



2023/2024 STAKEHOLDER WORKING  
GROUP

MCCARRAN AMENDMENT  
SPECIALIZED COURTS

November 13, 2023

LT. GOVERNOR KRISTEN JURAS

- The seminal case concerning the nature and extent of tribal claims to water -- *Winters v. United States*, 207 U.S. 564 (1908) – arose out of the Fort Belknap Reservation in Montana
- The Supreme Court ruled that even if a treaty establishing an Indian reservation is silent as to water, the federal government intended to deal fairly with the Indians by impliedly reserving water for the use and benefit of the Indians who would reside on the reservation.
- The doctrine applies to all federal lands, such as national parks and U.S. Forest Service lands. *Arizona v. California*, 373 U.S. 546 (1963); *Cappaert v. United States*, 426 U.S. 128 (1976)

## Federal Reserved Water Rights

# Practical Consequences of the Winters Doctrine

- On any given stream or body of water, there may be two distinct bodies of law governing water use:
  - State-based water rights, governed by state law
  - Federal reserved water rights, governed by federal law
- Adjudication of the precise amount to which the tribes or federal government are entitled requires joinder of the United States, either in its capacity as trustee of tribal reserved water rights or as a direct owner of a federal enclave reserved water right.
- But the doctrine of sovereign immunity presented an insuperable obstacle to such joinder.





*The king  
Can  
Do  
NO  
Wrong*

- Under the doctrine of **sovereign immunity**, the federal government may not be sued without its consent. *Block v. North Dakota ex rel. Bd. Of Univ. & Sch. Lands*, 461 US 273 (1983).
- Although Montana and other western states had developed orderly and comprehensive procedures for the allocation and administration of state-based water rights under the doctrine of prior appropriation, their inability to determine and administer federally owned or reserved water rights within these processes gave rise to great uncertainty for state-based water rights holders.

- In 1951 Nevada Senator Pat McCarran sponsored legislation to **promote certainty** in water allocation by subjecting undeclared and unquantified federal water rights to state adjudication and administration.
- Given the interrelated nature of water resources within a watershed, this legislation was deemed necessary to allow each state to **comprehensively adjudicate and administer** all claims to water within its boundaries to **avoid inconsistent or conflicting state and federal decrees.**



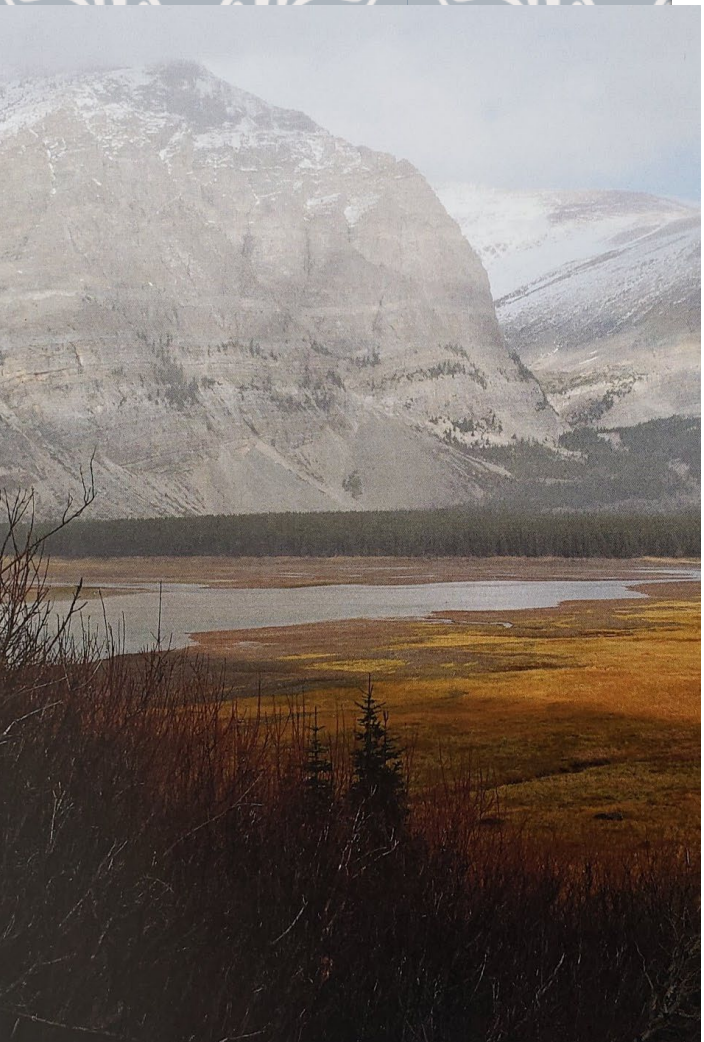
# 43 USC 666

- 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.

# 43 USC 666 continued

- 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.**





## Legislative History: S. Rep. 755, 82d Cong., 1st Sess. (1951)

- "In the arid Western States, for more than 80 years, the law has been that the water above and beneath the surface of the ground belongs to the public, and the right to the use thereof is to be acquired from the State in which it is found, **which State is vested with the primary control thereof.**"
- "In the **administration of and the adjudication** of water rights under State laws the **State courts are vested** with the jurisdiction necessary for the proper and efficient disposition thereof."
- "Since it is clear that the States have the control of water within their boundaries, it is essential that **each and every owner along a given water course, including the United States, must be amenable to the law of the State, if there is to be a proper administration of the water law as it has developed over the years.**"



# Key Rulings

- *United States v. District Court in and for Eagle County*, 401 U.S. 520 (1971): McCarran Amendment includes a waiver of sovereign immunity not only for federal rights acquired under state law, but for federal reserved water rights that are not dependent on state law, including:
  - *Winters v. United States*, 207 U.S. 564 (1908): Indian reservations
  - *Arizona v. Colorado*, 373 U.S. 546 (1963): federal lands
- *Colo. River Water Conservation Dist. v. United States*, 424 U.S. 800 (1976): McCarran Amendment includes consent to determine in state court reserved water rights held by the federal government on behalf of Indians and their administration by the State Water Engineer:
  - “The clear federal policy evinced by that legislation **is the avoidance of piecemeal adjudication of water rights in a river system.** . . . The consent to jurisdiction given by the McCarran Amendment bespeaks a policy **that recognizes the availability of comprehensive state systems** for adjudication of water rights as the means for achieving these goals.” 424 U.S. at 819.

## McCarran Applies to:

(1) Adjudication

(2) Administration

- *United States v. Hennen*, 300 F. Supp. 256 (D. Nev. 1968): “
- “Once a legal proceeding within the purview of 666(a)(1), determining relative rights of claimants to the waters of a stream system or other source, has been had and a decree adjudicating such rights entered [adjudication],
- **Congress has given its consent to any suit properly commenced for the administration of such rights under 666(a)(2).**
- **To administer a decree is to execute it, to enforce its provisions, to resolve conflicts as to its meaning, to construe and interpret its language.”**

- In *United States v. City and County of Denver*, 656 P.2d 1, 9 (Colo. 1983), the Colorado Supreme Court held that the McCarran Amendment recognizes “the **primacy** of the western states’ interests in regulation **and administering** water rights,” and confirmed that the Colorado State Engineer had administrative jurisdiction over federal reserved water rights adjudicated by the Colorado courts.

## Primacy of States



# Confederated Salish & Kootenai Tribes v. Clinch, 2007 MT 63

- “A plain reading of the [McCarran Amendment’s] text indicates that the United States has waived its sovereign immunity so that it may be joined as a defendant when it is a necessary party in cases seeking **to adjudicate or administer** water rights in state courts.
- The United States Supreme Court has interpreted this waiver to extend to the Indian tribes, providing consent **to determine in state court** federal reserved water rights held on behalf of Indians.
- The Amendment's waiver is not for purposes of private suits against the United States or the Indian tribes; rather, it is limited to **comprehensive state adjudications** of water rights.”
- (internal citations omitted)

- To date, no court, state or federal, has interpreted the McCarran Amendment to require that adjudicated water rights may only be administered by the same state court that issued the decree adjudicating those rights.
- State and federal courts have overwhelmingly acknowledged that the McCarran Amendment's purpose is to permit the joinder of the United States in state proceedings designed by the State Legislature to implement the comprehensive **adjudication and administration** of **all** state-based and federal-based water rights on a single water source.

# Examples of Cases Not Covered by McCarran Amendment

- *Rosette, Inc. v. United States DOI*, 142 N.M. 717 (2007): McCarran Amendment did not apply to property owner's claim of an ownership interest in geothermal resources underlying plaintiff's property
- *Orff v. United States*, 358 F.3d 1137 (2004): McCarran Amendment did not apply to a private lawsuit for damages between farmers and government for a taking of water rights
- *Dugan v. Rank*, 372 U.S. 609 (1963): McCarran Amendment did not apply to a claim of two individual cattle ranchers against the United States



# Moving Forward

- It is the position of the Governor's Office that Montana's comprehensive system of water right adjudication and administration is McCarran compliant.
- Consistent with the McCarran Amendment's stated purposes, an essential goal of this working group is to maintain state primacy in the comprehensive adjudication and administration of both state-based and federal-based water rights.
- Once you have finalized your policy recommendations, the Governor's Office and DNRC will conduct an extensive legal analysis to ensure compliance with all applicable federal and state laws, including the McCarran Amendment.



# CONSTITUTIONALITY OF THE WATER COURT

# Montana Constitution

Article VII, Sec. 1: The judicial power of the state is vested in one supreme court, district courts, justice courts, and such other courts as may be provided by law.

Article VII, Sec. 8(1): Supreme court justices and district court judges shall be elected by the qualified electors as provided by law.



# District Court General Jurisdiction

Montana Constitution  
Article VII, Sec. 4

- (1) The district court has original jurisdiction in all criminal cases amounting to felony and all civil matters and cases at law and in equity. It may issue all writs appropriate to its jurisdiction. It shall have the power of naturalization and such additional jurisdiction as may be delegated by the laws of the United States or the state of Montana. Its process shall extend to all parts of the state.
- (2) The district court shall hear appeals from inferior courts as trials anew unless otherwise provided by law. The legislature may provide for direct review by the district court of decisions of administrative agencies.
- (3) ***Other courts*** may have jurisdiction of criminal cases not amounting to felony and ***such jurisdiction concurrent with that of the district court as may be provided by law.***

# Additional Facts

- The legislature has created 22 judicial districts. 3-5-101, MCA.
- The Legislature determines the number of judges assigned to each district. 3-5-102, MCA.
  - There are currently 51 district court judges.
- District courts are funded by the state out of the general fund. 3-5-901, MCA
  - Counties provide office, courtroom, and other space for district court operations. 3-1-125, MCA.

# Workers' Compensation Court

- The 1975 Legislature created the Workers' Compensation Court.
- The Legislature has defined the scope of the Workers Compensation Court, including:
  - resolving disputes arising under the Workers' Compensation Act and the Occupational Disease Act;
  - independent contractor exemptions;
  - appeals of Department of Labor & Industry orders on workers' compensation and occupational disease issues.
- The Montana Workers' Compensation Judge is *appointed* by the Governor and serves a six-year term. 2-15-1707, MCA

- The Workers' Compensation Court holds trials in cities around the state.
- No right to a trial by jury.
- Appeals from a final decision of the workers' compensation judge are filed directly with the Montana Supreme Court of Montana. 39-71-2904, MCA.
- All expenditures of the workers' compensation judge, including salaries, traveling expenses, office rent, office equipment, and supplies, are paid out of the workers' compensation administration fund. 39-71-2902, MCA.

## Additional Facts



# Recognition of Authority of Legislature to Create “Other Courts”

- In *State ex rel. Uninsured Employers’ Fund v. Hunt*, 191 Mont. 514 (1981), the Montana Supreme Court acknowledged that the “Workers’ Compensation Court *is not vested with the full powers of a District Court.*”
- The Court upheld the authority of the Legislature to grant exclusive jurisdiction “with respect to the benefits payable to a claimant” to the Workers’ Compensation Court, including the right to determine whether a person was an “employee” or “independent contractor” for purposes of workers’ compensation benefits.
- This decision reflects a deference on the part of the Montana Supreme Court to the Legislature’s prerogative to create courts that are not district courts and to grant exclusive jurisdiction over specified matters to those courts.

# Youth Courts

- The 1974 the Montana Legislature enacted the Montana Youth Court Act (41-5-101 et seq.), which provided exclusive jurisdiction over certain crimes committed by minors to a Youth Court.
- In *State ex rel. Maier v. City Court of Billings*, 203 Mont. 443 (1983), the Montana Supreme Court deferred to the authority of the Legislature to create a “special jurisdiction” youth court “*separate and apart from the District Courts.*”
- Even though, under the Act, a district court judge served as a Youth Court judge, the Montana Supreme Court distinguished Youth Courts from district courts.

# State v. Wilcox

- In *State v. Wilcox*, 208 Mont. 351 (1984), the Montana Supreme Court *expressly recognized that not all judges in Montana must be elected*:
  - While it is true in a general sense that Montana has an elected judiciary, all persons serving as judges and exercising judicial functions are not elected by the people by popular vote.
  - For example, retired judges are empowered to serve as water judges.... The Chief Water Judge is appointed by the Chief Justice of the Montana Supreme Court and may be a retired judge. Section 3-7-221, MCA. Judge Lessley and Judge Thomas, both retired district judges, are presently serving in such capacities and exercising judicial functions.
  - The Workers' Compensation Judge clearly exercises judicial functions but is appointed by the Governor, not elected by the people. Section 2-15-1014, MCA.

# Facts to Consider

- The district courts are courts of general jurisdiction with the authority to preside over all criminal and civil matters, including family law, probates, property law, contract disputes, tort liability, etc.
- The Constitution expressly authorizes the legislature to create “other courts” that exercise concurrent jurisdiction in some areas with district courts.
- The Montana Supreme Court has determined that a legislatively-created court that does not exercise the full powers of a district court is NOT a district court.
- The legislature has created 22 judicial districts and has specified the number of district court judges. The legislature has not included the water court judges appointed by the Chief Justice as district court judges.
- No case to date has challenged the appointment of water court judges.



# Montana Water Court History

- Initially, the 1973 Montana Water Use Act tasked the DNRC with determining pre-July 1, 1973 water rights, with district courts issuing decrees.
- In 1979 the legislature changed course and established the Montana Water Court to adjudicate pre-July 1, 1973 water rights.
  - DNRC was given responsibility for examining all pre-July 1, 1973 claims.
  - DNRC was given responsibility for permitting new water rights and processing change of use applications for pre- and post-1973 water rights.
- The Legislature has also assigned to the Water Court the authority to determine whether existing water rights have been abandoned (3-7-501(4), MCA) and to address claims certified by the district courts when a “water distribution controversy arises” regarding existing water rights (85-2-406, MCA).

# The Ross Report

- In 1988 the Water Policy Interim Committee (WPIC) hired a Colorado firm to evaluate the judicial mechanisms set up by the 1979 legislature.
- The review by the Saunders, Snyder, Ross & Dickson law firm considered many matters, including the DNRC-Water Court relationship, Water Court practices and procedures, McCarran Amendment considerations, and the accuracy of adjudication decrees.
- The 1988 Ross Report concluded that the Water Court “is clearly **a special court created by law**, pursuant to article VII, section 1 of the Montana constitution, free from the requirement of election which attaches to district court judges.”

# Other Important Legislation

- In 2005, HB 22 developed a funding source to reinvigorate the adjudication process and set deadlines for DNRC to examine claims.
- In 2015, SB 57 created benchmark deadlines for the DNRC to complete reexamination.
- In 2013 (SB355) and 2017 (HB110), the Legislature provided for filing of previously exempt domestic or stockwater claims (adding 25,000 claims to the DNRC and Water Court workloads).
- In 2017, SB28 was passed allowing a party aggrieved by an agency decision on a water permit or change to appeal to the Water Court (in addition to a district court).

# Other Analyses

- A May 9, 2016 memo presented by Attorney Helen Thigpen to WPIC concluded that the water court would “most likely be considered a specialized court within the meaning of Article VII, section 1, of [the] Constitution,” and its judges would **not be required to be elected**, even if the jurisdiction of the Water Court were expanded.
- A December 16, 2019 memo presented by Attorney Cori Hach to WPIC concluded that **making the Water Court permanent** would not violate the Article VII, Section 1 requirement that district court judges be elected.
- The August 2020 WPIC report “HJ14: Prospects for a Future Water Court” found that the constitutionality of the Water Court **will be presumed constitutional** unless a court rules otherwise, and that **there is nothing in the Montana Constitution that prohibits the Water Court from being made permanent.**



# Summary

- Article VII, Sec. 8 of the Montana Constitution requires Montana Supreme Court justices and **district court judges** to be elected.
- Article VII, Sec. 8 expressly authorizes the Legislature **to create courts other than district courts and does not require those judges to be elected.**
- Article VII, Sec. 4 grants the Legislature the authority to create **specialized courts** that exercise “concurrent” jurisdiction with district courts.
- The Montana Supreme Court has previously ruled that courts created by the legislature (the Workers’ Compensation Court and the Youth Court) which do not have the full powers of a district court are NOT district courts.

# Moving Forward

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Past decisions of the Montana Supreme Court and legal memoranda support the authority of the legislature to create “other courts” with specialized jurisdiction whose judges may be appointed.

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Any final proposals will be vetted by legal counsel to ensure compliance with all applicable federal and state laws, including the Montana Constitution.

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Keep in mind and consider whether the legislature, as a matter of policy, will support the appointment of Water Court judges or prefer their election.



THANK YOU