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4 IN THE SUPERIOR COURT FOR THE STATE OF WASHINGTON FOR YAKIMA COUNTY

5  
6 IN THE MATTER OF THE DETER- )  
7 MINATION OF THE RIGHTS TO THE )  
8 USE OF THE SURFACE WATERS OF THE )  
9 YAKIMA RIVER DRAINAGE BASIN, IN )  
10 ACCORDANCE WITH THE PROVISIONS OF )  
11 CHAPTER 90.03 REVISED CODE OF )  
12 WASHINGTON, )

NO. 77-2-01484-5

MEMORANDUM OPINION RE:  
UNITED STATES MOTION  
TO DISMISS.

13 THE STATE OF WASHINGTON,  
14 DEPARTMENT OF ECOLOGY,

15 Plaintiffs,

16 vs.

17 JAMES J. ACQUAVELLA, ET AL,

18 Defendants. )  
19 )  
20 )  
21 )  
22 )  
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21 This action was filed October 12, 1977 by the State of  
22 Washington Department of Ecology, requesting a general adjudication  
23 of all water rights within the Yakima River Basin pursuant to RCW  
24 90.03. The factual background regarding this matter is contained in  
25 the Memorandum Opinion re: Motion to Dismiss and Motion for  
26 Determination of Jurisdiction and Order for Joinder of Necessary  
27 Parties filed contemporaneously herein. The United States was  
28 named as a party defendant herein, both on behalf of its own water  
29 rights as well as on behalf of all reserved water rights held by the  
30 United States, including the reserved water rights held on behalf of  
the Confederated Tribes and Bands of the Yakima Indian Nation.

On November 25, 1977, the United States appeared specially  
and filed a Petition for Removal (and obtained an Order based thereon)  
in the U. S. District Court for the Eastern District of Washington.  
(Cause No. C-77-347). Shortly thereafter the State of Washington

1  
2 filed a Motion to Remand, requesting this matter be remanded to this  
3 Court. After extensive and comprehensive briefs had been filed by  
4 many interested parties, oral argument was had to that court on  
5 September 18, 1978. U. S. District Judge Marshall A. Neill entered  
6 therein his Memorandum and Order on January 12, 1979, in which order  
7 he declined jurisdiction in the U. S. District Court and remanded  
8 the matter to this Court for the adjudication. A copy of this order  
9 is marked "Attachment A", is attached hereto and incorporated herein.

10 The United States, pursuant to RCW 90.03, filed its claim  
11 herein on August 31, 1981, which claim purports to cover all  
12 appropriated and reserved water claims as noted above.

13 Thereafter, and on October 23, 1981, the United States  
14 filed this motion to dismiss "on the ground this court lacks  
15 jurisdiction to entertain the cause." The main thrust of the United  
16 States' motion appears to be that the State does not have jurisdiction  
17 over the Indian reserved water rights because of the "disclaimer" in  
18 the Federal Enabling Act and Article XXVI of the Washington State  
19 Constitution and that the McCarran Amendment cannot confer such  
20 jurisdiction in a "disclaimer" state such as Washington. All parties  
21 agree that these issues were not raised or presented to the U. S.  
22 District Court on the States' Motion to Remand when that motion was  
23 argued on September 18, 1978. However, this Court recognizes that  
24 the question of this Court's jurisdiction may be raised at any time,  
25 even on appeal. Williams v. Poulsbo Rural Telephone Ass'n, 87 Wn.2d  
26 636.

27 The Enabling Act whereby Washington could become a State  
28 was enacted by Congress in 1889. Act of Feb. 22, 1889, Ch. 180,  
29 Sec. 4, 25 Stat. 676. Also included in that Act were the States of  
30 Montana, North Dakota and South Dakota. This act provided for a

1  
2 convention of the people of the Territory to form a constitution  
3 and required, in specific terms, that a "disclaimer" be included in  
4 such constitution. Accordingly, Article XXVI of the Washington  
5 Constitution was written in virtually the identical language of the  
6 Enabling Act. This disclaimer provision reads, in pertinent part,  
7 as follows:

8 "The following ordinance shall be irrevocable without  
9 the consent of the United States and the people of  
10 this state:

11 Second. That the people inhabiting this state do agree  
12 and declare that they forever disclaim all right and  
13 title to the unappropriated lands lying within the  
14 boundaries of this state, and to all lands lying within  
15 said limits owned or held by any Indian or Indian  
16 tribes; and that until the title thereto shall have been  
17 extinguished by the United States, the same shall be  
18 and remain subject to the disposition of the United  
19 States, and said Indian lands shall remain under the  
20 absolute jurisdiction and control of the Congress of  
21 the United States...." (Emphasis added)

22 This same disclaimer, in substantially the exact language, was also  
23 inserted into the constitutions of Montana, North Dakota and South  
24 Dakota. It is important to note, for the purposes of this opinion,  
25 that by subsequent acts in 1894, 1906 and 1910, four more states were  
26 admitted to the Union with the same language in their Enabling Acts  
27 and state constitutions. These were the states of Utah, Oklahoma,  
28 Arizona and New Mexico. These eight states have thereafter been  
29 generally referred to as the "disclaimer" states. It should also  
30 be noted that, for purposes of this opinion, Sec. 4 of the Alaska  
Statehood Act, 72 Stat. 339, as amended by 73 Stat. 141, also  
contains the same general disclaimer provisions.

The State of Washington, in 1917, (1917 Laws of Wash. Chap.  
117, now codified as RCW 90.03.110 through 90.03.240, as amended),  
provided for a comprehensive, general plan for the adjudication  
of all water rights diversions within the state. This is a special

1  
2 statute establishing a particular type of a special proceeding  
3 action to be held in the courts of this state. However, as noted  
4 in Footnote 10, page 21 of the State's brief, even though this  
5 act provided for the adjudication of all water rights, this could  
6 not apply to those claims of the United States because of the  
7 federal sovereign immunity. It should also be noted that this  
8 sovereign immunity to suit was, at that time, "the sole and only  
9 legal impediment to joinder of the United States as a party  
10 defendant in state court proceedings relating to federally reserved  
11 water rights, including those waters reserved for use by Indian  
12 tribes." Jicarilla Apache Tribe v. United States, 601 F.2d 1116,  
13 1128.

14 At this point, the United States raises the obfuscatory issue  
15 of the application and meaning of Public Law 83-280, 67 Stat. 588  
16 which was passed by Congress in 1953. This act purported to allow  
17 the various states to exercise jurisdiction over criminal offenses  
18 and civil causes of action in Indian country. 4(a) of Pub.L. 280  
19 (28 USC Sec.1360) reads, in pertinent part, as follows:

20 "Each of the states...shall have jurisdiction over  
21 civil causes of action between Indians or to which  
22 Indians are parties which arise in the areas of  
23 Indian country listed...to the same extent that  
24 such State...has jurisdiction over other civil  
25 causes of action, and those civil laws that are of  
26 general application to private persons or private  
27 property shall have the same force and effect within  
28 such Indian country as they have elsewhere within  
29 the State." (Emphasis added).

30 This section of Pub.L. 280 clearly applies to the use of  
the various general civil causes of action applicable within a  
state and does not apply to general state civil regulatory control  
over Indian reservations. See Bryan v. Itasca County, 426 US 373  
(1976). Under Sec. 6 of that act, the "disclaimer" states were

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2 to be allowed to assume such jurisdiction, provided certain con-  
3 ditions were met. Sec. 6 reads as follows:

4 "Notwithstanding the provisions of any Enabling  
5 Act for the admission of a State, the consent of  
6 the United States is hereby given to the people of  
7 any State to amend, where necessary, their State  
8 constitution or existing statutes, as the case may  
9 be, to remove any legal impediment to the assumption  
10 of civil and criminal jurisdiction in accordance with  
11 the provisions of this act: Provided, that the  
12 provisions of this act shall not become effective  
13 with respect to such assumption of jurisdiction by  
14 any such State until the people thereof have  
15 appropriately amended their State constitution  
16 or statutes as the case may be." (Emphasis added).

17 The United States indicates that this section contains three  
18 requirements, namely: (1) waiver of the prohibition of the enabling  
19 acts; (2) consent of the United States for the removal of disclaimers  
20 by the States, and (3) that the States actually remove the impedi-  
21 ments. (Page 7, Original Brief of U.S.) It argues that the first  
22 two requirements are met by the statute itself, but that the State  
23 has never amended its constitution to remove this prohibition  
24 against jurisdiction. (Page 2 of U.S. Orig. Brief). This contention  
25 was effectively settled in Washington v. Yakima Indian Nation,  
26 439 US 463, 493, wherein the U. S. Supreme Court stated:

27 "We conclude that §6 of Pub.L. 280 does not require  
28 disclaimer States to amend their constitutions to  
29 make an effective acceptance of jurisdiction. We  
30 also conclude that any Enabling Act requirement of  
this nature was effectively repealed by §6...  
disclaimer States must still take positive action  
before Pub.L. 280 jurisdiction can become effective.  
The Washington Supreme Court having determined that  
for purposes of the repeal of Art. XXVI of the  
Washington Constitution legislative action is  
sufficient, and appropriate state legislation having  
been enacted, it follows that the State of Washington  
has satisfied the procedural requirements of §6."  
(Emphasis added).

This ruling is based on the premise that it is up to the  
State courts to determine how "the people" of that State act to

1  
2 remove the prohibition. The Court recognized (Footnote 27) that  
3 the Supreme Court of the State of Washington indicated that "the  
4 people would speak through the mouth of the legislature". See  
5 State v. Paul, 53 Wn.2d 789; Makah Indian Tribe v. State, 76 Wn.2d  
6 485; Tonasket v. State, 84 Wn.2d 164; Quinault Tribe of Indians v.  
7 Gallagher, 368 F.2d 648, Cir. 9, 1966. Indeed, when all is said  
8 and done, the United States agrees that "it is a matter of state law  
9 how to provide state consent to the exercise of jurisdiction over  
10 Indian property". (Page 25, U.S. Response to Reply Briefs). Thus,  
11 it is firmly established that all of these three barriers to the  
12 assumption of jurisdiction have been met.

13 The State of Washington and various irrigation districts  
14 further urge upon the court that the disclaimer provisions themselves  
15 only apply to the "proprietary" interests of the Indians and not  
16 to the State's governmental or regulatory authority over the land.  
17 I agree. "The disclaimer of right and title by the State was a  
18 disclaimer of proprietary rather than governmental interest".  
19 Organized Village of Kake v. Egan, 369 US 60, 69. (Hereinafter Kake)  
20 (Emphasis added). White Mountain Apache Tribe v. Arizona, 649 F.2d  
21 1274, 1280 (9 Cir., 1981). Here, of course, in the adjudication  
22 (the establishment and quantification) of the Indian reserved  
23 water rights, we are not dealing with the "proprietary" interests  
24 of the Indians in that water. Apparently, the United States agrees.  
25 On page 7, U. S. Response to Reply Briefs, it is stated: "...the  
26 United States has never even suggested that, in initiating this  
27 suit, the State of Washington is asserting a proprietary interest  
28 in the Yakima Indians' water rights...Rather, the United States  
29 contends that the state courts of Washington have no jurisdiction  
30 to adjudicate Indian water rights because of the language in the

1  
2 second clause."

3           The argument is that the disclaimer provisions in the  
4 Enabling Act and Art. XXVI of the State Constitution contain two  
5 disclaimers. Their first is the disclaimer of "all right and title"  
6 to all Indian lands and the second disclaimer is that "said Indian  
7 lands shall remain under the absolute jurisdiction and control of  
8 the Congress of the United States." In Kake v. Egan, supra, the  
9 U.S. Supreme Court held that the words "absolute jurisdiction and  
10 control" did not mean "exclusive" jurisdiction and control, thereby  
11 indicating that in certain instances there may be concurrent  
12 jurisdiction. The United States, however, claims that this holding  
13 in Kake applies only to off reservation activities, such as in Kake,  
14 or non-Indian activity, such as in Draper v. United States, 164  
15 US 240. However, Tonasket v. State, 84 Wn.2d 164 involved an  
16 Indian retailer selling cigarettes to non-Indians on the reservation.  
17 In that case, page 178 and quoting from Kake, our court emphasized:  
18 "...even on reservations state laws may be applied to Indians unless  
19 such application would interfere with reservation self government or  
20 impair a right granted or reserved by federal law." This concurrency  
21 of state and federal jurisdictional interest in an on-reservation  
22 setting between Indians and non-Indians, except where it affects  
23 the "proprietary" interests of the tribe or is otherwise expressly  
24 preempted, is recognized in Washington v. Yakima Indian Nation,  
25 supra; Washington v. Confederated Tribes of the Colville Indian  
26 Reservation, 447 US 134 and White Mountain Apache Tribe v. Arizona,  
27 supra. Therefore, it is apparent that in respect to governmental or  
28 regulatory interest, there can be concurrent federal and state  
29 jurisdiction, unless otherwise preempted, under Pub.L. 280.

30           The United States, however, asserts that, in the process of

1  
2 assuming jurisdiction by legislative action as hereinbefore referred  
3 to, the State of Washington not only did not remove the prohibition  
4 contained in the disclaimer, but rather endorsed it. This is due  
5 to the language of Sec. 4(b) of Pub.L. 83-280 (28 USC §1360(b))  
6 which was then enacted, in substantially verbatim language, in Laws  
7 of Wash. 1957 Chap. 240, §6. This is now codified, as amended in  
8 1963, in RCW 37.12.060 and, in pertinent part, reads as follows:

9       "Nothing in this chapter shall authorize the  
10 alienation, encumbrance, or taxation of any  
11 real or personal property, including water  
12 rights and tidelands, belonging to any Indian  
13 tribe, band or community that is held in  
14 trust by the United States or is subject to  
15 a restriction against alienation imposed by  
16 the United States; or shall authorize regula-  
17 tion of the use of such property in a manner  
18 inconsistent with any federal treaty, agreement,  
19 or statute or with any regulation made pursuant  
20 thereto; or shall confer jurisdiction upon the  
21 state to adjudicate, in probate proceedings or  
22 otherwise, the ownership or right to possession  
23 of such property or any interest therein...."  
24 (Emphasis added).

25 I disagree with the assertion of the United States that this  
26 language constitutes an endorsement of the disclaimers. This  
27 language deals solely with interference with the "proprietary"  
28 rights of the Indians as heretofore explained. It deals with the  
29 "alienation, encumbrance or taxation" of property and with the  
30 adjudication of "ownership or right to possession" of property, not  
to the establishment of such a right and the quantification of the  
same. Congress apparently very carefully drafted these limitations  
upon their consent to the assumption of jurisdiction, and, as has  
been previously noted, the United States Supreme Court has so  
interpreted this language. Kake v. Egan, supra. Secondly, it  
must be remembered that Pub. L. 280 and RCW 37.12 deal only with  
civil causes of action in general and the words "Nothing in this

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2 chapter" confines this limitation to the simple general civil causes  
3 of action over which jurisdiction may be assumed pursuant to this  
4 chapter. There is certainly no language which indicates that the  
5 limitation is to go outside of RCW 37.12 to affect other provisions  
6 of the law dealing with special proceedings of the nature of this  
7 matter. Finally, it should be noted that in 1968, Congress passed  
8 Title IV of the Civil Rights Act which repeals Sec. 7 of Pub.L. 280  
9 and requires tribal consent to further state assumptions of juris-  
10 diction. The Yakima Indian Nation has never given such consent.  
11 It should further be noted that these issues having been raised,  
12 thoroughly briefed, exhaustively argued (and now ruled upon), it was  
13 conceded by all parties hereto that Pub.L. 280 and RCW 37.12 are not  
14 applicable to this matter.

15 We then turn to the crux of this matter. In 1952 (one year  
16 prior to the passage of Pub.L. 280), Congress passed what is  
17 generally referred to as the "McCarran Amendment", which the United  
18 States categorizes as an independent "consent to sue" statute from  
19 Pub. L. 280. This statute, codified as 43 USC §666(a), provides:

20 "(a) Consent is given to join the United States as  
21 a defendant in any suit (1) for the adjudication of  
22 rights to the use of water of a river system or other  
23 source, or (2) for the administration of such rights,  
24 where it appears that the United States is the owner  
25 of or is in the process of acquiring water rights  
26 by appropriation under State law, by purchase,  
27 by exchange, or otherwise, and the United States  
28 is a necessary party to such suit. The United  
29 States, when a party to any such suit, shall (1)  
30 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."

1  
2 As can be seen, this is a very limited "consent to suit"  
3 statute dealing with one special type of proceeding, namely, the  
4 general adjudication of water rights in a river system. This is a  
5 very narrow consent indeed, relating only to those situations where  
6 there is a general adjudication of an entire river system, such as the  
7 case at bar. In view of the fact that Pub. L. 280 is not applicable  
8 to this proceeding, the question then becomes: Notwithstanding the  
9 McCarran Amendment, do the disclaimers in the Enabling Act and  
10 Article XXVI of the State Constitution preclude this court from  
11 jurisdiction over the federally reserved Indian water rights? This  
12 precise question was answered in the negative in Jicarilla Apache  
13 Tribe v. United States, 601 F.2d 1116, (Cir. 10, 1979). In that  
14 case, the State of New Mexico (which has the same Enabling Act and  
15 state constitutional disclaimers as Washington, and they have not been  
16 repealed or acted upon by either statute or constitutional amendment  
17 under Pub. L. 280 in New Mexico) brought action in their state  
18 court for a general adjudication of all water rights to the San Juan  
19 River Stream System. The United States was named as a party  
20 defendant under the McCarran Amendment. The United States filed its  
21 petition for removal to federal district court on the grounds that the  
22 state court lacked jurisdiction to adjudicate the federally reserved  
23 Indian water rights. The federal district court, as herein,  
24 remanded the matter to the state court. Upon appeal to the 10th  
25 Circuit Court of Appeals, many of the same arguments posited herein  
26 by the United States were presented to that court. That court  
27 disagreed, concluding as follows, on page 1135:

28 "We thus conclude...that the New Mexico constitutional  
29 disclaimer of right and title to Indian lands prohibits  
30 the state from asserting a proprietary interest in  
Indian lands, but does not constitute a disclaimer  
of state control which does not 'interfere with

1  
2 reservation self government or impair a right granted  
3 or reserved by federal law'...We have recently stated  
4 that 'In summary, the cases stress that regulatory  
5 powers in Indian country or on Indian lands belong  
6 to Congress except for inherent jurisdiction of  
the tribes. Congress may delegate this authority to  
the state, but when it does so it must be in specific  
terms.' Such delegation was precisely the effect  
of the McCarran Amendment."

7 The United States, however, disagrees with this holding,  
8 citing several reasons for such disagreement. (Page 9, U.S. Original  
9 Brief and Page 3, U.S. Response to Reply Brief.) First, the U. S.  
10 claims that the court mistakenly applied Colorado River Water Con-  
11 servation District v. United States, (hereinafter Akin), 424 US 800  
12 (1976) claiming that the court assumed Colorado had a disclaimer  
13 in its constitution when in fact Colorado did not and therefore Akin  
14 was not applicable. This is purely a semantical distinction.  
15 Jicarilla, at page 1129, recognized some limiting language contained  
16 in the Colorado constitution and labeled it the "Colorado disclaimer"  
17 and further indicated that it was not the same disclaimer as in New  
18 Mexico. The court considered the case in that context. Next, the  
19 United States indicates that Jicarilla is in error because they  
20 "erroneously relied on Kake v. Egan, supra, to hold that disclaimers  
21 are limited to matters of a proprietary nature". However, that  
22 is precisely what Kake said (see previous discussion) and it was  
23 also interpreted thereby in White Mountain Apache Tribe v. Arizona,  
24 supra. Thirdly, the United States claims again that Kake should not  
25 be relied upon as that case was limited by the holding in McClanahan  
26 v. State Tax Commission of Arizona, 411 US 164 (1973). However,  
27 Jicarilla, on page 1134, distinguished McClanahan and recognized  
28 that case for what it involved - the very narrow question of federal  
29 preemption respecting taxation of the income of an Indian earned  
30 exclusively on the reservation and that other treaties and statutes,

1  
2 such as the Buck Act (4 USC § 105) pertaining strictly to taxation  
3 of federal areas and exempting reservation Indians from its coverage,  
4 constituted specific federal preemption in that instance.

5 Next, the United States complains that the Jicarilla court  
6 was confused when they "mistakenly thought that in enacting the  
7 McCarran Amendment, Congress "was deemed to be fully cognizant of  
8 the provisions of (Public Law 83-280)" which was enacted 13 months  
9 after the McCarran Amendment. This is the purest of sophistry. The  
10 Jicarilla court well knew Pub.L. 280 was a later enactment as they  
11 said, page 1129, "This Act (Pub. L. 280) became law some thirteen  
12 months after the McCarran Amendment was enacted." What the United  
13 States complains about is the language on page 1133 wherein the court  
14 said, "When the Congress was dealing with the McCarran Amendment,  
15 it was deemed to be fully cognizant of the provisions of (Pub. L. 280)."  
16 Surely, the United States doesn't mean to imply that Pub. L. 280 was  
17 a "spur of the moment" Congressional Act that was dreamed up and  
18 passed overnight. Undoubtedly, the exact provisions of that act  
19 were not worked out at the time of the McCarran Amendment, but just  
20 as surely Congress must have been aware of the concept of allowing  
21 state jurisdiction over civil causes of actions and criminal matters  
22 to those Indians who were without an adequate court structure. As  
23 noted in Jicarilla, Congress specifically refused to exempt reserved  
24 Indian water rights from the McCarran Amendment. Next, the United  
25 States indicates that the Jicarilla court mistakenly relied on  
26 State of New Mexico ex rel Reynolds v. Lewis, 545 P.2d 1014 (1976)  
27 because that case had been "put into question" by Chino v. Chino,  
28 561 P.2d 476 (1977). However, this is like trying to compare apples  
29 and oranges. Chino was a case concerned with whether the state  
30 courts had jurisdiction over a forcible entry and wrongful detainer

1  
2 action involving fee patent land within reservation boundaries. It  
3 should be noted that New Mexico has the same disclaimer as Washington  
4 and had not assumed jurisdiction under Pub. L. 280. The case clearly  
5 deals with "proprietary rights" and held that under the "federal  
6 preemption", McClanahan, supra, and "infringement" tests, Williams  
7 v. Lee, 358 US 217, the state had no jurisdiction. On the other  
8 hand, in State ex rel Reynolds v. Lewis, supra, the sole issue was  
9 whether the McCarran Amendment grants jurisdiction to state courts  
10 over the United States in general stream adjudications involving  
11 Indian reserved water rights. The New Mexico Supreme Court held that  
12 the state was not asserting a proprietary interest in Indian lands  
13 and that the state could exercise power over the Indians if the  
14 federal government expressly granted it, which was done by way of the  
15 McCarran Amendment. Consequently, it can be seen that Chino was  
16 dealing with an entirely different situation and had no bearing  
17 whatsoever on the holding of State ex rel Reynolds v. Lewis.  
18 Chino dealt with a general jurisdiction problem as opposed to the  
19 limited special consent to sue for a particular type of special  
20 proceeding and has no effect on the holding of State ex rel Reynolds  
21 v. Lewis. This, then, disposes of the claimed errors in Jicarilla.  
22 It is interesting to note that the U. S. Supreme Court denied  
23 certiorari of Jicarilla, at 444 US 995.

24 The United States next urges that an "implicit repeal of  
25 the prohibitions cannot be ascribed to Congress", noting that the  
26 McCarran Amendment does not directly mention the disclaimer clauses  
27 of the various states. I do not agree with this proposition. Again,  
28 as noted in Jicarilla, Congress specifically refused to exempt  
29 reserved Indian water rights from the McCarran Amendment. Apparently  
30 they must have debated this matter. Unquestionably, they were aware

1  
2 of the Winters doctrine (Winters v. United States, 207 US 564 (1908))  
3 and the cases following it, which provide that by reserving land  
4 for the Indians, the United States also reserved rights to all  
5 necessary water for use on the land. Additionally, Congress had to  
6 be aware of their own Enabling Acts and the disclaimers contained  
7 in the constitutions of the states admitted thereunder, and that  
8 all of those western states were arid lands totally dependent upon  
9 the water from their river stream systems to make those areas pro-  
10 ductive. Lastly, it appears that Congress specifically dealt with  
11 this situation when they provided, in the second sentence of the  
12 Amendment, as follows: "The United States, when a party to any such  
13 suit, shall (1) be deemed to have waived any right to plead that the  
14 State laws are inapplicable or that the United States is not  
15 amenable thereto by reason of its sovereignty..." (Emphasis added).  
16 This clearly is directed to any claim of sovereignty that may be  
17 required by an Enabling Act and thereby included as a disclaimer in  
18 a state constitution. There can hardly be any other reason for the  
19 inclusion of that language, when they well knew that that "sovereignty"  
20 also included the federally reserved Indian water rights. (More  
21 about this second sentence later.)

22 I fully agree with the United States that "repeals by im-  
23 plication are not favored". Morton v. Mancari, 417 US 535. I  
24 also agree with the language in that case that states: "When there  
25 are two acts upon the same subject, the rule is to give effect to  
26 both if possible...the intention of the legislature to repeal  
27 'must be clear and manifest.'" But it is difficult to see what could  
28 be clearer than that the United States has waived the claim that it  
29 is not amenable to state laws by reason of its sovereignty in this  
30 instance. The United States also cites United States v. Sherwood,

1  
2 85 L.Ed 1058. But therein it is said: "The United States is  
3 immune from suit save as it consents to be sued...and the terms of  
4 its consent to be sued in any court define that court's jurisdiction  
5 ...The [statute] must be interpreted in the light of its function  
6 in giving consent of the government to be sued, which consent, since  
7 it is a relinquishment of a sovereign immunity, must be strictly  
8 interpreted." Here, for the sole purpose of a very narrow special  
9 proceeding, the terms of the consent are not limited in any sense  
10 other than it must involve a general adjudication of a river system.  
11 In light of its function to provide for a total, general adjudication  
12 of a river system, the McCarran Amendment has very clearly consented  
13 to suit and waived any claim that it is not amenable to state  
14 jurisdiction by reason of its sovereignty. There is no room for any  
15 other interpretation. Further, in Morton v. Mancari, supra, the  
16 court held:

17 "Where there is no clear intention otherwise, a  
18 specific statute will not be controlled or nullified  
19 by a general one, regardless of the priority of  
enactment."

20 Here, we have the Enabling Acts which generally require  
21 a disclaimer of jurisdiction and assert the general sovereignty  
22 of the United States over Indian affairs. Then we have the McCarran  
23 Amendment which, for only one very limited and special purpose,  
24 waives that immunity. The general statute cannot control or nullify  
25 the special statute. See also Footnote 20 in Colorado River Water  
26 Conservation District v. United States, 424 US 800. The United  
27 States urges, however, that this rule need not apply inasmuch as  
28 the two statutes, the Enabling Act and the Amendment, are not in  
29 conflict and both can be given effect. This is true if you accept  
30 their argument that the "consent to be sued" would therefore not

1  
2 apply to the 8 arid disclaimer states wherein reserved water rights  
3 could only by adjudicated in the federal courts. Congress was  
4 urged to exempt the Indian reserved water rights from the Amendment  
5 and refused to do so. It clearly intended the consent and waiver  
6 to apply to all states. This does, then, constitute a conflict  
7 between the two and the special statute will prevail over the general  
8 statute.

9         Lastly, the United States urges that the McCarran Amendment  
10 cannot override state sovereignty and inasmuch as the State of  
11 Washington has not expressly chosen to assume jurisdiction in this  
12 matter, the McCarran Amendment does not apply. Firstly, it is  
13 up to the state courts to determine what the state law may be.  
14 Washington v. Yakima Indian Nation, supra. Secondly, the State of  
15 Washington in 1917 provided (in RCW 90.03) a comprehensive procedure  
16 for the general adjudication of all rights to divert any waters  
17 within the state. No exceptions were noted and the only barrier to  
18 that was the recognition of the sovereign immunity claimed by the  
19 United States. That immunity has now been waived by the United  
20 States and the State of Washington, by filing this action and in-  
21 cluding the United States as a party defendant, has evidenced its  
22 intent to assume jurisdiction. Additionally, in 1979 (two years  
23 after the initial petition herein), the state enacted RCW 90.03.245  
24 wherein it declared that the previously mentioned state adjudication  
25 proceedings shall "include rights to the use of water claimed by the  
26 United States". It is clear that this would include the federally  
27 held reserved Indian water rights and is an express assumption of  
28 such jurisdiction. The United States claims that this statute is  
29 remedial and can operate prospectively only. I agree, but I have  
30 been cited to no authority to the effect that the United States

1  
2 cannot be added as a party at any time. Certainly they have appeared  
3 by filing their claims herein on August 31, 1981, two years after the  
4 effective date of this express assumption of jurisdiction. Further,  
5 being properly joined, the United States is precluded by the McCarran  
6 Amendment from asserting it is not amenable to state law.

7           It should be noted, although not necessary to this opinion,  
8 that the court has considered and agrees generally with the analysis  
9 of the Union Gap Irrigation District and Yakima Valley Canal Company  
10 in their brief to the effect that this action meets the "infringe-  
11 ment test" of Williams v. Lee, 358 US 217, to the extent that this  
12 matter does not infringe upon the "right of reservation Indians to  
13 make their own laws and be ruled by them." It must be noted, however,  
14 that Williams v. Lee has generally been applied to matters involving  
15 non-Indians. I also agree that the McCarran Amendment can be con-  
16 strued as a delegation of the power of adjudication to the state  
17 courts, concurrently with the federal courts, as stated in Marcy v.  
18 Board of Commissioners of Seminole County, 144 P. 611; Parker v.  
19 Richard, 250 US 235, and United States v. Shuck, 187 F. 870. These  
20 cases indicate that Congress may delegate the authority to the  
21 state courts to act as a federal agency involving federal matters.  
22 However, I do not agree that the arguments concerning "equality  
23 of statehood" as contained in that brief are applicable to the  
24 issue herein, insofar as that doctrine is the reasoning upon which  
25 the McCarran Amendment should be upheld. However, there is no  
26 question that "equality of statehood" is the net result or effect  
27 of the Amendment, as previously noted.

28           In summary, this court is convinced that the reasoning and  
29 holding in Jicarilla Apache Tribe v. United States, supra, is  
30 sound and is dispositive of the issues raised herein. I hold that,

1  
2 notwithstanding the general language of the Enabling Act, the  
3 special McCarran Amendment clearly authorizes this court to assume  
4 jurisdiction over the federal reserved Indian water rights in this  
5 action.

6 Now, having considered all of the issues raised and argued  
7 by counsel, and having ruled thereupon, the court will address  
8 what it believes might have also been raised as an issue. This has  
9 not been raised, briefed or argued by counsel and also has not been  
10 briefed by the court. I simply mention it as a thought which occurred  
11 to me while I was reading the McCarran Amendment preparatory to  
12 working on this opinion. The second sentence of the Amendment  
13 states that the United States, when a party, waives any right to  
14 plead that the state laws are inapplicable or that the United States  
15 is not amenable thereto by reason of its sovereignty. I recognize  
16 that the question of jurisdiction may be raised at any time, but  
17 doesn't it have to be raised by one who has standing to raise the  
18 issue? This language is very clear and does not admit to inter-  
19 pretation. Did not Congress absolutely preclude the United States  
20 from even raising (or pleading) the issue now before the Court and  
21 thereby deprive it of standing? Doesn't this "thou shalt not"  
22 constitute a commandment that Congress did not want this very  
23 question of the "disclaimers" raised? It might be said that the  
24 United States is not a party unless this jurisdictional issue is  
25 solved, but when directly coupled with the first sentence which  
26 specifically gives the consent to join the United States in a  
27 general adjudication, it would appear that merely joining the United  
28 States as a defendant automatically makes it a party and it is then  
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also automatically precluded from thereafter raising these issues as to the applicability of state law. Interesting.

DATED this 16<sup>th</sup> day of February, 1982.

Walter Stauffer  
JUDGE

Attachment A

FILED IN THE  
U. S. DISTRICT COURT

JAN 15 1979

L. B. PARSONS, Clerk  
Deputy

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF WASHINGTON

IN THE MATTER OF THE DETERMINATION )  
OF THE RIGHTS TO THE USE OF THE )  
SURFACE RIGHTS OF THE YAKIMA RIVER )  
DRAINAGE BASIN, IN ACCORDANCE WITH )  
THE PROVISIONS OF CHAPTER 90.03 OF )  
THE REVISED CODE OF WASHINGTON )

No. C-77-347

THE STATE OF WASHINGTON,  
DEPARTMENT OF ECOLOGY,

MEMORANDUM AND ORDER

Plaintiff,

-vs-

JAMES J. ACQUAVELLA, et al,

Defendants.

-----  
This matter having come on regularly for hearing before the Court upon the motion of the State of Washington (Department of Ecology) for an order remanding these proceedings to the Superior Court of the State of Washington in and for Yakima County, and the Court having considered the briefs and arguments of the parties, and it appearing to the Court:

1. That this is a water adjudication proceeding commenced by the State of Washington (Department of Ecology) pursuant to Chapter 90.03, Revised Code of Washington, to adjudicate the rights to the use of surface waters in the Yakima River Basin in south central Washington state.

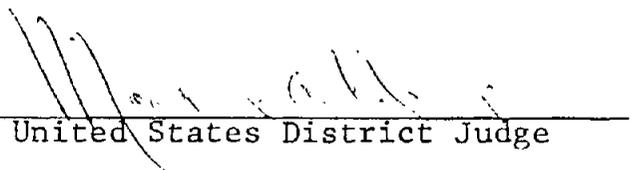
2. That a water adjudication proceeding is sui

1 generis in that all the named defendants are in effect  
2 involuntary parties plaintiff, and each has an interest  
3 adverse to every other party; therefore, the usual requirement  
4 that all named defendants join the petition for removal does  
5 not apply.

6 3. That this action was nevertheless removed  
7 "improvidently and without jurisdiction" within the meaning  
8 of 28 U.S.C. §1447(c), because the McCarran Amendment, 43  
9 U.S.C. §555, as interpreted in Colorado River Water  
10 Conservation District v. United States, 424 U.S. 800 (1976),  
11 evidences a Congressional policy favoring state courts for  
12 resolution of water adjudication cases; this policy would be  
13 defeated if the United States could invariably remove such  
14 cases under 28 U.S.C. §1441(a); therefore the McCarran  
15 Amendment constitutes an Act of Congress which "expressly  
16 provide[s] [otherwise]" within the meaning of 28 U.S.C.  
17 §1441(a). Wherefore, it is

18 ORDERED, ADJUDGED AND DECREED that the motion of  
19 the State of Washington (Department of Ecology) to remand  
20 these proceedings to state court be, and it hereby is,  
21 GRANTED, and this case is remanded to the Superior Court for  
22 the State of Washington for Yakima County. A certified copy  
23 of this Order, together with the file herein, shall be  
24 transmitted by the Clerk of this Court to the Clerk of the  
25 Superior Court of the State of Washington for Yakima County.

26 DONE BY THE COURT this 12<sup>th</sup> day of January, 1979.

27  
28   
United States District Judge

29  
30 Entered in Civil Docket on 1/15/79 

31 ATTEST: A True Copy.  
32 J. R. FALLQUIST, Clerk  
United States District Court  
Eastern District of Washington

By Dorothy Buffin  
Deputy Clerk