1993

Federal Liability for State Water-Adjudication Filing Fees: Has the United States Waived Its Sovereign Immunity?

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Federal liability for state water-adjudication filing fees: Has the United States waived its sovereign immunity?

by Robert H. Abrams

United States
v.
State of Idaho
(Docket No. 92-190)

Argument Date: March 29, 1993

ISSUE

The issue presented by this case is whether the United States must pay state-imposed filing fees in general water adjudications in which the extent of federal water rights are to be decided. The United States claims that its surrender of sovereign immunity allowing it to be made a party to those water adjudications did not include a waiver of its sovereign immunity with respect to filing fees.

FACTS

Unlike most water-rights controversies that reach the United States Supreme Court, this one is relatively simple and easy to understand. As part of its state water-rights administration, the state of Idaho, like virtually all of the western states, has devised a general adjudication procedure that ascertains in a single proceeding all of the existing water rights for the use of water from a particular water source. In this case the water source is the Snake River in Idaho, one of the great rivers of the West. In 1987, the United States, along with more than 450,000 other potential claimants, was notified of the proceeding and invited to file its claims for adjudication. Failure by the United States to file and participate in the proceeding would result in the loss of all its water rights in that particular source.

By Idaho statute, water-rights claimants must pay a filing fee before their "notice of claim" can be accepted for adjudication. Those fees are set by a schedule that is included in the state statute. *See* Idaho Code § 42-1414 (1990). The collected fees are then segregated from other state revenues, and are used "to pay for judicial expenses directly relating to the Snake River adjudication." See Idaho Code §§ 42-1414 (3) & 42-1777 (1) and (2). This is a non-trivial matter, as Idaho's estimate of the cost of the proceeding is $32 million.

The United States is not the typical water-rights claimant in the Snake River Basin Adjudication (SRBA). It estimates that it will be required to pay in excess of $10 million in filing fees, fees that it feels are assessed on a basis that is intended to discriminate against it and Indian tribes by charging substantially more for the filing of claims to instream flow than for any other type of claim. Idaho rejects the claim of bias in the fee schedule and further points out that while the aggregate amount of fees that would be paid by the United States seems high, the United States is making a myriad of claims for a vast amount of water. More specifically, in all of its various capacities the United States is expected to file more than 30,000 different claims, representing twelve agencies. This computes out to a mere $330 per claim, for water that will service more than 23 million acres of federal land within the boundaries of the SRBA.

Procedurally, the case came to a head when the United States refused to pay filing fees and the Idaho Director of Water Resources refused to accept notices of claim filed by the United States. The United States filed a petition with the state district court seeking a writ of mandamus requiring the director to accept the filings without the fees. The petition was denied in an unreported decision, and that result was appealed to the Idaho Supreme Court. By a divided vote (3-2) on March 30, 1992, the denial of the petition was affirmed, leaving the United States under the obligation to pay the filing fees or have its claims excluded from the SRBA. *See* 832 P.2d 289. Certiorari was thereafter granted by the United States Supreme Court.

BACKGROUND AND SIGNIFICANCE

Like most sovereigns, the United States enjoys sovereign immunity, which generally means that the United States cannot be sued without its consent. In the water-rights context, the sovereign immunity of the United States historically prevented the several states from forcing the United States to submit its water-rights claims for adjudication. As discussed more fully below, this led to significant uncertainty regarding the extent of potential federal claims to water in the western states that might conflict with and displace claims to the use of the same water by holders of state-law water rights.

Two short digressions about the American West may be in order, one concerning state water law and the other concerning federal water rights. As part of the effort to allow the states created out of the western lands to operate on an equal footing with their eastern sister states, the western states were assumed to have the power to make their own water law insofar as so doing would not conflict with any federal water rights. In the arid West, most of the states have adopt-

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ed as their water law the doctrine of prior appropriation. At a very simplistic level, that doctrine grants state-law based water rights to persons who put the water to beneficial use on the basis of priority in time as typified by the watchwords, "First in time is first in right." What that means is that when there is insufficient water in a stream to fulfill the water rights of all of the users, the users who began their uses most recently must stop their use entirely in order to allow the more senior water users to receive their entire water right.

In marked contrast to the water rights created under state law on the basis of historic levels of beneficial use of water, stand a species of water rights called federal reserved water rights. These rights have a complex origin rooted in history. The federal government acquired virtually all of the West by purchase or treaty, and subsequently disposed of much of that land while retaining large tracts. The retained lands are divided into two general categories: lands that have been reserved for a particular federal purpose, such as Indian reservations, national parks, or the national forest system, and lands that have not been reserved that are simply called the public domain.

In the landmark case of *Winters v. United States*, 207 U.S. 564 (1908), the Supreme Court explained that by implication (rather than by actual beneficial use) federal water rights are created when federally owned lands are withdrawn from the public domain and reserved. The amount of water associated with the reservation is that quantity necessary to fulfill the primary purposes of the reservation. To coordinate these federal reserved water rights with their state water-rights cousins, the federal rights can arise only in water that was unappropriated at the time the land was reserved from the public domain, and the federal reserved rights carry a priority date of the time of the reservation. For example, if land was reserved for a national forest on January 1, 1891, state-law appropriators having senior (pre-1891) appropriative water rights are unaffected, but all post-reservation date state law appropriators are junior to the federal water right.

There is significant potential for conflict in this system. Federal reserved rights that are unquantified (i.e., it is uncertain how much water has been reserved) and often unused (the right arises in virtue of reservation, not actual use) exist throughout the West. Once quantified and put to use, these federal reserved rights hold the potential to displace state-law juniors in the event that there is not enough water for both the federal use and the junior's use. As the use of water in the West began to near or exceed reliable supply in many basins, the cloud of federal reserved rights began to inhibit development by persons whose water rights would be junior to those of the federal government. This state of affairs generated two forms of uncertainty: (1) state-law juniors had no way of knowing when, if at all, federal reserved water rights would be put to use; and (2) they did not know just how much water was covered by the federal reserved rights.

One way the states could overcome the latter ground of uncertainty was to force the United States to have its water rights quantified. The United States for a number of years invoked sovereign immunity when sued and thereby avoided quantification. To counter that federal strategy, the western states eventually persuaded Congress to enact the McCarran amendment in 1952.

The McCarran amendment provides in pertinent part:

"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. ... The United States, when a party to any such suit, shall (1) be deemed to have waived any right to plead that 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 ... 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."

As might be expected, the parties have devoted considerable time to arguments over the significance of the "in the same manner and to the same extent as a private individual under like circumstances" and "no judgment for costs" phrases.

Previous McCarran amendment cases have already defined the nature of proceedings that must be involved before waiver of immunity will be found. *See, e.g., Dugan v. Rank*, 372 U.S. 609 (1963), *United States v. District Court for Water Division No. 5*, 401 U.S. 527 (1971). Likewise, it seems fairly clear that the United States, once a party to state proceedings, is required to comply with relevant state procedures for the conduct of the litigation. *See, e.g., United States v. Bell*, 724 P.2d 631 (Colo. 1986). Thus, the precedential value of this case seems likely to be limited to the context of water-adjudication filing fees.

What is at stake is mostly money—lots of money by ordinary standards, and even a fair amount for agencies of the federal government. Here, there is a sort of multiplier—if the Idaho fee schedule is upheld, the other western states will be sure to follow with their own filing-fee systems that collect significant amounts of money from federal claimants in water adjudications. For the states involved, the amounts involved are likewise significant. If, as Idaho claims, the adjudication will cost $32 million, a failure to recoup that money, or any significant part of it, due to federal immunity will force the state to allocate general revenues to pay for the adjudication. Here, for example, if the $10 million anticipated filing fee cannot be charged to the United States, Idaho must make up that money from another source.

ARGUMENTS

For the United States *(Counsel of Record, Kenneth W. Starr, Solicitor General, Department of Justice, Washington, DC 20530; telephone (202) 633-2217):*

1. The United States is immune from the requirement that it pay "filing fees" to finance the state's costs in a general water-rights adjudication.
2. The state must demonstrate that the waiver of immunity of the McCarran amendment as it pertains to "filing fees" is both clear and unambiguous.

3. The McCarran amendment does not waive the United States' immunity from assessment of filing fees in general stream adjudications.

For the State of Idaho *(Counsel of Record, Clive J. Strong, Deputy Attorney General, Office of the Attorney General, Natural Resources Division, Statehouse, Room 210, Boise, ID 83720-1000; telephone (208) 334-2400):*

1. The McCarran amendment does waive the United States' immunity from assessment of filing fees in general stream adjudications.
2. The United States Supreme Court has interpreted the McCarran amendment as a sweeping waiver of federal sovereign immunity.
3. The language and legislative history of the McCarran amendment require the United States to comply with state laws governing the conduct of general stream adjudications.
4. The Idaho filing fee at issue in this case is part of the state's general stream adjudication laws and is within the scope of the waiver of immunity.
5. The services financed by the filing fees collected by Idaho benefit all claimants in the adjudication, including the United States.
6. The assessment of a filing fee is not a forbidden "judgment for costs."

AMICUS BRIEFS

In Support of United States

Nez Perce Tribe, Klamath Tribe, Tule River Tribe, Klamath Allottee Water Users Association, and Confederated Tribes of the Umatilla Indian Reservation *(Counsel of Record, Robert T. Anderson, Native American Rights Fund, 310 K Street, STE 708, Anchorage, AK 99501; telephone (907) 276-0680):*

1. The decision of the Idaho Supreme Court undermines the ability of Indian Tribes and the United States as trustee to assert and defend tribal water rights in Idaho and other western states.
2. Waivers of sovereign immunity are to be narrowly construed, especially when, as here, the rights of other sovereigns are affected.

In Support of the State of Idaho

States of Alaska, Arizona, California, Colorado, Montana, Nevada, Oregon, Utah, Washington, and Wyoming *(Counsel of Record, Virginia Linder, Solicitor General, State of Oregon, 400 Justice Building, Salem, OR 97310; telephone (503) 378-4402):*

1. Judgments for costs are the only exception to the sweeping waiver of sovereign immunity worked by the passage of the McCarran amendment.