NOTE

ALEXANDER WOOD*

Watering Down Federal Court Jurisdiction: What Role Do Federal Courts Play in Deciding Water Rights?

* J.D., University of Oregon School of Law, 2008. The author would like to thank Professor Adell Amos and Professor Maurice Holland for their early encouragement and editing. The author also thanks the editorial staff at the *Journal of Environmental Law and Litigation* for their help throughout the publication process.

> It is most true that this Court will not take jurisdiction if it should not: but it is equally true, that it must take jurisdiction if it should. . . . We have no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given. The one or the other would be treason to the constitution.
>
> —Chief Justice John Marshall, *Cohens v. Virginia*[1]

These words reflect the Chief Justice's belief that the United States Constitution requires the federal judiciary to hear all cases that are properly before it. However, over the course of time, and given the increasing strain upon judicial resources, federal courts have developed and refined several means of deferring or declining their exercise of jurisdiction. One such mechanism is abstention. Abstention doctrines direct federal courts, under certain circumstances, to refrain from deciding cases within their jurisdiction, thus transferring part or all of their responsibility to a state court.[2]

In 1976, the United States Supreme Court decided *Colorado River Water Conservation District v. United States*, holding that a federal court may defer a water rights adjudication, in certain instances, to a state court.[3] The Court's reasoning hinged on the convenience of ruling at the state level, avoidance of piecemeal litigation, and promotion of "wise judicial administration."[4] *Colorado River* thereby established state courts as the principal for adjudicating all water rights, even federal reserved water rights, within state boundaries.[5]

1 Cohens v. Virginia, 19 U.S. (6 Wheat.) 264, 404 (1821).

2 ERWIN CHEMERINSKY, FEDERAL JURISDICTION 783–85 (5th ed. 2007).

3 Colo. River Water Conservation Dist. v. United States, 424 U.S. 800, 813–15 (1976).

4 *Id.* at 818.

5 Robert H. Abrams, *Reserved Water Rights, Indian Rights and the Narrowing Scope of Federal Jurisdiction: The Colorado River Decision*, 30 STAN. L. REV. 1111, 1111 (1978).

Nearly thirty years ago, Professor Robert Abrams argued that *Colorado River* would have "harmful consequences for proper determination of [federal] reserved [water] rights claims" and would subsequently impede proper development of federal lands.[6] Despite Professor Abrams' concern, *Colorado River* has not foreclosed federal jurisdiction over all water rights conflicts. Some federal courts have since exercised jurisdiction over water rights adjudications by distinguishing *Colorado River* on both the facts and law.[7]

Within the context of water rights issues, this Note discusses how federal courts have analyzed *Colorado River* in deciding whether to exercise jurisdiction or abstain because of "exceptional circumstances."[8] Part I provides a brief overview of judicially created abstention doctrines. Part II discusses the tension among federal reserved water rights, the prior appropriation doctrine, and a state's authority over allocating its own water. Part II also focuses on the reasons federal agencies may choose to assert water rights claims in federal court and how the McCarran Amendment has limited that choice.

Part III describes the *Colorado River* decision in detail and analyzes how courts have applied and misapplied its doctrine when resolving water rights issues. Part IV examines the doctrine of prior exclusive jurisdiction, a narrow abstention exception focusing on situations where the court that originally adjudicated a water-rights determination, whether state or federal, would have exclusive jurisdiction over all subsequent adjudications concerning the same water body. Part V explains how *Colorado River* abstention and the prior exclusive jurisdiction doctrine connect in the realm of water rights

6 *Id.*

7 *See, e.g.*, United States v. Morros, 268 F.3d 695, 705–07 (9th Cir. 2001); United States v. Alpine Land & Reservoir Co., 174 F.3d 1007, 1009, 1012–14 (9th Cir. 1999).

8 As noted in *Colorado River*, federal courts should abstain only in "exceptional circumstances." 424 U.S. at 813 (quoting County of Allegheny v. Frank Mashuda Co., 360 U.S. 185, 188–89 (1959)). The following factors are considered to determine whether exceptional circumstances exist: avoiding piecemeal litigation; whether congressionally declared policy exists that would be supported by abstention; the order in which jurisdiction was obtained; the relative progress of state and federal court proceedings; the source of governing law, state or federal; and the adequacy of state court action in protecting federal rights. *Id.*

conflicts. The Note concludes by providing a final assessment of the subject at hand.

I
JUDICIALLY CREATED ABSTENTION DOCTRINES

Abstention doctrines are judicially created common law rules that enable federal courts to decide not to rule on matters before them "even though all jurisdictional and justiciability requirements are met."[9] Proponents of these doctrines believe abstention is necessary to serve vital interests, such as protecting states within a system of federalism.[10] Critics condemn abstention as an unjustified violation of separation of powers.[11] The Supreme Court endorses abstention, but only under certain circumstances.[12]

For instance, abstention is sometimes appropriate to allow state courts to clarify ambiguous state law. Three significant Supreme Court cases explain when abstention due to unclear state law is warranted. *Railroad Commission of Texas v. Pullman Co.* determined that federal court abstention is necessary when a state court's clarification of state law might make a federal court's constitutional ruling unnecessary.[13] The Court offered three reasons for this holding: friction would be avoided between federal and state courts, the likelihood of erroneous interpretations would be reduced, and the need for federal constitutional rulings would be obviated.[14] In *Louisiana*

9 CHEMERINSKY, *supra* note 2, at 783.

10 Michael Wells, *Why Professor Redish is Wrong About Abstention*, 19 GA. L. REV. 1097, 1108, 1117–18 (1985).

11 Martin H. Redish, *Abstention, Separation of Powers, and the Limits of the Judicial Function*, 94 YALE L.J. 71, 76 (1984).

12 It is uncertain within the Court whether abstention is mandatory or discretionary. There have been times when the Court has ruled that it must abstain if a state's clarification might avoid a constitutional ruling. *See, e.g.*, City of Meridian v. S. Bell Tel. & Tel. Co., 358 U.S. 639, 640–41 (1959). However, there have been other times when the Court has treated abstention as a discretionary tool. *See, e.g.*, Baggett v. Bullitt, 377 U.S. 360, 375 (1964); NAACP v. Bennett, 360 U.S. 471, 471 (1959). More recently, the Court has stated that abstention was historically derived from the *discretion* inherent in all courts of equity. Quackenbush v. Allstate Ins. Co., 517 U.S. 706, 727–28 (1996).

13 R.R. Comm'n of Tex. v. Pullman Co., 312 U.S. 496, 501 (1941).

14 *Id.* at 499–501. These reasons, however, have been criticized by many commentators. *See, e.g.*, Martha A. Field, *Abstention in Constitutional Cases: The Scope of the Pullman Abstention Doctrine*, 122 U. PA. L. REV. 1071, 1090 (1974)

Power and Light Co. v. City of Thibodaux, the Court established that federal courts should abstain in diversity cases if state law is unclear and a pertinent state interest is tightly linked with the government's "sovereign prerogative."[15] In *Burford v. Sun Oil Co.*, the Court justified abstention because of the presence of both unclear questions of state law and the need to defer to complex state administrative proceedings.[16] Although the *Pullman* and *Thibodaux* doctrines allow a case to return to federal court if necessary once state law is clarified, *Burford* abstention requires the court to dismiss the case rather than stay the proceedings.[17] Furthermore, the procedures vary in a number of other respects depending on what type of abstention is involved.[18]

Federal courts also abstain in certain circumstances to avoid interference with pending state proceedings. The Court in *Younger v. Harris* held that federal courts may not enjoin pending state court criminal proceedings.[19] This doctrine extends to prevent federal courts from interfering with: (1) state civil proceedings, both involving the government as a party and between private litigants;[20] (2) state administrative proceedings

(challenging whether *Pullman* abstention doctrine actually lessens friction between federal and state courts and arguing that it is questionable that federal judges are less capable of correctly interpreting state law than are state judges); Lisa A. Kloppenberg, *Avoiding Constitutional Questions*, 35 B.C. L. REV. 1003 (1994) (criticizing the principle that federal courts should avoid constitutional rulings).

15 La. Power & Light Co. v. City of Thibodaux, 360 U.S. 25, 28–30 (1959); *see* CHEMERINSKY, *supra* note 2, at 800. The Court in *Quackenbush* seemed to expand the scope of abstention in diversity cases by allowing federal courts to abstain so long as the case was stayed and not dismissed, even if there was not some special state interest as required by *Thibodaux*. *Quackenbush*, 517 U.S. at 721. Many commentators are also critical of the *Thibodaux* abstention doctrine. *See* Charles L. Gowen & William H. Izlar, *Federal Court Abstention in Diversity of Citizenship Litigation*, 43 TEX. L. REV. 194, 194 (1964) (arguing that abstention defeats the very purpose of diversity jurisdiction—providing a neutral federal forum for litigants from different states); Kelly D. Hickman, Note, *Federal Court Abstention in Diversity of Citizenship Cases*, 62 S. CAL. L. REV. 1237, 1256–62 (1989) (arguing that the application of *Thibodaux* should be limited to only certain occasions).

16 Burford v. Sun Oil Co., 319 U.S. 315, 332–34 (1943).

17 CHEMERINSKY, *supra* note 2, at 803.

18 *Id.* at 808–17.

19 Younger v. Harris, 401 U.S. 37, 53–54 (1971).

20 *See, e.g.*, New Orleans Public Serv., Inc., v. Council of New Orleans, 491 U.S. 350, 367–68 (1989).

involving important state interests;[21] (3) actions requesting injunctive relief against state and local executive officers;[22] and (4) the review of the legality of military tribunals.[23] As with the other abstention doctrines, scholars disagree over the desirability of the *Younger* doctrine.[24]

Whether a federal court should exercise its jurisdiction or defer to a state court is a subject of great debate. After all, the first court to rule might preclude the other from deciding the case because of res judicata.[25] Some commentators argue that federal courts should not be required to abstain when there are duplicative proceedings. Mandatory abstention under these circumstances "would give federal court defendants a powerful tool for defeating federal jurisdiction" by filing in state court.[26] In 1942, in *Brillhart v. Excess Insurance Co. of America*, the Court held that federal court deference to a pending state proceeding is appropriate if the federal court is convinced that the state court would adequately settle the controversy.[27] The Court found that it would not make economic sense for a federal court to proceed in a declaratory judgment suit where another

21 *See, e.g.*, Ohio Civil Rights Comm'n v. Dayton Christian Sch., Inc., 477 U.S. 619, 627–28 & n.2 (1986).

22 *See, e.g.*, Rizzo v. Goode, 423 U.S. 362, 380 (1976).

23 *See, e.g.*, Hamdan v. Rumsfeld, 126 S. Ct. 2749, 2769–72 (2006); Schlesinger v. Councilman, 420 U.S. 738, 740, 758 (1975).

24 *See* CHEMERINSKY, *supra* note 2, at 820 n.4; *see also supra* notes 14–15.

25 CHEMERINSKY, *supra* note 2, at 865. *See generally* James C. Rehnquist, *Taking Comity Seriously: How to Neutralize the Abstention Doctrine*, 46 STAN. L. REV. 1049 (1994) (arguing that federal court abstention is only justified when a duplicative suit is first filed in state court and provides a litigant with an adequate opportunity to raise his or her federal claim); David J. McCarthy, Note, *Preclusion Concerns as an Additional Factor When Staying a Federal Suit in Deference to a Concurrent State Proceeding*, 53 FORDHAM L. REV. 1183 (1985) (recommending that res judicata principles be considered when federal courts are determining to stay their proceedings due to pending state court litigation).

26 CHEMERINSKY, *supra* note 2, at 868. The U.S. Supreme Court has long established that "the pendency of a prior suit in another jurisdiction is not a bar to a subsequent suit . . . even though the two suits are for the same cause of action." Stanton v. Embrey, 93 U.S. 548, 554 (1876). In addition, there has been no indication by Congress, based on their jurisdictional statutes, that it wants federal courts to abstain when there are federal proceedings. *See* Martin H. Redish, *Intersystemic Redundancy and Federal Court Power: Proposing a Zero Tolerance Solution to the Duplicative Litigation Problem*, 75 NOTRE DAME L. REV. 1347, 1354–55 (2000).

27 Brillhart v. Excess Ins. Co. of America, 316 U.S. 491, 495 (1942).

suit was pending in state court with state law issues arising between the same parties.[28]

A detailed examination of the abstention doctrines is beyond the scope of this Note.[29] The examples above are merely intended to set forth the range of options that a federal court may have when a water rights claim filed in its jurisdiction duplicates litigation simultaneously occurring in state court.

II
BALANCING FEDERAL RESERVED WATER RIGHTS AND STATE WATER RIGHTS

A. Whose Right to What Water Under Which Sovereign's Court of Law

Unless state law interferes with congressional directives, each state in the United States has the authority to determine how water will be allocated and administered among its citizens.[30] In most western states, water rights are allocated pursuant to the doctrine of prior appropriation.[31] This doctrine allows the first user, established by priority dates, to retain a right to water if it is used for a specific "beneficial use."[32] These beneficial uses are determined and defined by state law.[33]

28 *Id.* *Brillhart* was reaffirmed in Wilton v. Seven Falls Co., 515 U.S. 277, 282 (1995), which held that federal courts have discretion to abstain in declaratory judgment suits pursuant to the Declaratory Judgment Act, 28 U.S.C. § 2201 (2006).

29 For a sampling of the vast amount of literature on abstention doctrines, commentaries on how each doctrine affects the relationship between federal and state courts, and subsequent case law that has more clearly defined how these doctrines should be applied, see Leonard Birdsong, *Comity and Our Federalism in the Twenty-First Century: The Abstention Doctrines Will Always Be with Us—Get Over It!!*, 36 CREIGHTON L. REV. 375 (2003) (providing an overview of the classic abstention doctrines, criticisms of these doctrines, and how they have been applied in the twenty-first century); Mathew D. Staver, *The Abstention Doctrines: Balancing Comity with Federal Court Intervention*, 28 SETON HALL L. REV. 1102 (1998) (discussing the different abstention doctrines).

30 Adell Louise Amos, *The Use of State Instream Flow Laws for Federal Lands: Respecting State Control While Meeting Federal Purposes*, 36 ENVTL. L. 1237, 1241–42 (2006); *see also* Todd A. Fisher, Note, *The Winters of Our Discontent: Federal Reserved Water Rights in the Western States*, 69 CORNELL L. REV. 1077, 1093 (1984).

31 Amos, *supra* note 30, at 1242 & n.16.

32 *Id.* at 1242; *see also* Jennie L. Bricker & David E. Filippi, *Endangered Species Act Enforcement and Western Water Law*, 30 ENVTL. L. 735, 739–40 (2000).

33 Amos, *supra* note 30, at 1242.

When the federal government reserves or acquires land for some particular purpose, a certain amount of unappropriated water necessary to achieve the purposes of the federal land designation is implicitly reserved.[34] This authority is defined as federal reserved water rights.[35] Federal agencies may assert federal reserved water rights, for example, in the following circumstances: (1) fulfilling the purposes of an Indian reservation, usually for agriculture; and (2) fulfilling purposes of federal land in general, such as recreation, fish and wildlife, wild and scenic rivers, and national parks.[36]

Federal reserved water rights are not created or maintained based upon any beneficial use; thus, the right may remain "dormant" until the water is needed.[37] In contrast, holders of appropriative rights, pursuant to state law, must continue the beneficial use or must relinquish that particular water right.[38] Federal agencies often assert ownership rights to water within state boundaries to fulfill federal purposes, providing subsequent protection to proprietary interests.[39] When there is not enough water to meet the needs of water rights holders, federal reserved water rights usually trump prior appropriation rights acquired under state law.[40] As a result, state and federal sovereigns often argue over the allocation of water resources.[41] This Note

34 *Id.* at 1243–44 & n.21; *see* Winters v. United States, 207 U.S. 564, 577 (1908).

35 Sean E. O'Day, San Carlos Apache Tribe v. Superior Court*: Rejecting Legislative Favoritism in Water Right Allocations*, 4 U. DENV. WATER L. REV. 29, 37 (2000).

36 *See* Gregory J. Hobbs, Jr., *State Water Politics Versus an Independent Judiciary: The Colorado and Idaho Experiences*, 5 U. DENV. WATER L. REV. 122, 129–30 (2001).

37 *See* Fisher, *supra* note 30, at 1090.

38 *Id.*

39 Amos, *supra* note 30, at 1243.

40 *See, e.g.*, Bricker & Filippi, *supra* note 32, at 750–54 (finding that state-certificated water rights may be reduced or eliminated by federal law pursuant to the Endangered Species Act's section 9 takings provision); *see also* Abrams, *supra* note 5, at 1113–14. However, this depends on how expansive or narrow a court construes the federal reserved water right. For instance, a state court may narrowly construe a federal reserved water right because the proposed water use is not for a primary purpose of an Indian reservation. *See* Fisher, *supra* note 30, at 1089–93 (providing an analysis of how the prior appropriation doctrine can be reconciled with the *Winters* doctrine).

41 Amos, *supra* note 30, at 1243 (citing John E. Thorson et al., *Dividing Western Waters: A Century of Adjudicating Rivers and Streams*, 8 U. DENV. WATER L. REV.

explores the resolution to such water rights disputes that arise when federal and state interests clash in the western United States, where natural supply of water is commonly outpaced by human demand.

States claim that federal agencies should use state law mechanisms to secure their water rights.[42] Federal administrators, however, may additionally assert water rights under the federal reserved water rights doctrine.[43] The Supreme Court has upheld the federal reserved water rights doctrine, but only for securing water rights for the "primary purposes" of the reservation or land designation.[44] The Court has indicated that when water rights are necessary for secondary purposes, federal agencies *should* secure these rights under state law.[45] However, federal agencies appear to have some flexibility in determining whether to invoke federal mechanisms to protect water for federal lands or reconcile their individual federal mandates with state water code provisions by relying on state law. In addition, federal policies acknowledge circumstances where state law may be insufficient to protect federal purposes.[46] In these instances, federal agencies may turn to the federal reserved water rights doctrine and federal courts to lay claim to federal reserved water rights.

A federal agency may often prefer to assert a federal reserved water right as opposed to a state-based instream flow right because of established priority dates.[47] As mentioned before,

355 (2005)). There has also been great tension between state and federal courts related to jurisdiction over tribal reserved water rights claims. *See* Harold S. Shepherd, *State Court Jurisdiction over Tribal Water Rights: A Call for Rational Thinking*, 17 J. ENVTL. L. & LITIG. 343, 344–45 (2002). *See generally* Reed D. Benson, *Deflating the Deference Myth: National Interests vs. State Authority Under Federal Laws Affecting Water Use*, 2006 UTAH L. REV. 241 (2006).

42 Amos, *supra* note 30, at 1243 (citing John D. Leshy, *Water Rights for New Federal Land Conservation Programs: A Turn-of-the-Century Evaluation*, 4 U. DENV. WATER L. REV. 271, 283 (2001)).

43 Amos, *supra* note 30, at 1242–44.

44 Cappaert v. United States, 426 U.S. 128, 141 (1976).

45 United States v. New Mexico, 438 U.S. 696, 700–02 (1978).

46 A federal agency looks to its enabling legislation and internal policies to determine the purposes that must be met. Amos, *supra* note 30, at 1246. Professor Amos describes how some agencies are more flexible, based on their policies and mandates, in working with state administrators to protect their particular resources. *Id.* at 1244–49; *see also* Bricker & Filippi, *supra* note 32, at 757–59.

47 Amos, *supra* note 30, at 1262.

under the prior appropriation system, the first water user to perform a beneficial use has a full right to the water in its entirety.[48] State water codes, for the most part, have only recently defined an instream flow right as a true water right.[49] Given these instream rights' new status, they are placed later in the priority date system.[50] Since the amount of available unappropriated water in the West is severely limited, a federal land manager is more likely to pursue a federal reserved water right.[51] An earlier priority date secures a more consistent availability of water for federal lands.[52]

Federal land managers may also prefer to assert water rights under federal law to meet the water needs of a particular reservation due to limitations or risks of state law. These limitations or risks include: (1) subjective definitions of beneficial use; (2) structural issues, such as mechanisms for holding instream flow rights or determining priority dates for such rights, that may prevent the federal government from securing necessary water rights; (3) states lacking the administrative ability to process an application to secure federal reserved rights; and (4) state "political and institutional obstacles" hindering "full utilization of state law by federal agencies," thus creating complications for those agencies seeking water rights for the purposes of their land designations.[53]

Although states may control the allocation of water within their boundaries, the large quantity of federal land and federal agency policies may overwhelm state water allocation systems,[54] thereby persuading federal land managers to assert water rights in federal court. In addition to all of the reasons stated above, federal land managers would also prefer to assert water rights in federal court because, in general, state water courts are often less protective of federal water rights than are federal courts.[55]

48 *See supra* note 32.

49 *See* Amos, *supra* note 30, at 1262.

50 *Id.* at 1262–63.

51 *Id.* at 1263.

52 *Id.*

53 *Id.* at 1249.

54 *Id.* at 1249–50.

55 Abrams, *supra* note 5, at 1113–14. Federal courts are more likely to be familiar with federal water law and Indian treaties than state courts and thus rule in favor of federal interests in accordance with such applicable legal provisions. *Id.* at

B. The McCarran Amendment's Limitation on Federal Decision Makers

The passing of the McCarran Amendment (the Amendment) in 1952 limited the choice of federal land managers to assert water rights under federal law in federal court.[56] The Amendment waives the sovereign immunity of the United States in suits involving the adjudication and administration of water rights.[57] The development of the Amendment stemmed from western states' distrust in the federal government in matters involving water rights.[58] Furthermore, the legislative history of the Amendment reveals that Congress sought to protect the doctrine of prior appropriation and state authority in water rights matters.[59] Members of Congress from the various western states were "offended that the United States could ignore state law and process,"[60] while opponents of the bill feared that such proceedings would "encompass all federal water rights," consequently limiting their own needs.[61]

The United States Supreme Court first examined the Amendment in *Dugan v. Rank* in 1963.[62] The Court noted that

1130–31. In addition, state courts may be pressured to find in favor of state interests and against the federal government's reserved water rights claims because the supply of water in the West each year is commonly outpaced by the demand. *Id.* at 1131–32. As such, state courts may narrowly construe federal reserved water rights to maximize important state interests. *Id.*

56 *See* Department of Justice Appropriation Act, Pub. L. No. 495, 66 Stat. 560 (1952) (codified as amended at 43 U.S.C. § 666 (2006)).

57 The McCarran Amendment, 43 U.S.C. § 666, provides:

> Consent is hereby 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.

58 Scott B. McElroy & Jeff J. Davis, *Revisiting* Colorado River Water Conservation District v. United States—*There Must Be a Better Way*, 27 ARIZ. ST. L.J. 597, 601 (1995).

59 *Id.* at 601–02.

60 *Id.* at 603.

61 *Id.* at 604.

62 Dugan v. Rank, 372 U.S. 609 (1963). In *Dugan*, California irrigators sued to enjoin the United States from storing and diverting water at the Bureau of Reclamation's Friant Dam, arguing that these operations would interfere with the plaintiff's existing water rights downstream on the San Joaquin River. *Id.* at 610, 614–15.

even though the Amendment authorized state adjudications, the state proceeding must be a *comprehensive* stream adjudication.[63] In its 1971 decision in *United States v. District Court in and for the County of Eagle*, the Court held that the United States could be joined as a party defendant in state water adjudications over federal reserved water rights.[64] Justice Douglas stated that the McCarran Amendment's waiver of sovereign immunity applied to federal reserved water rights as well as non-reserved rights.[65] The Court again addressed the application of the Amendment and the question of jurisdiction over reserved rights in *Colorado River Water Conservation District v. United States*.[66]

III
COLORADO RIVER ABSTENTION

A. Colorado River *Overview*

The *Colorado River* Court examined the McCarran Amendment's effect on federal district jurisdiction under 28 U.S.C. § 1345.[67] The specific issue involved water rights suits brought by the United States as trustee for certain Indian tribes and as owner of various non-Indian government claims.[68] The

63 *Id.* at 618–19.

64 United States v. Dist. Court in & for the County of Eagle, 401 U.S. 520, 523–24 (1971) (noting that the McCarran Amendment's reference to the federal government's "rights to the use of water of a river system" is broad enough to cover federal reserved rights, including those rights extending to Indian rights).

65 *Id.* at 524. However, the Court has also stated that "if there [was] a collision between prior adjudicated rights and reserved rights of the United States, the federal question can be preserved in the state decision and brought here for review." United States v. Dist. Court in & for Water Div. No. 05, 401 U.S. 527, 529–30 (1971).

66 Colo. River Water Conservation Dist. v. United States, 424 U.S. 800, 802–03 (1976).

67 *Id.*

68 *Id.* at 803. The Court first provided an overview of legal procedures in Colorado for allocating water and adjudicating conflicting claims for water. *Id.* at 804–05. Under Colorado's Water Rights Determination and Administration Act, enacted in 1969, Colorado is divided into seven water divisions where water claims are adjudicated on a continuous basis within each division. COLO. REV. STAT. §§ 37-92-101 to -602 (2007). A water referee in each division either rules on a water rights application or refers it to a water judge. *Id.* § 37-92-603. Colorado, like most western states, applies the doctrine of prior appropriation through which one acquires a priority among confirmed rights based on the date he or she began to use

United States, claiming federal reserved water rights for those waters affecting Colorado Water Division No. 7, initiated a suit in federal district court in Colorado seeking a declaration of those rights on its own behalf and on behalf of certain Indian tribes.[69] Private irrigators, named as defendants, claimed rights to the same water.[70] A number of Colorado water conservation districts subsequently intervened as defendants.[71] Shortly thereafter, one defendant filed suit in Colorado state court seeking adjudication of the same rights.[72] The United States was joined as a defendant pursuant to the Amendment.[73] Subsequently, several defendants and intervenors sought to dismiss the federal case by arguing that the Amendment vested the state courts with exclusive jurisdiction to determine the reserved rights of the United States.[74]

On June 21, 1973, the district court granted the defendants' motion to dismiss, without deciding the jurisdictional question, pursuant to the abstention doctrine.[75] Thereafter, the Court of Appeals for the Tenth Circuit reversed, holding that abstention was inappropriate and that the district court had jurisdiction under 28 U.S.C. § 1345.[76] The Supreme Court granted certiorari to determine whether the McCarran Amendment foreclosed federal district courts from adjudicating federal water rights, and if not, whether the district court dismissed the case appropriately.[77]

The Court first considered whether the district court had jurisdiction under 28 U.S.C. § 1345.[78] Based on this statute's

water by diverting it from a natural source and applying it to some beneficial use. *Colorado River*, 424 U.S. at 805.

69 *Id.*

70 *See id.* at 805–06.

71 *See id.*

72 *Id.* at 806.

73 *Id.*

74 *Id.*

75 *Id.*

76 *Id.*

77 *Id.*

78 *Id.* at 806–09. 28 U.S.C. § 1345 (2006) provides: "*Except as otherwise provided by Act of Congress*, the district courts shall have original jurisdiction of all civil actions, suits or proceedings commenced by the United States, or by any agency or officer thereof expressly authorized to sue by Act of Congress." (emphasis added). The Court examined whether the McCarran Amendment constituted an Act of

language and legislative history, the Court determined that the Amendment did not repeal district court jurisdiction under § 1345 to adjudicate suits brought by the United States for adjudication of claimed federal water rights.[79] As a result, the Court concluded that the Amendment gave consent to jurisdiction in both state and federal courts over controversies involving federal rights to the use of water.[80]

The Court then discussed whether it was appropriate for the federal district court to dismiss the case in view of concurrent proceedings in Colorado state court.[81] The Court found that none of the existing judicially created abstention doctrines were appropriate to dismiss the case.[82] However, certain circumstances would permit federal courts to dismiss a case similar to this one "due to the presence of a concurrent state proceeding for reasons of wise judicial administration."[83] The Court noted that these circumstances are "considerably more limited than the circumstances appropriate for abstention."[84]

The Court identified four factors that a federal court should consider in assessing the appropriateness of dismissal when concurrent jurisdiction is being exercised: (1) the problems that might occur when a state and federal court assume jurisdiction over the same real property;[85] (2) the federal forum's relative inconvenience; (3) the avoidance of piecemeal litigation; and (4) the order in which concurrent forums obtained jurisdiction.[86] Federal courts must take into account these factors as well as their "virtually unflagging obligation . . . to exercise the jurisdiction given them" when determining dismissal of a case

Congress that excepted jurisdiction under § 1345. *Colorado River*, 424 U.S. at 806–09.

79 *Colorado River*, 424 U.S. at 807.

80 *Id.* at 809.

81 *Id.*

82 *Id.* at 813–17 & n.23. The *Pullman*, *Burford*, and *Younger* abstention doctrines are more aimed at federalism concerns—preventing federal courts from interfering in matters better left to state administration—while *Colorado River* abstention is more concerned with conservation of judicial resources. Bricker & Filippi, *supra* note 32, at 752–53.

83 *Colorado River,* 424 U.S. at 818.

84 *Id.*

85 *See infra* Part IV.

86 *Colorado River*, 424 U.S. at 818.

when there exists a pending state court proceeding.[87] A federal court may avoid this obligation "only in the *exceptional circumstances* where the order to the parties to repair to the state court would clearly serve an important countervailing interest."[88]

The Court relied heavily on its interpretation of the Amendment and its underlying policy, which was to avoid "piecemeal adjudication of water rights in a river system."[89] Furthermore, Justice Brennan viewed the Amendment as "a policy that recognizes the availability of comprehensive state systems for adjudication of water rights as the means for achieving these goals."[90] In addition, the Court found significant:

> (a) the apparent absence of any proceedings in the District Court, other than the filing of the complaint, prior to the motion to dismiss, (b) the extensive involvement of state water rights occasioned by this suit naming 1,000 defendants, (c) the 300-mile distance between the District Court in Denver and the court in Division 7, and (d) the existing participation by the Government in Division 4, 5, and 6 proceedings.[91]

The *Colorado River* doctrine thus created the presumption that a federal action should be dismissed when both federal and state actions are pending for purposes of adjudicating federal reserved water rights.[92]

Although *Colorado River* seemingly clarified the law with regard to abstention in the case of parallel proceedings, "confusion [remained] among the lower courts as to what constituted sufficiently exceptional circumstances as to justify deference to concurrent state court litigation."[93]

---

87 *Id.* at 817.

88 *Id.* at 813 (emphasis added) (quoting County of Allegheny v. Frank Mashuda Co., 360 U.S. 185, 188–89 (1959)).

89 *Id.* at 819.

90 *Id.*

91 *Id.* at 820 (citation omitted).

92 Fisher, *supra* note 30, at 1084. For additional commentary on *Colorado River*, see David A. Sonenshein, *Abstention: The Crooked Course of Colorado River*, 59 TUL. L. REV. 651 (1985); Linda S. Mullenix, *A Branch Too Far: Pruning the Abstention Doctrine*, 75 GEO. L.J. 99 (1986).

93 CHEMERINSKY, *supra* note 2, at 874. Professor Sonenshein observed that some lower federal courts "resisted deference in the absence of 'exceptional circumstances,' while others indicated that *Colorado River* might have freed them

B. Subsequent Applications of Colorado River *Abstention*[94]

1. Adair v. United States *Cases*

In 1975, the United States brought suit in the District Court of Oregon seeking a declaration of water rights in the Williamson River drainage.[95] Four months after the United States filed suit, the State of Oregon initiated formal proceedings to adjudicate all water rights in the Klamath Basin, which included the Williamson River drainage.[96] Oregon and the Klamath Tribe both intervened in the federal suit.[97] Oregon moved to dismiss the case on jurisdictional grounds pursuant to the rule announced in *Colorado River*.[98]

As noted in *Adair II*, the district court denied the motion and, in lieu of abstaining, limited its ruling to issues of federal law.[99] Specifically, the court retained its jurisdiction to determine the existence, scope, and priority of water rights among the litigants. These determinations included the Klamath Tribe's hunting, fishing, and irrigation rights; the federal government's water rights in the Winema National Forest; and non-Indian landowners' and the State's rights to water for irrigation and domestic uses.[100] In its unpublished declaratory judgment, the *Adair I* court decided to retain its jurisdiction

> for the purpose of enabling the parties . . . to apply to this court at any time for such orders and directions as may be necessary

to clear their dockets merely because a parallel, and thus duplicative, state court action had been filed." Sonenshein, *supra* note 92, at 667.

94 "Although commonly referred to as an abstention doctrine, the Supreme Court has flatly rejected this categorization." Nakash v. Marciano, 882 F.2d 1411, 1415 n.5 (9th Cir. 1989) (citing 17A CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 4247, at 150–51 (2d ed. 1988)).

95 United States v. Adair (*Adair I*), 478 F. Supp. 336, 339 (D. Or. 1979) *aff'd*, 723 F.2d 1394, 1419–20 (9th Cir. 1983).

96 United States v. Adair (*Adair II*), 723 F.2d 1394, 1398–99 (9th Cir. 1983).

97 *Id.* at 1399.

98 *Id.*

99 *Id.* It should be noted that the district court never expressly ruled on the motion to dismiss under the *Colorado River* doctrine. *Id.* However, during the hearing on the defendants' motions to dismiss, the court and counsel discussed *Colorado River* and its application to the facts of this particular case which led to the court's pretrial order of how the federal suit would proceed and be governed. *Id.* at 1402 n.6.

100 *Adair I*, 478 F. Supp. at 350; *Adair II*, 723 F.2d at 1399.

> or appropriate for the construction and effectuation of this judgment, for the modification of any of the provisions hereof, and for the enforcement of compliance with this judgment.[101]

The court, however, left the quantification of those rights to the State of Oregon's Klamath Basin Adjudication.[102] Thereafter, the State and individual defendants appealed the decision, arguing that the district court should have dismissed the case under the *Colorado River* doctrine.[103]

The Ninth Circuit's *Adair II* decision concluded that the district court did not abuse its discretion in determining federal law priorities among water rights for each party.[104] The court noted that there are circumstances where a federal water suit need not be dismissed or stayed in deference to a concurrent and adequate state adjudication.[105] Specifically, the court cited to the posture of the case,[106] the limited nature of the district court's decision on federal law questions,[107] and the overriding objective of the *Colorado River* abstention doctrine in avoiding duplication and waste of state and federal judicial resources.[108] The court mainly proceeded on the premise that "the federal suit

101 *See* United States v. Adair (*Adair III*), 187 F. Supp. 2d 1273, 1274 (D. Or. 2002), *vacated on other grounds*, United States v. Braren (*Adair IV*), 338 F.3d 971, 974–76 (9th Cir. 2003) (holding that the dispute in *Adair III* was not ripe for federal judicial determination).

102 *Adair II*, 723 F.2d at 1399.

103 *Id.* at 1399–1400. The United States and the tribes initially tried to avoid the abstention doctrine entirely by arguing that the McCarran Amendment did not apply because the Oregon adjudication was an administrative proceeding and not a "suit" within the meaning of the Amendment. *Id.* at 1405 n.9. The Ninth Circuit, however, rejected that argument stating that "the Supreme Court has warned against [an] overly technical application of the McCarran Amendment." *Id.* (citing United States v. Dist. Court in & for the County of Eagle, 401 U.S. 520, 525 (1971)).

104 *Id.* at 1403–04.

105 *Id.* at 1404–05 & n.8.

106 At the time of the Ninth Circuit's ruling, nearly seven years after the initial notice of investigation, the state's determination of water rights in the Klamath Basin still had not proceeded beyond the administrative phase; in effect, this was a stayed state proceeding. *Id.* at 1405.

107 The district court only ruled on those questions involving the application of the Federal Indian law doctrine of reserved water rights, thereby avoiding state law matters and allowing each forum to consider those issues most within their own expertise. *Id.* at 1406.

108 *Id.* at 1404; *see* Ryan Sudbury, Case Note, *When Good Streams Go Dry:* United States v. Adair *and the Unprincipled Elimination of a Federal Forum for Treaty Reserved Rights*, 25 PUB. LAND & RESOURCES L. REV. 147, 158–61 (2004).

at issue [may be] well enough along that its dismissal would itself constitute a waste of judicial resources and an invitation to duplicative effort."[109]

Given that the district court had taken evidence, developed a multi-volume record, and allowed for all parties to fully present their case, the Ninth Circuit determined that reversing and vacating the district court's judgment was not in the best interest of "wise judicial administration."[110] Moreover, the district court's decision to prioritize water rights under federal law did not add an otherwise unnecessary judicial step for establishing water rights in the Klamath Basin.[111] In summary, the Ninth Circuit concluded that the district court properly limited its jurisdiction to a determination of federal water right priority dates, did not undertake a comprehensive stream adjudication, avoided any duplication of litigation, and did not cause a piecemeal determination of water rights.[112]

2. Arizona v. San Carlos Apache Tribe

In 1983, the United States Supreme Court heard *Arizona v. San Carlos Apache Tribe of Arizona*.[113] The first question before the Court involved state jurisdiction over the adjudication of Indian water rights.[114] A determination that states did have such jurisdiction would require the Court to then decide whether concurrent federal suits brought by Indian tribes, rather than the United States, should be dismissed pursuant to the *Colorado*

109 *Adair II*, 723 F.2d at 1404 (quoting Arizona v. San Carlos Apache Tribe of Ariz., 463 U.S. 545, 569 (1983)).

110 *Id.* at 1405–06.

111 *Id.* at 1406 n.11.

112 *Id.* at 1407. Thereafter, the district court exercised its jurisdiction "to determine two narrow issues: (1) whether the Klamath Tribes [had] a water right to support reserved gathering rights; and (2) whether and to what extent the 'moderate living' standard applie[d] in quantifying the Tribes' water rights." United States v. Adair, 187 F. Supp. 2d 1273, 1275 (D. Or. 2002) (*Adair III*), *vacated on other grounds*, United States v. Braren (*Adair IV*), 338 F.3d 971, 974–76 (9th Cir. 2003). The district court's decision to proceed with analyzing the merits of the initial declaratory judgment as well as its announcement of a two-step method of establishing the tribes' water rights was later vacated and remanded by the Ninth Circuit because the dispute was considered not ripe for judicial review. *Adair IV*, 338 F.3d at 974–76. The Ninth Circuit, however, did not explore the challenges to the district court's exercise of jurisdiction. *Id.* at 976.

113 *San Carlos Apache Tribe*, 463 U.S. 545.

114 *Id.* at 549.

River doctrine.[115] The Court considered two petitions from tribes in Arizona and Montana arising out of three separate consolidated appeals with the United States, as trustee, and certain tribes on their own behalf asserting the right to have Indian water rights be adjudicated in federal court.[116]

The Court first concluded that each state's statehood enabling acts did not have any effect on the ability of state courts to adjudicate Indian water rights based on the McCarran Amendment.[117] The Amendment's intent to resolve the general problem of states not being able to adjudicate federal reserved water rights, the absence of textual language or legislative history showing that the Amendment should apply differently from one state to another, and the "ubiquitous nature of Indian water rights in the Southwest" all pointed to Arizona and Montana having state jurisdiction over Indian water rights.[118]

The Court then analyzed whether *Colorado River* applied to federal water rights suits brought by Indian tribes, rather than the United States.[119] The federal government and various Indian respondents argued that these federal suits should not be dismissed for a number of reasons:

> (1) Indian rights have traditionally been left free of interference from the States. (2) State courts may be inhospitable to Indian rights. (3) The McCarran Amendment . . . did not waive *Indian* sovereign immunity. . . . (4) Indian water rights claims are generally based on federal rather than state law. (5) Because Indian water claims are based on the doctrine of "reserved rights," and take priority over most water rights created by statelaw, they . . . could simply be

115 *Id.*

116 *Id.* at 553. Starting in 1966, Indians were given the right to proceed in federal court, without having to meet the $10,000 amount-in-controversy then required under 28 U.S.C. § 1331, the general federal question jurisdictional statute, when 28 U.S.C. § 1362 was passed. *Id.* at 561 n.10. Section 1362 provides in relevant part: "[t]he district courts shall have original jurisdiction of all civil actions, brought by any Indian tribe . . . wherein the matter in controversy arises under the Constitution, laws, or treaties of the United States." 28 U.S.C. § 1362 (2006).

117 *San Carlos Apache Tribe*, 463 U.S. at 563–64.

118 *Id.* at 564–65 (quoting Colo. River Water Conservation Dist. v. United States, 424 U.S. 800, 811 (1976)). The Court noted that any other result would defeat the purpose of the Amendment and constrain the rationale behind the Court's ruling in *Colorado River*. *Id.* at 464.

119 *Id.* at 565.

> incorporated into the comprehensive state decree at the conclusion of the state proceedings.[120]

Justice Brennan agreed that these arguments were valid, but they were similarly raised and rejected in *Colorado River* and *Eagle County*.[121] Again, the Court relied on the underlying policies of the McCarran Amendment. These policies favored avoiding duplicative and wasteful proceedings, discouraging parties from racing to a forum that would best serve their interests, and encouraging state courts to adjudicate water rights in the course of comprehensive water rights adjudications.[122] The Court dismissed the tribes' argument that a state court could simply divert its attention away from the general, comprehensive adjudication until the federal court determined its quantification of Indian water rights.[123] The Court refuted the respondents' assumptions that federal courts could resolve these claims in a timely manner and that state courts, state legislatures, and state parties would fully cooperate with each other as being neither legally required nor realistically expected.[124]

The Court concluded that the federal district court correctly deferred to the state court pursuant to policies underlying the McCarran Amendment, the state court's expertise and efficiency in administering water rights adjudications, the nascent level of the federal litigation, and the convenience to the parties.[125] Federal courts in several more recent cases have either misapplied the *Colorado River* abstention doctrine or ruled that it is inapplicable.[126]

120 *Id.* at 566–67.

121 *Id.* at 567.

122 *Id.* at 567–68. However, state courts may not "adjudicate, administer, and regulate the appropriation and use of naturally-flowing water sources in a way which produces invidious discrimination" against Indian tribes. K. Heidi Gudgell et al., *The Nez Perce Tribe's Perspective on the Settlement of its Water Right Claims in the Snake River Basin Adjudication*, 42 IDAHO L. REV. 563, 570 (2006).

123 *Id.* at 568–69.

124 *Id.*

125 *Id.* at 569–70.

126 *See, e.g.*, United States v. Morros, 268 F.3d 695, 697, 706–07 (9th Cir. 2001) (holding that *Colorado River* abstention did not apply because the Department of Energy's filing of water permit applications with Nevada's state engineer for purposes of preparing Yucca Mountain as a national site for a nuclear waste repository were not considered a comprehensive stream adjudication, allocation of limited water rights was not a concern, nor were there any laws passed by Congress

IV
PRIOR EXCLUSIVE JURISDICTION DOCTRINE

The general rule is that the existence of a case in one court does not preclude another court from hearing the same or similar case for the same cause of action.[127] However, the U.S. Supreme Court has established an exception for actions concerning real property. The first court to rule in suits related to real property is entitled to exclusive jurisdiction over the matter.[128] Furthermore, a state or federal court may enjoin any other court from hearing the case.[129] This exception is designed to avoid inconsistent dispositions of property. As the *Colorado River* Court mentioned, though, the real benefit of creating exclusive jurisdiction in such cases is to increase judicial efficiency by having a single court resolve the issue.[130] Lower federal courts have identified several elements that must be present before they may divest jurisdiction and defer to state court proceedings. These elements include: (1) the state court action must have been filed before the federal court action; (2) both actions, in federal and state court, must be *in rem* or *quasi in rem*, and not *in personam*; and (3) the state court must be able

expressing a preference for state adjudication of federal preemption issues); United States v. City of Las Cruces, 289 F.3d 1170, 1175 (10th Cir. 2002) (remanding the district court's judgment because it did not provide suitable reasons to explain why they dismissed the case, pursuant to *Colorado River* abstention, in lieu of staying the proceedings). Finding that the district court properly applied the *Brillhart* analysis, the Tenth Circuit in *Las Cruces* did not speak to whether the district court erred in dismissing the case under the *Colorado River* doctrine. *Id*. at 1193.

127 *See, e.g.*, Stanton v. Embrey, 93 U.S. 548, 554 (1876) ("[T]he pendency of a prior suit in another jurisdiction is not a bar . . . even though the two suits are for the same cause of action . . . ."); *see also* McClellan v. Carland, 217 U.S. 268, 282 (1910) (stating that federal courts do not have the authority to abdicate jurisdiction due to pending state proceedings).

128 CHEMERINSKY, *supra* note 2, at 869. The Supreme Court has explained that whenever "a court has custody of property, that is, proceedings in rem or quasi in rem . . . the state or federal court having custody of such property has exclusive jurisdiction to proceed." Donovan v. City of Dallas, 377 U.S. 408, 412 (1964).

129 An exception to the Anti-Injunction Act permits federal courts to enjoin state proceedings when property is involved. *See* 28 U.S.C. § 2283 (2006). A state court may also enjoin the initiation of federal litigation when there is an in rem or a quasi in rem proceeding in state court. *See* Gen. Atomic Co. v. Felter, 434 U.S. 12, 12 (1977).

130 Colo. River Water Conservation Dist. v. United States, 424 U.S. 800, 817–19 (1976); CHEMERINSKY, *supra* note 2, at 870.

to adjudicate, within its power, all of the claims effectively.[131] In other words, a state court's prior jurisdiction over a *res* creates an exceptional circumstance, as set forth in *Colorado River*, which allows a federal court to decline its jurisdiction.[132]

In *Colorado River*, Justice Brennan, writing for the majority, acknowledged the doctrine of prior exclusive jurisdiction as one factor that a federal court may consider when deciding whether to dismiss an action.[133] Although not explicitly applying the doctrine, Justice Brennan argued that the McCarran Amendment's policy of avoiding piecemeal adjudication was similar to the prior exclusive jurisdiction doctrine's objective to avoid additional litigation and inconsistent results.[134]

Justice Stewart's dissent pointed out that the doctrine of prior exclusive jurisdiction was inapplicable because the federal court did not need to obtain *in rem* or *quasi in rem* jurisdiction.[135] The United States was not asking for "control" of the river to ascertain federal reserved water rights.[136] Accordingly, Justice Stewart argued that the Court only needed to determine as a matter of federal law whether the United States had specific rights in the flow of the water, and if such rights existed, the dates and scope of those rights.[137] In the wake of this dissent, federal courts have nevertheless applied the doctrine of prior exclusive jurisdiction in the context of administering and adjudicating water rights.[138]

131 Peter Nicolas, *Fighting the Probate Mafia: A Dissection of the Probate Exception to Federal Court Jurisdiction*, 74 S. CAL. L. REV. 1479, 1526–28 (2001).

132 Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 19 (1983).

133 *Colorado River*, 424 U.S. at 818.

134 *Id.* at 819; *see also* Abrams, *supra* note 5, at 1123 (arguing that Justice Brennan, by joining these two considerations, "sought to overcome the Amendment's silence about the proper forum").

135 *Colorado River*, 424 U.S. at 822 (Stewart, J., dissenting).

136 *Id.* at 822–23.

137 *Id.*

138 *See, e.g.*, State Eng'r of Nev. v. S. Fork Band of the Te-Moak Tribe of W. Shoshone Indians of Nev., 339 F.3d 804, 809–10 (9th Cir. 2003); United States v. Alpine Land & Reservoir Co., 174 F.3d 1007, 1012–14 (9th Cir. 1999); Mineral County v. State, 20 P.3d 800, 806–07 (Nev. 2001).

V
THE FUTURE OF FEDERAL JURISDICTION OVER WATER RIGHTS

A. Fitting the Doctrines Together

Colorado River created a presumption that a federal action should be dismissed when both federal and state actions are pending for purposes of adjudicating federal reserved water rights. If a dispute arises out of a state's comprehensive water rights administration, whether it involves federal, state, or tribal claims, a state court will usually preside over the case. State courts generally have more expertise in deciding such matters, and state court jurisdiction tends to further the McCarran Amendment's goal of avoiding piecemeal litigation. However, if a party files a lawsuit seeking redetermination of court-decreed water rights, the court that made the first determination has exclusive jurisdiction to hear the second case. The prior exclusive jurisdiction doctrine applies regardless of whether a state or federal court first heard the case. Prior exclusive jurisdiction does not moot the issue of discretionary abstention in every case where a state water court first exercises jurisdiction. The doctrine is triggered only if the state water court explicitly rules on a matter concerning real property in the first instance.

The McCarran Amendment, which may apply to water decrees that were issued before the Amendment's enactment in 1952, does not repeal or supersede the prior exclusive jurisdiction doctrine. However, debate lingers as to whether *Colorado River*, the McCarran Amendment, and subsequent case law have completely foreclosed federal courts from resolving disputes over water rights issues.

Since *Colorado River*, the U.S. Supreme Court has confirmed that federal district courts have some discretion to abstain in favor of pending state court litigation.[139] The Court has also

139 *See, e.g.*, Wilton v. Seven Falls Co., 515 U.S. 277, 286-87 (1995); Will v. Calvert Fire Ins. Co., 437 U.S. 655, 663–64 (1978). There had been speculation, before *Wilton* was ruled on, that even discretion to deny declaratory relief in favor of concurrent state court litigation had been narrowed. This speculation had been created by the Court's ruling in *Moses H. Cone Memorial Hospital v. Mercury Construction Corp.* which found that *Colorado River* was a narrow exception to the

developed additional criteria for federal district courts to consider when deciding whether to defer to state court proceedings. In addition to the four factors outlined in *Colorado River*,[140] the Court added two more in *Moses H. Cone Memorial Hospital*: (1) the determination of which forum's substantive law governs the merits of the litigation; and (2) the adequacy of the state court proceeding to protect the parties' rights.[141] The Court emphasized that this was not a "mechanical checklist" and that a federal court must carefully balance all "important factors as they apply in a given case, with the balance heavily weighted in favor of the exercise of jurisdiction."[142]

In 1995, the Court in *Wilton v. Seven Falls Co.* upheld a district court's decision to stay a federal declaratory judgment action in favor of state proceedings.[143] The Court held that the *Brillhart* discretionary standard, a broader doctrine, should govern the district court's decision to stay a federal declaratory judgment.[144] However, the Court did not reject the *Colorado River* exceptional circumstances test for certain instances.[145] Thus, absent a filing for a declaratory judgment, a federal court must still identify exceptional circumstances to determine whether to abstain on account of a pending state court proceeding. Given *Colorado River*'s narrow abstention standard, a federal court's jurisdiction over water rights issues

normal obligation of federal district courts to decide cases before them. 460 U.S. 1, 19, 25–26 (1983).

140 *Moses H. Cone Mem'l Hosp.*, 460 U.S. at 15–16.

141 *Id.* at 25–27.

142 *Id.* at 16.

143 *Wilton*, 515 U.S. at 290. In *Wilton*, Seven Falls Co. was sued in Texas state court over the ownership and operation of several oil and gas properties. *Id.* at 279. After it lost in state court, Seven Falls Co. sought indemnification from Wilton, an insurance underwriter. *Id.* at 279–80. Wilton sought a declaratory judgment in federal court for a ruling that it was not liable under the insurance policies. *Id.* In response, Seven Falls Co. filed a suit in state court against Wilton while also asking the federal court to dismiss or stay the state court proceeding. *Id.* at 280. The federal district court granted the stay, which was later affirmed by the Court of Appeals and the U.S. Supreme Court, to avoid duplicative litigation. *Id.* at 280–82.

144 *Id.* at 289–90.

145 *Id.*; John J. Higson, *Federal Court Jurisdiction over Interpleader Actions: A Virtual Unflagging Obligation or Inherently Discretional? The Third Circuit Opts for the Discretionary Approach*, 41 VILL. L. REV. 1137, 1157 (1996). The Court also relied on the discretionary nature of the Federal Declaratory Judgment Act itself. *Wilton*, 515 U.S. at 286–87.

may not be completely foreclosed by the *Colorado River* doctrine and the policies underlying the McCarran Amendment.

B. Administrative Procedure Act's Revival of Federal Jurisdiction

In 2004, the Colorado Supreme Court held that a state water court's stay order to delay quantification of the United States' reserved water right in the Black Canyon of Gunnison National Park was not an abuse of discretion.[146] The court found that the water court acted within its discretion because the federal court had exclusive jurisdiction over federal claims raised by environmental groups.[147]

The events leading up to the supreme court's decision began over twenty-five years earlier. On March 6, 1978, the United States was first awarded absolute and conditional waters for the Black Canyon area pursuant to an interlocutory decree issued by a Colorado state water court.[148] This decree acknowledged priority dates of 1933, 1938, and 1939 to satisfy scenic, aesthetic, and natural purposes and uses of the reservation.[149] In 2001, the United States filed an application to quantify its conditional water rights for the Black Canyon.[150] More than 380 parties, including environmental groups, opposed this initial quantification application.[151] Consequently, the water court stayed the action for over a year to allow the United States to enter into settlement negotiations.[152] Following an agreement with the State of Colorado, the United States filed an amended quantification application to reduce its claim of water.[153]

On August 5, 2003, environmental groups filed a complaint in federal district court regarding this amended application.[154] The

146 Application for Water Rights of the U.S. v. Colo. State Eng'r (*In re* Application for Water Rights of the U.S.), 101 P.3d 1072, 1074 (Colo. 2004) (en banc).

147 *Id.* at 1084.

148 *Id.* at 1075.

149 *Id.*

150 *Id.* at 1076.

151 *Id.*

152 *Id.*

153 *Id.*

154 *Id.*

environmental groups alleged that the "United States' decisions regarding the protection and management of the water-related natural resources of the Black Canyon violated various provisions of federal law."[155] These laws included the National Park Service Act, the Black Canyon Act, the National Environmental Policy Act (NEPA), and the Administrative Procedure Act (APA).[156]

On September 12, 2003, the environmental groups filed a written motion to stay the water court's quantification proceeding until the federal court resolved the issues before it.[157] To avoid piecemeal litigation and prevent undue hardship, delays, and prejudice to the environmental petitioners, the water court granted the stay on October 7, 2003.[158] The water court's order did not defer quantification of the water right, but merely stayed the proceedings until the federal court resolved the distinct federal questions raised in the complaint.[159] The United States moved to dismiss the case from federal court but was denied.[160] The court held federal agencies have a duty to protect national park resources, including the water that supports such uses and resources, pursuant to APA's judicial review provisions.[161] However, the court clearly stated that it was not determining the "exact amount of water necessary to fulfill the Park's purpose," thereby attempting to distinguish *Colorado River*.[162]

155 *Id*.

156 *Id.* The environmental groups sought both declaratory relief and injunctive relief pursuant to the APA's judicial review provision articulated in 5 U.S.C. § 706 (2006). *Id.* at 1076-77. Specifically, they claimed that the United States violated the NPS Act and the Black Canyon Act because it did not protect the water-related natural resources in the subject area and "limited its reserved water right by relying upon an inadequate state-law in-stream flow right" without doing a NEPA environmental analysis. *Id.* at 1077 n.1. In addition, they claimed the United States violated federal law which prohibited an unauthorized dispossession of federal property by surrendering its federal reserved water right. *Id.* Finally, by giving the State of Colorado the responsibility to protect the federal park's water rights, they claimed the United States unlawfully delegated authority. *Id.*

157 *Id.* at 1077.

158 *Id.*

159 *Id.*

160 *Id*.

161 *Id.*

162 *Id.*

The Colorado Supreme Court concluded that it did not have jurisdiction to examine the environmental groups' federal claims under the McCarran Amendment.[163] The Amendment limits the United States' waiver of sovereign immunity to those proceedings that either determine or administer the rights to the *use* of water.[164] According to the court, the dispute did not involve the use of water, but the Department of Interior and National Park Service's compliance with APA provisions.[165] Citing the language and legislative history of the APA, the court noted that any decision made by a federal administrative agency could only be appealed and resolved by a federal court.[166] Therefore, the state court's role in quantifying federal reserved water rights should be distinguished from the federal court's responsibility in deciding whether the United States' amended application complied with the applicable federal law.[167]

The court next considered whether the water court's decision to stay the proceedings constituted an abuse of discretion. To make this determination, the supreme court evaluated factors that were similar to those outlined in *Colorado River*: "1) the order in which jurisdiction was obtained, 2) the adequacy of relief available in state court, 3) comity, and 4) the need for comprehensive adjudication and attendant desire to avoid piecemeal litigation."[168] The supreme court dismissed the first and fourth factors because the federal court's exclusive jurisdiction over federal claims trumped both considerations.[169] In response to the second factor, the supreme court found that the water court's stay protected the United States' ability to

163 *Id.* at 1078.

164 *Id.* at 1079. The McCarran Amendment provides, in relevant part, that "[c]onsent 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." *Id.* at 1080 (emphasis added) (quoting 43 U.S.C. § 666 (2006)).

165 *Id.*

166 *Id.* A reviewing court shall "compel agency action unlawfully or unreasonably delayed" when a person suffers a "legal wrong because of agency action, or [is] adversely affected or aggrieved by agency action within the meaning of a relevant statute." 5 U.S.C. §§ 702, 706 (2006). That person who suffers the legal wrong is entitled to judicial review and may bring suit against the agency but only "in a court of the United States." 5 U.S.C. § 702.

167 *Colorado State Eng'r*, 101 P.3d at 1080.

168 *Id.* at 1082–83.

169 *Id.* at 1083–84.

claim broader reserved water rights in the future.[170] Without the stay, res judicata might bar the United States from making such claims.[171] With respect to the third factor, the supreme court noted the water court's stay would promote comity by avoiding the potential for conflict between federal and state courts.[172]

Although the supreme court explained that the federal court's decision would not quantify the United States' reserved water right,[173] the differentiation underlying this conclusion is merely semantic. The federal court's determination of how much water is needed to fulfill the reservation's broad range of uses will almost certainly impact the overall quantification of water rights, even if the decision does not provide a specific numeric allocation of water volume. The state court itself acknowledged that the "federal case may have an impact on the water court proceeding"[174] and "may influence the parameters of the water court's decision."[175]

The dissent criticized the majority's "neat distinction" between the federal court's review of federal claims and the state court's quantification of reserved water rights.[176] According to the dissent, this differentiation did not fall in line with the interrelated factual and legal issues of the case and effectively abandoned the state's role in McCarran adjudications.[177] The dissent further stated that the federal court would be indirectly presiding over issues pertaining to the quantification and *administration* of federal reserved water rights, duties that are better suited for the water court pursuant to strong congressional policies expressed in the McCarran Amendment.[178]

170 *Id.* at 1083.

171 *Id.*

172 *Id.*

173 *Id.* at 1083–84.

174 *Id.* at 1080.

175 *Id.* at 1084.

176 *Id.* at 1088 (Hobbs, J., dissenting).

177 *Id.*

178 *Id.* at 1086. The dissent disagreed that the federal court had exclusive jurisdiction over these claims just because these issues involved the authority of agency decision makers. *Id.* Instead, the dissent believed the water court had the authority under the McCarran Amendment, which states that the United States consents to being joined "*for the administration of such rights*," to decide all factual and legal issues involved in the motion to amend and the administration agreement. *Id.* (quoting 42 U.S.C. § 666 (2006)). In addition, by not integrating "federal rights

Despite the dissent's persuasive logic, the decision still stands as an important case that federal decision makers may cite to argue for federal court jurisdiction based on the APA's judicial review provisions.

C. Expanding Federal Court Jurisdiction over Water Rights

In addition to using the APA exception, federal courts may be able to resolve water disputes before them by narrowly construing the application of the McCarran Amendment and the *Colorado River* decision. The Amendment only applies to comprehensive stream adjudications, so it does not implicate every water rights controversy that involves the federal government.[179] It is not entirely clear how comprehensive a water rights adjudication must be before a federal court should dismiss it.[180]

States normally undergo a general stream adjudication to prioritize and quantify all rights to a water body.[181] These adjudications enable states to administer all water rights "efficiently and effectively" and are especially helpful when federal reserved water rights are involved.[182] Although most states in the West have utilized a state administrative agency to issue water permits as part of their general stream adjudication,[183] considerable differences exist in the reach of each state's adjudication. Some states attempt to determine every right within its borders while others only concentrate on certain

into the network of highly interdependent relative priorities for the use of water on common stream systems" the ultimate purpose of the McCarran Amendment is defeated. *Id.* at 1087. The federal court's resolution of these federal claims is only a small "piece of a complex interrelated puzzle of the type Congress envisioned in adopting the McCarran Amendment for state court determination of rights to the use of water from the same stream system." *Id.* at 1089.

179 Benson, *supra* note 41, at 273.

180 Thomas H. Pacheco, *How Big is Big? The Scope of Water Rights Suits Under the McCarran Amendment*, 15 ECOLOGY L.Q. 627, 634–35 (1988). The Court in *Arizona v. San Carlos Apache Tribe of Arizona* warned state courts that they could lose their jurisdiction to determine federal water rights if their procedures did not rise to a full-fledged general stream adjudication. *Id.* at 633–34.

181 *See id.* at 635.

182 *Id*

183 In Colorado, water rights are qualified by making a claim and obtaining a decree from a water court. *See* PETER D. NICHOLS ET AL., COLO. WATER TRUST, WATER RIGHTS HANDBOOK FOR COLORADO CONSERVATION PROFESSIONALS 8–9 (2005).

categories of water interests.[184] These differing approaches have practical implications as to how federal courts determine whether a state's general stream adjudication is comprehensive enough to trigger the McCarran Amendment and the subsequent decision of whether to abstain.[185]

For instance, in *Dugan v. Rank*, the Supreme Court held that the McCarran Amendment did not apply because: (1) the case involved a "private suit to determine water rights" solely between the plaintiff and the United States; (2) "all of the claimants to water rights along the river [were] not made parties" in the suit; (3) no relief was relief was requested as between claimants; and (4) the claimants did not seek priorities "as to the appropriate and prescriptive rights asserted."[186]

In *Cappaert v. United States*, the Court upheld a federal court's injunction protecting water levels in an underground pool at Devil's Hole National Monument.[187] The United States obtained the injunction against an irrigator with a water right permit issued under Nevada law,[188] despite the State's argument that the United States must claim its water rights in state court.[189]

More recently, in *United States v. Oregon*, the Ninth Circuit rejected federal and tribal arguments against the sufficiency of Oregon's Klamath Basin adjudication under the McCarran Amendment.[190] The United States argued that the State's proceedings were not sufficiently comprehensive for two reasons. First, water rights determined in previous adjudications were not subject to redetermination; therefore, the United States could not challenge water rights certificates previously issued

184 Pacheco, *supra* note 180, at 636. Pacheco provides an overview of how Arizona, Colorado, Idaho, Montana, and Oregon have developed their own statutory schemes for general stream adjudications. *Id.* at 637–43.

185 A number of questions arise when one attempts to determine whether a stream adjudication is general or comprehensive. These inquiries focus on issues such as: how to define a "river system" for McCarran jurisdictional purposes; whether groundwater rights must be adjudicated; and whether every water user, including those with previously decreed water rights, must be joined. Pacheco analyzes these issues "under the rubrics of hydrological comprehensiveness [and] water use comprehensiveness." *Id*. at 646–59.

186 Dugan v. Rank, 372 U.S. 609, 618–19 (1963).

187 Cappaert v. United States, 426 U.S. 128, 136–38 (1976).

188 *Id.* at 134–37.

189 *Id.* at 143–46.

190 United States v. Oregon, 44 F.3d 758, 762–63 (9th Cir. 1994).

through the permit system.[191] Second, this adjudication did not attempt to determine the rights of claimants to groundwater in the Klamath Basin.[192] The court dismissed the first argument by stating that a federal court could review any disputes regarding the volume or scope of particular reserved rights after the state court's final judgment.[193] The second argument failed because the court found that Congress probably did not intend the Amendment to apply to the rights of users of all hydrologically related water sources, such as groundwater.[194]

The *Colorado River* Court acknowledged another set of circumstances where a federal court may be able to exercise its concurrent jurisdiction with the state court and proceed with the case:

> We emphasize, however, that we do not overlook the heavy obligation [of federal courts] to exercise jurisdiction. We need not decide, for example, whether, despite the McCarran Amendment, dismissal would be warranted if more extensive proceedings had occurred in the District Court prior to dismissal, if the involvement of state water rights were less extensive then it is here, or if the state proceeding were in some respect inadequate to resolve the federal claims.[195]

In light of this language, courts have decided that some situations make determinations of federal reserved water rights better suited for federal court. The Colorado Supreme Court's APA carve-out (described in Section B above) is one such example. The *Adair II* court set forth another. In that case, the court noted that it did not make sense for the federal court to dismiss the case when it would only be deciding limited federal questions, and state proceedings had not yet advanced beyond the initial notice of investigation.[196] The court concluded that dismissing the case under the circumstances would waste judicial

191 *Id.* at 767–68.

192 *Id.* at 768.

193 *Id.* (citing United States v. Dist. Court in & for Water Div. No. 05, 401 U.S. 527, 527 (1971)).

194 *Id.* at 769.

195 Colo. River Water Conservation Dist. v. United States, 424 U.S. 800, 820 (1976).

196 United States v. Adair (*Adair II*), 723 F.2d 1394, 1404–05 (9th Cir. 1983).

resources and contravene the policies underlying the McCarran Amendment.[197]

Another situation in which the administration and determination of water rights may be adjudicated in federal court is when such rights have been previously determined in federal court pursuant to a water decree. For instance, the federal courts in *United States v. Alpine Land and Reservoir Co.* and *Mineral County v. State* both exercised jurisdiction pursuant to the prior exclusive jurisdiction doctrine.[198] In these cases, the federal court had already ruled on actions concerning the relevant water rights and thus had exclusive jurisdiction over the matter. Further, the *Alpine Land* court's decision was important for the federal court to provide a consistent and controlling interpretation of federal law since the water decree involved the allocation of interstate waters between California and Nevada. The *Colorado River* Court cited the prior exclusive doctrine as a factor and an exceptional circumstance that a court should take into account when determining whether a federal court should exercise its jurisdiction.[199] Overall, circumstances do exist when federal courts may proceed to resolve a water rights dispute despite *Colorado River* and the underlying policies of the McCarran Amendment.

VI
CONCLUSION

Federal courts in general do not abstain when there is identical concurrent litigation in state court. Even though concurrent jurisdiction is economically wasteful and induces parties to attempt to "manipulate the timing of the decisions" to satisfy their needs, the judiciary is reluctant to give litigants the power to avoid federal court by filing in state court.[200] However, by examining the underlying policies of the McCarran Amendment as well as other factors, the *Colorado River* Court ruled that federal water rights should be resolved in state court

197 *Id.* at 1405–06.

198 *See supra* note 138.

199 *Colorado River*, 424 U.S. at 818.

200 CHEMERINSKY, *supra* note 2, at 879–80.

proceedings for purposes of preventing duplicative litigation.[201] Therefore, *Colorado River* provided some guidance in determining that state courts should hear cases involving federal water rights.

Some commentators, including Professor Robert H. Abrams, believed that *Colorado River* would create strong incentives for state courts to discriminate against federal reserved water rights.[202] However, in the years following *Colorado River*, federal courts have exercised their jurisdiction when distinct federal questions and claims were involved, federal proceedings were more mature than concurrent state proceedings, or an alternative federal statutory provision mandated federal judicial review.[203] Thus, federal courts may still have some leeway in deciding to exercise their jurisdiction, even in the face of a pending state court proceeding.[204] Although these distinctions may appease decision makers asserting federal reserved water rights, these exceptions also create confusion over jurisdictional issues that existed prior to the passage of the McCarran Amendment and the *Colorado River* decision.

Regardless of whether federal or state courts are better suited to hearing such cases, additional congressional guidance as to when federal courts should abstain because of ongoing state proceedings might be the best solution to the problem of

201 *Id* at 873. *See generally* Howard A. Davis, *Slowing the Flow of Colorado River: The Doctrine of Abstention to Promote Judicial Administration*, 77 ILL. B.J. 648 (1989) (discussing how the *Colorado River* factors should be applied by courts). In addition, when federal courts rule on cases involving declaratory judgments, the Declaratory Judgment Act provides federal courts with more discretion in abstaining regardless of whether they find exceptional circumstances or not. CHEMERINSKY, *supra* note 2, at 880.

202 Abrams, *supra* note 5, at 1111.

203 *See supra* Part V.

204 It must be noted that even if a federal court decides not to exercise its jurisdiction for general stream adjudications, the state court that does have jurisdiction to adjudicate federal and tribal water right claims must still apply federal law. *See, e.g.*, Cappaert v. United States, 426 U.S. 128, 145–46 (1976); Arizona v. San Carlos Apache Tribe of Ariz., 463 U.S. 545, 571 (1983). The Court in *San Carlos Apache Tribe* emphasized that if a state court misapplied federal law or seriously abridged a tribal interest, that decision might be reviewed by the U.S. Supreme Court subject to "a particularized and exacting scrutiny commensurate with the powerful federal interest in safeguarding those rights from state encroachment." *Id*. at 571.

duplicative proceedings.[205] For instance, Congress could create a rule that mirrors the prior exclusive jurisdiction doctrine and allows the court that first acquired jurisdiction to decide the case and enjoin the parties from proceeding in the other court.[206] The downside of such a rule is that it could induce parties to "race to the courthouse" to ensure that the case is heard in a forum that best satisfies their agenda.[207] Until Congress devises some solution to the problem of duplicative litigation, "pending concurrent proceedings in state and federal court undoubtedly will continue to be a frequent problem confronting the judicial system."[208]

In addition, as water scarcity increases in the West, federal courts will become increasingly burdened with water rights disputes. Although federal courts will most likely preside over interstate water rights conflicts,[209] intrastate conflicts may be decided either in federal or state court, depending on the comprehensiveness of adjudications and the types of water rights involved. Until Congress sets forth more concrete and specific guidelines assigning jurisdiction, federal courts must continue to examine whether "exceptional circumstances" exist that should prevent them from exercising jurisdiction.

205 CHEMERINSKY, *supra* note 2, at 885.

206 *Id.*

207 *Id.*

208 *Id.* at 886.

209 The Supreme Court may allocate interstate waters pursuant to the Constitution's grant of original jurisdiction over conflicts between states. U.S. CONST. art. III, § 2, cl. 2; Kansas v. Colorado, 206 U.S. 46, 83–84 (1907).