

Federal Water Projects: After California v. United States, What Rights Do the State and Federal Governments Have in The Water?

The Supreme Court's decision in California v. United States provides some delineation of the rights of the federal and state governments in federal water projects, but also raises some questions. This article examines the history of the litigation and then attempts to resolve some of the questions raised by the opinion. It then examines the extent of state and federal power in the latter's water projects. After determining the extent of each government's rights in the projects, the article concludes with an analysis of the means by which the states can best protect their interests and also cause federal water projects to reflect their true costs.

Until recently, the federal and state governments consistently cooperated to develop western water resources, thus providing the means to make arid and semi-arid western lands productive.¹ For over seventy-five years, federal and state interests in constructing federal water projects coincided and such projects were models of the benefits of federal and state cooperation.² Over the last twenty years, however, fed-

1. See *Ivanhoe Irrigation Dist. v. McCracken*, 357 U.S. 275, 279-84 (1957). For a historical discussion of the need of irrigation to make western lands productive, see W. STEGNER, *BEYOND THE HUNDREDTH MERIDIAN*, 219-31 (1954).

2. *California v. United States*, 98 S. Ct. 2985 (1978); *Ivanhoe Irrigation Dist. v. McCracken*, 357 U.S. 275, 279-80 (1957).

Actually, in California, the state originally proposed and designed the major water projects. The state, however, was unable to finance the projects and thus requested the help of the federal government. While the federal government has provided the financing and planning for projects, the state has retained responsibility for managing state water resources. See, e.g., *Ivanhoe Irrigation Dist. v. All Parties*, 47 Cal. 2d 597, 613-19, 306 P.2d 824, 833-37 (1957), *rev'd on other grounds* in *Ivanhoe Irrigation Dist. v. All Parties*, 53 Cal. 2d 692, 3 Cal. Rptr. 317, 350 P.2d 69 (1960). As a result of this cooperative effort, the California valleys are very productive. In California, nine of the ten and one-half million acres of cultivated lands are irrigated. CAL. DEP'T OF WATER RESOURCES, BULLETIN no. 160-74, *THE CALIFORNIA WATER PLAN OUTLOOK IN 1974*, at 69

eral and state interests in water projects have progressively diverged.³ While the federal government remained primarily interested in irrigation, power development and flood control uses, the states increasingly recognized domestic water needs, water quality problems and environmental concerns.⁴

The difficulty posed by these diverging interests arose because while the federal government provided the funding, construction and operation of the projects, the states controlled the water supplies necessary for project operation.⁵ No statutes or court decisions made a precise delineation of the extent of each government's rights and each asserted their interests in varying degrees.⁶ Finally, the interests of California and the federal government on components of the Central Valley Project (CVP), the New Melones and Auburn-Folsom South Unit projects, diverged to such a point that some delineation of each government's rights was necessary.⁷

In an area complicated by problems of federalism, section 8 of the Reclamation Act of 1902 provided the balance between state and fed-

(1974). Irrigated crops constitute 85% California's agricultural output. *Id.* at 56. Of the 200 crops which California produces, it is among the nation's top 5 producers in 70 of those crops. *Id.* at 49.

3. Recent litigation has highlighted this diversion. *See, e.g.*, *United States v. California*, 403 F. Supp. 874 (E.D. Cal. 1975) *aff'd* in 558 F.2d 1347 (9th Cir. 1977), *rev'd* in *California v. United States*, 98 S. Ct. 2985 (1978); *Natural Resources Defense Council v. Stamm*, — F. Supp. —, 6 Env. Rptr. Cases 1525 (E.D. Cal. 1974) (The court denied relief to the plaintiffs, who sought a review of the environmental impact report for the Auburn-Folsom South Unit Project. Plaintiffs argued that the government agency in charge of designing the project should have to adjust the impact statement to reflect the effect of state imposed terms and conditions in the permits granted for the project.).

4. *Contrast* 43 U.S.C. § 390(b) (1970), *with* CAL. WATER CODE §§ 1254, 1257, 1258 (West 1971). *See also* note 37 *infra*.

5. A statement by Justice Rehnquist in the majority opinion in *California v. United States*, 98 S. Ct. 2985 (1978) points up the probable reason for this lack of litigation over the rights of the federal and state governments in water projects:

Perhaps because of the cooperative nature of the legislature, and the fact that Congress in the Act merely authorized the expenditure of funds in states whose citizens were generally anxious to have them expended, there has not been a great deal of litigation involving the meaning of its language. Indeed, so far as we can tell, the first case to come to this court involving the Act at all was *Ickes v. Fox*, 300 U.S. 82 (1937), and the first case to require construction of section 8 of the Act was *United States v. Gerlach Livestock Co.*, 339 U.S. 725 (1950), decided nearly a half century after the enactment of the 1902 statute.

Id. at 2989.

As Justice Rehnquist points out, only six cases decided by the Supreme Court have addressed the meaning of section 8 of the Reclamation Act of 1902, 43 U.S.C. § 383 (1970), which determines the rights of the state and federal governments under Congress' existing statutory framework.

6. Three decisions of California's State Water Resources Control Board (SWRCB) have resulted in litigation over the rights of the state and federal governments in federal water projects. *See* note 35 *infra*.

7. *See* text accompanying notes 48-72 *infra*.

eral interests.⁸ Section 8 requires the Secretary of the Interior, or his agents, the Bureau of Reclamation, to comply with state water law in planning and operating federal water projects. Originally, the Bureau of Reclamation, which administers the federal water projects, considered itself bound to apply for state appropriative water rights permits in order to secure the necessary water for its projects.⁹ In turn, California's State Water Resources Control Board was compelled by state law, in issuing permits, to impose those terms and conditions necessary to protect certain state interests.¹⁰ On the New Melones project, the state-imposed terms and conditions so restricted the Bureau's operation of the project that it changed its position and contended that it was no longer bound by any terms and conditions imposed by the state.¹¹ Litigation on the issue culminated in the Supreme Court's decision in *California v. United States*.¹² The Supreme Court determined that section 8 required the Bureau to abide by state law except where it directly interfered with specific federal purposes.

The Supreme Court's decision provides a definitive interpretation of section 8. It raises, however, as many problems as it solves. For instance, state conditions which are inconsistent with specific federal purposes are still invalid.¹³ These state interests underlying the terms and conditions are still unprotected by section 8. Furthermore, perhaps the most telling statement in the opinion is that of the dissent: "Of course, the matter is purely statutory and Congress could easily put an ending to our funding if it chose."¹⁴ Because Congress can always change the law, legitimate state interests are continually threatened.¹⁵ The uncertainty surrounding voluntary federal submission to state water law evidences the need for development of a more certain means for the states to protect their interests than the imposition of terms and conditions in federal water permits. To develop a solution for this problem, it is nec-

8. 43 U.S.C. § 383 (1970) (Originally enacted as Reclamation Act of 1902, Ch. 1093, section 8, 32 Stat. 390 (1902)).

9. See notes 17, 18 & 68 *infra*.

10. See text accompanying notes 21-38 *infra*.

11. *United States v. California*, 403 F. Supp. 874, 877 (1975).

12. *California v. United States*, 98 S. Ct. 2985 (1978). See also discussion accompanying notes 73-100 *infra*.

13. *Id.* at 5006.

14. *Id.* at 5010. The majority of the Supreme Court noted in another recent opinion that where Congress defers to state control, it also has the power to reassert its own control over the area when it so desires. See *Hancock v. Train*, 426 U.S. 167, 198 (1976).

15. The difficulty is heightened in the water law area because the states' reliance upon the Bureau's previous interpretation of federal law, to the effect that the Bureau was bound to comply with state water law, meant that the states did not need to develop the water law to meet a full assertion of federal rights. However, the federal government is capable of asserting its full rights in the water law area. The Ninth Circuit's decision in *United States v. California*, 558 F.2d 1347 (9th Cir. 1977), highlights the difficulties which the state may face if Congress fully asserts its federal rights. See note 73 *infra*.

essary to assess the extent of federal power to authorize and operate federal water projects. Once the limits of this power are defined, the state's ability to control its own resources can be ascertained.

This article begins by analyzing the history of the litigation in *United States v. California*¹⁶ and the problems associated with a system of voluntary compliance to state water law. The section also explores the Supreme Court's decision in *California v. United States*.¹⁷ Due to the problems and uncertainty remaining under section 8 which threaten legitimate state interests, an analysis of the full extent of federal and state powers is necessary to ascertain whether the states can successfully protect their interests. Section II discusses the extent of federal power to authorize projects under the navigation power. The section analyzes the broad scope of this power and suggests a need to limit its scope. Alternatively, Section III explores why the General Welfare Clause should govern federal water projects and the ramifications resulting therefrom. The article concludes by proposing ways by which the states can best protect their interests in federal water projects.

I. VOLUNTARY COMPLIANCE WITH STATE WATER LAW AND CALIFORNIA'S APPROPRIATIVE WATER RIGHTS SYSTEM

Until recently, the extent of federal power to use state water in its reclamation projects was not subject to dispute. The federal agency administering the projects, the Bureau of Reclamation (Bureau), interpreted the Reclamation Act to require federal submission to state water law.¹⁸ Consequently, it consistently applied to the states for appropriative water rights permits.¹⁹ Because no substantial differences existed between state and federal interests, the governments' cooperation resulted in the development of western water resources.²⁰ When California begin imposing stricter limitations upon federal water appro-

16. *United States v. California*, 403 F. Supp. 874 (E.D. Cal. 1975), *aff'd* 558 F.2d 1347 (9th Cir. 1977), *rev'd* in 98 S. Ct. 2985 (1978).

17. *California v. United States*, 98 S. Ct. 2985 (1978).

18. *See, e.g.* Statement of the Regional Director for the Bureau of Reclamation's Central Valley Project Region in *United States v. Gerlach Livestock Co.*, 339 U.S. 725, 740-41 at n.41 (1949). Furthermore, the original judicial interpretation and commentary argued that the Bureau was bound to abide by state water law. 2 S. WIEL. WATER RIGHTS IN THE WESTERN STATES, § 1394 (3d ed. 1911).

19. For instance, in California the Bureau of Reclamation filed 51 applications for permits to acquire water for various elements of the Central Valley Project. *United States v. California*, 403 F. Supp. 874, 898 (1975). Of those 51 applications, California approved 41 of them with attached conditions. *Id.*

20. Apparently, the Bureau first asserted that it was not bound to abide by state imposed terms and conditions in water permits in 1961. The controversy centered around the SWRCB's predecessor requiring minimum releases from all Central Valley Projects to repel salinity intrusion into the Sacramento-San Joaquin Delta. Cal. State Water Rights Bd., Decision 990, at 22-27 (1961). The Bureau, while objecting, complied. *Id.* One commentator has suggested that the Bureau complied due to considerations of

priations, however, the Bureau began asserting greater powers. Thus, due to the interplay of state and federal statutes, an analysis of the problems present in federal and state relations in water projects must begin with an analysis of the two statutory systems.

A. California's Appropriative Water Rights System

California water law operates primarily under an appropriative water rights system.²¹ A potential user must apply to the State Water Resources Control Board (SWRCB) for a permit to appropriate the necessary water.²² The SWRCB first determines that sufficient unappropriated water exists to fill the user's needs.²³ Then, the SWRCB examines the costs and benefits associated with granting the necessary water for the proposed use within the context of the state's water needs as a whole.²⁴ The system is designed to recognize competing interests in a limited water supply and promote the maximum beneficial use of California's water resources consistent with the public interest.²⁵ The SWRCB examines, weighs and protects such diverse interests as water quality,²⁶ domestic needs,²⁷ irrigation uses,²⁸ the protection of fish and wildlife,²⁹ recreational³⁰ and environmental concerns.³¹ If the SWRCB determines that sufficient unappropriated water exists and that the proposed use is in the public interest, it will grant the per-

comity. Note, *the Delta Water Rights Decision*, 2 *ECOLOGY* L.Q. 733, 746-48 (1972) (hereinafter cited as *Delta Water Rights*).

21. CAL. WATER CODE §§ 1200-1800 (West 1971). While California also recognized riparian, pueblo and prescriptive water rights, the system is largely a system of prior appropriation. W. HUTCHINS, 3 *WATER RIGHTS IN THE WESTERN UNITED STATES* 179-214 (1977).

22. CAL. WATER CODE § 1225 (West 1971).

23. *Id.* § 1375(d).

24. *Id.* §§ 1256-58. For an excellent example of the procedure used by the SWRCB in determining the relative weight to accord various conflicting interests, see Cal. State Water Res. Control Bd., Decision 1422 (1973).

25. CAL. WATER CODE §§ 1250-58 (West 1971). The SWRCB is required to hold hearings if any protests are received in regard to proposed use. *Id.* at § 1340. For a further discussion of the full scope of analysis California applies to proposed water use, see R. Robie, *Some Reflections on Environmental Considerations in Water Rights Administration*, 2 *ECOLOGY* L.Q. 695 (1972) (hereinafter cited as Robie).

26. CAL. WATER CODE § 1258 (West 1971).

27. *Id.* §§ 1254, 1257.

28. *Id.*

29. CAL. WATER CODE § 1243 (West Cum. Supp. 1978). The Department of Fish and Game is also empowered to suggest modifications or measures to protect fish and wildlife. CAL. FISH & GAME CODE §§ 1600-1606 (West Cum. Supp. 1977). Finally, the SWRCB must consider the needs of fish and wildlife in assessing the relative benefit of various water uses. CAL. WATER CODE § 1257 (West 1971).

30. CAL. WATER CODE § 1243 (West Cum. Supp. 1978). CAL. WATER CODE § 1270 (West 1971).

31. CAL. PUB. RES. CODE §§ 2100-176 (West 1977). See Robie, note 25 *supra* at 701-10.

mit.³²

In approving an application and granting a use permit, however, the SWRCB is required to impose those terms and conditions which are necessary to protect the public interest and insure that the user will continue to apply the water beneficially.³³ For instance, the SWRCB may require a user to make timed releases to provide minimum stream flows,³⁴ allow for future review of the water's use,³⁵ or limit the appropriation to a lesser amount than requested.³⁶

The SWRCB's imposition of terms and conditions in federal water permits created the current controversy in federal and state relations in water projects. In three recent decisions, the SWRCB imposed terms and conditions on permits for federal water projects which severely altered the Bureau's proposed administration of the projects.³⁷ The con-

32. The Water Code actually provides that the SWRCB shall reject an application if it is not in the public interest. CAL. WATER CODE § 1255 (West 1971). However, if the other statutory requirements are met, the SWRCB will grant the permit or license. *Id.* §§ 1375, 1380. In determining whether a proposed use is in the public interest, state law gives the SWRCB a wide amount of discretion. *Temescal Water Co. v. Dept of Public Works*, 44 Cal. 2d 90, 100, 280 P.2d 1, 7 (1975).

33. CAL. WATER CODE §§ 1253, 1391 (West 1971). Under California law, a permit is only effective as long as the water is actually used beneficially. For a consideration of the effects of drought and other unusual circumstances on this requirement, see, Comment, *Legal Aspects of Appropriative Water Rights Transfers in California*, this volume.

34. Cal. State Water Rights Control Bd., Decision 1400 (1972).

35. CAL. WATER CODE § 1394 (West 1971). See Cal. State Water Rights Bd., Decision 990 (1961).

36. Cal. State Water Rights Control Bd., Decision 1422 (1973).

37. The controversy actually began with a 1961 decision by the SWRCB's predecessor requiring minimum releases from all Central Valley Projects to repel salinity intrusion into the Sacramento-San Joaquin Delta. See note 20 *supra*. One of the terms and conditions the SWRCB frequently imposes reserves jurisdiction over permits to allow the SWRCB a means of reviewing past water grants to provide for changing needs. CAL. WATER CODE § 1394 (West 1971) Cal. State Water Rights Board's Decision 990 contained such a reservation. Cal. State Water Rights Bd., Decision 990, at 86 (1961). That reservation was invoked and new terms and conditions were imposed in 1971 to provide salinity repulsion in the Sacramento-San Joaquin Delta. Cal. State Water Res. Control Bd., Decision 1379 (1971). The SWRCB required coordinated releases from the Central Valley Project (CVP) and State Water Project (SWP) to provide salinity repulsion and protect agricultural, industrial and urban uses in the Delta. *Delta Water Rights*, *supra* note 20, at 746-48. While the Bureau first objected to the imposition of any terms and conditions, Cal. State Water Res. Control Bd., Decision 1379 at 18 (1971), it later agreed to comply with state terms so long as state water law did not interfere with any national policy or operation of the project. *Id.* at 42. Bureau compliance in this instance is apparently crucial because the SWP alone cannot provide sufficient water for solemnity repulsion. See, *Contra Costa Times*, Dec. 18, 1977, at 1, col. 1 and Dec. 8, 1977 at 1, col. 1.

In 1972 the SWRCB imposed minimum flow requirements on Bureau permits for the Auburn-Folsom South Unit Project to protect recreational uses on the lower American River through municipal Sacramento. Cal. State Water Res. Control Bd., Decision 1400 at 7-12 (1972). In this instance, the National Resources Defense Council (NRDC) filed suit to enjoin the Bureau from proceeding further with the project until the environmental impact statement addressed the terms and conditions imposed by the state. *NRDC v. Stamm*, — F. Supp. —, 6 Env. Rptr. Cases 1525, 1528 (E.D. Cal. 1974). The district

troverly over the New Melones Project culminated in the Supreme Court's decision in *California v. United States*.³⁸

B. The New Melones Project and United States v. California.

The New Melones Project is a unit of the Central Valley Project and designed to flood thirteen miles of the Stanislaus River near Angels Camp.³⁹ The Stanislaus begins high in the Sierras and runs west, passing through groves of virgin sequoia and limestone canyons, finally joining the San Joaquin River near Modesto. If filled, the New Melones Dam would flood thirteen miles of river from just below the Old Melones Dam upriver to Pacific Gas and Electric's Camp Nine Powerhouse. It would also flood nine miles of the nation's second most heavily used white-water river run,⁴⁰ destroy archaeological sites, caves and rare animal species.⁴¹

Congress authorized the New Melones Project in 1946.⁴² Later, the

court did not address the NRDC's demand and allowed the Bureau to proceed with the project. The case points out a problem with Bureau procedure: The Bureau does not apply for permits nor file comprehensive environmental impact statements prior to constructing a project. Consequently, the Bureau gets approval and initiates construction before it knows whether sufficient unappropriated water exists to fill its needs and what the state interests are. Thus, litigation always approaches the courts in a context prejudicial to the state—the federal government has spent millions of dollars on the project and the state will “only” be deprived of unappropriated water. A court has difficulty enjoining nearly completed million dollar projects. *See, United States v. California*, 403 F. Supp. 874 (E.D. Cal. 1975). At a minimum, Congress should require the Bureau to apply for state permits during the planning stage of a project so that disputes between the state and federal agencies can be resolved before expenditures are made.

After the Supreme Court's decision in *California v. United States*, 98 S. Ct. 2985 (1978), the District Court's decision in *NRDC v. Stamm*, — F. Supp. —, 6 Env. Rptr. Cases 1525, 1528 (E.D. Cal. 1974), may have been wrong. The District Court in that case assumed that the state imposed terms and conditions that were not valid. Because the Bureau is bound to abide by state imposed conditions in water projects, the environmental impact statements which the Bureau is required to file should reflect the terms and conditions which the state imposes.

38. *California v. United States*, 98 S. Ct. 2985 (1978).

39. Cal. State Water Res. Control Bd., Decision 1422, at 17 (1973). *See also, United States v. California*, 403 F. Supp. 874 (E.D. Cal. 1975).

40. Cal. State Water Res. Control Bd., Decision 1422, at 23 (1973). The SWRCB noted that, “While the opportunities for flat water boating are abundant, streams suitable for white water boating are extremely scarce” *Id.* Also, the Stanislaus may be the second most heavily used river in the nation for that purpose in actual numbers of visitors per year. *Id.* In fact, the Bureau has contended that overuse of the river may become a problem. *See also, B. Parry & R. Norgaard, Wasting A River*, 17 ENVIRONMENT 17 (1975) (hereinafter cited as Parry & Norgaard).

41. The Stanislaus River Canyon was once occupied by native American Indians and several of their archeological sites are left in the vicinity. Grinding stones, petroglyphs and other evidences of their previous occupation are found along stretches of the river. The limestone walls of the canyon have also created many caves in which several rare species of spiders live.

42. The New Melones Dam was authorized by the Flood Control Act of 1944, 58 Stat. 88, and reauthorized in the Flood Control Act of 1962, 76 Stat. 1180.

Bureau applied to California for water permits.⁴³ After public hearings, the SWRCB determined that the nine miles of river and canyon below Camp Nine were a unique asset to the state and nation.⁴⁴ In comparison, the Bureau had no plan or need for the water which would flood the upper nine miles of river.⁴⁵ Consequently, the SWRCB imposed terms and conditions which limited the Bureau's right to appropriate water and limited the Bureau's ability to fill the reservoir.⁴⁶ The

43. Cal. State Water Res. Control Bd., Decision 1422, at 1 (1973).

44. The SWRCB stated that "The Board finds that the reach of river in question is a unique asset to the state and nation." *Id.* at 23, 24.

45. The SWRCB found that

The Bureau has presented no specific plan for applying project water to beneficial use for consumptive purposes in any particular location. Furthermore, the record shows that the CVP has substantial quantities of water that are not being used and are not yet under contract. The Bureau's own records indicate that without the yield of the New Melones Reservoir that the Bureau can meet the estimated buildup of demands under present contracts for a long period of years.

Id. at 14. Furthermore, the Board noted that there was a lack of any evidence which showed that the water would be needed for consumptive purposes outside of the four basin counties for many years to come if at all. *Id.* at 17. The Bureau's position is now particularly untenable. The New Melones Dam was originally designed to provide water for the East Side Canal. That canal has never been authorized and the Bureau is now making plans for an alternate and much smaller Mid-Valley Canal. Telephone conversation with Public Information Officer, Bureau of Reclamation, Sacramento Office, April 25, 1978.

46. Cal. State Water Res. Control Bd., Decision 1422, at 28-37 (1973). The SWRCB's decision appears appropriate.

The public interest required the use of Stanislaus River for white water boating, stream fishing and wildlife habitat be protected to the extent that water is not needed for other beneficial uses. Therefore, although there is a demonstrated need for the full yield of the project in the four basin counties at some time in the future, but for which no contracts had been negotiated, and in view of the adverse effects the proposed reservoir will have upon these recreational uses, impoundment of water to satisfy that need should not be permitted at this time. Instead, the Board should retain jurisdiction over the permits for the purpose of approving incremental appropriations for consumptive use up to the quantities covered by the applications when the need for the water is substantiated.

Id. at 26-27. The Supreme Court's decision in *California v. United States*, 98 S. Ct. 2985 (1978), provides that the District Court shall determine whether or not the SWRCB's limitation of the Bureau's right to store water interferes with federal purpose or not. While the SWRCB's decision limits the ability of the Bureau to produce hydropower, that limitation does not appear sufficient to provide a finding that the state law is overridden by a specific federal purpose. The decision, which will protect the white water stretch of the Stanislaus River, will also reduce the power capabilities of the New Melones Dam. Letter from John D. Anderson, Department of Energy, Sacramento, California to Author (November 17, 1977). Generation of power will be cut by over half and any firm capacity eliminated. *Id.* See also, Cal. State Water Res. Control Bd., Decision 1422, at 27 (1973). However, note that the loss in revenue by protecting the white water stretch is offset by the user fees received by the Bureau of land management from commercial rafters. This could amount to over \$20,000 a year. Letter from Steve Howard, Bureau of Land Management, Folsom, California to Author (Feb. 14, 1978). Furthermore, the SWRCB's decision appears to be in line with the specific requirements of the National Environmental Protection Act (NEPA) 42 U.S.C. §§ 4321-4347 (1970). Finally, much of the need for the New Melones storage is predicated upon a completion of

Bureau objected and contended that the SWRCB was powerless to impose any terms and conditions on federal permits. California maintained that section 8 required the Bureau to apply for permits and bound the Bureau to those terms and conditions the SWRCB imposed. The United States filed suit against the State of California for a declaratory judgment.⁴⁷

The controversy centered around the meaning of section 8 of the Reclamation Act of 1902.⁴⁸ The question was the extent to which Congress intended to submit to state water law in the construction and operation of water projects.⁴⁹ Judicial interpretation of section 8 was limited and no case addressed the validity of state imposed terms and conditions in federally requested water permits.⁵⁰ However, in *California v. United States*,⁵¹ the Supreme Court has provided the fullest exposition of the meaning of section 8 to date. It has, also, effectively overruled two of the previous cases and posed questions as to how state and federal law will interact in the future.

C. *California v. United States: The Supreme Court's Decision*

Section 8 provides that the Secretary of the Interior, or his agents such as the Bureau, will "proceed in conformity" with state laws in the operation and construction of federal water projects.⁵² Despite a rich legislative history evidencing Congress' intent to defer to state water law, the District Court in *United States v. California*⁵³ held that the Bureau was only required to apply for state water permits out of considera-

the East Side Canal, the fate of which is uncertain. See note 45 *supra*. Thus, the SWRCB's decision appears consistent with the federal purpose that states shall provide for sound water management of their local resources and the directives of NEPA. *Cf.*, *Environmental Protection Agency v. California State Water Res. Control Bd.*, 426 U.S. 200 (1976).

47. *United States v. California*, 403 F. Supp. 874 (E.D. Cal. 1975).

48. 43 U.S.C. § 383 (1970).

49. *United States v. California*, 403 F. Supp. 874, 877, 882-883 (E.D. Cal. 1975).

50. As the Supreme Court noted in *California v. United States*, 98 S. Ct. 2985 (1978), the Supreme Court has only addressed the interpretation of section 8 in six previous cases. See *Nebraska v. Wyoming*, 295 U.S. 40 (1935); *Nebraska v. Wyoming*, 325 U.S. 545 (1945); *United States v. Gerlach Livestock*, 339 U.S. 725 (1950); *Ivanhoe Irrigation Dist. v. McCracken*, 357 U.S. 295 (1958); *City of Fresno v. California*, 372 U.S. 627 (1963); *Arizona v. California*, 373 U.S. 546 (1963).

51. *California v. United States*, 98 S. Ct. 2985 (1978).

52. 43 U.S.C. § 383 provides:

Nothing in . . . this title shall be construed as affecting or intending to affect, or in any way interfere with the laws of any state or territory relating to the control, appropriation, use or distribution of water in irrigation or any vested right acquired thereunder, and the Secretary of the Interior, . . . shall proceed in conformity with such laws.

43 U.S.C. § 383 (1970). The Bureau is the Secretary of the Interior's agent and thus bound by section 8.

53. *United States v. California*, 403 F. Supp. 874 (E.D. Cal. 1975).

tions of comity.⁵⁴ The decision limited the state's role to determining whether or not unappropriated water existed. The Ninth Circuit affirmed the decision with one modification: the Bureau was required to apply to the states for permits because of section 8, due to comity.⁵⁵

While Justice White criticizes the Supreme Court majority's reversal as based on "revisionary zeal",⁵⁶ the majority's decision is true to Congress' intent as shown by section 8's legislative history. In writing for the majority, Justice Rehnquist holds that section 8 was intended to, and does, oblige the Bureau to comply with state law except where that state law are actually inconsistent with specific congressional directives.⁵⁷ Rather than constituting an overruling of previous cases interpreting section 8, the majority's opinion properly interprets the legislative history conforms to the early interpretation of section 8, and correctly applies constitutional principles.

Section 8's legislative history is the foundation for the majority opinion.⁵⁸ The Congress of 1902 was deeply concerned about states retain-

54. *Id.* at 902. As a matter of semantics, it is difficult to understand the district court's holding that the Bureau was "required" to apply to the state due to principles of comity. As a practical matter, however, the district court's decision made sense. The Bureau must allow the state to ascertain the availability of water for federal water projects even without section 8. In order to effectively plan a project, the Bureau must apprise itself of the extent to which unappropriated water is available. Without a determination as to potential cost of obtaining the necessary water, the Bureau will be unable to make an accurate benefit/cost analysis as required. 43 U.S.C. § 485(h) (1970). *See also*, N. ELY, AUTHORIZATION OF FEDERAL WATER PROJECTS 4-22 (1971). As a corollary, the state needs to know the extent to which the Bureau will appropriate water in a stream so that the state can properly manage the remaining water supply. As Judge Wallace noted in his opinion in *United States v. California*, 558 F.2d 1347 (9th Cir. 1977) (opinion of Judge Wallace, concurring and dissenting):

By construing section 8 under compulsion of Hancock and EPA as not requiring the Bureau of Reclamation compliance with state appropriation procedures, we bring an element of uncertainty to the administration of water resources. Absent some mechanism to convey the information, the states cannot know what amount of unappropriated water remains for private use in the water shed after a portion is appropriated by the Bureau.

Id. at 1352.

55. *United States v. California*, 558 F.2d 1347, 1351 (9th Cir. 1977).

56. *California v. United States*, 98 S. Ct. 2985, 3010 (1978).

57. *Id.* at 3003. The court remanded the proceedings because as the District Court had failed to reach the United States' contention that the conditions actually imposed were inconsistent with Congressional directives as to the New Melones Project. The resolution of that issue the court stated, may require additional fact-finding. Furthermore, California contends that the United States is collaterally estopped from challenging the conditions and terms imposed by Decision 1422 because the Bureau failed to utilize its avenue of relief afforded by state law. CAL. WATER CODE § 1360 (West 1971) (any interested person may file a writ of mandate for review of an SWRCB decision).

58. A reiteration of the legislative history surrounding section 8 is unnecessary given the complete coverage afforded by the District Court's and Supreme Court's decisions. *See United States v. California*, 403 F. Supp. 874, 884-890 (E.D. Cal. 1975); *California v. United States*, 98 S. Ct. 2985 (1978).

ing full rights in federal water projects.⁵⁹ Some members of Congress even had doubts as to the constitutionality of federal interference with state water law.⁶⁰ Furthermore, the members of Congress recognized that the need for sound water management of western water resources necessitated a deferral to state water law. For example, California's appropriative water rights is designed to recognize competing claims to water and promote the maximum beneficial use of California's water resources consistent with the public interest⁶¹ whereas no comparable mechanism exists under federal law.⁶²

The importance of local interests and the state's expertise in dealing with water is evident from Congress' continued acknowledgement that state agencies are the appropriate bodies for making determinations as to water management needs.⁶³ In fact, in addition to incorporating section 8's requirements in law governing federal reclamation projects, the authorizing legislation generally includes a separate, specific requirement that the Bureau operate the project in conformity with state law.⁶⁴ Congress recognizes that sound water management of western water resources requires strong local input into federal decision-making because the states have the expertise and legal mechanisms to integrate complex policies to provide sound planning for the use of scarce water re-

59. *E.g.*, 35 CONG. REC. 6669-6683 (1902).

60. *See* H. R. Rep. No. 794, 57th Cong., 1st Sess. (1902); *and* 35 CONG. REC. 2219 (1902) (Remarks of Senator Clark addressing that concern. Senator Clark was a sponsor of the Reclamation Act).

61. CAL. WATER CODE §§ 1250-58 (West 1971). *See also*, text accompanying notes 21-35 *supra*.

62. In California the SWRCB weighs competing uses, their present and future values, and then makes a decision within the context of the states' need as a whole as to each proposed water use. CAL. WATER CODE §§ 1200-1382 (West 1971). In contrast, no comparable federal mechanism exists to provide a thorough and independent weighing of interests involved in the use of water. While the National Environmental Protection Act (NEPA), 42 U.S.C. §§ 4321-4347 (1970), may require consideration of the project's environmental impact, it only considers the project in terms of environmental consequences within a localized area. Furthermore, NEPA entrusts the agency sponsoring the project to develop the report. *Id.* It is difficult to imagine that such reports are not somewhat biased, and commentators continue to level criticism at the procedure. *See* W. STEGNER, BEYOND THE HUNDREDTH MERIDIAN 351-62 (1954); J. McCaull, *Dams of Pork*, 17 ENVIRONMENTS 11 (1975) (hereinafter cited as McCaull). Allowing for the administration of water rights by the states was also one of the purposes of the Desert Land Act of 1877, Ch. 107, 19 Stat. 377 (1877). *California Oregon Power Co. v. Beaver Portland Cement Co.*, 295 U.S. 142, 164-5 (1934); 35 Cong. Rec. 2222, 57th Cong., 1st Sess. (1902) (Remarks of Senator Clark). More recently, Congress has provided for state administration of federally approved water pollution control plans, 33 U.S.C. 1342(b) (Supp. III, 1973), and regards the state as the primary protectors of environmental quality. 42 U.S.C. § 4371(b)(2) (1970).

63. *See* note 62 *supra*. *But see*, *Environmental Protection Agency v. Cal. State Water Res. Control Bd.*, 426 U.S. 200 (1976).

64. *E.g.*, Flood Control Act of December 22, 1944, P.L. 78-534, 58 Stat. 887.

sources.⁶⁵

The majority could also have supported its holding on the basis of the Bureau's long standing interpretation of section 8 as binding it to state law. In the interpretation of a federal statute, the courts may rely, in part, on the administrative interpretation of the language.⁶⁶ Justice Douglas, for instance, found the Bureau's past interpretation of section 8 a sufficiently strong basis on which hold that the Bureau was bound to abide by state law.⁶⁷ Furthermore, the interpretation was consistent with the original judicial decisions and commentary.⁶⁸ In fact, while the minority in *California v. United States*⁶⁹ criticizes the majority for overruling past precedent,⁷⁰ their holding is consistent with congressional intent, Bureau practice and original judicial interpretation.⁷¹

65. In addressing several editorials criticizing section 8 of the Reclamation Act of 1902, Senator Clark stated that one of the primary purposes of the reclamation laws was to leave administration of waters with the state because they possess the experience and expertise. 35 CONG. REC. 2222, 57th Cong., 1st Sess. (1902) (Remarks of Senator Clark). Allowing for the administration of water rights by the states was also one of the purposes of the Desert Land Act of 1877, Ch. 107, 19 Stat. 377 (1877). *California Oregon Power v. Beaver Portland Cement Co.*, 295 U.S. 142, 164-65 (1935). One commentator had suggested that Congress deferred to state water law because of the lack of federal law and procedural mechanisms necessary for the administration of water rights. J. Sax, *Problems of Federalism and Reclamation Law*, 37 U. COL. L. REV. 49, 66 (1964).

66. *Zemel v. Rusk*, 381 U.S. 1 (1965); *Udall v. Tallman*, 380 U.S. 1 (1965).

67. *United States v. Gerlach Livestock*, 339 U.S. 725, 760-61 (1950). Justice Douglas stated:

Whatever doubts there may be are for me dispelled by the administrative practice under the Act, as summarized by the Commissioner of Reclamation in a memorandum dated April 19, 1950. Reports from the seven regional councils and review of the files in the Bureau of Reclamation formed the basis for the memorandum.

The Commissioner concluded that it has been the almost invariable practice of the Bureau to file notices of appropriation under state law without regard to whether the stream involved was navigable or non-navigable. Such filings were made pursuant to state law on water rights riparian to at least 13 navigable or probably navigable rivers. This administrative practice is too clear to be contradicted by the Bureau of Reclamation documents cited by petitioner. Moreover, the Commissioner of Reclamation has drawn attention to recent public statements by Department of Interior Officers confirming this practice.

This Court has often emphasized that weight is to be given to the interpretation of a statute made by the administering agency. [Cites]. This long course of practice by the Bureau of Reclamation resolves any doubts and ambiguities that arise from the history and wording of the statute. I conclude that Congress by section 8 of the Reclamation Act agreed to pay though not required to do so by the Constitution for water rights acquired under state law in navigable as well as non-navigable streams.

Id.

68. See S. WIEL, 2 WATER RIGHTS IN THE WESTERN UNITED STATES, § 1394 (3rd ed. 1911). See also, *Nebraska v. Wyoming*, 295 U.S. 440 (1935).

69. *California v. United States*, 98 S. Ct. 2985 (1978).

70. *Id.* at 3010.

71. An examination of the Ninth Circuit's decision in *United States v. California*, 558 F.2d 1347 (9th Cir. 1977), shows the propriety of the Supreme Court's decision. The Ninth Circuit's resolution of the conflict fell between the federal and state positions. It

Justice White's dissent, however, highlights the difficulties posed by the interpretation of section 8 as binding the Bureau to state law. In

decided that section 8 required the bureau to abide by state law in that it must apply for permits. *Id.* at 1242-43. The Court's interpretation, however, limited the state's role in determining the unavailability of unappropriated water. Once the state determined that sufficient unappropriated water existed to fill the Bureau's needs, it was required to grant the Bureau a permit free of limiting terms and conditions. Under the Ninth Circuit's interpretation, states could no longer utilize § 8 to protect their divergent interest by imposing limitations on the exercise of federal power. *Id. Accord* *Env. Defense Fund v. E. Bay Mun. Util, Dist.*, 20 Cal. 3d 327, 142 Cal. Rptr. 904, 572 P.2d 1128 (1977), (California Supreme Court held that federal reclamation law preempts conflicting state water law. This decision may no longer be valid given the United States Supreme Court's recent decision interpreting section 8).

The major criticism of the Ninth Circuit's decision is that it made section 8 superfluous. *See* *California v. United States*, 98 S. Ct. 2985, 3001 (1978) ("The government's interpretation will trivialize the broad language and purpose of section 8"). There are only two possibilities as to the availability of water for federal needs when the Bureau applies for water: either sufficient unappropriated water exists to fill Bureau needs or it does not. Constitutionally, the Bureau has the power to obtain the water which it needs. *See* *Dugan v. Rank*, U.S. 609, 622-23 (1962). *But see* *California v. United States*, 98 S. Ct. 2985 (1978). Thus, the Bureau has the power to obtain the water which it needs. The only question under the Ninth Circuit's interpretation, would be the cost involved in the taking. The answer is the same regardless of section 8.

If the Bureau does not apply to the state for a permit and impounds unappropriated water, it will not have to pay any compensation because there is no recognized holder of the property rights in that water. *See* *United States v. Gerlach Livestock Co.*, 339 U.S. 725, 742-55 (1950). Under the Ninth Circuit's decision, section 8 would require the Bureau to allow the state to determine initially if the unappropriated water exists. *United States v. California*, 558, F.2d 1347 (9th Cir. 1977). However, because the states can impose no terms and conditions on the permits, the Bureau takes the water free of operational or monetary costs just as it would absent section 8.

The other possibility is that sufficient unappropriated water does not exist to fill the Bureau's needs. In that case the Bureau must take the need water by condemnation. (The procedure is in doubt after the Supreme Court's decision in *California v. United States*, 98 S. Ct. 2985 (1978). *See* text accompanying notes 87-96 *infra*. Regardless of section 8's requirement that the state determine the existence of water rights in the water shed, the Due Process clause of the fifth amendment, U.S. CONST. amend. V. cl. 3, requires the state to determine whether a user has an appropriative water right. Little litigation has taken place over this fundamental issue. The only case to consider the right to be compensated for a water right independent of a federal statute, the Supreme Court held that state law determines the property rights in water for purposes of compensation. *Fox River Paper Co. v. R.R. Comm.*, 274 U.S. 651, 655-57 (1927). If the user has a state recognized property right, the fifth amendment requires the Bureau to pay just compensation. *Id.* Thus, the fifth amendment requires the state to determine whether or not water has been appropriated regardless of § 8's similar requirement. The role relegated to § 8 is either a formality or constitutional requirement. Under the Ninth Circuit's interpretation, it added little to the law.

The Ninth Circuit's interpretation of section 8 posed a further problem. It was doubtful that the state could comply with the specific terms of the Court's decision. For full discussion of this problem in the related context, see, Comment, *California Water Districts: Can a State Created Entity Violate State Law?*, this volume. The SWRCB has a duty to impose such terms and conditions as it considers necessary to protect the public interest and insure a continued beneficial application of water. CAL. WATER CODE §§ 1253, 1257 (West 1971). While the Supremacy Clause, U.S. CONST. Art. VI, sec. 2, in-

particular, it raises questions as to the viability of past decisions based in part on section 8.

D. Reconciling California v. United States and Past Supreme Court Opinions.

The first judicial interpretations of section 8 held that it bound the Bureau to comply with state water law.⁷² Perhaps, because the Supreme Court continually refused to critically analyze congressionally authorized water projects, however, several later decisions contributed to water down section 8's force. The dissent protests that the majority's holding is not in line with those of *United States v. Gerlach Livestock Co.*,⁷³ *Ivanhoe Irrigation Dist. v. McCracken*,⁷⁴ and *Arizona v. California*.⁷⁵ The holding in *California v. United States* comports with *Gerlach*, however, and is immediately distinguishable from the two latter cases. The dissent appears correct in its assessment that *Dugan v. Rank*⁷⁶ and *Fresno v. California*⁷⁷ are effectively overruled. If the law is analyzed properly, however, *Dugan* and *Fresno* were decided incorrectly.

In *Gerlach*, the United States argued that because the Friant Dam project was authorized for navigation purposes, the United States did not need to pay compensation for the taking of claimant's downstream riparian rights. The Court rejected the argument that the project was

validates those terms and conditions that interfere with federal purposes, is nevertheless not clear how the Board can refrain from imposing such conditions in federal water permits and still carry out its duties under state law. The Supremacy Clause, *id.*, only invalidates conflicting state law where Congress has the power to legislate. *Huron Portland Cement Co. v. Detroit*, 362 U.S. 440, 443-48 (1960); *Gibbons v. Ogden*, 22 U.S. 1, 210-11 (1824). It does not, however, operate to force a state agency to act affirmatively and violate state law in order to effectuate a federal goal.

72. See 2 S. WIEL, WATER RIGHTS IN THE WESTERN STATES, § 1394 (3rd Ed. 1911); and, *Nebraska v. Wyoming*, 295 U.S. 40, 43 (1934). The district court in *United States v. California*, 403 F. Supp. 874 (E.D. Cal. 1975), discounted the Supreme Court's decision in *Nebraska v. Wyoming* because it was only a procedural matter. *Id.* at 890. However, the language in the Supreme Court's decision is explicit and the interpretation of section 8 which it made was necessary to a decision of the case. The Court stated:

The bill alleges, and we know as a matter of law (section 8), that the Secretary and his agents, acting by authority of the Reclamation Act and supplementary legislation, must obtain permits and priorities for the use of water from the State of Wyoming in the same manner as private appropriator or an irrigation district formed under state law. His rights can rise no higher than those of Wyoming and an adjudication of the defendant's rights will necessarily bind him. Wyoming will stand in judgment for him as any other appropriator in the state. He is not a necessary party.

Nebraska v. Wyoming, 295 U.S. 40, 43 (1934).

73. *United States v. Gerlach Live Stock Co.*, 339 U.S. 725 (1950).

74. *Ivanhoe Irrigation Dist. v. McCracken*, 357 U.S. 295 (1958).

75. *Arizona v. California*, 373 U.S. 546 (1963).

76. *Dugan v. Rank*, 372 U.S. 609 (1963).

77. *Fresno v. California*, 372 U.S. 627 (1963).

authorized for navigation purposes because Congress had provided that the project to be run in accordance with the reclamation laws. The Court held that under those circumstances the United States, regardless of their rights, had elected to recognize state created rights and pay for them when it took them under the power of eminent domain. The Court's conclusion was that section 8 required the United States to abide by state water law and pay for the taking of any water rights created thereunder.⁷⁸

The question of the efficacy of state imposed terms and conditions presented in *California v. United States* did not arise in *Gerlach* because California had granted the Bureau sufficient water rights under state law for their needs. Thus, the only question presented was whether or not the United States was required to pay compensation for rights with which it incidentally interfered due to the operation of the project. At a minimum, section 8 requires the federal government to pay compensation when it takes state created water rights.⁷⁹ Nothing in that holding contradicts the decision in *California v. United States*.

The decisions in *Ivanhoe* and *Arizona* are also reconcilable with the Court's decision in *California v. United States*. *Ivanhoe* and *Arizona* base their holdings upon a narrow principle of statutory construction. In *Ivanhoe*, the Court was presented with the question as to whether or not Section 5 of the Reclamation Act,⁸⁰ which provides that distribution of water from federal projects shall be limited to holdings of 160 acres, overrode the provisions of section 8. The California Supreme Court had held that section 8, by requiring the Bureau to abide by state water law, which required distribution of water to landowners regardless of parcel size, took precedence over Section 5's requirements.⁸¹ Under the

78. *United States v. Gerlach Live Stock Co.*, 339 U.S. 725 (1950). The Court stated, "We conclude that, whether required to do so or not, Congress elected to elect recognize any state-created rights and to take them under its power of eminent domain." *Id.* at 739.

79. See discussion in note 71 *supra*. The procedure undertaken by the Bureau in *Gerlach* may have been technically improper. See notes 87-96 *infra*. However, the question, which was brought up in *Fresno v. California*, 372 U.S. 627 (1963), was not presented in the *Gerlach* case. Thus, the Court did not need to decide whether or not the Bureau's procedure was proper under section 8. Consequently, the holding in *California v. United States*, 98 S. Ct. 2985 (1978), does not contradict the holding in *Gerlach*. In fact, the holding in *Gerlach* was a sound one. See discussion accompanying notes 121-124 *infra*.

80. 43 U.S.C. § 423(e) (1970) (Originally enacted as 32 Stat. 389, 43 U.S.C. § 431). Section 5 reads as follows:

[N]o right to the use of water for land in private ownership shall be sold for tract exceeding 160 acres to any one landowner, and no such sell shall be made to any landowner unless he be an actual bona fide resident on such land, or occupant thereof residing in the neighborhood of said land, and no such right shall permanently attach until all payments therefor are made.

81. *Ivanhoe Irrigation Dist. v. All Parties*, 47 Cal. 2d 597, 306 P.2d 824, *rev'd on other*

principles of *ejudem generis*, the Court held that the specific requirements of Section 5 overrode the general provisions of section 8.⁸² Given the legislative history behind the Reclamation Act of 1902,⁸³ the Court's opinion in *Ivanhoe* is apparently correct. Similarly, in *Arizona*, the Court was presented with the question of how to allocate water from the Colorado River among the states through which it runs. Some states argued that the Bureau was bound to distribute the water pursuant to state law. However, the Court noted that Congress had the power to provide for the distribution of water between the States. Congress' specific intent to distribute the water among the various states was found controlling by the Court.⁸⁴ Once more, the Court determined

grounds in *Ivanhoe Irrigation Dist. v. All Parties*, 53 Cal. 2d 629, 3 Cal. Rptr. 317, 350 P.2d 69 (1960).

82. *Ivanhoe Irrigation Dist. v. McCracken*, 357 U.S. 275 (1958). The Supreme Court stated:

As we have noted, the Supreme Court of California first concluded that the provisions of section 8 of the 1902 Act as to application of state law were absolute, and controlled all provisions of the Act and other reclamation statutes having to do with 'the control, appropriation, use, or distribution of water used in irrigation, or any vested right acquired thereunder We believe this erroneous insofar as the substantive provisions of section 5 of the 1902 Act are concerned. As we read section 8 it merely requires the United States to comply with state law when, in the construction and operation of the reclamation project, it becomes necessary for it to acquire water rights or vested interest therein. But the acquisition of water rights must not be confused with the operation of federal projects. We read nothing in section 8 that compels the United States to deliver water on conditions imposed by the state. To read section 8 to the contrary would require the secretary to violate section 5, the provisions of which, as we shall see, have been national policy for over half a century. Without passing generally on the coverage of section 8 in the delicate area of federal-state relations in the irrigation field, we do not believe that the Congress intended section 8 to override the repeatedly reaffirmed national policy of section 5.

Id. at 291-92. The Supreme Court specifically limited its holding to the issues involved in the case and did not delve into an interpretation of section 8. The dissent in *California v. United States*, 98 S. Ct. 2985 (1978), is incorrect in its statement that the majority overruled the holding in *Ivanhoe*. That holding was specifically limited to a determination as to whether or not the specific provisions of section 5 overruled the more general ones of section 8.

83. 32 Stat. 390, C. 1093, now codified at 43 U.S.C. §§ 372-73, 381, 383-84, 391, 411, 416-419, 421, 431-32, 434, 461, 491 and 498 (1970).

84. *Arizona v. California*, 373 U.S. 546 (1962). The Court found that the general language of section 8 of the Reclamation Act and section 18 of the Project Act did not nullify the express language and purposes of the other sections of the Act. *Id.* at 588. The argument was also rejected that section 8 required water to be disposed of in accordance with state law. *Id.* at 585-86. The broad language in that statement may no longer be appropriate given the Supreme Court's decision in *California v. United States*, 98 S. Ct. 2985 (1978). Where distribution according to state law violates specific Congressional directives, the state law would be invalid. However, where that state law was consistent with federal directives, or not directly overruled, the state law would appear to govern. The holding in *California v. Arizona*, does not appear overruled however, because in that instance Congress had made its own specific plans for disbursement of water from the project.

that specific provisions of congressional legislation overrode the general provisions of section 8.

California v. United States is in accord with these holdings. The majority has remanded the case to determine whether or not the conditions imposed by California are actually inconsistent with congressional directives in the New Melones Project.⁸⁵ This is in line with the procedure followed in *Ivanhoe* and *Arizona*.⁸⁶ In *Ivanhoe*, the case was remanded to the California Supreme Court to determine whether or not state law was inconsistent with the directives found in section 5 of the Reclamation Act.⁸⁷ No remand was necessary in *Arizona* because the Supreme Court had original jurisdiction over the case. Thus, contrary to Justice White's contention that the Supreme Court did not follow its own precedent in *California v. United States*, the majority's holding and disposition are consistent with past cases.

The dicta in *California v. United States*, however, cannot be reconciled with the holdings of *Dugan* and *Fresno*. While Justice White is correct that the dicta in *California v. United States* is insufficient to overrule those past cases, they should be overruled if the questions presented therein arise once more. In particular, the procedure followed by the Court in *Dugan* and *Fresno* seems improper.⁸⁸

85. *California v. United States*, 98 S. Ct. 2985, 3003 (1978).

86. The opinion explains this in a footnote:

In previous cases interpreting § 8 of the 1902 Reclamation Act, however, this Court has held that state water law does not control in the distribution of reclamation water if inconsistent with other congressional directives to the Secretary. See *Ivanhoe Irrigation District v. McCracken*, 357 U.S. 275 (1958); *City of Fresno v. California*, 372 U.S. 627 (1963). We believe that this reading of the Act is also consistent with the legislative history and indeed is the preferable reading of the Act. (citation) Whatever the intent of Congress with respect to state control over the distribution of water, however, Congress in the 1902 Act intended to follow state law as to appropriation of water and condemnation of water rights.

Id. at 2998, n. 21. The Court went on to note that the trial court was free to consider the Bureau's arguments that the SWRCB's terms and conditions are inconsistent with specific congressional directives. *Id.*

87. The California Supreme Court decided that the state law was inconsistent with the specific directives found in § 5 of the Reclamation Act. *Ivanhoe Irrigation Dist. v. All Parties*, 53 Cal. 2d 692, 3 Cal. Rptr. 317, 350 P.2d 69 (1961).

88. The Court disavowed the dictum of *Fresno* because it was not shown that state law actually conflicted with the federal law. *California v. United States*, 98 S. Ct. 2985, 2999, n. 24 (1978). The court's reasoning seems correct. The majority stated about the *Fresno* decision,

The Court also concluded in a separate portion of its opinion that "§ 8 does not mean that state law may operate to prevent the United States from exercising the power of eminent domain to acquire the water rights of others. . . . Rather, the effect of § 8 in such a case is to leave to state law the definition of the property interests, if any, for which compensation must be made." (citation) Because no provision of California law was actually inconsistent with the exercise by the United States of its power of eminent domain, this statement was dictum. It also might have been apparent from examination of the congres-

In *Dugan*, the trial court decided that Congress did not authorize the taking of water rights by physical seizure but only through eminent domain proceedings under state law. Furthermore, it found that the Bureau was bound to state law requiring priority for water users within the water's county or watershed of origin.⁸⁹ Both of these conclusions seem proper.⁹⁰

There is no question that the Bureau has the power to take water through eminent domain.⁹¹ The question is, under what procedure the Bureau may do so. In analyzing the legislative history behind section 8, Justice Rehnquist notes that one of the sponsors of the bill had responded to a question concerning the right of the federal government to take water by condemnation, "[T]he bill provides explicitly that even an appropriation of water cannot be made except under state law."⁹²

In *Fresno*, the city claimed water rights in underground water fed by the river the Bureau had damned. Pursuant to California law, it asserted its priority as a domestic user law as a user within the water's county origin. The district court granted Fresno all of its requests and

sional authorization of the Central Valley Project that Congress intended the Secretary to have the power to condemn any necessary water rights. We disavow this dictum, however, to the extent that it implies that state law does not control even where not inconsistent with such expressions of congressional intent.

Id. The Supremacy Clause, U. S. CONST. art. VI, cl. 2, only invalidates state law inconsistent with federal law. Thus, because no state law was shown to violate federal law in *Fresno*, the Court's statements were dicta. See text accompanying notes 96-98 *infra*.

89. *Dugan v. Rank*, 372 U.S. 609, 616-17 (1963). The California provisions under consideration were CAL. WATER CODE, §§ 11460, 11463 (West 1971). The correct interpretation now appears to be that which was made by the California Attorney General in 1952 that the federal government was bound to those provisions by its voluntary compliance with § 8. 25 CAL. OPP. ATT'Y GEN. 8 (1952).

90. The Bureau is bound to the state law provisions unless the state law is inconsistent with federal directives. The Supreme Court stated in *California v. United States*, 98 S. Ct. 2985 (1978).

In previous cases interpreting section 8 of the Reclamation Act, however, this Court has held that state water law does not control the distribution of reclamation water if inconsistent with other Congressional directives to the Secretary. We believe that this reading of this Act is also consistent with the legislative history and indeed is the preferable reading of the Act. Whatever the intent of Congress with respect to state control of the distribution of water, however, Congress in the 1902 Act intended to follow state law as to appropriation of water and condemnation of water rights. Under the 1902 Act the Secretary of the Interior was authorized in his discretion to 'locate and construct' reclamation projects. As the legislative history of the 1902 Act convincingly demonstrates, however, if the state law did not allow for the appropriation or condemnation of the necessary water, Congress did not intend the Secretary of Interior to initiate the project.

Id. at —.

91. See, e.g., *United States v. Gerlach Live Stock Co.*, 339 U.S. 725, 757 (1950). Both the United States and California have conceded this. See *United States v. California*, 403 F. Supp. 874, 883 (1975).

92. *California v. United States*, 98 S. Ct. 2985, 2996 (1978).

the appellate court affirmed.⁹³ The Supreme Court reversed and noted that

Section 8 does not mean that state law may operate to prevent the United States from exercising the power of eminent domain to acquire the water rights of others. This was settled in *Ivanhoe Irrigation District v. McCracken*. Rather, the effect of section 8 in such a case is to leave to state law the definition of the property interests, if any, for which compensation must be made.⁹⁴

Neither of those propositions appears directly inconsistent with the language in *California v. United States*. Section 8 does not prevent the United States from exercising its power of eminent domain to acquire water rights for federal projects. Instead, as the dicta in Justice Rehnquist's opinion indicates, section 8 requires the United States to proceed in state courts to acquire those rights prior to resorting to impoundment of the water. As noted in the opinion, such a procedure is consistent with the congressional purpose behind section 8. Secondly, section 8 and the fifth amendment both require state law to define property interests for which compensation must be paid by the federal government.⁹⁵ Thus, the majority's opinion only overrules the *Dugan* and *Fresno* language to the extent that the Bureau is entitled to impound water by seizure prior to taking it through eminent domain proceedings.

A further problem with the *Dugan* and *Fresno* cases is the procedure by which they determined that the state law was inconsistent with specific federal purposes. In both cases, the district court found that the state law was binding upon the federal government. Neither case addressed the question of whether that state law was inconsistent with federal purposes.⁹⁶ As a matter of judicial procedure, the better approach is the one taken in *California v. United States*. Under the Supremacy Clause,⁹⁷ only those laws which actually interfere with specific federal law or purposes are invalid.⁹⁸

While the majority's opinion is consistent with past precedent, legislative intent, and sound public policy, a problem still faces the states. As Justice White points out, ". . . the matter is purely statutory and Congress could easily put an end to our feuding."⁹⁹ Because Congress can always repeal section 8 or provide that certain projects shall not be op-

93. *Fresno v. California*, 372 U.S. 627 (1963).

94. *Id.* at 630.

95. *See* note 72 *supra*.

96. The Court in both cases assumed that because the state law would have some effect upon the operation of the federal project, that the state law was thereby inconsistent with federal purposes. The difficulty appears to be the same which faced the Court throughout this period: It refused to examine congressional directives for federal water projects. *See* note 104 *infra*.

97. U.S. CONST. Art. VI, sec. 2.

98. *Huron Portland Cement Company v. Detroit*, 362 U.S. 440 (1960).

99. *California v. United States*, 98 S. Ct. 2985, 3011 (1978).

erated in accordance with its provisions, the protection which section 8 offers is uncertain.¹⁰⁰ Furthermore, no protection is provided state interests protected by state laws which directly interfere with a specific federal purpose. Thus, the question of what rights the state may exercise in federal water projects remains. The question is important because the states have provided for sound management of water resources whereas federal law does not provide for such comprehensive management. After the scope of federal power to authorize and operate federal water projects is determined, an analysis can be made of the means available to the states to protect their interests in their limited water resources. The answer depends upon which constitutional power Congress bases its authorization of such projects.¹⁰¹ The next sections explore the constitutional powers and limitations with respect to federal appropriation of water for federal projects.

II. AUTHORIZATION OF FEDERAL WATER PROJECTS UNDER THE COMMERCE CLAUSE: THE NAVIGATION POWER

Since section 8 only provides uncertain boundaries for federal power to appropriate water, it is important to examine the constitutional imitations of the two powers Congress primarily uses to authorize federal water projects.¹⁰²

One basis of authorizations is the navigation power derived from the Commerce Clause¹⁰³ and used primarily for projects which do not fall under the Reclamation Act.¹⁰⁴ An overuse and overexpansion of the

100. A similar problem was presented in *Tennessee Valley Authority v. Hill*, 98 S. Ct. 2279 (1978) (the Snail Darter case). One day after the Court's decision, the House voted 263-59 to authorize completion of the project. *Los Angeles Times*, June 17, 1978, at 1, col. 4. Thus, the protection provided to the snail darters by the Supreme Court's decision may only be temporary.

101. In *McCulloch v. Maryland*, 17 U.S. 316 (1819), Chief Justice Marshall stated what is now one of the universally accepted principles of federalism: Congress' power is limited to the enumerated ones. The government holds only those power which have been granted to it. *Id.* at 405. While the government's powers are limited, within the scope of its powers, the federal government is supreme. *Id.* at 406. Because the scope of each enumerated power may vary, *cf.*, *Heart of Atlanta Motel v. United States*, 379 U.S. 241 (1964); and, *United States v. Butler*, 297 U.S. 1 (1936), the preempting effect of federal action under the clauses may vary. Finally, the states have certain areas of power into which the federal government may not interfere. *Nat'l League of Cities v. Usery*, 426 U.S. 833 (1976). It is well established that the ultimate determination of the scope of state and federal powers under the Constitution rests with the judicial branch. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803).

102. Federal water projects have been authorized under several powers. This note deals with the two powers most commonly used: the power over commerce, U.S. CONST. art. I, § 2, cl. 3; and the power to spend for the general welfare, U.S. CONST. art. I, § 8, cl. 1. The proprietary power and the power to wage war have also been used to a limited extent. See 2 R. CLARK, *WATERS AND WATER RIGHTS*, §§ 102, 104 (1967).

103. U.S. CONST. art. I, § 8, cl. 3.

104. *E.g.*, *Oklahoma v. Atkinson*, 313 U.S. 508 (1941) (Dennison Dam on the Red River authorized under the Commerce Clause to provide flood control).

navigation power has resulted because the courts have provided only limited judicial review of water projects which Congress has authorized under the navigation power.¹⁰⁵ Because federal water projects authorized under this clause do not recognize property interests, public policy and protection of legitimate state interests require a critical examination of the scope of this power.

A. Derivation of the Navigation Power and Servitude

In 1824, the United States Supreme Court interpreted the Commerce Clause as granting Congress the power to regulate waterways for the purposes of navigation.¹⁰⁶ The Supreme Court first held that the scope of this power over navigation extended to those which were in fact navigable.¹⁰⁷ With the increasing development of water projects, however, the Court extended the navigation power to permit congressional regulation of the tributaries of navigable rivers where necessary to protect federal navigation interests in the mainstream.¹⁰⁸ Finally, the Court expanded the navigation power to authorize federal control over any river that "reasonable improvements" would make navigable.¹⁰⁹ Congress is also considered to possess the power to regulate the tributaries

105. COMM. ON WATER RESOURCES, LEGAL PROBLEMS IN WATER RESOURCES 39-62 (1957) (C. Corker, *the Western Water Rights Settlement Bill of 1957*) (hereinafter cited as Corker). "The difficulty arising in these cases dealing with navigation is that both the Congress and the courts have been content to treat the word 'navigation' as an open sesame to constitutionality." *Id.* at 48.

"Judicial supervision over congressional dealings with the nation's water resources in the name of navigation has failed as an effective check of congressional power." R. CLARK, 2 WATERS AND WATER RIGHTS § 101.2(B) (1967).

106. *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 190 (1824). This power is not exclusively the federal government's but allows state regulation which does not interfere with the federal power. *Huron Portland Cement Co. v. Detroit*, 362 U.S. 440, 443-48 (1960) (Detroit ordinance regulating emissions from federally licensed ships engaged in interstate commerce constituted a legitimate exercise of local power). *Cooley v. Bd. of Port Wardens*, 53 U.S. 298, 315-21 (1851).

107. "Those rivers must be regarded as public navigable rivers in law which are navigable in fact." *The Daniel Ball*, 77 U.S. (10 Wall.) 557, 563 (1870).

108. *United States v. Rio Grand Irrig. Dist.*, 174 U.S. 690, 701-09 (1899). Furthermore, once a stream becomes navigable in law, its status does not change due to misuse. *United States v. Appalachian Power Co.*, 311 U.S. 377, 407-11 (1940). *United States v. Grande River Dam Auth.*, 363 U.S. 229 (1960), however, indicates that the power over tributaries is limited in two ways. First, the regulation must be necessary to protect the navigable capacity of the mainstream. Secondly, Congress must expressly exercise its power over the non-navigable tributary. See E. Morreale, *Federal Power in Western Waters: The Navigation Power and the Rule of No Compensation*, 3 NAT. RESOURCES J. 1, 8 (1963) (hereinafter cited as Morreale).

109. *United States v. Appalachian Power Co.*, 311 U.S. 377 (1940). Writing for the majority, Justice Reed stated, "The power of Congress is not to be hampered because of the necessity for reasonable improvements to make an interstate waterway available for navigation." *Id.* at 408. However, there does seem to be some accuracy in the dissenting statement by Justice Roberts, "If this test be adopted, then every creek in every state of the Union . . . may be pronounced navigable." *Id.* at 433.

where necessary to protect the "now" navigable mainstream.¹¹⁰

Congress takes advantage of the broad scope of the navigation power. Congress includes "aiding navigation" as one of the purposes of nearly every federally authorized multipurpose water project.¹¹¹ Generally, the courts have accepted these congressional declarations that projects are in aid of navigation without examination and upheld the constitutionality of these projects on this basis.¹¹² As a result, the courts, effectively, have allowed Congress to define the limits of its navigation power.¹¹³ The real danger in this lack of judicial scrutiny, however, is that the Supreme Court has interpreted the navigation power to possess a complementary navigation servitude which displaces state created property rights.¹¹⁴ The present interpretation of the navigation power, combined with the navigation servitude, operates to displace legitimate state property interests in many projects.

B. *Effect of the Navigation Servitude*

As long as the navigation power possesses a corollary navigation servitude, state interests cannot be protected unless the power is interpreted narrowly. In some instances, the courts have allowed the navigation power to authorize entire multipurpose water projects where navigation constituted only a small portion of the project purposes.¹¹⁵ In fact, the Supreme Court has applied the navigation servitude to displace property interests for the non-navigable portions of the project along with the navigational portions.¹¹⁶ The rationale of the court was that the no compensation rule should apply to the entire project if Congress would not have built the non-navigational portions of the project "but for" the

110. Morreale, *supra* note 108, at 8-9.

111. *E.g.*, The Rivers and Harbors Act of August 26, 1937, P.L. 75-392, 50 Stat. 844. "The entire Central Valley Project, California, . . . is hereby reauthorized and declared to be for the purposes of improving navigation, regulating the San Joaquin River and Sacramento River." *Id.* The extent of this boilerplating is obvious in the CVP. Only six percent of the entire CVP services navigation or flood control purposes. DEPARTMENT OF THE INTERIOR, BUREAU OF RECLAMATION, SUPPLEMENTAL REPORT ON THE AUBURN-FOLSOM SOUTH UNIT, CENTRAL VALLEY PROJECT, CALIFORNIA, at XI (1963) (hereinafter cited as AUBURN-FOLSOM SUPPLEMENTAL REPORT).

112. *See* Corker, *supra* note 105, at 48-49.

113. 2 R. CLARK, WATERS AND WATER RIGHTS, § 101.2(B) (1967). Morreale, *supra* note 108, at 12-17.

114. *United States v. Twin City Power Co.*, 350 U.S. 222 (1956). *United States v. Willow River Co.*, 324 U.S. 499 (1954) (property interests subject to a dominant public interest).

115. *Oklahoma v. Atkinson*, 313 U.S. 508 (1941). A multipurpose federal water project is one such as the CVP which encompasses several uses such as irrigation, power, flood control and navigation in varying degrees.

116. *Id.* at 528-35 (Navigation constituted only 15% of the project's purpose. Power generation comprised the remaining purposes. The project was upheld on the basis of Congress' power over navigation).

navigation purpose.¹¹⁷

Since the federal government's navigation servitude allows it to displace all other property interests where necessary to improve navigation, not only are state interests jeopardized, but individual property owners do not receive compensation for the taking of their property.¹¹⁸ Authorization of the same project under any other power would require the federal government to compensate the owner for any property taken.¹¹⁹

The navigation power's broad scope and the application of the no-compensation rule to an entire multipurpose project where any portion promotes navigation have eroded legitimate state power and distorted project economics to society's detriment. If Congress authorizes a project solely to provide irrigation water, the no-compensation aspect of the navigation servitude should not apply because irrigation uses serve no navigational purposes.¹²⁰ Consistent application of this doctrine should cause the no-compensation rule to apply only to navigational portions of multipurpose projects. Nevertheless, the Supreme Court has applied this limited no-compensation rule only where the Bureau of

117. *Id.* Such an assumption does not appear justifiable. It is difficult to imagine, for instance, that Congress authorized the two-billion dollar CVP to serve only the six percent navigational purposes. Auburn-Folsom Supplemental Report, *supra* note 111, at XI. Language in *United States v. Gerlach Live Stock Co.*, 339 U.S. 725, 738 (1950), casts serious doubts on the viability of the procedure followed in *Oklahoma v. Atkinson*, 313 U.S. 508 (1941). It appears that the Supreme Court may be backing off an expansive interpretation of the navigation power.

118. *United States v. Grand River Dam Auth.*, 363 U.S. 279 (1960); *United States v. Twin City Power Co.*, 350 U.S. 222 (1956); *United States v. Appalachian Power Co.*, 311 U.S. 377 (1940).

119. *Fox River Paper Co. v. R.R. Comm.*, 274 U.S. 651, 655-57 (1926). *See also United States v. Gerlach Live Stock Co.*, 339 U.S. 725, 737-39 (1950).

The apparent theory behind the no-compensation rule is that the federal government has a superior easement over waters which displaces state property rights in favor of federal regulation of commerce. *United States v. Chandler-Dunbar Co.*, 229 U.S. 53, 70-76 (1913). It would seem that the limit of the no-compensation rule should correlate with the extent of navigational purposes upon which the no-compensation rule is based. Morreale, *supra* note 107, at 64. Furthermore, the theoretical basis of the no-compensation rule appears untenable. The rule is an anomaly. While water passage may have been critical to commerce in 1796, land and air transportation are equally valuable today. Yet, the no-compensation rule does not operate to displace property interests in those areas. *See United States v. Causby*, 328 U.S. 256 (1946) (Federal government had to pay for the taking of airspace over private property incident to military flights).

Congress has the power to authorize these projects under another power. *United States v. Gerlach Live Stock Co.*, 339 U.S. 725, 738 (1950). Thus, it is the anomalous navigation servitude which works the interference with state interests. Given the questionable validity of the no-compensation rule, the Supreme Court should limit its application to those situations where it serves navigational purposes.

120. *See United States v. Gerlach Live Stock Co.*, 329 U.S. 725, 739-42 (1950) (irrigation projects authorized pursuant to the Reclamation Act are intended to serve navigational interests only incidentally).

Reclamation administers a project.¹²¹ Since the practical consequences of water projects are the same in both situations, the Court should apply this limiting rule in all situations.

The rule developed in *United States v. Gerlach*,¹²² is that the no-compensation rule only applies to those portions of the project which actually aid navigation where the Bureau of Reclamation administers the project.¹²³ In formulating the rule, the Supreme Court recognized that Congress no longer needs to rely on a strained interpretation of its power over navigation because it can promote projects on the basis of the General Welfare Clause.¹²⁴ The rule of this case protects the federal navigational interests and also allows a recognition of state interests in the non-navigational portions of the project.¹²⁵

C. An Added Benefit of Limiting the Navigation Power: Economic Efficiency.

Absent its restriction to a project's navigational portions, the use of the navigation power to authorize projects designed primarily for irrigation or power distorts the project's economics and ignores state property rights because of the no-compensation rule. The primary purpose of federal water projects in California has been irrigation.¹²⁶ Navigational purposes have constituted a small portion of most projects. Because the navigation servitude allows the federal government to obtain all necessary water at no cost, the federal government does not take the cost of depriving alternative users of project water into account.¹²⁷

121. *Id.* at 737. While *Gerlach* based its reasoning on § 8, 43 U.S.C. § 383 (1970), in upholding an award of compensation to riparian owners deprived of their water rights by Friant Dam, the opinion's dicta and the reasoning underlying the navigation servitude, *see* note 118 *supra*, argue that the fifth amendment's Due Process Clause applies to non-navigational portions of projects.

122. *United States v. Gerlach Live Stock Co.*, 339 U.S. 725 (1950).

123. *Id.* at 735-42.

124. *Id.* at 738.

125. California already follows this rule when analyzing federal applications for unappropriated water. The SWRCB automatically allows federal appropriations for navigation and flood control purposes because it recognizes its lack of jurisdiction where the federal government legitimately exercises the commerce power. Cal. State Water Rights Bd., Decision 990, at 41 (1960). As a practical matter, this result is easily obtained because project documents break down a project into its various functions. *See e.g.*, Auburn-Folsom Supplemental Report, *supra* note 111, at XI.

126. Auburn-Folsom Supplemental Report, *supra* note 111, at XI. Irrigation constitutes 45% of the CVP's purposes. Commercial power constitutes another 25%. Navigation and flood control constitute only 6%. *Id.* The figures represent a compilation for all units of the CVP combined. *Id.*

127. For example, on the Friant unit of the CVP, the Bureau was required to pay claimants for the loss of their riparian right to spring flooding. *United States v. Gerlach Live Stock Co.*, 339 U.S. 725 (1950). The award was made because of an interpretation of section 8. Otherwise, if the rule of *Oklahoma v. Atkinson*, 313 U.S. 508 (1941), had been applied, the Bureau would not have had to compensate the owners for the taking

This is not to suggest that the federal government should not develop such projects. History and economic theory both show that the federal government is an appropriate entity to develop large scale water projects.¹²⁸ Ideally, however, the government should undertake only those projects where the benefits exceed the costs.¹²⁹ In attempting to conform to this ideal, Congress requires the developing agency to prepare a benefit/cost analysis, and will only authorize those projects where the benefit/cost ratio exceeds one.¹³⁰ Thus, theoretically, only projects which increase the net social welfare are authorized.¹³¹ Where the navigation servitude is allowed to displace state property interests, however, the analysis of the project costs fails to include the cost of depriving present and future water users of the value of their re-

and presumably the cost of depriving claimants of their water rights would not be included as a project cost.

128. *Ivanhoe Irrigation Dist. v. All Parties*, 47 Cal. 2d 597, 614, 306 P.2d 824, 828 (1957), *rev'd on other grounds*, 357 U.S. 275 (1958). M. MONTGOMERY, *HISTORY OF LEGISLATION AND POLICY FORMATION ON THE CENTRAL VALLEY PROJECT 21-92* (1946) (An examination of the history of the CVP). In California, experience showed that while the state can plan the projects it may not be able to fund them. *Ivanhoe v. All Parties*, 47 Cal. 2d at 614, 306 P.2d at 828.

Economically, reclamation projects are designed to have national benefits. To make those benefiting from the project pay their share of the cost, the national government is the most appropriate agency for constructing the project. For example, a project built on the Snake River in Wyoming may cause flood control benefits in Idaho, Oregon and Washington. If the State of Wyoming constructs the project which only its citizens pay for and the citizens of the other three states receive benefits without having to pay for them, then, the result would be that a project which would benefit all four states may not be built by Wyoming if the benefits to its residents is outweighed by the cost they would have to bear. Because the federal government can capture the benefits to all four states in the project, it can insure that citizens of all four states will pay the costs. Thus, the federal government is the better agency to build the project. (It should be Congress' duty to insure that spending and taxes in regard to projects equalize over the 50 states). See E. Mishan, *The Postwar Literature on Externalities: An Interpretive Essay*, 9 J. ECON. LIT. 1 (1971) (general discussion of the externality principles).

129. J. KRUTILLA & O. ECKSTEIN, *MULTIPLE PURPOSE RIVER DEVELOPMENT 71-73* (1960) (hereinafter cited as KRUTILLA & ECKSTEIN). If a private firm were constructing the project, economic efficiency would be achieved where the cost of the incremental unit of input equated with the value of the corresponding unit of output. *Id.* at 71. However, where the government produces goods, particularly those which no other entity can produce, economic efficiency is best considered by equating the project's social benefits and costs. *Id.* at 71-73.

130. 43 U.S.C. § 485(h) (1970). N. ELY, *AUTHORIZATION OF FEDERAL WATER PROJECTS 4-22* (1971). Thus, projects are authorized where their benefits exceed their costs.

131. For a criticism of the compilation of benefit to cost ratios in federal water projects, see McCaull, note 62 *supra*, at 13. For criticism of the specific procedures used in the New Melones reservoir, see Parry & Norgaard, *supra* note 40, at 17.

132. If the fifth amendment applied, the ordinary rule is that the government must pay the fair market value or its equivalent for any property taken. 4 NICHOLS ON EMINENT DOMAIN, § 12.2 (1977). The fair market value of a resource represents its worth to society. KRUTILLA & ECKSTEIN, *supra* note 129, at 19-23. Thus, the failure of the federal government to pay the owner of the resource for its taking results in a failure to take the true value of the resource into account. Furthermore, this result is exacerbated in the

The result is an approval of more projects than optimal because benefits are more likely to exceed the falsely low costs.¹³³ Furthermore, society loses the use of valuable resources where the true costs exceed the true benefits without a compensating increase in societal wealth.¹³⁴ If the courts or Congress were to apply the no-compensation rule only to navigational portions of projects, the federal government would take the project's true costs into account. The result of requiring this compensation in federal water projects should be the undertaking of fewer marginally beneficial projects and a protection of local interests.¹³⁵ The former result will create a more efficient use of resources with a greater likelihood of increasing the national welfare.¹³⁶

D. A Corollary to Increasing Efficiency: Products that Accurately Reflect Costs.

A second problem with applying the navigation servitude's no-compensation rule to the non-navigational aspects of federal water projects is that an underpricing of the project's products, such as irrigation water

case of natural resources because the market itself fails to take into account the value of the resource to future generations and thus undervalues the resource. Krutilla, *Conservation Reconsidered*, 57 AM. ECON. REV. 777 (1967). The duty of protecting the value of a resource for future generations rests with the government. A. PIGOU, *THE ECONOMICS OF WELFARE* 29-30 (1932). Thus, where the navigation servitude displaces property interests the federal government fails to include the true cost of water in its analysis and fails in its function to protect future generations.

133. See McCaull, *supra* note 62, For example, consider a power project with \$1,000,000 in capital costs. An incident result of the power project will be to provide a more regular streamflow downstream of the project which will improve navigation. Under present theory, the incidental navigation benefits would allow the government to take the necessary project water at no cost. Thus, if its long-term power benefits, discounted to present value, exceed one million dollars, the project will be constructed. If that project were correctly authorized under the reclamation laws, or the no compensation rule held inapplicable, the appropriate water right holders would receive compensation. If those rights are worth one hundred thousand dollars then discounted benefits must increase proportionately. Under the no compensation rule, a project which was non-beneficial and decreased net social welfare could be approved. Under the proposed rule, however, the benefits would have to actually exceed the true social cost.

134. See KRUTILLA & ECKSTEIN, *supra* note 129, at 71-77.

135. Furthermore, this requirement may help alleviate some of the problems associated with the development of federal water projects. Under present federal procedure, the sponsoring agency has a vested interest in seeing the completion of a project. McCaull, *supra* note 62, at 11-12. A recent report of the General Accounting Office found that in general the sponsoring agencies have underestimated costs and overestimated benefits. *Id.* Two authors independently performing a benefit/cost analysis on the New Melones Project found the estimate of the Army Corps of Engineers to exceed their estimates by 3-5 times. Parry & Norgaard, *supra* note 40 at 17. In particular, the authors note the probable decline in farm prices due to the large CVP projects in the future. *Id.* at 19-20. The problem of the decline of farm prices and incomes due to federal water projects does not appear to be dealt with sufficiently by federal procedures. W. WILCOX, W. COCHRANE & R. HERDT, *ECONOMICS OF AMERICAN AGRICULTURE* 365-66 (1974).

136. See KRUTILLA & ECKSTEIN, *supra* note 129, at 71-77. Any time a project's real costs exceed the real benefits building the project causes a net loss in social welfare.

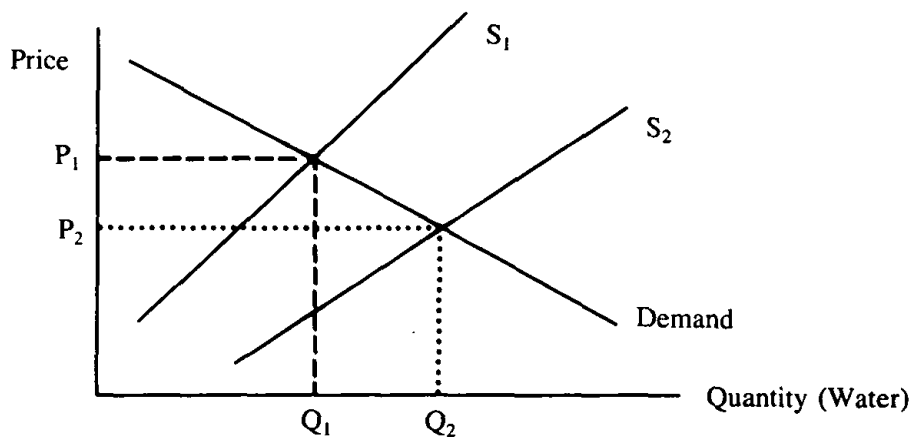
and hydropower, occurs. Elimination of the no-compensation rule's improper application solves this problem. Federal reclamation law requires that the price of water and power received from federal water projects at least recapture the project's costs.¹³⁷ The no-compensation rule, however, allows the pricing of these products without taking into account the cost of depriving old users of their water.¹³⁸ An artificially low cost of water results, thereby artificially reducing the cost of project water and hydropower produced.¹³⁹

In turn, underpricing these products distorts their product markets causing their overconsumption.¹⁴⁰ The falsely low cost of one resource

137. 43 U.S.C. §§ 485-485(h) (1970). Re-examination of these policies seems eminent. A recent survey of the CVP showed that under the present system of pricing and contracting the CVP is losing \$79,000 per day because the prices of the project's products do not reflect their costs. Los Angeles Times, Feb. 2, 1978, at 1, col. 6. This loss is borne by taxpayers. The benefit runs to central valley water users and farmers in particular.

138. See E. MANSFIELD, MICROECONOMICS 222-52 (1970). Failing to include the value of water as an input in the product, i.e. irrigation water or hydropower, results in an underestimate of the cost of the project. (Notice particularly note 16 analyzing a government subsidy problem.)

139. *Id.* at 79-113. A diagram best illustrates the problem.



Given a constant demand for water (demand curve), the effect of lower price is reflected in two supply curves, S1 and S2. S1 is the supply curve at the true market price. S2 is the supply curve for irrigation water with a government subsidy. The result is that consumers demand an extra quantity of water above the "normal" demand equal to $Q_2 - Q_1$.

140. E. MANSFIELD, MICROECONOMICS 148-85 (1970). A referral to the diagram, *supra* note 139, is useful. As noted, the subsidization of a product leads to an increase in the demand of the product. See note 138 *supra*. However, it also leads to a reduction in price equal to $P_1 - P_2$. Note 139 *supra*. In the production process a competitive firm produces to the point where the cost of the last incremental unit of input equals the marginal revenue associated with the last unit produced (marginal cost = marginal revenue), E. MANSFIELD, MICROECONOMICS 190-92 (1970), lowering the price of one component of the input will allow more production of the product before marginal cost equals marginal revenue. Thus, those other factors employed in combination with the underpriced factor to produce the product will be overconsumed in comparison with the mar-

can distort many markets and cause a misallocation of resources throughout the economy. Consequently, the eventual result of over-consuming the products of federal water projects is an overconsumption of products used in conjunction with federally supplied water and hydropower.¹⁴¹ Thus, low cost irrigation water causes the overdevelopment of arid land, overuse of cement for canals and pipes for irrigating fields, as well as the overproduction of irrigated crops. Lower economic efficiency and fewer benefits to society result from underpricing water.¹⁴²

In summary, to protect state property interests and to promote economic efficiency, the courts should limit authorization of federal water projects under the navigation power. Limiting the navigation power also limits the application of the no-compensation rule. If the navigation power is so limited, it is possible to analyze the means by which the state can protect its interests in the non-navigational aspects of projects. Those aspects would be treated as if they had been authorized under the General Welfare Clause.¹⁴³ It is therefore necessary to discuss next how the courts treat takings of state water under that clause.

III. AUTHORIZATION OF FEDERAL WATER PROJECTS UNDER THE GENERAL WELFARE CLAUSE.

While policy and constitutional considerations should limit the power of Congress to authorize federal water projects under the navigation power, the power of Congress to authorize such projects under the General Welfare Clause appears unquestionable.¹⁴⁴ The United States Supreme Court has suggested that the General Welfare Clause is the appropriate power for authorizing multipurpose federal reclamation projects.¹⁴⁵ This clause should also provide the basis of authorization

ket equilibrium. For a good introduction to the economic principles presented in this discussion with a specific application to multiple purpose river projects, see KRUTILLA & ECKSTEIN, *supra* note 129, at 15-51.

141. See note 138 *supra*. A particular problem in irrigation projects are the potentially deleterious effect of reducing farm prices and income. W. WILCOX, W. COCHRANE & R. HERDT, *ECONOMICS OF AMERICAN AGRICULTURE* 365-66 (1974).

142. E. MANSFIELD, *MICROECONOMICS* 239-52 (1970).

143. U.S. CONST. art. I, § 8, cl. 1.

144. *United States v. Gerlach Live Stock Co.*, 339 U.S. 725, 737-38 (1950) (Congress need no longer rely upon a strained interpretation of the commerce clause because the general welfare clause allows reclamation projects). *Accord*, *United States v. Butler*, 297 U.S. 1 (1936); General Welfare Clause, U.S. CONST. art. I, § 8, cl. 1. See generally, 2 R. CLARK, *WATERS AND WATER RIGHTS*, § 103 (1967).

145. "Thus the power of Congress to promote the general welfare through large scale projects for reclamation, irrigation or other internal improvement, is now as clear and ample as its power to accomplish the same results indirectly through resort to a strained interpretation of the power over navigation." *United States v. Gerlach Live Stock Co.*, 339 U.S. 725, 738 (1950).

for the non-navigational aspects of all multipurpose water projects.¹⁴⁶

The difference between the two authorizing powers rests in whether the federal government must compensate for a taking. In proceeding to acquire property interests for projects authorized under the General Welfare Clause, the fifth amendment requires the federal government to pay just compensation for any undue interference with private property rights of individuals and the state.¹⁴⁷ While federal law operates through the Supremacy Clause to displace property interests for purposes of navigation,¹⁴⁸ no similar operation takes place for projects authorized under the General Welfare Clause because there is no attendant servitude displacing state law.¹⁴⁹ Thus, although the federal government has the power to impound any water necessary for its projects through the power of eminent domain, it also must compensate the owner of that water for the taking.¹⁵⁰

State law defines property rights in water.¹⁵¹ The fifth amendment guarantees and secures those rights against uncompensated takings by the federal government.¹⁵² Thus the state may be able to protect its local interests through a broader recognition of property rights in water. If the navigation servitude is limited to navigational portions of projects, then the federal government will have to compensate alternative users, including the states, when it impounds water for federal use. As an added benefit, the potential added cost to the federal government will increase the economic efficiency of projects selected and help assure that projects add to the net social welfare in the use of resources.

IV. PROPOSALS FOR THE PROTECTION OF STATE INTERESTS THROUGH THE RECOGNITION OF PROPERTY RIGHTS IN WATER.

The ability of the states to protect their interests in water resources through the imposition of terms and conditions of federal permits is an

146. See text accompanying notes 115-125 *supra*.

147. While the Supreme Court has never held this expressly in regard to federal water projects, the implication is clear. *United States v. Gerlach Live Stock Co.*, 339 U.S. 725, 737-39 (1950); *United States v. Willow River*, 324 U.S. 499, 511-5 (1945) (dissent of Justice Roberts); *Oklahoma v. Atkinson*, 313 U.S. 508, 534-35 (1940); and, *Fox River Paper Co. v. R.R. Comm.*, 274 U.S. 651 (1926).

148. See text accompanying notes 114-119 *supra*.

149. For a discussion of the anomalous nature of the navigation servitude and the need to limit its application see Morreale, *supra* note 108.

150. See note 147 *supra*.

151. *Fox River Paper Co. v. R.R. Comm.*, 274 U.S. 651 (1926).

152. See note 71 *supra*. The implication is also present in the various cases refusing to award damages due to the navigation servitude. *Dugan v. Rank*, 372 U.S. 609, 611 (1963); *United States v. Willow River*, 324 U.S. 499 (1945); *California Oregon Power Co. v. Beaver Portland Cement Co.*, 295 U.S. 142, 155-59 (1934).

uncertain proposition. Even if the Bureau is required to apply for permits and abide by the terms and conditions imposed by the state, any terms and conditions which interfere with specific congressional directives and invalid. Thus, if the states are to fully protect their interests in water resources, the states must find other means to protect their interests.

Absent the application of the navigation power's no-compensation rule, the fifth amendment requires the federal government to compensate holders of state recognized property rights for any takings incident to a project.¹⁵³ Therefore, the state may secure local interests through appropriate recognition of property rights in water. The remainder of this section suggests ways to define property rights in state water to afford protection of local interests. By expanding the scope of property rights recognized under state law, the state can enlarge upon the uses of water for which the federal government must pay compensation when it exercises its power of eminent domain.¹⁵⁴ This forces the federal government to consider the value of the condemned uses as a project cost and thus effectively makes the federal government give greater recognition to state interests.¹⁵⁵ Society will benefit because such action by the state will help insure that a federal project's analysis includes the true cost of using the water resources.

A. Traditional Private Water Rights Holders: Who Qualifies for Compensation.

Issues of fifth amendment compensation traditionally arise when the federal government interferes with the property rights of a private individual or organization.¹⁵⁶ In water law, a private water user generally

153. See notes 71 & 152 *supra*.

154. See text accompanying notes 155-209, *infra*. It is clear that even under the Ninth Circuit's interpretation of § 8 that *United States v. Gerlach Live Stock Co.*, 339 U.S. 725 (1950), would apply and require the federal government to compensate the holder. *United States v. California*, 558 F.2d 1347 (9th Cir. 1977), *reversed*, 98 S. Ct. 2985 (1978). It is certainly true under the Supreme Court's decision. *Id.* at 5003. Where the navigation servitude does not apply, the requirement is a constitutional one. See note 71 *supra*.

155. By influencing the cost benefit ratio used by federal agencies, 43 U.S.C. § 485(h) (1970), the state should be able to exert more control over federal water projects. See N. ELY, *AUTHORIZATION OF FEDERAL WATER PROJECTS* (1971). For instance, the state holds many permits for projects which it obtained through filings by the Department of Finance. *Ivanhoe Irrigation Dist. v. All Parties*, 47 Cal. 2d 597, 618, 306 P.2d 824 (1957). The state has turned some of these permits over to the federal government to allow the operation of the CVP. *Id.* at 618. If the state were to vest those water rights in a private entity of a state agency, it appears that the state could control the cost aspects of federal projects through the correct imposition of terms and conditions in its permits. See text accompanying notes 157-211 *infra*.

156. 2 NICHOLS ON EMINENT DOMAIN, § 6.1 (1976).

has an appropriative or riparian water right.¹⁵⁷ Both rights are considered vested and compensable for purposes of the fifth amendment.¹⁵⁸ In granting the right to use water to a private holder, the state protects that interest at least to the extent that the federal government must compensate the holder for any interference with the property right. The general rule for compensation is that the federal government must compensate an individual for the fair market value of the property right taken.¹⁵⁹ Paying the fair market value forces the federal government to include the true cost of the resource in its project analysis.¹⁶⁰ Thus, the agency must include the true costs of the project in the required cost-benefit analysis of the project and an efficient economic use of resources should result.¹⁶¹

Private appropriative water rights can constitute major usage in a watershed, but the state can retain some control over water rights granted to private holders. The state can grant the water use to a private holder knowing that the interest is protected against a cost free taking by the federal government.¹⁶² However, because a private holder is subject to the state's terms and conditions, the state may exercise its power to reserve control over the permit and the SWRCB may condition the permit with a reservation of jurisdiction.¹⁶³ Thus, if conditions change, the

157. 3 W. Hutchins, *Water Rights in the Western United States* 179-214 (1977).

158. The compensability of riparian rights under the fifth amendment poses no difficulty. *See* *United States v. Gerlach Livestock Co.*, 339 U.S. 725 (1940); *Fox River Paper Co. v. R.R. Comm.*, 274 U.S. 651 (1926). However, in California, the compensation which the holder of a permit may receive for the taking of their water right is limited to the actual amount paid to the state in obtaining that water right. CAL. WATER CODE § 1392 (West 1971). Thus, for California to effectively protect its water resources in relationship to the federal government, this section will have to be amended. Other states do allow such compensation above the costs of obtaining the permit. *E.g.*, *Sigurd City v. State*, 105 Utah 278, 142 P.2d 154 (1943). The appropriative right in California is considered real property, W. HUTCHINS, 3 WATER RIGHTS IN THE NINETEEN WESTERN STATES 179-214 (1977), and thus the strictures of the fifth amendment should apply.

159. 2 NICHOLS ON EMINENT DOMAIN, § 12.1 (1976).

160. *See* N. ELY, *AUTHORIZATION OF FEDERAL WATER PROJECTS*(1971); and KRUTILLA & ECKSTEIN, *supra* note 129.

161. KRUTILLA & ECKSTEIN, *supra* note 129, at 75-77 (1969). "If those who gain could and do compensate those who lose by the economic change stemming from a multiple purpose development, and if they will have a net gain remaining, our efficiency criteria will provide guides to achieving an increase in social welfare." *Id.* at 76. It is obvious that irrigators could compensate previous riparian owners for the taking of their property through the medium of the federal government. *United States v. Gerlach Live Stock Co.*, 339 U.S. 725, (1950). The same should be true of appropriative water rights holders. *Id.* Thus, when a benefit/cost analysis is prepared, the inclusion of these prices will help assure an efficient use of resources.

162. *See* note 72 *supra*.

163. CAL. WATER CODE § 1394 (West 1971). This would seem to be a matter within the discretion of the SWRCB. *Id.* at § 1253. The basis of the SWRCB's reservation would be its continuing authority necessary to determine the most beneficial use of water to the public. GOVERNOR'S COMMISSION TO REVIEW CALIFORNIA WATER RIGHTS LAW, *LEGAL ASPECTS OF INSTREAM USES IN CALIFORNIA* 59-62 (1978) (herein-

SWRCB may alter the terms of the permit and allow use of the water for more beneficial purposes.¹⁶⁴ One such purpose might be granting the use of water to a federal water project.

B. Private Ownership of "Instream" Water Uses.

The major difficulty with traditional appropriative water rights systems is that they require the user to exercise control over the water in the stream to perfect the rights.¹⁶⁵ Unlike the riparian system which protects certain minimum stream-flows,¹⁶⁶ most appropriative systems have not recognized that a user may have a right to the uncontrolled use of water in the stream.¹⁶⁷ The recognition of a right of a private holder to a minimum instream flow has major implications in the field of federal and state relations.

The traditional appropriative water rights system does not provide the state with sufficient flexibility to carry out its duty as trustee of the public trust in the waters of the state because appropriative rights require some exercise of physical control over the water.¹⁶⁸ There are many beneficial uses of water which do not require diversion of water from the stream. Minimum flows for fish, wildlife, water quality and recreation all deserve protection.¹⁶⁹ Allowing greater recognition of instream uses can provide protection for important public interests.

after cited as *Instream Uses in California*). This may affect the valuation of the water right. R. CLARK, 1 *WATERS AND WATER RIGHTS* § 77.1(B) (1967).

164. *E.g.*, Cal. State Water Res. Control Bd., Decision 1379, (1971). This would be similar to an assignment of rights like that performed when the state transfers permits held by the Department of Finance to the federal government. *Ivanhoe Irrigation Dist. v. All Parties*, 47 Cal. 2d 597, 618 (1957). Conversely, when the state grants water permits to the federal government, it loses control over them. *United States v. California*, 50 F.2d 1239 (9th Cir. 1977), *rehearing denied*, 558 F.2d 1347 (9th Cir. 1977), *reversed in* 98 S. Ct. 2985 (1978). *EDF v. EBMUD*, 20 Cal. 3d 327, 572 P.2d 1128, 142 Cal. Rptr. 904 (1977). *See also*, *Ivanhoe v. McCracken*, 357 U.S. 275 (1958) (decided in part upon the proprietary power of the United States).

165. *INSTREAM USES IN CALIFORNIA*, *supra* note 164, at 65-68.

166. The rule at common law was that land owners adjacent to a water course had a right to the natural, undiminished streamflow. *California Oregon Power Co. v. Beaver Portland Cement Co.*, 295 U.S. 142, 152 (1934). This rule was modified in the eastern United States to provide that owners had an equal right to the streamflow and that none could use it to the detriment of others. However, this allowed for diversion which did not interfere with the rights of those below. 1 R. CLARK, *WATERS AND WATER RIGHTS* § 16 (1967).

167. *INSTREAM USES IN CALIFORNIA*, *supra* note 164, at 65-68. *See also*, Trial Brief for Plaintiff, *California Trout, Inc. v. The State Water Resources Control Bd.*, (no. 233933, S. Ct., Sacramento, California, Nov. 1977) (hereinafter cited as *Cal. Trout v. SWRCB*).

168. *See* notes 166-168 *supra*. For an analysis of the trust doctrine, *see* text accompanying notes 181-200 *infra*.

169. *See* A. Tarlock, *Recent Developments in the Recognition of Instream Uses in Western Water Law*, 1975 *UTAH L. REV.* 871 (hereinafter cited as *Tarlock*). *See also* notes 25-31 *supra*.

Several states recognize the right of a private user to a designated minimum flow in a stream.¹⁷⁰ In California, there is no final word on whether such a right is recognized. A superior court recently held that a private association could hold an appropriative right to protect a stream's fish and animal life.¹⁷¹ Thus, in California, a private individual or group may be able to apply for a permit allowing the maintenance of a specified minimum stream flow to protect water quality, fish and wildlife, or preserve recreational values.¹⁷²

By recognizing an instream appropriative right in a private holder, the state creates two beneficial results. First, the recognition of instream rights increases the number of appropriative claims in a particular stream and thus limits the amount of unappropriated water over which it has no control.¹⁷³ This would reduce the amount of water available for the federal government to appropriate. Consequently, it enables the state to avoid the problem of having to grant water to the federal government free of any terms and conditions even though the federal use is not in the state's best interests.¹⁷⁴ The ability of the state to reserve jurisdiction in private permits, however, allows the state to grant the water cost free to the federal government at a later date if that assignment is in the state's best interests.¹⁷⁵ In California, the SWRCB could have protected the Stanislaus River through a recognition of in-

170. Tarlock, *supra* note 169. Note, *Water Allocation in Utah-Protection of Instream Uses*, 1975 UTAH L. REV. 687. See *State Dept. of Parks v. Idaho Dept. of Water Administration*, 96 Idaho 440, 530 P.2d 924 (1974); COLO. REV. STAT. ANN. §§ 37-82-101, 37-92-102(3) (1973); and WASH. REV. CODE ANN. §§ 90.54.010-90.54.050 (Supp. 1976).

171. The court decided that state law allowed a private group to have an instream use for the protection of fish and wildlife. *California Trout v. SWRCB*, No. 233933 (Super. Ct., Sacramento Co., California, October 1977). However, another court held that state law required a denial of an application by the Department of Fish and Game. *Fullerton v. SWRCB*, No. 61136 (Super. Ct., Humboldt Co., California, filed Jan. 1977).

172. A bill proposed in 1977 by Senator John Nejedley would have allowed instream appropriation in California by statute. S.B. 97, Cal. Legis., 1977 Sess. The measure was opposed by agricultural interests because of the detrimental effect which it was felt that the bill would have on federal water projects. 5 ACWA News 2 (Jan. 24, 1977). See also letter from Cal. State Water Res. Control Bd. to Hon. Sen. J. Nejedley, Feb. 4, 1977 (hereinafter cited as Letter from SWRCB to Sen. Nejedley).

173. See *United States v. California*, 558 F.2d 1347 (9th Cir. 1977), *reversed* in 98 S. Ct. 2985 (1978). See also, Letter from SWRCB to Sen. Nejedley, *supra* note 173.

174. See note 173 *supra*. Under either the present interpretation of § 8, or due to the implications of the Due Process clause, the state will have control over its water at least to the extent that it determines whether the federal government will have to pay compensation for the taking of water. The alternatives for the federal government are either to pay the compensation or to submit to the imposition to state terms and conditions. In submitting to those terms and conditions the government should be estopped from later denying their efficacy. This latter alternative has the advantage of insuring that local interests are represented in the project and has worked successfully in the past.

175. CAL. WATER CODE § 1258 (1971).

stream uses for groups such as California Trout, the Sierra Club, or private rafting companies. By reserving jurisdiction over those permits, the state could ensure that the water would be available for impoundment in the New Melones Dam should a future need develop.¹⁷⁶ Second, even though the federal government may take this instream appropriated water through eminent domain,¹⁷⁷ the state is assured that the federal government will compensate those persons affected by the seizure as required by the fifth amendment.¹⁷⁸ For instance, in the New Melones Project, if the Sierra Club held a permit for wildlife protection on the Stanislaus River, the Bureau would have to compensate the Sierra Club for the loss of the Stanislaus River as a recreational asset. Thus, the Bureau would have to include the true value of the water in its project analysis. This compensation would insure that the true costs would be weighed against the project's benefits.¹⁷⁹

C. State Ownership of Water.

The state is also capable of holding private property rights within the meaning of the fifth amendment.¹⁸⁰ Thus, if the state or its agent holds a property right to water, the federal government must recognize the state's right by paying it just compensation for the taking of that property.¹⁸¹ By asserting its own property rights in water, the state can better fulfill its obligation as trustee of the state's water.¹⁸² It can assure its citizens that their interests will be protected. The citizens of one state will not have to subsidize a federal water project which is not in their best interests.¹⁸³

While this solution seems reasonable, there is considerable debate over whether a state can, in fact, own the unappropriated water within its boundaries.¹⁸⁴

176. *Id.* See also, note 165 *supra*.

177. *Fresno v. California*, 372 U.S. 627, 630 (1963). *But see also* text accompanying notes 88-98 *supra*.

178. See note 71 *supra*.

179. See text accompanying notes 126-143 *supra*.

180. *Oklahoma v. Atkinson*, 313 U.S. 508, 534-35 (1940). *Wayne Co. v. United States*, 53 Ct. Claims 417 (1918), *affirmed per curiam* 252 U.S. 574 (1920). (Award to county for the taking of an easement for a road by the federal reservoir).

181. See note 182 *supra*.

182. For a discussion of the state's role as trustee of the state's water, see text accompanying notes 197-199 *infra*.

183. Theoretically, projects must serve national interests if authorized under either the commerce clause, *Heart of America Motel v. United States*, 379 U.S. 241 (1964), or the general welfare clause. *United States v. Butler*, 297 U.S. 1 (1936). While citizens of each state are citizens of the nation, equitable considerations argue for an equal sharing of the costs of these national projects. Thus, absent their consents, citizens of one state should not be required to bear more of the share of the project than other citizens are required to pay.

184. The cases have not addressed the issue. *Oklahoma v. Atkinson*, 313 U.S. 508

To determine the compensability aspects of state ownership of water it is useful to distinguish between navigable and non-navigable water. Each state has a political right to ownership of the navigable waters within its boundaries.¹⁸⁵ The federal government may displace that right in favor of navigational purposes.¹⁸⁶ However, federal water projects are designed largely for other purposes such as irrigation and hydro-electric power.¹⁸⁷ Thus, the state can argue persuasively that the federal government cannot take navigable water for non-navigation purposes without either the state's consent or paying the state for the taking.¹⁸⁸ For example, the New Melones Project is largely for irrigation purposes.¹⁸⁹ The unappropriated water fits the federal navigable-in-fact requirement for navigability.¹⁹⁰ Thus, if the Bureau of Reclamation chooses not to abide by the state's terms and conditions but impounds the necessary water, the Bureau should compensate the state for the taking.¹⁹¹

The problem becomes more difficult in California when the unappropriated waters are non-navigable. California originally adopted the

(1964) (*Oklahoma* raised the issue but the Supreme Court avoided it.). Furthermore, the commentators are unclear. See C. Martz, *The Role of the Federal Government in State Water Law*, 5 KAN. L. REV. 626, 632-34 (1957). F. Trelease, *Government Ownership and Trusteeship of Water*, 45 CALIF. L. REV. 638 (1957). Note, *It's Our Water!—Can Wyoming Constitutionally Prohibit the Exportation of State Waters?*, 10 LAND & WATER L. REV. 121, 123-24 (1975).

185. *Shivley v. Bowlby*, 152 U.S. 1, 26-28 (1894). See also *Utah v. United States*, 403 U.S. 9, 10-11 (1971).

186. *Oklahoma v. Atkinson*, 313 U.S. 508 (1940). The court implied that compensation would have been required if the project had not served navigational purposes. *Id.* at 528-35.

187. See AUBURN-FOLSOM SUPPLEMENTAL REPORT *supra* note 111.

188. *Wayne Co. v. United States*, 53 Ct. Claims 417 (1918), *affirmed per curiam*, 252 U.S. 574 (1920), stands for the proposition that the state can be compensated for the taking of its property. Particularly in California, where most water flows entirely within the one state before reaching the ocean, the ownership interest seems clear. A similar argument was made by the appellees in *United States v. Gila River Pima-Maricopa Indian Community*, 586 F.2d 209, 215 (Ct. Cl. 1978) (at note 13). While the court did not reach the question, this argument by the Pima-Maricopa Indian Nations for its members bears analogy to the state holding such property rights for its citizens. *But See* note 156 *supra*.

189. 1 C. ENGLE, CENTRAL VALLEY PROJECT DOCUMENTS, 974 (1956).

190. Presently, upwards of 22,000 people per year float the river commercially. Letter from S. Howard, Bureau of Land Management, Folsom, California, to Author (Feb. 14, 1978). Parrot's Ferry was operated in transporting people across the Stanislaus River during the gold rush. It is located on a portion of the Stanislaus River to be flooded by the New Melones Dam. See, *U.S. v. Appalachian Electric Power Co.*, 311 U.S. 377 (1941), for a discussion of those uses which indicate that a river is navigable.

191. The State of California did not argue this position in *United States v. California*, 550 F.2d 1239 (9th Cir. 1977) (see Brief for Appellant). *Oklahoma* did make this argument in *Oklahoma v. Atkinson*, 313 U.S. 509, 1540 (1940) (see Brief for Appellant, No. 832, Oct. Term 1940), but the Court avoided the issue. *Id.* at 540. However, note the dicta in *California v. United States*, 98 S. Ct. 2985, 2990-95 (1978), supporting this position.

common law of England and the riparian doctrine upon being admitted to statehood.¹⁹² Thus, the federal government's extensive land holdings carried with them riparian rights to adjacent water.¹⁹³ The Supreme Court has held that the federal government severed its water rights from the appurtenant lands.¹⁹⁴ The only exception is when the federal government specifically reserves the lands.¹⁹⁵

The severance of the federal government's land and water rights left the state as the administrator of the water in trust for its citizens.¹⁹⁶ California law, for instance, seems to consider the state to hold all unappropriated waters within the state in trust for its citizens.¹⁹⁷ Ordinarily,

192. *Lux v. Haggin*, 69 Cal. 255, 10 P. 674 (1886). See W. HUTCHINS, *THE CALIFORNIA LAW OF WATER RIGHTS*, 178-81 (1956). This is frequently stated as the "California Doctrine", 5 R. CLARK, *WATERS AND WATER RIGHTS* §§ 405-32 (1967), based upon *Lux v. Haggin*, 69 Cal. 255, 10 P. 674 (1886). However, Congress seems to have reordered federal property rights by splitting its ownership of land and water and making available that water to which it might have had a riparian right. *California Oregon Power Co. v. Beaver Portland Cement Co.*, 295 U.S. 142, 162-65 (1934). It is clear that the United States still has riparian rights to reserved lands. *Cappaert v. United States*, 426 U.S. 128 (1976) *Arizona v. California*, 373 U.S. 546, 601 (1963) (application of doctrine to Indian reservations). *FPC v. Oregon*, 349 U.S. 435 (1955).

193. *California Oregon Power Co. v. Beaver Portland Cement Co.*, 295 U.S. 142, 162-65 (1934).

194. *Id.*

195. See note 192 *supra*. In *Cappaert v. United States*, 426 U.S. 128 (1976), the Court held that the withdrawal of land in 1952 by presidential proclamation vested in the United States rights to underground water supply necessary for the purpose of the reservation. The reservation was to protect desert pupfish, a rare desert species, and the reservation reserved water to that extent. *Id.* at 147. Furthermore, the Court noted that the land had been in the continuous possession of the United States since the Treaty of Guadalupe Hidalgo. *Id.* at 131. Such an unbroken chain of title appears to be a requisite condition. *Power Co. v. Cement Co.*, 295 U.S. 142 (1934).

196. *Power Co. v. Cement Co.*, 295 U.S. 162 (1934). See also *Ivanhoe Irrigation Dist. v. All Parties*, 47 Cal. 2d 597, 306 P.2d 824 (1957). But see *Ivanhoe Irrigation Dist. v. All Parties*, 53 Cal. 2d 692, 3 Cal. Rptr. 377, 350 P.2d 69 (1960) (suggesting that the holding in the previous case was dicta and thus no longer binding).

197. In *Ivanhoe Irrigation Dist. v. All Parties*, 47 Cal. 2d 597, 306 P.2d 840 (1957), the California Supreme Court declared that the state held all unappropriated water in trust for its citizens. *Id.* at 620, 306 P.2d at 840. After reversal by the Supreme Court of the United States upon grounds for statutory construction, *Ivanhoe Irrigation Dist. v. McCracken*, 357 U.S. 275 (1958), the California Supreme Court stated that its prior statements regarding the trust in water were dicta. *Ivanhoe Irrigation Dist. v. All Parties*, 53 Cal. 2d 692, 716, 350 P.2d 69, 3 Cal. Rptr. 317, 331 (1960). However, the dicta of the first case appears to be the correct decision.

State statute declares that all unappropriated water belongs to the citizens of the state. CAL. WATER CODE § 102 (West 1971). Both state statutes, *id.* at § 100 and the California Constitution, CAL. CONST. art. 10, § 2 (West Cum. Supp. 1978), require the conservation and protection of water to insure that water is applied to its most beneficial use. The statutory provisions under which the SWRCB operates indicates that the SWRCB is charged with the administration of a trust. CAL. WATER CODE §§ 1200-1801 (West 1971). Seemingly, the trust doctrine which has been applied to tidelands, *Marks v. Whitney*, 6 Cal. 3d 241, 491 P.2d 374, 98 Cal. Rptr. 790 (1971), bears analogy to the moving waters of the state's streams. Certainly, the SWRCB has acted as though it were trustee of the state water resources and no complaints from the state appear. See Deci-

taking trust property would require the federal government to compensate the trustee for the benefit of the trust.¹⁹⁸ The Supreme Court, however, avoided the issue when it was presented.¹⁹⁹ While it seems that the federal government should compensate the state when it takes unappropriated water, the uncertainty concerning the viability of that assertion argues for the adoption of a more certain means of protecting state interests: instream appropriation.

D. State Ownership of Instream Water Rights.

Although the state can enhance its protection of legitimate state interests by recognizing private instream appropriative water rights,²⁰⁰ it can achieve even more flexibility and control by holding instream water uses itself.²⁰¹ Unlike compensating the private holder, though, compensating the state results in a distribution to all potential beneficiaries of the water because the state or its agent holds the water in trust for those beneficiaries.²⁰² Thus, in California, the State Parks and Recreation Department might file for an appropriative right to minimum stream flows to protect recreational uses on a river. Or, a local government agency could hold a permit to protect the flow of a stream through a municipal park. The result is the same as when the state recognizes an instream flow in a private group or individual. Once again, the state can reserve the ability to limit these permits to allow assignment of the water right to the federal government if the state decides that such assignment best benefits its trust.²⁰³ However, vesting this water right in the state or its agent insulates it from an uncompensated taking by the

sion 1422, *supra* note 22. See generally *Instream Uses in California*, *supra* note 135, at 8-29.

198. See notes 59-60 *supra*.

199. *Oklahoma v. Atkinson*, 313 U.S. 508, 528-35 (1940).

200. See text accompanying notes 128-151 *supra*.

201. Washington allows its Department of Ecology to file for appropriations to protect state environmental interests. WASH. REV. CODE ANN. §§ 90.54.010-90.54.050 (Supp. 1976).

The proscriptions of *National League of Cities v. Usery*, 426 U.S. 833 (1976) may apply in these situations. The implication is that the federal government cannot interfere with such state governmental functions.

202. 2 NICHOLS ON EMINENT DOMAIN § 5.6 (1976); 6A NICHOLS ON EMINENT DOMAIN § 28.2 (1976).

As trustee, the state should have to use the compensation received to benefit the beneficiaries of the trust. The state would seem to be required to provide white-water facilities where compensation was derived from the loss of such a use. The process might be similar to that being employed by the Army Corps of Engineers in regards to the Stanislaus River to compensate for the losses due to the New Melones Dam. CORPS. OF ENGINEERS, STUDY OF ALTERNATIVES FOR WHITEWATER BOATING/RAFTING ACTIVITIES (July, 1976).

203. See text accompanying notes 134-36 *supra*. The state can also transfer its water rights as it does with permits held by the Department of Finance. See *Ivanhoe v. All Parties*, 47 Cal. 2d 597, 306 P.2d 824 (1957).

federal government.²⁰⁴ While problems of evaluating the worth of the water resource to the state agency may pose some conceptual difficulties,²⁰⁵ the federal government must nevertheless compensate the citizens who are deprived of the alternate use of water by compensating their trustee, the state. The result is the equitable one envisioned by the fifth amendment: the cost is not borne by those deprived of their water use, but rather the cost is transferred to those people who benefit from the new use of water in the federal project.²⁰⁶ Because federal law requires the project's costs to be included in the charge for goods produced, those persons who benefit from the new use of water compensate those deprived of the use of that water.²⁰⁷

The recognition of these property rights by the state will not end federal water projects nor should it. Rather, it will force the federal agencies to recognize state interests when designing water projects.²⁰⁸ The federal government must compare the cost of paying for the water with that of submitting to state terms and conditions. The result benefits society because proper recognition of the value of resources used in federal projects will insure that benefits exceed actual costs.²⁰⁹ Furthermore, protecting the interests of alternative users of water will minimize distortions of market forces and the consequent misallocation of other

204. See notes 59-60 *supra*.

205. While compensation may be difficult to determine, some method should be devisible to ascertain the value of these resources to the holder. See 1 R. CLARK, *WATERS AND WATER RIGHTS* § 77 (1967). Replacement cost might be a usable standard. Thus, on the New Melones Dam project, the value of the water taken might be equivalent to that amount necessary to replace the white water recreational facilities plus the amenities of the canyon. The Army Corps of Engineers estimated that it would cost \$550,000 to provide three miles of "comparable" whitewater below the New Melones Dam. Letter from G. Weddell, Chief, Engineering Division, Sacramento District, Army Corps of Engineers to author, (March 15, 1978). However, the valuation of these resources should account for the irreversibility associated with federal water project decisions. Once the dam is filled, the environmental resource is lost. The cost of recreating such a resource may be unreachable. A. Fisher, J. Krutilla & C. Ciccehetti, *The Economics of Empirical Analysis*, 62 *AMER. ECON. REV.* 605 (1972). Thus, it has been suggested that the value of these environmental resources is increasing over time. *Id.* at 606. Finally, in some cases the state will act as a transfer agent. This transfer should be equitable in that it makes the beneficiary of the project pay the person deprived of the water use, and it should assure the proper allocation of resources. J. KRUTILLA & O. ECKSTEIN, *MULTIPLE PURPOSE RIVER DEVELOPMENT*, 73 (1970).

206. See KRUTILLA & ECKSTEIN, note 128 *supra*, at 73.

207. See text accompanying notes 137-143 *supra*.

208. The federal procedure now used does not really take into account state interests on water projects. In most instances, the Bureau files for permits and begins construction of the project before a determination is made on its applications for permits. *E.g.*, *United States v. California*, 403 F. Supp. 874 (E.D. Cal. 1975). If the alternative to not abiding by state terms and conditions is a requirement that the Bureau pay for the water it takes, the Bureau may begin assessing the extent of local interests in water before initiating construction of a project.

209. See text accompanying notes 126-135 *supra*.

resources utilized because additional water is available.²¹⁰ Thus, the equitable solution is also more economically sound.

CONCLUSION

The diverging state and federal interests in federal water projects has caused a need to examine the nature and extent of federal and state rights in water. The Bureau of Reclamation's reinterpretation of section 8 coupled with the Ninth Circuit's decision that the state's role was limited to determining the availability of unappropriated water showed that California was unprepared to deal with a full assertion of federal rights. The United States Supreme Court's decision properly interprets section 8 as requiring the Bureau to abide by state water law in constructing and operating projects. The uncertain nature of section 8 and Congress' future legislative efforts, however, points out the need for states to develop other means for the protection of local interests than the imposition of terms and conditions on federal water permits.

The extent of the state's control over the federal appropriation depends upon the constitutional basis Congress uses in authorizing a project. If the navigation power and its total preemption of state interests in water are confined to the navigational portions of projects, then the state can legitimately protect its interests. In obtaining water for the non-navigational portions of projects authorized under the General Welfare Clause, the federal government must comply with the compensation requirements of the fifth amendment. Thus, the state can protect its interests in water by expanding its recognition of property rights in water. Through increased recognition of traditional private appropriative water rights and development of a system allowing private and public instream appropriative water rights, the state can force the federal government's recognition of local interests, an equitable transfer of the costs of federal water projects and increased economic efficiency.

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210. See text accompanying notes 137-143 *supra*.

