz. at 274-75, 697 P.2d at 667-68.

65. 144 Ariz. at 275-76, 697 P.2d at 668.

66. *Id.* at 276, 697 P.2d at 669.

67. *Id.*

> eral adjudication of water rights in state court, even though as part of that proceeding there will be an adjudication of the claim of tribes and of reservation Indians. By virtue of the McCarran Amendment, the state has jurisdiction over the United States as trustee of the Indian claims and has jurisdiction to adjudicate the subject matter of those claims. The Arizona Constitution does not prohibit it from so doing.[68]

The court disposed of the remaining issues, concluding that Judge Goodfarb had properly denied the tribes' and the United States' motions to dismiss.[69] The most significant remaining issue was whether technical assistance provided to the trial court by the Director of the Department of Water Resources (DWR) violated the constitutional guarantees of due process.[70] Petitioners contended that the DWR is "an institutional adversary of Indian reserved rights."[71] The court reasoned that the petitioners' "argument misconceives the functions of DWR and the nature of its involvement under the statutory scheme"[72] because the director's role in the adjudication "fall far short of participation in the actual adjudicatory process."[73] The director and the DWR will render technical assistance in areas in which they have expertise, but will decide no contested issue of fact or law. The court decides the ranking and quantification of rights.[74]

IV. THE ADJUDICATION'S FUTURE

The Arizona Supreme Court's decision in *United States v. Superior*

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68. *Id.* at 277, 697 P.2d at 670. The court's ruling that the Arizona Constitution need not be amended for state courts to exercise jurisdiction could have future significance. The tribes are foreclosed from urging that the disclaimer represents an absolute prohibition on state court jurisdiction over tribal affairs. The court rejected any contentions that Congressional power is "exclusive." *See supra* notes 58-61 and accompanying text. The court's decision appears linked to the federal policy of the McCarran Amendment. 144 Ariz. at 276-77, 697 P.2d 668-70. It seems highly unlikely, however, that the disclaimer clause would be interpreted differently. It is illogical for the disclaimer not to be a concession to exclusive Congressional jurisdiction in one instance and to be such in another. The court's ruling is likely to influence other states which are now in the process of adjudicating water rights. *Cf.* State *ex rel.* Greely v. Confederated Salish and Kootenai Tribes, — Mont. —, 712 P.2d 754 (1985) (Montana's "disclaimer clause," MONT. CONST. art. I, need not be admended for the Montana courts to exercise jurisdiction over Indian-reserved water rights.).

69. The court dismissed the petitioners' arguments that the adjudication statutes violated various provisions of the Arizona Constitution. 144 Ariz. at 278, 697 P.2d at 671. *See supra* notes 50-51. The court also held that the McCarran Amendment removed any barrier to state jurisdiction created by the Apache Treaty, 10 Stat. 979 (1852). The court reasoned that under *San Carlos* the McCarran Amendment removed all federal barriers to state court adjudication of Indian water rights, including barriers allegedly created by treaties with the tribes. 144 Ariz. at 277-78, 697 P.2d at 670-71.

70. 144 Ariz. at 278-79, 697 P.2d at 672.

71. 144 Ariz. at 279, 697 P.2d at 672. The tribes and the United States focused on positions the director took in two unrelated litigations. *See* Babbitt v. Andrus, Civ. No. 80-992 PHX-CEH D. Ariz. (1980); Arizona v. California, 373 U.S. 546 (1963).

72. 144 Ariz. at 279, 697 P.2d at 672.

73. *Id.* at 281, 697 P.2d at 674.

74. *Id.* at 280, 697 P.2d at 673. In ruling on the tribes' and the United States' due process challenge, the court closely obeyed its duty to constitutionally interpret the statutes that concerned the DWR's role in the adjudication. The result foreclosed any broad assertions of authority by the DWR in the course of the adjudications. For this reason, this portion of the court's decision might prove significant. At a minimum, the court's thoughts concerning the DWR's role will guide the DWR and influence the superior court's handling of the adjudication.

Court ended the long, first chapter of Arizona's general adjudication.[75] Many issues were resolved; however, two issues remain concerning Arizona state courts' power to decide questions concerning Indian water rights.[76] First, what is left of federal jurisdiction over Indian water rights after *San Carlos* when there is a concurrent state proceeding? Second, how comprehensive must an adjudication be to satisfy the McCarran Amendment?[77] The answers to these questions are important, both to Arizona's proceedings and future proceedings in other western states.

A. *Federal Jurisdiction Over Indian Water Rights After* San Carlos

In *Colorado River*, the United States Supreme Court held, *inter alia*, that in light of the clear, federal policies underlying the McCarran Amendment, a general adjudication of water rights brought by the United States was properly dismissed from federal court because a concurrent, comprehensive adjudication reaching the same issues was filed in Colorado state court.[78] The Court held in *San Carlos*, under the principles outlined in *Colorado River*, that suits raising only Indian claims to water, brought by Indian tribes rather than the United States, should also be dismissed in favor of concurrent state-court proceedings under the McCarran Amendment.[79] The Court cautioned, however, that:

> *Colorado River*, of course, does not require that a federal water suit must always be dismissed or stayed in deference to a concurrent and adequate comprehensive state adjudication. Certainly, the federal courts need not defer to the state proceedings if the state courts expressly agree to stay their own consideration of the issues raised in the federal action pending disposition of that action. Moreover, it may be in a particular case that, at the time a motion to dismiss is filed, the federal suit at issue is well enough along that its dismissal would itself constitute a waste of judicial resources and an invitation to duplicative effort. (citations omitted). Finally, we do not deny that, in a case in which the arguments for and against deference to state adjudication were otherwise closely matched, the fact that a federal suit was brought by Indians on their own behalf and sought only to adjudicate Indian rights should be figured into the balance.[80]

Given the above statement, then the issue becomes one of determining when it is appropriate not to defer federal water-rights suits in favor of concurrent state court proceedings.

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75. The United States and the tribes have not sought United States Supreme Court review of the Arizona Supreme Court's decision.

76. In addition, several other issues were not resolved. For instance, the Arizona Supreme Court did not address: whether Arizona's adjudication constitutes a "general adjudication" within the meaning of the McCarran Amendment; the *res judicata* effect of prior water rights decrees; or what effect the assertion of non-reserved federal water rights claims might have on the adjudication.

77. Not every adjudication qualifies as a general adjudication under the McCarran Amendment. *See infra* notes 113-43 and accompanying text.

78. 424 U.S. at 820.

79. 463 U.S. at 570.

80. *Id.* at 569.

1. United States v. Adair

The Court of Appeals for the Ninth Circuit has formulated one answer to this question. In *United States v. Adair*,[81] the court of appeals relied on the Supreme Court's admonition in *San Carlos*[82] to uphold a federal district court's refusal to completely defer an Indian water-rights adjudication in favor of a pending state-court proceeding. In *Adair*, the United States filed an action in federal district court requesting the adjudication of all water rights within the Williamson River. The State of Oregon later initiated a state adjudication to determine water rights in the larger Klamath Basin, including that part of the Williamson River which was the subject of the federal government's suit.[83]

A variety of claimants asserted rights to Williamson River water, and all the claimants traced the origin of their rights to federal law. The claimants included Indians on the lands of the former Klamath Reservation,[84] Indians on allotted reservation lands,[85] non-Indians on transferred, allotted lands, and the United States Forest Service. The United States owned approximately seventy percent of the former reservation lands.[86] All the claimants occupied lands that were part of the former reservation.

The state, acting in accordance with the Supreme Court's decision in *Colorado River*, intervened[87] in the federal proceeding and, along with individual defendants, moved to dismiss the action in favor of the state proceeding. The district court failed to grant the motions to dismiss[88] and entered a pretrial order governing the conduct of the federal suit.[89] The district court's order limited the scope of its inquiry: 1) were water rights reserved at the time of the Klamath Reservation's creation; 2) if reserved, were the water rights passed to subsequent fee owners of former reservation land; and 3) if rights passed, what priorities existed among present owners.[90]

The State of Oregon and the individual defendants appealed from the district court's decision, arguing for dismissal of the suit under the *Colorado River* doctrine.[91] The Ninth Circuit noted that "in most cases a federal court should defer to a contemporaneous and comprehensive state water-

81. 723 F.2d 1394 (9th Cir. 1983), *cert. denied*, 104 S. Ct. 3536 (1984).

82. *See supra* note 80 and accompanying text.

83. The Oregon statutes authorizing the adjudication were OR. REV. STAT. §§ 539.010-.110 (1979).

84. The Klamath Reservation was terminated pursuant to the Klamath Termination Act. Act of Aug. 13, 1954, ch. 732 § 1, 68 Stat. 718 (codified at 25 U.S.C. § 564-564w (1976)).

85. These lands were allotted pursuant to the General Allotment Act, ch. 119, 24 Stat. 388 (1887) (current version at 25 U.S.C. §§ 331-34, 348, 381 (1976)).

86. 723 F.2d at 1398.

87. 723 F.2d at 1399. The Klamath Tribe also intervened.

88. The district court failed to formally deny the motions to dismiss but instead proceeded to decide the federal law priorities among the water rights in the suit. 723 F.2d at 1399.

89. *Id.*

90. *Id.* The district court did not quantify the prioritized rights. *See* United States v. Adair, 478 F. Supp. 336 (D. Or. 1979).

91. 723 F.2d at 1399-1400. The state and individual defendants also argued that the district court erroneously awarded water rights to the tribe and the United States. The United States and tribe cross-appealed, contending that the district court improperly awarded water rights to non-Indian successors of Indian landowners. *Id.*

rights adjudication."[92] The court concluded, however, that the district court did not abuse its discretion in failing to dismiss the federal action in favor of the state proceeding.[93] The court reasoned that dismissal of the federal suit would result in duplication of effort and waste of judicial resources.[94]

The decision in *Adair* is unique. It is the only decision published after *Colorado River* and *San Carlos* that affirms a federal district court's refusal to defer a water rights adjudication in favor of a concurrent state court proceeding.[95] However, the facts of the case, and thus the basis of the decision, are not likely to be repeated.

In *Adair*, the state adjudication remained almost completely inactive. In the meantime, the federal action moved expeditiously forward.[96] The state apparently failed in its obligation to prepare and move the litigation forward in the state forum.[97] Additionally, *Adair* involved a terminated reservation and litigants who claimed federal-reserved rights, owned land that was part of the former reservation, and sought advantage under the early reserved-right priority date. Thus, all claimants raised issues of federal law.

It appears, with the benefit of hindsight, that on the facts of *Adair* both the district court and Ninth Circuit had little choice but to conclude that the most expeditious course was to proceed with the federal action. If the state action had proceeded, the district court's failure to rule on the motions to

92. *Id.* at 1400.

93. *Id.* at 1407.

94. *Id.* at 1405-06. The court also reasoned that: 1) no state proceeding existed at the time the federal suit was filed; 2) none of the steps preliminary to Oregon's adjudication were completed at the time the motions to dismiss were ruled on; and 3) no state adjudication had moved forward at the time of the Ninth Circuit's decision in *Adair*, seven years after the suit was filed. *Id.* at 1404-05.

95. At least one other court has exercised limited federal jurisdiction during a pending state general water rights adjudication. In Confederated Salish and Kootenai Tribes v. Flathead Irrigation and Power Project, 616 F. Supp. 1292 (D. Mont. 1985), the court discussed its exercise of limited jurisdiction in issuing a temporary restraining order under "emergency circumstances" to prevent the depletion of instream water levels and to protect wild fish during drought conditions, even though a general adjudication of water rights was pending in Montana state courts. *Id.* at 1294-95, 1297. On August 1, 1985, because of potentially severe drought conditions and the effect of low water levels on the well-being of tribal fisheries, the plaintiffs moved for a temporary restraining order to protect instream water levels during the 1985 irrigation season. The court issued the temporary restraining order. At the hearing on the tribes' motion for preliminary injunction, the tribes presented the court with a stipulated agreement resolving the issue of instream flow maintenance.

The court recognized that a decision concerning the issue of its jurisdiction to ultimately resolve the question of instream flow maintenance was no longer necessary in light of the stipulation between the parties. The court, however, cited United States v. Adair, 723 F.2d 1394 (9th Cir. 1983), for the proposition that state courts do not have "exclusive" jurisdiction over Indian water rights. The court held that under the "emergency circumstances," jurisdiction was properly invoked to issue the temporary restraining order for the protection of tribal fisheries against irreparable injury. Despite its exercise of limited jurisdiction, the court held that "under *San Carlos*, the proper forum for general adjudication of water rights on the Flathead Indian Reservation lies in the state courts of Montana." 616 F. Supp. at 1297. *Compare with* Confederated Salish & Kootenai Tribes v. Montana, 616 F. Supp. 1299 (D. Mont. 1985) (court stayed federal court proceedings in deference to ongoing state adjudication).

96. "Expeditious litigation" is almost a contradiction in terms when referring to water rights adjudications. The federal action in *Adair*, however, can be considered "expeditious." The time from the filing of the federal suit to the published district court opinion was approximately four years. *Adair*, 723 F.2d 1394.

97. Notably, a federal action to determine only federal water rights generally moves more quickly than a concurrent state adjudication because a federal action normally involves fewer parties.

dismiss set the stage for duplicative litigation, the very result the Court in *San Carlos* sought to avoid.

Adair should not be taken as authority for the proposition that a "hurry-up" of proceedings in federal court will allow the tribes and the United States to achieve federal court water-rights determinations when concurrent, active proceedings are pending in state court. Such a reading would allow the "unseemly and destructive race to see which forum can resolve the same issues first,"[98] something the court in *San Carlos* so clearly condemned. If a state court is proceeding with reasonable diligence toward a resolution of a state-court general adjudication, federal courts should defer concurrent federal proceedings in favor of the state proceeding.[99]

The decision in *Adair* also affirmed a perilous approach to water-rights adjudication. The district court limited its determination to rights based upon the reserved rights doctrine. The Ninth Circuit supported this approach, reasoning that it did not infringe upon the state court's role and did allow "each forum to consider those issues most appropriate to its expertise."[100] The Ninth Circuit failed to mention, however, that the purposes of a general adjudication are to consider all competing claims to a river system and source and to render an *inter sese* determination, whatever the legal bases for the various, competing claims. Although the district court did not actually quantify the claimants' rights, it did determine their scope and priority. This approach required the state court to later fit the district court's determination of these issues into the larger adjudication of non-reserved rights.[101]

Requiring a state court to "plug" the federal determination of reserved rights into the broader state decree is unworkable. Persons not parties to the federal proceeding are not bound by it.[102] Thus, the parties to a state proceeding who were not parties to the federal proceedings are able to subsequently challenge the federal determinations. This will necessarily require a relitigation of these rights. Waste of judicial time and resources is inevitable.[103]

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98. 463 U.S. at 567.

99. State courts often have specialized resources and experience not available in the federal courts and, if properly committed to the adjudication, can process the adjudication in a reasonably diligent manner. In Arizona, the superior court has the benefit of the DWR's technical assistance. ARIZ. REV. STAT. ANN. § 45-256 (Supp. 1984-1985).

100. 723 F.2d at 1406. The court also reasoned that the district court's determination was a necessary separate proceeding because "reserved water rights are established by reference to the purpose of the reservation rather than any actual beneficial use of water." *Id.* at 1406 n.11. The court apparently reasoned that reserved rights were not determined by prior beneficial use, so other parties claiming rights based on state law—prior beneficial use—need not be involved in the reserved right determination.

101. In *Colorado River*, the Court deferred the federal proceedings in favor of the state proceedings even though both were comprehensive general adjudications. *See supra* notes 17-19 and accompanying text.

102. Simple principles of *res judicata* make this clear: persons not parties to the determination are not bound by it. *See, e.g.*, Nevada v. United States, 463 U.S. 110 (1983).

103. The approach to water rights adjudication approved in *Adair* comes dangerously close to ignoring the Supreme Court's *San Carlos* mandate. In *San Carlos*, the tribes raised arguments supporting their contention that dismissal or stay of the federal actions was inappropriate. 463 U.S. at 566-567. Among other things, the tribes maintained: "Because Indian water claims are based on the doctrine of 'reserved rights,' and take priority over most water rights created by state law, they need

The Ninth Circuit seems to condone this piecemeal determination, offering the rationale that each forum, federal and state, is allowed "to consider those issues most appropriate to its expertise."[104] This rationale is contrary to the clear reasoning of *San Carlos*. The advantages of having one court consider all rights in an adjudication are obvious. Further, state courts have a "solemn obligation to follow federal law,"[105] and state court decisions that are appealed will be reviewed by the Supreme Court with a "particularized and exacting scrutiny."[106]

In summary, *Adair* teaches that state courts should proceed with state general adjudications in a manner which reveals a commitment to consider, determine, and quantify all rights to a river system and sources. The lesson for federal courts is that *Adair* cannot be read too broadly. The factual circumstances of *Adair* present a one-time situation. Federal, Indian water-rights actions without *Adair*-type facts should be dismissed or stayed in favor of concurrent state proceedings. A broad reading of *Adair* clearly runs afoul of the Supreme Court's mandate in *Colorado River* and *San Carlos*.

2. *The Remand in* San Carlos

The decision in *Adair* illustrates only one aspect of federal jurisdiction over Indian water rights after *San Carlos*. The *San Carlos* Court made clear that federal court involvement in Indian water cases does not automatically end if the cases are deferred to concurrent state proceedings:

> We leave open for determination on remand as appropriate whether the proper course in such cases is a stay of the federal suit or dismissal without prejudice. [citation omitted]. In either event, resort to the federal forum should remain available if warranted by a significant change of circumstances, such as, for example, a decision by a state court that it does not have jurisdiction over some or all of these claims after all.[107]

Federal court jurisdiction may be preserved to ensure a federal forum for issues not addressed in the state adjudication. On remand in *San Carlos*, the Ninth Circuit stayed the tribes' actions pending conclusion of the state court proceedings.[108] The court reasoned: "A stay of the federal actions

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not as a practical matter be adjudicated *inter sese* with other water rights, and could simply be incorporated into the comprehensive state decree at the conclusion of the state proceedings." *Id.* at 567. The Court found this argument, among others, unpersuasive:

> We note, though, that very similar arguments were raised and rejected in *Eagle County* and *Colorado River*. Most important, all of these arguments founder on one crucial fact: If the state proceedings have jurisdiction over the Indian water rights at issue here, as appears to be the case, then concurrent federal proceedings are likely to be duplicative and wasteful, generating 'additional litigation through permitting inconsistent dispositions of property.'

Id. at 567 (citation omitted).

104. 723 F.2d at 1406.

105. *San Carlos*, 463 U.S. at 571.

106. *Id.*

107. *Id.* at 571 n.21.

108. 721 F.2d 1187 (9th Cir. 1983). Initially, the Ninth Circuit simply affirmed the district court's dismissal of the tribes' actions without prejudice. *See* Northern Cheyenne v. Adsit, 713 F.2d 502 (9th Cir. 1983). Later, the *San Carlos* court stayed the district court proceedings. 721 F.2d 1187 (9th Cir. 1983).

would be preferable to a dismissal here so the federal forum would most readily be available if warranted by a 'significant change of circumstances' such as that referred to in footnote 21 of the Court's opinion."[109]

Arizona courts have jurisdiction to adjudicate Indian water rights held in trust by the United States.[110] Presumably, however, at the conclusion of the state proceeding, the federal forum remains open to consider issues outside the scope of the state proceeding. How extensively will the federal courts consider the completed state adjudication?

The Ninth Circuit's remand order preserved a federal forum for the determination of issues not decided in the state proceeding. This federal safety net should not provide the tribes and the United States an opportunity to relitigate the state adjudication. State courts, and legislatures if necessary, should ensure as complete and fair an adjudication as possible, making a return to the federal forum unnecessary.

The manner of the Ninth Circuit's remand in *San Carlos* should encourage the Arizona courts to consider the possible claims and to push the proceedings forward. A complete adjudication in state court would obviate the need for parties to seek additional relief in the federal forum. A less complete course in state court would waste judicial resources and time, contrary to the intent of the McCarran Amendment. Moreover, an incomplete state adjudication would provide incentive for the tribes to preserve as many issues for the federal forum as possible. A properly conducted state proceeding should not result in any legitimate federal litigation, except, possibly, an appeal of state-court statutory and constitutional interpretations to the United States Supreme Court.

The "significant change of circumstances" that the Court referred to in footnote 21 of the *San Carlos* opinion—which would allow a return to the continuing jurisdiction of the federal court—must be limited to instances where state courts either refuse to exercise jurisdiction or decide they lack the jurisdiction to adjudicate a claim.[111] The *Colorado River* and *San Carlos* mandate is clear: Indian water rights held in trust by the United States are to be litigated in the state-court proceedings *unless* the state court lacks jurisdiction.[112]

In summary, it should be the goal of all state-court general adjudica-

109. 721 F.2d at 1188.

110. *See supra* notes 52-74 and accompanying text.

111. 463 U.S. at 571 n.21. Admittedly, the wording of footnote 21 seems to suggest that other circumstances might exist that justify a return to federal court continuing jurisdiction. One such circumstance might be a return to federal court to determine the amount of trespass damages a tribe might claim for trespass to tribal water. The district court in Determination of Conflicting Rights to use Water from the Salt River Above Granite Reef Dam, 484 F. Supp. 778, 784-85 (D. Ariz. 1980), deferred such a claim until the conclusion of the state proceeding.

Federal courts must remember that state courts have the power, ability, and solemn obligation to apply both federal and state law in the adjudication. Thus, state courts are competent to consider all claims arising in the adjudication, assuming the court has determined it has jurisdiction in the first instance. Arizona's Supreme Court has made this determination. United States v. Superior Court, 144 Ariz. 265, 697 P.2d 658 (1985). *See supra* note 68 and accompanying text.

112. The Ninth Circuit hinted that the issue of the "adequacy" (comprehensiveness) of the state proceeding might be considered in federal court after the conclusion of the state proceeding. 721 F.2d at 1188. The question of "adequacy" is central to the broader question of whether a state court has jurisdiction under the McCarran Amendment to adjudicate Indian water rights. If an adjudica-

tions to make the return to federal court continuing jurisdiction unnecessary. In this way, state courts can best effectuate the purpose and intent of the McCarran Amendment.

B. *Comprehensive Adjudications*

The McCarran Amendment,[113] Arizona's general adjudication statutes,[114] and Supreme Court authority[115] all require a comprehensive general water-rights adjudication in order to litigate and determine the water rights of the United States and the Indian tribes. To qualify as a comprehensive general adjudication under these provisions, the action must be an "adjudication of rights to the use of water of a river system or other source."[116] A "private suit to determine water rights solely between [a party] and the United States" does not come within the McCarran Amendment.[117]

Comprehensiveness is at the heart of the state adjudication process. If an action is not a comprehensive general adjudication, state proceedings, especially in Arizona where there are many Indian tribes involved in two separate adjudications,[118] are worthless. A partial adjudication of rights to a river system or source is always contingent upon unadjudicated rights.[119]

The Court in *San Carlos* did not ignore the importance of comprehensive state proceedings. Holding that the district courts had properly deferred to the state proceedings, the Court expressly assumed that "the state adjudications are adequate to quantify the rights at issue in the federal suits."[120] The Court noted:

> In a number of these cases, respondents have raised challenges, not yet addressed either by the Court of Appeals or in this opinion, to the jurisdiction or adequacy of the particular state proceedings at issue to adjudicate some or all of the rights asserted in the federal suit. These challenges remain open for consideration on remand. Moreover, the courts below should, if the need arises, allow whatever amendment of pleadings not prejudicial to other parties may be necessary to preserve in federal court those issues as to which the state forum lacks jurisdiction or is inadequate.[121]

Presumably, when the Court spoke of the "adequacy of the particular

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tion is not "adequate," i.e., not sufficiently comprehensive, the McCarran Amendment grant of jurisdiction may not apply. *See* Dugan v. Rank, 372 U.S. 609 (1963).

113. *See supra* notes 15-35 and accompanying text.

114. ARIZ. REV. STAT. ANN. § 45-251(1) (Supp. 1984-1985) provides: "1. 'General Adjudication' means an action for the judicial determination or establishment of the extent and priority of the rights of all persons to use water in any river system and source."

115. *See* Dugan v. Rank, 372 U.S. 609 (1963); *infra* notes 121-29 and accompanying text.

116. 43 U.S.C. § 666 (West 1964). In Montana *ex rel.* Greely v. Confederated Salish and Kootenai Tribes, — Mont. —, 712 P.2d 754 (1985), the Montana Supreme Court held that the Montana general adjudication procedure was adequate on its face, within the meaning of the McCarran Act, to adjudicate both Indian and federal reserved rights. *See supra* notes 15-35 and accompanying text.

117. Dugan v. Rank, 372 U.S. at 619.

118. *See supra* note 6.

119. *See supra* note 5 and accompanying text.

120. 463 U.S. at 570.

121. 463 U.S. at 570 n.20. On remand, the Ninth Circuit refused to decide the comprehensiveness issue. The Ninth Circuit hinted, however, that the comprehensiveness issue could be raised at the conclusion of the state proceedings. *See supra* notes 108-09 and accompanying text.

state proceedings," it was referring to whether, under state law, the action qualified as a comprehensive adjudication of water rights sufficient to meet the requirements of the McCarran Amendment. The Court, however, did not specify what constituted a comprehensive adjudication. The three following Supreme Court decisions, interpreting the McCarran Amendment, help define what is meant by a comprehensive adjudication.

1. *Parties Necessary to a Comprehensive Proceeding*

In *Dugan v. Rank*,[122] the United States Supreme Court held that an action to determine water rights among private, water-rights claimants, the United States, and local Reclamation Bureau officials was not a general adjudication within the meaning of the McCarran Amendment.[123] Rather, the action was "a private suit to determine water rights" because "all of the claimants to water rights along the river [were] not made parties, no relief was either asked or granted as between claimants, nor [were] priorities sought to be established as to the appropriative and prescriptive rights asserted."[124]

In *United States v. District Court for Eagle County*,[125] the Court held that a supplemental adjudication that included only those persons claiming water rights since a 1966 prior adjudication and that determined priority dates no earlier than the last priority date of the previous adjudication was a general adjudication adequate under the McCarran Amendment.[126] Further, in *United States v. District Court for Water Division No. 5*,[127] a companion case to *Eagle County*, the Court found that a water-rights determination that only considered rights claimed in applications filed in a particular month and that determined rights junior to all previously determined rights was a general adjudication under the McCarran Amendment.[128] The Court reasoned: "[T]he present suit, like the one in the Eagle County case, reaches all claims, perhaps month by month but inclusively in the totality."[129]

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122. 372 U.S. 609 (1963).

123. *Id.* at 619-20. 43 U.S.C. § 666 (1952). *See supra* note 15. Senator McCarran, chairman of the committee reporting on the bill, stated in response to a question from Senator Magnuson:

> [Section] 18 is not intended . . . to be used for any other purpose than to allow the United States to be joined in a suit wherein it is necessary to adjudicate all of the rights of various owners on a given stream. This is so because unless all of the parties owning or in the process of acquiring water rights on a particular stream can be joined as parties defendant, any subsequent decree would be of little value.

S. Rep. No. 755, 82d Cong. First Sess. 9 (1951).

124. 372 U.S. at 618-19.

125. 401 U.S. 520 (1971).

126. The supplemental adjudication was undertaken pursuant to COLO. REV. STAT. ANN. §§ 148-9-7, 148-9-13 (1963). *See* 401 U.S. at 525-526. The Court in *Eagle County* stated:

> The absence of owners of previously decreed rights may present problems going to the merits, in case there develops a collision between them and any reserved rights of the United States. All such questions, including the volume and scope of particular reserved rights, are federal questions which, if preserved, can be reviewed here after final judgment by the Colorado court. (footnote omitted).

Id. at 525-26. Notably, the Court held in *Eagle County* that the reserved rights or "*Winters* Doctrine" rights could be adjudicated in a state court McCarran Amendment proceeding. *Id.* at 525.

127. 401 U.S. 520 (1971).

128. *Id.* at 529-30.

129. *Id.* at 529.

The lesson of these cases is this: An adjudication need not include every conceivable claimant to a river system or source to be a comprehensive general adjudication within the meaning of the McCarran Amendment. Instead, the adjudication must include all those claimants relevant to the adjudication of rights—an *inter sese* determination after consideration of competing claims—and the adjudication must neither be contingent upon previously unadjudicated rights nor merely a "private suit" to determine water rights. A good-faith effort to include all relevant claimants to a river system or source satisfies the comprehensive general adjudication requirement of the McCarran Amendment. "Technical" arguments on the issue of what constitutes a comprehensive adjudication should be rejected.[130]

2. *Water Encompassed in a Comprehensive Adjudication*

No Arizona court has identified the types of water which must be included in a comprehensive general adjudication.[131] A determination of what types of water will be included in an adjudication will define the scope of the adjudication, both in terms of the number of claimants and involved geographic areas. Thus, this is a threshhold issue which should be resolved early in the adjudication.

Arizona's adjudication statutes specify two classes of water that are subject to such a proceeding. These are "appropriable" water and "water subject to claims based on federal law."[132] "Appropriable" water in Arizona includes water that flows on the surface of the ground[133] and two types of water that flow underground: 1) the sub-flow of surface streams and riv-

130. United States v. District Court for Eagle County, Colo., 401 U.S. 520 (1971). Arizona's water rights adjudication scheme exemplifies a comprehensive general adjudication process within the requirements and meaning of the McCarran Amendment. In order to qualify as a general adjudication under Arizona's statutory scheme, a petition for general adjudication must be filed. *See* ARIZ. REV. STAT. ANN. § 45-252 (Supp. 1984-1985). The petition must "request that the court determine the nature, extent and relative priority of the water rights of all persons in the river system and source." ARIZ. REV. STAT. ANN. § 45-252(D) (Supp. 1984-1985). A "river system and source" is defined as "all water appropriable under § 45-131 and all water subject to claims based on federal law." ARIZ. REV. STAT. ANN. § 45-251(4) (Supp. 1984-1985). Appropriable water is defined in § 45-131:

> A. The water 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, belong to the public and are subject to appropriation and beneficial use as provided in this chapter.

ARIZ. REV. STAT. ANN. § 45-131 (Supp. 1984-1985).

Three courts have determined that Arizona's general adjudication scheme constitutes a comprehensive general adjudication within the meaning of the McCarran Amendment. *See* Determination of Conflicting Rights to Use of Water From the Salt River Above Granite Reef Dam, 484 F. Supp. 778 (D. Ariz. 1980); Gila River Indian Comm. v. American Smelt. and Ref. Co., CIV 78-145 TUC-MAR, January 21, 1980; *Gila Adjudication Order, supra* note 2, at 32-34.

The Supreme Court in *San Carlos* expressly noted that the federal courts did not address the issue of the Arizona adjudication's "adequacy." 463 U.S. at 570 n.20. The Arizona Supreme Court was not requested to address, nor did it address, this issue in United States v. Superior Court, 144 Ariz. 265, 697 P.2d 658 (1985).

131. The statement-of-claimant form sent to claimants pursuant to ARIZ. REV. STAT. ANN. § 45-254 (Supp. 1984-1985) requests information for the court concerning any claimed rights to both surface and groundwater.

132. ARIZ. REV. STAT. ANN. § 45-251 (Supp. 1984-1985).

133. ARIZ. REV. STAT. ANN. § 45-131 (Supp. 1984-1985).

ers;[134] and 2) underground streams flowing in definite, underground channels with defined beds and banks.[135] Groundwater, however, is not appropriable.[136]

The appropriable/non-appropriable distinction becomes troublesome when the above definitions are applied to a given, factual situation. For instance, individuals who claim rights to appropriable water will be vitally concerned with any pumping near a surface stream since such pumping may impair surface flows. Appropriable water claimants will attempt to identify and include any nearby pumpers who affect the surface supply as claimants to appropriable water. Factually, the water pumped could be "appropriable" water. Surface-water rights are of little value if individuals who lack surface-water rights and fail to comply with surface-water priorities are allowed to deplete the surface-water supply through pumping.

The classification of water as "appropriable," and thus subject to adjudication, depends upon technical data and expert testimony.[137] Experts will attempt to demonstrate hydrological connections between groundwater and surface streams and, when possible, will show the flow of water in underground channels with defined beds and banks.[138]

Although pumped water that is not "appropriable" water is not specifically included in the adjudications under Arizona's general adjudication statutes, groundwater[139] may still be included in a general adjudication as "subject to claims based on federal law."[140] For instance, Indian tribes and other federal claimants might claim rights to groundwater by asserting that the right to groundwater was reserved at the time of the reservation's creation.[141] Non-Indians lack any basis upon which to claim rights to ground-

134. *See* Zannaras v. Baghdad Copper Corp., 260 F.2d 575 (9th Cir. 1958); Maricopa County Water Conservation District No. 1 v. Southwest Cotton, 39 Ariz. 65, 4 P.2d 369, *modified*, 39 Ariz. 367, 7 P.2d 254 (1931).

135. *See* ARIZ. REV. STAT. ANN. § 45-131(A) (Supp. 1984-1985); Neal v. Hunt, 112 Ariz. 307, 541 P.2d 559 (1975). Surface water is defined in ARIZ. REV. STAT. ANN. § 45-101(6) (Supp. 1984-1985): "Surface water means the 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, [or] of lakes, ponds [or] springs on the surface. For the purposes of administering this title, surface water is deemed to include central Arizona project water."

136. ARIZ. REV. STAT. ANN. § 45-131(A) (Supp. 1984-1985). *See infra* note 139.

137. In *Maricopa County Municipal Water Conservation District No. 1 v. Southwest Cotton*, the court adopted the following test to determine if pumping affects sub-flow of a stream, so the water pumped is "appropriable": "Does drawing off the sub-surface water tend to diminish appreciably and directly the flow of the surface stream?" 39 Ariz. at 96, 4 P.2d at 380. Obviously, technical data and expert testimony is required to present evidence satisfying this test.

138. *See, e.g.*, United States v. Smith, 625 F.2d 278 (9th Cir. 1980).

139. Groundwater is defined as follows: "Groundwater means water under the surface of the earth regardless of the geologic structure in which it is standing or moving. Groundwater does not include water flowing in underground streams with ascertainable beds and banks." ARIZ. REV. STAT. ANN. § 45-101(4) (Supp. 1984-1985). Groundwater meeting this definition is sometimes referred to as "percolating groundwater." *See, e.g.*, Neal v. Hunt, 112 Ariz. 307, 541 P.2d 559 (1975). Unlike other states, groundwater is not appropriable in Arizona. *See, e.g.*, N.M. STAT. ANN. § 72-12-1 (1978).

140. *See* ARIZ. REV. STAT. ANN. § 45-251(4) (Supp. 1984-1985). Whether groundwater will be included in the adjudication pursuant to rights based upon federal law is an open question.

Additionally, it is not entirely clear whether groundwater rights not based on federal law will be included in the adjudication. This issue is likely to be raised in the ongoing state proceedings.

141. It is unclear whether there are reserved rights to groundwater. *See* Cappaert v. United States, 426 U.S. 128 (1976); Winters v. United States, 207 U.S. 564 (1907); New Mexico *ex rel.*

water in the adjudications. Water which is not hydrologically connected to a river system or source is, as a factual matter, not included in a river system or source.[142] Thus, individuals who pump groundwater that is neither sub-flow nor from appropriable underground streams should not be included in the adjudications. Rights to groundwater unrelated to a river system are not relative rights; therefore, there is no need to make an *inter sese* determination of them.[143]

V. CONCLUSION

Arizona's general adjudications have been pending for approximately a decade. In that time, the United States and Arizona Supreme Courts have confirmed the state courts' power to determine the rights of the various adjudication claimants, including the tribes. Issues related to the general adjudication of water rights remain unresolved, however.

The extent of proper federal court involvement in ongoing state adjudications is substantially resolved. In *United States v. Adair*, however, the Ninth Circuit affirmed a federal court's retention of a partial adjudication where the rights of all the claimants were linked to former reservation lands and were based on federal law. *Adair* must be read narrowly. Federal courts should defer federal court water adjudications to proper, concurrent state proceedings whenever the state proceeding is moving forward in good faith. Additionally, a return to federal court at the conclusion of the state adjudication should be limited to Supreme Court appellate review of state court constitutional and statutory interpretations.

To be within the McCarran Amendment's grant of power to adjudicate water rights, an adjudication procedure must be "comprehensive." The question of comprehensiveness concerns both the parties to the adjudication and the water involved therein. All claimants to a "river system and source" must be included in the adjudication. Because Arizona has jurisdiction over both Indian and non-Indian water users, this aspect of comprehensiveness is satisfied in Arizona.

Arizona courts should resolve the issue of what water will be included in the adjudications. "Appropriable" water and water subject to "claims based on federal law" will be included in the adjudication. At this time, Arizona and federal law are unclear concerning precisely what water falls in these categories.

Reynolds v. Aamodt, 618 F. Supp. 993 (D.N.M. 1985); Note, *Indian Claims to Groundwater: Reserved Rights or Beneficial Interest*, 33 STAN. L. REV. 103 (1980).

142. *See* ARIZ. REV. STAT. ANN. §§ 45-401 to -637 (Supp. 1984-1985).

143. If the uncertain area of federal reserved rights in groundwater is set aside the validity of including non-Indian groundwater rights in the adjudication is especially questionable. Non-Indian users of groundwater, other than sub-flow of surface streams and water that runs in subterranean rivers, gain rights to groundwater through withdrawal and reasonable use. *See* ARIZ. REV. STAT. ANN. §§ 45-401 to -637 (Supp. 1984-1985). An attempt to include such water in a general adjudication would mean undertaking the unwieldy and unnecessary task of determining rights in the two different systems—surface water and groundwater.