Ninth Circuit Rules That Disclaimer States Lack Jurisdiction over Indian Water Rights under the McCarren Amendment

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NINTH CIRCUIT RULES THAT DISCLAIMER STATES LACK JURISDICTION OVER INDIAN WATER RIGHTS UNDER THE MCCARRAN AMENDMENT

WATER LAW—JURISDICTION: The Ninth Circuit holds that Arizona's and Montana's enabling acts and constitutional jurisdictional disclaimer provisions over Indian lands prevent them from asserting jurisdiction over federally recognized Indian tribes under the McCarran Amendment for purposes of adjudicating Indian water rights. San Carlos Apache Tribe v. Arizona, 668 F.2d 1093 (9th Cir. 1982), cert. granted, 51 U.S.L.W. 3217 (U.S. Oct. 5, 1982) (No. 81-2147) and Northern Cheyenne Tribe of the Northern Cheyenne Indian Reservation v. Adsit, 668 F.2d 1080 (9th Cir. 1982), cert. granted, 51 U.S.L.W. 3218 (U.S. Oct. 5, 1982) (No. 81-2188).

INTRODUCTION

Eleven states disclaim jurisdiction over Indian tribes and Indian lands.1 Those states include their enabling act disclaimer provisions verbatim in their constitutions. Although the specific language of each enabling act differs, Arizona's enabling act disclaimer provision is representative of many of the other western states' provisions:

Second. That the people inhabiting said proposed State do agree and declare that they forever disclaim all right and title to the unappropriated and ungranted public lands lying within the boundaries thereof and to all lands lying within said boundaries owned or held by any Indian or Indian tribes, the right or title to which shall have been acquired through or from the United States or any prior sovereignty, and that until the title of such Indian or Indian tribes shall have been extinguished the same shall be and remain subject to the disposition and under the absolute jurisdiction and control of the Congress of the United States; (emphasis supplied.)2

Consequently, none of the disclaimer states has authority to assert jurisdiction over Indian lands within its borders, absent a specific congressional grant of such jurisdiction.3 Because Indian lands, like all reserved federal lands, have implied reservations of water appurtenant to the land,4 organic law disclaimer provisions may prohibit states from determining water rights on Indian lands. Congress has granted all states criminal and

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1. Those eleven states are Alaska, Arizona, Idaho, Montana, New Mexico, North Dakota, Oklahoma, South Dakota, Utah, Washington and Wyoming.
3. For example, the following statutes which grant states jurisdiction over Indian lands within their boundaries include: 25 U.S.C. §§ 1321–1322, 1360 (1976) and 18 U.S.C. § 1162 (1976)
civil jurisdiction over Indians. This grant of civil jurisdiction, however, does not include water rights.

Water is a scarce resource in the West. Extraordinary competition exists for its use. Indian lands represent a significant percentage of the total acreage of western states. The size of Indian holdings is only one aspect of the water resource problem for western states. The expandability of Indian claims for water rights is another aspect of the problem. Much of the Indian land is located in places which potentially could permit control over water rights to entire river systems. Therefore, the right to assert jurisdiction over Indian lands and the appurtenant water rights is critical to western states. Exemption of jurisdiction over the water rights of a significant percentage of land within a state frustrates a state’s interest in the comprehensive adjudication of water rights within its boundaries.

Most western states, including the disclaimer states, have enacted statutes which allow the state to determine water rights in a comprehensive manner. To aid states in determining ownership of water rights, Congress passed the McCarren Amendment, which states that

(a) Consent is given to join the United States as a defendant in any suit (1) for the adjudication of rights to the use of water of a river system or other source, or (2) for the administration of such rights, where it appears that the United States is the owner of or is in the process of acquiring water rights by appropriation under state law, by purchase, by exchange, or otherwise, and the United States is a necessary party to such suit. The United States, when a party to any such suit, shall (1) be deemed to have waived any right to plead that the State laws are inapplicable or that the United States is not amenable thereto by reason of its sovereignty, and (2) shall be subject to the judgments, orders, and decrees of the court having jurisdiction, and may obtain review thereof, in the same manner and to 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.

The Amendment permits states to adjudicate federal water rights appur-
tenant to federal lands in state and federal courts. This waiver of federal sovereign immunity along with the implicit waiver of Indian sovereign immunity is of particular importance to western states, because the United States owns approximately 46 percent of the land in the West.\footnote{11} In \textit{Colorado River Water Conservancy District v. United States},\footnote{12} \cite{akn} (hereinafter \textit{Akin}), the Supreme Court stated that the McCarran Amendment waiver of sovereign immunity implicitly extended to Indian lands where the United States owned such lands.\footnote{13}

Recent Ninth Circuit holdings in \textit{San Carlos Apache Indian Tribe v. Arizona} \cite{sc} (hereinafter \textit{San Carlos}) and in \textit{Northern Cheyenne Indian Tribe of the Northern Cheyenne Reservation v. Adsit} \cite{adsit} (hereinafter \textit{Adsit}), however, refused to extend the McCarran waiver to permit disclaimer states to adjudicate Indian water rights. The refusal of the Ninth Circuit to extend the McCarran Amendment to include disclaimer states frustrates states which are trying to determine water rights within their borders, although this was the impetus for passing the McCarran Amendment. The McCarran Amendment's effect on disclaimer states' jurisdiction over Indian lands is the focus of this note.

\section*{HISTORICAL BACKGROUND}

Western water law is based on two doctrines: prior appropriation and implied reservation. The doctrine of prior appropriation is a use-based doctrine for acquiring water rights. The doctrine of implied reservation is a need-based doctrine employed by the federal government to reserve water rights for federal lands. The doctrines differ in the way water rights are acquired and in the quantity of water attached to the rights.

\textbf{Doctrine of Prior Appropriation}

The doctrine of prior appropriation grew out of local mining customs and laws which were based on necessity and practicality.\footnote{16} Most, if not all, of the western states have adopted the doctrine as a basis for deter-

\begin{thebibliography}{9}
\bibitem{nm} United States v. New Mexico, 438 U.S. 696, 699 n. 3 (1978).
\bibitem{akn} Colorado River Water Conservancy Dist. v. United States (\textit{Akin}), 424 U.S. 800 (1976).
\bibitem{id} \textit{Id.} at 811.
\bibitem{sc} 668 F.2d 1093 (9th Cir. 1982), \textit{cert. granted}, 51 U.S.L.W. 3217 (U.S. Oct. 5, 1982) (No. 81-2188).
\bibitem{adsit} 668 F.2d 1080 (9th Cir. 1982), \textit{cert. granted}, 51 U.S.L.W. 3218 (U.S. Oct. 5, 1982) (No. 81-2188). San Carlos and Adsit claimed federal district court jurisdiction pursuant to 28 U.S.C. § 1362 which provides that "[t]he district courts shall have original jurisdiction of all civil actions, brought by any Indian tribe or band with a governing body duly recognized by the Secretary of the Interior, wherein the matter in controversy arises under the Constitution, laws, or treaties of the United States."
\bibitem{cl} Coffin v. Left Hand Ditch Co., 6 Colo. 443 (1882).
\end{thebibliography}
mining and allocating water rights.  

To obtain water rights under the doctrine, an appropriator must make a physical diversion of a water resource, make some beneficial use of the diversion, provide notice of the use, and continuously apply the water to this beneficial use. In times of scarcity, appropriators who were first in time to perfect the right have priority over users with later claims; senior rights are protected over junior rights. Perfected water rights are transferable, and if a person owning water rights fails to use the water or fails to use it beneficially, his rights are subject to forfeiture.

**Doctrine of Implied Reservation**

The federal government recognizes the doctrine of prior appropriation. However, the courts have also enforced federal water rights based on implied reservations made by Congress. This doctrine conflicts with prior appropriation, and the conflict has led to voluminous litigation over what rights the government has acquired when reserving federal land.

The Supreme Court has held that when Congress or the executive branch sets aside land for a federal purpose, there is an implied reservation of sufficient water rights to support the purpose of the federal enclave. In *Winters v. United States*, the Supreme Court decided that when Congress established the Fort Belknap Indian Reservation, it retained water rights sufficient to meet the needs of the reservation. The *Winters* Court also held that the date of priority of the reserved rights impliedly coincided with the date of the establishment of the reservation. For some time after the *Winters* decision most observers thought that the doctrine of implied reservation applied only to Indian reserved lands. In 1955, the Supreme Court discarded this assumption in *Federal Power Commission v. Oregon*. The Court found the doctrine applied to other reserved federal enclaves such as wildlife refuges, national recreation areas, and national forests. It is now a settled rule that all reserved federal land carries with

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20. Id.
21. Id.
22. 207 U.S. at 577.
23. "It was the policy of the government, it was the desire of the Indians, to change those habits and to become a pastoral and civilized people." *Id.* at 576.
it an implied reservation of water to fulfill the primary purpose of the reservation.  

The purpose of the reservation and the needs of the Indians determine the quantity of Indian water rights reserved under the federal doctrine of implied reservations. *Arizona v. California* measured those needs by the "practicably irrigable" acreage test.  

Indians seeking the adjudication of water rights generally prefer that federal courts determine the quantity of water impliedly reserved. They fear that Indian tribes will not receive as fair a trial in state courts because of the combative history of state-Indian relations. Adjudicating Indian water rights in federal court presents a problem. Often states are simultaneously adjudicating water rights of all other claimants; yet, disclaimer clauses preempt state courts from obtaining jurisdiction over Indian claimants. The goal of comprehensively adjudicating water rights is therefore frustrated by the fact that adjudication must occur in two forums. States are forced to intervene in federal cases in order to adjudicate the rights of all parties in a single forum. Until 1953, states could not sue the United States in any forum to determine United States water rights within their boundaries, and, consequently, water rights adjudication was fragmented.

THE McCARRAN AMENDMENT

Congress passed the McCarran Amendment in 1953 to avoid those forum problems. Before the passage of the McCarran Amendment, the United States could not be sued in any forum for the adjudication of water rights because of its sovereign immunity. This situation caused problems for western states trying to adjudicate water rights comprehensively in state courts. Under the McCarran Amendment, states can sue the federal government when adjudicating water rights in state courts. By waiving the United States' sovereign immunity and implicitly waiving Indian sovereign immunity in water rights adjudication, Congress sought to end piecemeal adjudication of federal water rights.

The McCarran Amendment does not mention Indian lands and Indian water rights as being subject to state court adjudication, but *Akin* held

25. United States v. New Mexico, 438 U.S. 696 (1978), *Arizona v. California*, 373 U.S. 546 (1963), and United States v. District Court in and for the County of Eagle, 401 U.S. 520, 523 (1971), where the court stated that the nature of the federal enclave will determine the amount of water to be reserved under the doctrine of implied reservation. When deciding the amount of water reserved, the courts must look to the purpose of the enclave.

26. 373 U.S. at 600.


28. Id.

29. See *Akin*, 424 U.S. at 819.
that Congress intended the Amendment to apply to Indian lands. The Court held the Amendment applied to Indians because Congress rejected a specific recommendation that the McCarran Amendment apply only to non-Indian rights. The Akin Court, however, did not decide whether the McCarran Amendment overrules or repeals the disclaimer provisions in enabling acts or state constitutions.

The Akin Interpretation of the McCarran Amendment

The United States, plaintiff in Akin, filed suit in federal district court seeking the adjudication and determination of United States, Indian, and state water rights within a river system in Colorado. The defendants moved for a dismissal, arguing that Colorado state courts were adjudicating those rights pursuant to the McCarran Amendment. The district court dismissed the case on the grounds that the doctrine of abstention required the court to defer to a prior pending state proceeding on the same issue. On appeal, the Tenth Circuit reversed, holding the suit to be within the federal court's jurisdiction; hence, abstention was inappropriate. The Supreme Court granted certiorari to determine whether the McCarran Amendment terminated federal court jurisdiction to adjudicate federal water rights.

The Supreme Court held the McCarran Amendment did not terminate jurisdiction in the federal courts, but was a grant of concurrent jurisdiction to the state courts over the federal government for purposes of adjudicating federal water rights. The Court further held that the dismissal was improper under the doctrine of abstention. Nevertheless, the Court upheld the dismissal on the basis of the doctrine of wise judicial administration. The Court found the dismissal warranted because it furthered the congressional policy of the amendment, by encouraging comprehensive adjudication of water rights and by furthering Congress' preference for state court determination of water rights. The Court also listed several other "exceptional circumstances" as grounds for dismissal under the doctrine of wise judicial administration: (1) the apparent absence of any proceedings in the federal district court; (2) the extensive involvement in the state court proceedings; (3) forum non-conveniens; and (4) the participation of the federal government in other state court water rights cases.

Akin did not reach the issue of whether the McCarran Amendment repealed or amended disclaimer clauses in enabling acts because Colorado has no disclaimer clause in its constitution. Although neither Congress

30. 424 U.S. at 811. The Court stated that the "legislative history demonstrates that the McCarran Amendment is to be construed as reaching federal water rights reserved on behalf of Indians."
31. Id. at 812 n. 18. citing Hearings on S. 18 before the Subcommittee of the Senate Committee on the Judiciary of the United States Senate, 82d Cong., 1st Sess., at 6–7, 67–68 (1951).
32. Id. at 810–811.
33. Id. at 820.
nor the Supreme Court in *Akin* considered the McCarran Amendment's effect on disclaimer clauses, the Tenth Circuit in *Jicarilla Apache Tribe v. United States*\(^{34}\) held that, under *Akin*, the federal district court in New Mexico properly dismissed the Tribe's water case in favor of the state proceedings.\(^{35}\) The Supreme Court in *Akin*, however, specifically reserved the question of whether a federal district court could dismiss a water rights case brought by a private party in favor of a state proceeding.\(^{36}\) Uncertainty exists whether the *Akin* Court would have sanctioned the dismissal of an Indian water rights case in federal district court, especially in a disclaimer state such as New Mexico.\(^{37}\) The Supreme Court's interpretation of McCarran in *Akin* is therefore inappropriate when a disclaimer state seeks to adjudicate Indian water rights.

In *San Carlos* and *Adsit*, however, the Ninth Circuit squarely addressed whether the McCarran Amendment repealed the disclaimer provisions of the enabling acts and constitutions. The federal district courts should have decided this issue before dismissing the cases under the doctrine of wise judicial administration, because "dismissal [under any doctrine] clearly would have been inappropriate if the state court had no jurisdiction to decide those claims."\(^{38}\) The disclaimer provisions forbid the exercise of state court jurisdiction over Indian lands, while McCarran purports to allow it without specifically repealing those statutes. When such a situation arises, the rule enunciated in *Akin* is as follows: "In the absence of some affirmative showing of an intention to repeal, the only permissible justification for a repeal by implication is when the earlier and later statutes are irreconcilable."\(^{39}\) Hence, before deciding whether the *Akin* "exceptional circumstances" were present to warrant the dismissal under the

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\(34\) 601 F.2d 1116, 1131 (10th Cir. 1979), cert. denied, 444 U.S. 995 (1979).

\(35\) *Id.* The *Jicarilla Apache* Court relied on the State of New Mexico's argument that the adjudication of Indian water rights was a non-propriety interest and therefore allowed under Organized Village of Kake v. Egan, 369 U.S. 60 (1962). But the *Jicarilla Apache* court failed to discuss the fact that no where has *Kake* been interpreted to apply to Indian water rights. *Kake* dealt with non-Indian fishing rights. Cf. *McClanahan v. Arizona Tax Comm'n*, 411 U.S. 164, 176 n. 15 (1973). The Court there relegated *Kake* to apply to non-reservation Indians. The State of Alaska was allowed to "regulate" disclaimer property but not to exercise a proprietary interest over Indian property. The *Jicarilla Apache* court went on to rely on *United States v. New Mexico*, 438 U.S. 696 (1978), to support their view that the McCarran Amendment was a specific grant of jurisdiction by Congress to regulate Indian tribes. No Supreme Court case, however, has held that the adjudication of Indian water rights is a regulatory power.

\(36\) 424 U.S. at 820 n. 26.

\(37\) Under *Akin*, nondisclaimer state courts clearly have concurrent jurisdiction with federal courts to determine Indian water rights. The dismissal was affirmed because an alternate forum was available to decide the issues. When Indian tribes bring suit in federal district court pursuant to 28 U.S.C. § 1362, particularly in disclaimer states, it is not clear whether the federal courts could dismiss such an action. The *Akin* court reserved the issue whether a federal district court could dismiss a suit brought by a private party.

\(38\) 424 U.S. at 809.

doctrine of wise judicial administration, it must be decided whether the McCarran Amendment repealed the disclaimer provisions "by implication."

STATEMENT OF THE FACTS

In San Carlos, four federally recognized Indian tribes with reservations located in Arizona filed suit in federal district court against Arizona to force the adjudication of water rights from several water systems. The suits were consolidated and dismissed in favor of a pending state court proceeding adjudicating water rights on the water systems under Arizona law. Similarly, in Adsit, a federally recognized Indian tribe in Montana and the United States government, on behalf of several other tribes, filed suit in federal district court against numerous defendants and the State of Montana to force adjudication of water rights. The district court stayed the Adsit proceedings pending determination of Akin by the United States Supreme Court. After the Akin decision extended the McCarran Amendment waiver of sovereign immunity to Indian lands, the district court in Adsit dismissed the plaintiff's petition for water rights adjudication as an exercise of "wise judicial administration." 40

Until the Akin decision, Indian water rights had not been adjudicated in state courts. The Court in Akin held the McCarran Amendment applicable to Indian lands as well as other federal reserved lands. 41 Hence, after Akin, the quantity of reserved Indian water rights was also subject to state court determination. In San Carlos and Adsit, the district courts found jurisdiction, but dismissed the Indian tribes' cases under the doctrine of wise judicial administration as announced in Akin.

On appeal, the Ninth Circuit confronted the same issues in both San Carlos and Adsit. They were as follows: (1) whether a state with a disclaimer provision in its enabling act and in its constitution has jurisdiction over Indian water rights under the McCarran Amendment; and (2) whether the district courts properly dismissed the Indian tribes' cases under the doctrine of wise judicial administration. Although the Arizona and Montana enabling acts and constitutions have disclaimer provisions prohibiting them from asserting jurisdiction over Indian lands, both states argued on appeal that the McCarran Amendment grants their state courts jurisdiction over Indian water rights.

40. The doctrine of wise judicial administration is a theory developed to conserve judicial resources and to provide for the most efficient use of judicial resources. When two courts have concurrent jurisdiction over a cause of action, the theory dictates that the court which can best decide the issues be allowed to hear the case. One court defers to the other "giving regard to conservation of judicial resources and comprehensive disposition of litigation. . . ." Kerotest Mfg. Co. v. C-O-TWO Fire Equipment Co., 342 U.S. 180, 183 (1952) and see Akin, 424 U.S. at 817.
41. 424 U.S. at 811.
In *San Carlos* and *Adsit*, the Ninth Circuit held that the McCarran Amendment did not repeal the disclaimer provisions in the Arizona or Montana enabling acts or constitutions. Consequently, Arizona and Montana state courts do not have jurisdiction over Indian water rights. The Ninth Circuit remanded the cases to the district courts for determination of whether the disclaimer state obtained jurisdiction over the Indian tribes pursuant to Public Law 280. The Ninth Circuit further held that *San Carlos* and *Adsit* lacked the “exceptional circumstances” which warranted dismissal under the doctrine of wise judicial administration.

**ANALYSIS OF SAN CARLOS AND ADSIT**

When Congress conducted hearings on the effect of the McCarran Amendment, it considered the Amendment’s effect on Indian tribes only one time. During hearings before the Senate Judiciary Committee, the Justice Department and the Department of Interior suggested the Amendment be inapplicable to Indian water rights. This suggestion was rejected and never incorporated into the final language of the bill. Furthermore, the McCarran Amendment’s legislative history makes no mention of the disclaimer language of the enabling acts.

42. *San Carlos*, 668 F.2d at 1097 and *Adsit*, 668 F.2d at 1087.
43. 28 U.S.C. § 1360 (1976) and 18 U.S.C. § 1162 (1976). This law grants jurisdiction to the “States of California, Minnesota, Nebraska, Oregon, and Wisconsin with respect to criminal offenses and civil causes of action committed or arising on Indian reservations within such States.” Any state wishing to assume jurisdiction over Indians could do so “[n]otwithstanding the provisions of any Enabling Act for the admission of the state,” by amending their “constitutions or statutes as the case may be.” This Act was passed approximately one year and one month after the McCarran Amendment. It goes to demonstrate that Congress was aware of the disclaimer provisions and explicitly sought to repeal them for purposes of conferring jurisdiction on the State courts. This provision for overriding the enabling acts and constitutions was not, however, inserted in the McCarran Amendment. Public Law 280, however, did not “authorize the alleviation, encumbrance, or taxation of any real or personal property, including water rights, belonging to any Indian or any Indian tribe. . . .” (emphasis supplied.) 28 U.S.C. § 1360(b) (1976). This language is the same as that used in 18 U.S.C. § 1162(b) (1976). Essentially this means that no state would have jurisdiction to determine Indian water rights absent a specific grant of jurisdiction such as the McCarran Amendment. Public Law 280 is inapposite to *San Carlos* and *Adsit*. Disclaimer states, on the other hand, would have no jurisdiction whatsoever either under the McCarran Amendment or these acts.

44. *San Carlos*, 668 F.2d at 1098 and *Adsit*, 668 F.2d at 1087. In *Akin*, the Supreme Court affirmed the district court’s dismissal of the case in favor of the state court proceeding. The court cited the following factors as the basis for its decision under the doctrine of wise judicial administration:

> Beyond the congressional policy expressed by the McCarran Amendment and consistent with furtherance of that policy, we also find 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.

424 U.S. at 820.
45. *See supra* note 31.
Prior to the Tenth Circuit’s ruling in Jicarilla, no case law existed on the McCarran Amendment’s effect on Indian water rights. Akin itself never mentioned the McCarran Amendment’s effect on disclaimer provisions. The Akin Court held only that the McCarran Amendment clearly granted jurisdiction to states over Indian tribes, predating their decision on the congressional rejection of the earlier discussed proposal by the Departments of Interior and Justice. The Jicarilla court followed the Akin decision, but went further in stating that “subject matter jurisdiction should be recognized as allowable in the state courts of the general water rights adjudication proceeding, there being implicit modification of the Enabling Act to that extent, as necessary.”

The McCarran Amendment conflicts with the disclaimer provisions of 11 states. On the one hand, the disclaimer provisions prohibit those 11 states from asserting jurisdiction over Indian lands. On the other hand, the McCarran Amendment purports to waive federal and tribal sovereign immunity and to grant all states jurisdiction over all federal lands for purposes of adjudicating water rights, which should include Indian lands. As previously indicated, the conflict exists because the McCarran Amendment fails to explicitly repeal the disclaimer provision of the enabling acts.

When there are conflicts between statutes, a specific statute controls over a general statute. The enabling acts are specific statutes granting statehood upon definite conditions. In view of this fact, and the fact that the McCarran Amendment’s legislative history did not address the issue of the disclaimer provisions in the enabling acts, the general rule of construction requires that the enabling acts should control. The specific terms of enabling acts, that is, the disclaimer provisions, should prevail over the general terms of the McCarran Amendment, which otherwise would be controlling. McCarran cannot have the effect of repealing or abrogating the enabling act disclaimer provisions in light of the “cardinal rule . . . that repeals by implication are not favored.”

A repeal by implication is only acceptable when the earlier and later statutes are irreconcilable. The enabling acts and the McCarran Amendment, however, are not irreconcilable. The enabling acts can be read as prohibiting the assertion of state court jurisdiction over Indian lands even after the McCarran Amendment. The McCarran Amendment can be viewed

46. 601 F.2d at 1131.
49. Posadas, Collector of Internal Revenue v. National City Bank, 296 U.S. 497, 503 (1936) see also Ginsberg & Sons v. Popkin, 285 U.S. 204, 208 (1932) stating that “[s]pecific terms prevail over the general in the same or another statute which otherwise might be controlling.”
50. Posada, 296 U.S. at 503.
as granting jurisdiction to all states over the United States in all state and federal court cases adjudicating federal water rights. In view of the enabling acts, the McCarran Amendment grant of jurisdiction to disclaimer states is limited. Disclaimer state courts only have jurisdiction over all federal non-Indian lands in water rights cases. Non-disclaimer states under the McCarran Amendment have jurisdiction over all federal lands, both Indian and non-Indian, in water rights cases. The United States' and tribal sovereign immunity is waived in disclaimer states only in federal district court cases where Indian water rights are concerned. Therefore, the statutes are reconcilable. The McCarran Amendment should be read as not repealing the disclaimer provisions since the legislative history sheds no light on whether Congress intended to repeal the disclaimer provisions and since there is no explicit repeal. When the two laws are read together, the federal courts still have exclusive jurisdiction over Indian water rights in disclaimer states.

In addition, under 28 U.S.C. § 1362, the dismissal of an Indian case under the doctrine of wise judicial administration is inappropriate, especially if the McCarran Amendment is read as not granting disclaimer states jurisdiction over Indian water rights cases. The doctrine of wise judicial administration as applied in Akin presumed an alternate forum for litigation of the issues. The dismissal of Indian cases in favor of state court proceedings which do not have jurisdiction to hear Indian water rights cases would be a misapplication of the doctrine, at least as Akin intended it to apply. Dismissal under those circumstances is a clear abrogation of the federal court's duty to exercise jurisdiction under 28 U.S.C. § 1362.

Furthermore, even if it is conceded that the McCarran Amendment implicitly repealed the disclaimer provisions in enabling acts, the Amend-

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51. 28 U.S.C. § 1362 provides that "[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."

52. The policy behind § 1362 was as follows: (1) federal courts traditionally had jurisdiction over Indian lands; (2) the class of cases arising under federal law are best determined by federal courts; (3) Indian fears of adjudicating their claims in hostile state courts; and (4) federal courts have more expertise to decide federal questions. H.R. REP. NO. 2040 at 2, 1966 USCC & Ann. at 3146, and S. REP. NO. 1057, 89th Cong., 2d Sess. 3 (1966). Indians have generally feared state authority over them, and this fear clearly manifests itself in the congressional policy behind this act. Moreover, where a federal court is granted original jurisdiction by an act such as § 1362, it has "the duty . . . to adjudicate a controversy properly before it." Akin, 424 U.S. at 813, citing County of Allegheny v. Frank Mashuda Co., 360 U.S. 185, 188-189 (1959). When an Indian tribe brings a suit in a federal district court of a disclaimer state, it stands to reason that the court has "the virtually unflagging obligation" to exercise jurisdiction. Akin, 424 U.S. at 817, citing England v. Medical Examiners, 375 U.S. 411, 415 (1964). Under these circumstances, the federal district court improperly dismissed San Carlos and Adsit under the doctrine of wise judicial administration.

53. 424 U.S. at 809.

ment nowhere provides for the amending of state constitutional provisions prohibiting assumption of jurisdiction over Indian lands. Disclaimer states still have no authority to assume jurisdiction over Indian lands absent an amendment to their state constitutions. Disclaimer states have a double hurdle to overcome prior to their assuming jurisdiction over Indian lands. Their enabling acts must be amended as well as their constitutions. Unless both these steps are taken, they lack authority to assume jurisdiction over Indian water rights.

CONCLUSION

Absent an explicit congressional act such as Public Law 280, granting jurisdiction over Indian water rights to disclaimer states, those states cannot be given jurisdiction over Indian water rights under the McCarran Amendment. Federal courts do not have the power to confer jurisdiction over Indian water rights on disclaimer state courts. Congress must explicitly repeal the enabling acts' disclaimer provisions to make the McCarran Amendment applicable to disclaimer states. The legislative history of McCarran's effect on disclaimer provisions does not show a "clear and manifest" legislative intention to repeal the provisions as required by case law. As the Ninth Circuit in San Carlos and Adsit reads the enabling acts of disclaimer states and the McCarran Amendment, there is no conflict between the statutes and hence, no implicit repeal. In light of the disclaimer provisions of the enabling acts, the McCarran Amendment can only be read as a grant of jurisdiction to state courts in two situations: (1) the McCarran Amendment grants full concurrent jurisdiction for adjudication of federal water rights to nondisclaimer states over federal enclaves with Indian and non-Indian purposes, and (2) the McCarran Amendment grants concurrent jurisdiction for adjudication of federal water rights to disclaimer states only to the extent Indian lands are not being considered. Therefore, disclaimer states do not have concurrent jurisdiction with federal district courts over Indian water rights, absent an explicit modification, by Congress, of their enabling acts and an amendment to their state constitutions.

56. See generally Washington v. Yakima Indian Nation, 439 U.S. 463, 490 (1979), discussing Congress' explicit intention to provide disclaimer states with jurisdiction over Indian lands. The Court's discussion makes it clear that Congress intended disclaimer states to have jurisdiction over Indians under Public Law 280. Congress even provided a method for states to overcome constitutional and statutory barriers. The Court also discussed the legislative history of Public Law 280 which demonstrates that Congress was aware of the disclaimer problem.
57. See Marbury v. Madison, 1 Cranch 137, 174 (1804) and Hunter v. Martin's Lessee, 1 Wheat. 304, 388 (1816) stating that "[t]he case, then, and not the court, that gives jurisdiction."
59. Akin, 424 U.S. at 809.
Notwithstanding the Tenth Circuit’s holding in *Jicarilla*, the most *Akin* should be cited for, with respect to the McCarran Amendment and Indian water rights, is that *Akin* held the McCarran Amendment granted Colorado, a nondisclaimer state, concurrent jurisdiction with federal courts to adjudicate Indian water rights. The Ninth Circuit’s decisions with respect to *San Carlos* and *Adsit* were correct insofar as the court held that the McCarran Amendment did not repeal Arizona’s and Montana’s enabling acts and that the doctrine of wise judicial administration, as applied in *Akin*, was inapposite.

Whether the waiver of sovereign immunity extends to Indian tribes in disclaimer states is the issue before the Supreme Court in *San Carlos* and in *Adsit*. An additional point on appeal is whether the district courts properly dismissed these cases under the doctrine of wise judicial administration, as announced in *Akin*, in favor of pending state proceedings determining water rights. The Supreme Court in hearing and in reviewing the issues in these cases in light of the case law should find the specific enabling acts controlling in the disposition of *San Carlos* and *Adsit*. The Court’s consistent holdings in *Posada v. National City Bank* and *Morton v. Mancari* make it clear that Congress must explicitly repeal the disclaimer provisions. The Court has expressly stated in numerous cases that it does not favor repeals by implication. The McCarran Amendment simply failed to go the full stride to accomplish Congress’ purpose of allowing state courts to adjudicate all water rights.

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60. 296 U.S. 204 (1936).