

# Water Districts Contracting For Water With the Bureau of Reclamation—Can a State- Created Entity Violate State Laws?

*This article suggests that the State of California can control the ability of water districts to enter into contracts with the Bureau of Reclamation. If a contract violates the state constitution, it should be considered as ultra vires and void. The article suggests that the state can join the United States as a party in suits against water districts, arguing that section 8 of the 1902 Reclamation Act operates as a waiver of sovereign immunity.*

The State of California faces a crisis of state power in seeking to regulate and coordinate the myriad of state-created water districts located throughout the state.<sup>1</sup> This crisis arises because the state is unable to assert control over all water districts when they contract with the United States Bureau of Reclamation (Bureau) to receive water from federal water projects. The California Supreme Court holds that state law does not apply to existing contracts between water districts and the Bureau.<sup>2</sup> Although the United States Supreme Court recently took a strong states rights position in *California v. United States*, the state still cannot secure uniform regulation and control over its water districts.<sup>3</sup> The doctrine of

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1. The term "water districts" includes irrigation districts, utility districts, reclamation districts, and municipal districts. Each serves the local needs of a particular community and can enter into contracts with the Bureau. Some districts, however, do not enter into contracts with the Bureau, but obtain water by other means.

2. See *Environmental Defense Fund v. East Bay Mun. Util. Dist.*, 20 Cal. 3d 327, 572 P.2d 1128, 142 Cal. Rptr. 904 (1977). (An environmental group challenged a water district's contract with the Bureau as violating the California Constitution. The court rejected the challenge, holding the application of state law would frustrate the completion of a federal water project, and thus state law was preempted.)

3. The United States Supreme Court held in *California v. United States* that a state, under § 8 of the 1902 Reclamation Act, may impose terms and conditions on the water it gives to the Bureau of Reclamation when those terms and conditions are not inconsistent

federal preemption prohibits this state control where the application of state law would frustrate the completion of a federal water project or where the imposition of state law could be inconsistent with a congressional directive.<sup>4</sup>

The state's inability to apply its own laws to contracts between water districts and the Bureau is a significant development in federal-state relations in water rights law. The state is virtually powerless to decide the conditions under which state-created water districts may contract with the Bureau. This effectively renders the state impotent to protect the public's interest in water resources management even though the state can protect the public's interest in water resources management better than can local water districts. The state considers the need for water on a statewide basis<sup>5</sup> while districts operate within limited geographical boundaries.<sup>6</sup> The state considers all competing uses of water.<sup>7</sup> These include consumptive uses, such as agricultural, municipal, and industrial uses, as well as instream uses,<sup>8</sup> such as fishing, boating and swimming. Local water districts, on the other hand, consider only the consumptive uses of water by those landowners to whom it sells water. They rarely consider recreational uses by the general public.<sup>9</sup> The state also has a traditional interest in protecting fish and wildlife.<sup>10</sup> The state must en-

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with Congressional directives. *California v. United States*, 98 S. Ct. 2985 (1978). The decision's main impact is to shift the burden of persuasion of the unreasonableness of the terms and conditions to the Bureau and to the individual water districts. The decision does not say that the state will be able to impose its conditions on the federal government under all circumstances. There are many questions left unanswered by the Supreme Court's decision. One of the most important questions is how inconsistent with Congressional directives a term or condition must be before the courts will disallow it. For a fuller discussion of *California v. United States* see comment: *Federal Water Projects: After California v. United States, What Rights Do the State and Federal Governments Have in the Water?*, this volume.

4. See generally *Environmental Defense Fund v. East Bay Mun. Util. Dist.* 20 Cal. 3d 327, 572 P.2d 1128, 142 Cal. Rptr. 904 (1977) and *California v. United States*, 98 S. Ct. 2985 (1978).

5. For example, the California Department of Water Resources forecasts anticipated needs and supplies of water in California. See CAL. DEP'T OF WATER RES. BULL. No. 160-74, at 49 (Nov. 1974).

6. Santa Clara Valley Water District, for example, operates within the exterior boundaries of Santa Clara County. CAL. WATER CODE APP. § 60-2 (West Cum. Supp. 1978).

7. See CAL. WATER CODE § 1257 (West 1971).

8. See generally Schneider, *Legal Aspects of Instream Uses in California*, STAFF PAPER NO. 6, GOVERNOR'S COMM'N TO REVIEW CAL. WATER RIGHTS LAW (1978).

9. Water districts are heavily indebted with bond obligations. Bonds are issued to pay for the storage, conveyance, and treatment facilities built and used by the district. CAL. WATER CODE § 24950 (West 1956). To pay off their debt, or to expand their services, water districts require increasing returns on their sales of water. They are, therefore, not in a position to consider non-consumptive uses which do not require a sale of water, such as swimming and fishing.

10. See *People v. Stafford Packing Co.*, 193 Cal. 719, 227 P. 485 (1924) (The court

sure that sufficient water remains in the stream for wildlife to survive.<sup>11</sup> Also, a local water district's interest in water for consumptive uses may conflict with the public's need of water for instream uses. If local districts are not subject to some state control, this conflict may prevent the district from fairly protecting the public's interest in water resources management.

This article argues that despite current federal and state law, the state still has several ways to uniformly regulate the conduct of water districts that enter into contracts with the Bureau of Reclamation. Under one method, the state could bring suit to void a water district's contract on the theory that a district acted *ultra vires* in entering into a contract which violates state law.<sup>12</sup> The article advances several reasons why the *ultra vires* doctrine should be applied and suggests several methods to ensure its effective application. The article also argues that it is feasible to apply the *ultra vires* doctrine to contracts between the Bureau of Reclamation and water districts despite the difficulties that exist because the actions brought to void such contracts may require the joinder of the United States as a party.

The State of California should be able to assert control over the terms and conditions under which state-created water districts contract for water from federal water projects. This article suggests two ways for the state to regain its rightful ability to provide input into the management of water resources to further statewide social, economic and environmental policies.

### I. THE ULTRA VIRES ARGUMENT

The state has lost much of its ability to control water districts once they enter into contracts with the Bureau of Reclamation to receive water from federal water projects. This state power was eroded by two doctrines of constitutional law: preemption, or federal supremacy,<sup>13</sup> and federal sovereign immunity.<sup>14</sup> Federal reclamation law<sup>15</sup> had been held

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enjoined a packing company from violating a state law designed to prevent the waste of fish. The court found the state had the power to protect fish and wildlife.)

11. This is because "the state holds the title and the property in the fish and wildlife of the state in trust for the people." *People v. Monterey Fish Prod. Co.*, 195 Cal. 548, 563, 234 P. 398, 404 (1925) (validating a law to conserve food fish for the benefit of present and future generations).

12. An *ultra vires* contract is one not within the power of the water district to make. *See City of Oakland v. Key System*, 64 Cal. App. 2d 427, 441, 149 P.2d 195, 203 (1st Dist. 1944). The city sought to determine what right Key Systems had under a city ordinance which violated the city charter. The court found the contracts made pursuant to the ordinance *ultra vires* and void. *Id.*

13. *See Environmental Defense Fund v. East Bay Mun. Util. Dist.*, 20 Cal. 3d 327, 334, 572 P.2d 1128, 1131, 142 Cal. Rptr. 904, 907 (1977).

14. *See Dugan v. Rank*, 372 U.S. 609 (1963). (Riparian and overlying owners of

to preempt state law where state law conflicted with a federal statute<sup>16</sup> and where the application of state law would frustrate the full operation of a federal water project.<sup>17</sup> Particularly where state controls on water districts resulted in restrictions on the number of contracts, or in the quantity of water purchased under such contracts, state law had been held inapplicable.<sup>18</sup> With the advent of *California v. United States* much of the dicta upon which these decisions were based was disapproved. The court expressly stated however, that these decisions were still law.<sup>19</sup> Thus, federal preemption has and will continue to erode the state's control over its own water districts.

The state's ability to enforce its own laws also has been restricted by the principle of sovereign immunity.<sup>20</sup> The United States has been held to be an indispensable party in disputes over water district contracts with the Bureau.<sup>21</sup> The United States cannot be joined as a party without its consent or without a general waiver of sovereign immunity,<sup>22</sup> and the state's action against the water district thus may be dismissed be-

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groundwater supplies sought to enjoin Bureau officials from impounding water at a federal dam on the San Joaquin River because it interfered with their state rights to use water. The court held that the United States could not be made a party because it had not waived its sovereign immunity. *Id.*)

15. Federal Reclamation Act of 1902, 43 U.S.C. § 317-616 (1970).

16. The United States Supreme Court has held on several occasions that a state law is preempted because it conflicts with the Federal Reclamation Act of 1902, 43 U.S.C. § 371 (1970). For example, in *City of Fresno v. California*, 372 U.S. 627 (1963), disapproved in part in *California v. United States*, 98 S. Ct. 2985 (1978), the city claimed a statutory priority under state law to use water impounded by the Bureau of Reclamation (Bureau) for municipal and domestic purposes. The court held that state law was preempted by the Bureau's power to condemn the state-created water rights under eminent domain. *Id.* at 630-31. In *Ivanhoe Irr. Dist. v. McCracken*, 357 U.S. 275 (1958), disapproved in part in *California v. United States*, 98 S. Ct. 2985 (1978), a clause in the contract between the Bureau and a water district provided that water from a federal project would not be delivered to parcels exceeding 160 acres. *Id.* at 285. The court held that state law could not nullify the clause which was mandated by Congressional directives. *Id.* at 291.

17. For example, in *Arizona v. California*, 373 U.S. 546 (1963), disapproved in part in *California v. United States*, 98 S. Ct. 2985 (1978), the court held that a controversy among several states over rights to use water from the Colorado River could not be resolved under priorities set by state law. *Id.* In *Environmental Defense Fund v. East Bay Mun. Util. Dist.*, 20 Cal. 3d 327, 572 P.2d 1128, 142 Cal. Rptr. 904 (1977), an environmental group challenged a water district's contract with the Bureau as violating the California Constitution. Without discussing *ultra vires*, the majority held that the application of state law would frustrate the completion of a federal water project, and thus was preempted. *Id.* at 340, 572 P.2d at 1134, 142 Cal. Rptr. at 910 (1977).

18. *Environmental Defense Fund v. East Bay Mun. Util. Dist.*, 20 Cal. 3d 327, 338, 572 P.2d 1128, 1134, 142 Cal. Rptr. 904, 910 (1977).

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

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

21. *Id.*

22. No general waiver of sovereign immunity exists. *See generally Dugan v. Rank*, 372 U.S. 609 (1963) which held that the McCarren Amendment, 43 U.S.C. § 666 (1970), is not a general waiver of immunity.

cause of the absence of the United States. This effectively leaves the state without any way to enforce its laws either against the United States or the various water districts.

Despite the recent application of sovereign immunity and federal supremacy doctrines to effectively block assertion of state control over water districts, the state nevertheless should be able to have some input into these contracts. There are two justifications for greater state control. First, the state should have the ability to decide when it or its subdivisions may enter into contracts with the United States because control over state-created agencies is essential to the separate and independent existence of states in our federal system of government.<sup>23</sup> If association with the Bureau of Reclamation permits a state-created entity to violate state law, the state arguably ceases to be a viable separate organ of government. It no longer has any independent control over its own subdivisions. Congress should not intrude into the state's regulation of its own subdivisions. In other areas, courts have recognized that Congress has no authority to fix the wages and hours of state employees<sup>24</sup> or to impose procedural rules for state legislatures<sup>25</sup> because the ability to make these decisions is essential to the state's separate existence. Congress similarly should not interfere with state decisions as to whether it, or its subdivisions, will contract with the United States.

A second justification for state control over water districts is that the public's interest in resources allocation requires that the state limit the ability of water districts to enter into contracts with the Bureau. These contracts are usually long term<sup>26</sup> and commit millions of dollars and millions of acre-feet of water.<sup>27</sup> Many canals, dams, and pumping stations are built pursuant to these contracts. The public has an interest in determining where its limited resources will be spent. The state thus should be involved in overseeing the contracts that water districts enter into with the federal government. This is necessary to ensure that water districts put resources to the most beneficial use and build only such

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23. See *National League of Cities v. Usery*, 426 U.S. 833, 842 (1976). The court held that determination of wages and hours for state employees is a state decision essential to the separate and independent existence of states. *Id.*

24. *Id.*

25. *Dauids v. Akers*, 549 F.2d 120 (9th Cir. 1977). The Arizona House of Representatives consisted of 45% Democrats and 55% Republicans. The court refused to force the Republican Speaker of the House to appoint Democratic members to committees in proportion to their membership in the House. *Id.*

26. The average length of these contracts is 40 years. See 43 U.S.C. § 423(e) (1970).

27. See *Environmental Defense Fund v. East Bay Mun. Util. Dist.*, 20 Cal. 3d 327, 572 P.2d 1128, 142 Cal. Rptr. 904 (1977). (The contract required the water district to construct the Hood-Clay Canal, an integral part of the East Side Division of the Central Valley Project. The district contracted to purchase up to 150,000 acre-feet of water annually for a period of 40 years. *Id.*)

waterways and canals as are necessary.<sup>28</sup>

Applying the *ultra vires* doctrines to contracts entered into between the Bureau of Reclamation and water districts offers one possible way for the state to protect its interests. If a water district violates state law in entering into a contract, the state can assert that the district's actions are *ultra vires* and void.<sup>29</sup> *Ultra vires* means that the state entity is without authority to act.<sup>30</sup> There are two methods of applying the *ultra vires* doctrine, one pertaining to existing contracts and another to all future contracts.

The *ultra vires* doctrine can be applied to existing contracts between water districts and the Bureau by convincing a court that the state constitution ought to serve as a limitation on the power of the districts to enter into contracts. The state constitution forbids unreasonable uses of water and the diversion of water by unreasonable methods.<sup>31</sup> Water districts should have no power to violate either of these constitutional limitations. Water districts are creations of the state.<sup>32</sup> The legislation

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28. A case recently decided by the United States Supreme Court illustrates how an unnecessary waterway may be built. In *California v. United States*, 98 S. Ct. 2985 (1978), the Bureau of Reclamation filed for permits with the State Water Resources Control Board (Board) to appropriate water in connection with its proposed New Melones Dam Project. *Id.* The Board refused to issue the permits stating that water would not be needed from the project for many years to come, and that the Bureau presented no specific plan for applying the project water. Cal. State Water Res. Control Bd. Decision D-1422, at 14 (April 1973). In addition, the Board found that the New Melones Dam would eliminate the use of the Stanislaus River for whitewater rafting and kayaking, and posed a threat to the California salmon fishery resources. *Id.* The Court held that the state could impose reasonable terms and conditions on the water it gave the federal government. It remanded the case to the trial court to determine whether the conditions sought to be imposed by the Board were inconsistent with congressional directives. *Id.*

29. *See Stimson v. Alessandro Irr. Dist.*, 135 Cal. 389, 67 P. 496 (1902). The court held that the board of directors of a district had no power to make a contract with a private water company which had no water plant within the district. *Id.* at 393, 67 P. at 498.

30. *Oakland v. Key System*, 64 Cal. App. 2d 427, 441, 149 P.2d 195, 203 (1st Dist. 1944).

31. CAL. CONST. art. X, § 2 (numbered art. XIV, § 3 prior to June 8, 1976) acknowledges that water is a scarce resource, and requires that water be put to reasonable uses:

It is hereby declared that because of the conditions prevailing in this state the general welfare requires that the water resources of the State be put to beneficial use to the fullest extent of which they are capable, and that the waste or unreasonable use or unreasonable method of use of waters be prevented, and that the conservation of such waters is to be exercised with a view to the reasonable and beneficial use thereof in the interest of the people and for the public welfare. The right to water or to the use of flow of water in or from any natural stream or water course in this State is and shall be limited to such water as shall be reasonable required for the beneficial use to be served and such right does not and shall not extend to the waste or unreasonable method of use or unreasonable method of diversion of water.

*Id.*

32. The California Legislature authorizes the formation of water districts in two ways: by general enabling acts and by special enabling acts. Special enabling acts are

creating the district determines the extent of the district's powers,<sup>33</sup> including its power to enter into contracts with the Bureau of Reclamation.<sup>34</sup> The legislature itself, however, cannot delegate any power which violates the California Constitution.<sup>35</sup> Thus, since the power to enter into contracts cannot extend any further than the powers the legislature could constitutionally delegate,<sup>36</sup> water districts should be viewed as having no power to violate the California Constitution. Under this analysis, if a contract would violate the constitution, a water district would have no power to enter into it and the contract should be considered as *ultra vires* and void.

The California Constitution would limit existing contracts between the Bureau and the water districts in two ways. First, the constitution requires that water resources be put to reasonable use.<sup>37</sup> A water district contract may provide for unreasonable uses of water in several ways.

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statutes that create a specific water district. The appendix to the CAL. WATER CODE is a three volume compilation of such special statutes. *E.g.*, The Orange County Water District Act, 1933 Cal. Stat. 2400, *codified at* CAL. WATER CODE APP. § 40 (West 1968). They set out the specific boundaries of a district as well as enumerate each district's powers and governing structure. *E.g.*, CAL. WATER CODE APP. §§ 40-1, 40-2, 40-4 (West 1968).

General enabling acts resemble general corporation statutes. *E.g.*, CAL. CORP. CODE §§ 200-213 (West 1977). By complying with the statutory requirements, landowners in a local area can form a water district without specific legislative approval. These statutory requirements may be found in the CAL. WATER CODE. *E.g.*, County Water District Law, 1948 Cal. Stats. 496, *codified at* CAL. WATER CODE §§ 30000-30290 (West 1956). The general enabling acts set out the powers and structure of any district which is formed in this way. *E.g.*, CAL. WATER CODE §§ 30500-30575, 31000-31034 (West 1956).

However they are formed, all districts perform governmental functions such as providing flood control, developing water storage and transport systems and regulating the use of water within the district. *See* Craig, *Cal. Water Law in Perspective*, CAL. WATER CODE, p. CII-CVIII (West 1971). *See also* CAL. WATER CODE § 20570 (West 1956). They generally have the power to tax, *e.g.*, CAL. WATER CODE §§ 31650-31730 (West 1956) (water districts); the power of eminent domain, *e.g.*, CAL. WATER CODE §§ 35625-35627 (West 1956) (water districts); and the power to enter into contracts with the United States Bureau of Reclamation. *E.g.*, CAL. WATER CODE § 33195 (West 1956) (irrigation districts).

33. *See* State of California v. Marin Mun. Water Dist., 17 Cal. 2d 699, 705, 111 P.2d 651, 654 (1941). In this case the rights of a municipal water district to place water mains in the highway was later limited by a state statute, CAL. STS. & HY. CODE § 680 (West 1969). The statute permitted the Department of Public Works to remove and to recover the costs of removing the pipes to another location to permit highway improvement. *Id.* *See also* Moody v. Provident Irr. Dist., 12 Cal. 2d 389, 85 P.2d 128 (1938) (enforcing legislation specifying a particular method of paying bonds to an existing water district's contract).

34. *See, e.g.*, CAL. WATER CODE § 33195 (West 1956).

35. *Dean v. Kuchel*, 37 Cal. 2d 97, 100, 230 P.2d 811, 813 (1951) (the court looked to the statute creating the Fish and Game Commission to determine the commission's powers to protect fish and wildlife).

36. *Central Pac. Ry. Co. v. Costa*, 84 Cal. App. 577, 586, 258 P. 991, 996 (3d Dist. 1927) (enforcing a statute requiring a county to cancel a property tax assessment if a tax had previously been paid to another county on the same property).

37. CAL. CONST. art. X, § 2.

For example, a water district may purchase fresh water from the Bureau to supplement its water supplies. If treated reclaimed water can fulfil the water district's needs at approximately the same cost, purchasing the fresh water may be an unreasonable use.<sup>38</sup> The state courts have yet to determine whether the constitution imposes an affirmative duty to reclaim water. The California Supreme Court recently held in *Environmental Defense Fund v. East Bay Municipal Utility District*<sup>39</sup> that the question should be addressed to the State Water Resources Control Board.<sup>40</sup>

Also, a water district may engage in unreasonable uses of water by purchasing water from the Bureau knowing it will ultimately be used in an unreasonable way. One such unreasonable use could be to irrigate fields by flooding rather than by drip irrigation,<sup>41</sup> a method of irrigation which uses far less water.<sup>42</sup> If a water district contracts for additional water to allow irrigation by flooding, it is contracting for water it does not need. The contract to purchase additional water is thus a waste of water, and may violate not only the constitutional requirement that water be put to reasonable use, but the explicit proscription against waste in the California Constitution.<sup>43</sup>

A second constitutional limitation on water district contracts arises from the state constitution's proscription of unreasonable methods of diverting water.<sup>44</sup> Contracts often specify that water will be diverted

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38. The state courts have yet to determine whether the constitution imposes a duty to reclaim water. In 1977, the California Legislature declared that certain uses of fresh water were unreasonable where reclaimed water is available. [1977] Cal. Legis. Service 3199 (*to be codified at* CAL. WATER CODE § 13550). Water districts cannot use fresh water to irrigate cemeteries, golf courses, and parks where reclaimed water of adequate quality and cost is available. *Id.*

State policy generally has favored the use of reclaimed water. The Waste Water Re-use Law, CAL. WATER CODE § 461 (West Cum. Supp. 1978), declares that the state's primary interest in the conservation of water resources requires the maximum reuse of water. CAL. WATER CODE § 461 (West Cum. Supp. 1978). See also Lee, *Legal Aspects of Water Conservation in California*, STAFF PAPER NO. 3, GOVERNOR'S COMM'N TO REVIEW CAL. WATER RIGHTS LAW (1977).

39. 20 Cal. 3d 327, 572 P.2d 1128, 142 Cal. Rptr. 904 (1977).

40. *Id.*

41. This is a constant pressure system providing a continuous flow of water to a localized area at the base of each plant. See K. Shoji, *Drip Irrigation*, 237 SCIENTIFIC AM. 62 (Nov. 1977) for a general description of drip irrigation.

42. *But cf.* *Joerger v. Pacific Gas & Elec. Co.*, 207 Cal. 8, 23, 276 P. 1017, 1024 (1929) where the court permitted the continued use of flood irrigation even though the ground was hilly and porous and thus highly conducive to waste. The court said that the water users need not change the system of irrigation used to lessen waste. The user is entitled to make a reasonable use of the water according to the custom of the locality.

43. CAL. CONST. art. X, § 2.

44. Whether a particular method of diverting water is unreasonable depends on where and how the water is diverted. See CAL. CONST. art. X, § 2. For example, a diversion that puts only 10% of the water of a stream to beneficial use due to a poorly maintained diversion ditch has been held to be an unreasonable use. Cal. State Water Rights Bd. Decision No. 997, at 1-2 (Mar. 6, 1961).



from a particular location in a waterway.<sup>45</sup> The site selected for diversion, however, could interfere with downstream recreational and scenic uses of water by decreasing the amount of water flowing in the river or stream.<sup>46</sup> If another diversion point is available that would not interfere with these uses, the site selected could be an unreasonable method of diverting water. The California Supreme Court recently refused to address the question of whether a diversion interfering with downstream recreational values and scenic uses violated the constitution.<sup>47</sup> In *Environmental Defense Fund v. East Bay Municipal Utility District* the court held, instead, that the state constitution is not applicable to contracts between the water district and the Bureau.<sup>48</sup> The court reasoned that since federal reclamation law preempts state law,<sup>49</sup> it did not need to address the question. The court thus did not discuss how the water district came to have the power to violate the California Constitution.

Besides seeking to implement the *ultra vires* doctrine by reading the California Constitution into existing contracts, the state can enact legislation to ensure that state laws and policies are complied with in future contracts.<sup>50</sup> By requiring a broad review of proposed water district contracts, the state can remove the ability of water districts to enter into contracts which do not comply with state laws and policies. Under existing law, the state cannot always require that the contract comply with state water policies.

Although it is the position of the United States Supreme Court that Congress did not intend to relinquish total control of the actual distribution of the state reclamation water to the states,<sup>51</sup> the state should at least have the power to control the water district's capacity to enter into further contracts with the Bureau. This power should be viewed as an essential element of state sovereignty which the development of federal reclamation law has not limited.<sup>52</sup> The state can assert greater control

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45. For example, one contract specified that water was to be delivered from a diversion point on the Folsom-South Canal above its intersection with the proposed Hood-Clay Connection. *Environmental Defense Fund v. East Bay Mun. Util. Dist.*, 20 Cal. 3d 327, 332, 572 P.2d 1128, 1130, 142 Cal. Rptr. 904, 906 (1977). This choice rendered water unavailable to the lower American River. *Id.*

46. See generally Schneider, *Legal Aspects of Instream Uses in California*, STAFF PAPER NO. 6, GOVERNOR'S COMM'N TO REVIEW CAL. WATER RIGHTS LAW (1978).

47. *Environmental Defense Fund v. East Bay Mun. Util. Dist.*, 20 Cal. 3d 327, 572 P.2d 1128, 142 Cal. Rptr. 904 (1977).

48. *Id.* at 334, 572 P.2d at 1131, 142 Cal. Rptr. at 907.

49. *Id.*

50. Under the decision in *California v. United States*, 98 S. Ct. 2985 (1978), only limited conditions may be placed on the Bureau. This article proposes that new legislation be enacted to regulate the water districts' conduct before they enter into a contract with the Bureau.

51. See *California v. United States*, 98 S. Ct. 2997, at n. 21 (1978).

52. See text accompanying notes 23-28 *supra*.

over future water district contracts with the Bureau by enacting a statute requiring that the State Water Resources Control Board (Board) review future water district contracts.<sup>53</sup> The Board should be given authority to approve the contracts only if it finds that they are consistent with the state's social, economic, and environmental policies.<sup>54</sup> If the conditions required by the Board are not acceptable to the Bureau, then no contract should be made. This could lead to two alternative results. First the United States could negotiate with the state of California to determine what conditions are acceptable to both. Both the state's interest in balancing the environmental, agricultural, and domestic water needs and the federal interest in providing water for irrigation should be considered. The state would neither impose unreasonable conditions on the federal government, nor have unreasonable conditions imposed upon it. Second, the federal government could charter federal water districts. These would operate within the state like nationally chartered banks. They would purchase water from the Bureau for resale to local users. Both alternatives point towards greater state and federal cooperation in the development and provision of water resources.

The state has the power to enact legislation defining the circumstances under which a water district may contract with the Bureau. The legislature granted the water district a variety of powers,<sup>55</sup> including the power to enter into contracts.<sup>56</sup> The district has no power or right, however, which the legislature may not limit or completely take away.<sup>57</sup> Thus, since the state grants power to the districts to provide water services to California localities, the state should also be able to meet changed circumstances<sup>58</sup> by varying the water districts' powers and duties.

The state presently imposes several restrictions on the power and authority of water districts. For example, the state requires that a water district be financially sound before it may enter into contracts.<sup>59</sup> Water

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53. See text accompanying notes 73-99 *infra*.

54. The California Environmental Quality Act (CEQA), CAL. PUB. RES. CODE § 21000 (West 1977), is the latest and most comprehensive guideline of what these policies are. CEQA declares that the policy of the state is to take all action necessary to protect and enhance the environmental quality of the state. It seeks to ensure the long-term protection of the environment. CAL. PUB. RES. CODE § 21000(g) (West 1977).

55. See text accompanying notes 31-36 *supra*.

56. *E.g.*, CAL. WATER CODE § 23195 (West 1956).

57. *Mulcahy v. Baldwin*, 216 Cal. 517, 525, 15 P.2d 738, 741 (1932) (the court found no statutory bar to an irrigation district's refinancing of its bonds).

58. Such circumstances may include, for example, recurring drought cycles or the changing public attitude toward environmental protection.

59. CAL. WATER CODE § 24253 (West Cum. Supp. 1978). Some water agency contracts are exempted from this prior approval. *Id.* This exemption is based on either the small size of the agency, or the small amount of a contract obligation. *Id.* The Treasurer approves contracts where the payment to be made to the United States exceeds one-fourth of one percent of the total assessed value of the land in the district. *Id.*

districts must submit proposed contracts to the State Treasurer<sup>60</sup> for review. Only if the Treasurer finds that the district has the fiscal ability to carry out its contractual obligations<sup>61</sup> will the Treasurer approve them.<sup>62</sup> The legislature also has imposed restriction on water districts' ability to issue bonds<sup>63</sup> and on their right to lay water pipes along a highway.<sup>64</sup> Just as the legislature has asserted its power over state-created water districts by imposing such restrictions, so the legislature should also have the power to adopt limitations on a water district's ability to contract.

Some courts, however, have refused to recognize the power of the legislature to limit a water district's ability to contract with the Bureau of Reclamation. It has been held that since any such limitation might impair the Bureau's sales of water,<sup>65</sup> federal reclamation law preempts state regulation.<sup>66</sup> But the state's power to limit the district's authority should not be restricted merely because the district chooses to contract with the Bureau.<sup>67</sup> State laws regulating the authority of water districts to enter into contracts should not be subject to federal preemption. The United States Supreme Court has revived state sovereignty as a constitutional limitation on federal power.<sup>68</sup> Federal law cannot displace state decisions to provide necessary governmental services in a particular way.<sup>69</sup> Moreover, the state created the water districts to provide needed water supplies for industry, agriculture, and municipalities. The state thus has an interest in regulating water districts as subdivisions of the state.<sup>70</sup> Federal law should not interfere with the power of the state to

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60. *Id.*

61. *Id.*

62. *Id.*

63. *Moody v. Provident Irr. Dist.*, 12 Cal. 2d 389, 394, 85 P.2d 128, 130-31 (1938).

64. *State of California v. Marin. Mun. Water Dist.*, 17 Cal. 2d 699, 705, 111 P.2d 651, 654 (1941).

65. *Environmental Defense Fund v. East Bay Mun. Util. Dist.*, 20 Cal. 3d 327, 340, 527 P.2d 1128, 1134-35, 142 Cal. Rptr. 904, 910-11 (1977).

66. *Id.* at 334, 527 P.2d at 1131, 142 Cal. Rptr. at 907.

67. *Id.* at 346, 527 P.2d at 1138, 142 Cal. Rptr. at 914 (1977) (dissenting opinion).

68. *See National League of Cities v. Usery*, 426 U.S. 833 (1976) (holding that the state determinations of state employees' wages and hours could not be preempted by Congress. The state is sovereign as to these determinations).

69. *Id.* at 847.

70. Regulating the use of water within California is a traditional state function. *See Craig, Cal. Water Law in Perspective*, CAL. WATER CODE p. CII-CVIII (West 1971). Early in its history, California established a system for obtaining an enforceable water right. *Id.* at LX. A water user could obtain a right to continued use of water either by owning riparian land, or by actual use of water. *Irwin v. Phillips*, 5 Cal. 140, 63 Am. Dec. 113 (1855). The system developed into a permit and license process regulated by a state agency, the State Water Resources Control Board. *See CAL. WATER CODE* § 1200-1750 (West 1971).

California has an historic interest in developing its usable water supplies. The state originated the plan to build a vast water project. *See COOPER, AQUEDUCT EMPIRE*

regulate its own subdivisions by displacing state determinations as to the extent of a water district's power to provide water services.

The state has an interest in ensuring that the costs of a contract do not exceed the potential benefits. A broad review of contracts will facilitate the state's interest. A similar review is presently undertaken by the California Department of Water Resources in assessing proposed state water projects.<sup>71</sup> The Department considers "capital and annual costs, cost effectiveness, economic and social benefits, environmental and ecological effects and energy requirements. The least expensive alternative will not necessarily be selected."<sup>72</sup> The state likewise should require consideration of these factors when it reviews proposed water district contracts.<sup>73</sup>

The State Water Resources Control Board is the appropriate state body to review water district contracts with the Bureau. The Board presently reviews all applications for permits to divert and use water under California's appropriative water rights system.<sup>74</sup> The Board approves most applications if it finds that there is sufficient unappropriated water and that the use of water will best serve the public interest.<sup>75</sup> The Board imposes such terms and conditions on the use of water as it determines are necessary to protect the public interest.<sup>76</sup> In doing so it considers the long term social, economic, and environmental interest of the state.<sup>77</sup> By requiring that the Board also review proposed water district contracts, a single agency could determine where and how water is used within the state. The Board has the expertise to determine if a contract puts water to the most beneficial uses and it can balance competing demands for water with respect to overall state needs.<sup>78</sup>

Public participation is important in determining the best use of limited water resources. Interested members of the public can provide in-

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(1968). Dams, canals, and aqueducts would bring water from northern streams to the arid sections of the state. When it could not obtain the necessary funds, the state went to the United States for aid. *Id.* Many of the state's plans developed into the federal Central Valley Project. *Id.* The state built and maintains its own State Water Project which supplies almost two million acre-feet of water to local water districts annually. CAL. DEPT OF WATER RES. BULL. NO. 160-74, at 69 (Nov. 1974).

71. See Dep't of Water Resources, Water Management Policy (May 13, 1977).

72. *Id.*

73. A move toward such a review of water district contracts was recently defeated in the California Legislature. Assembly Bill 337 would have required all proposed contracts to be reviewed by the State Treasurer. The Treasurer would approve contracts only if consistent with the state's policies. Cal. A.B. 337 (1977).

74. CAL. WATER CODE § 1250 (West 1971).

75. *Id.* § 1255.

76. *Id.* § 1253. *But see* United States v. California, 558 F.2d 874 (9th Cir. 1977), reversed in 98 S. Ct. 2985 (1978), (holding that these permit terms could not be imposed on the Bureau of Reclamation).

77. CAL. WATER CODE § 1256 (West 1971).

78. *Id.* § 1257.

formation as to alternative needs and uses for water. The Board presently holds public hearings when it considers applications for water rights permits.<sup>79</sup> These procedures are easily adaptable to a review of water district contracts.

To protect the public's interests in its limited water resources the state should control the conduct of water districts when they contract with the Bureau of Reclamation.

Even with the decision of the United States Supreme Court in *California v. United States*, the state will not be able to fully protect the public's interest in its water resources. The state must be able to secure compliance by all water districts with its regulatory laws. It is for this reason that the state must still consider the use of the *ultra vires* doctrine. The state can best control a district's conduct by using the *ultra vires* doctrine. It can both apply the California Constitution as a limit on a water district's ability to enter into contracts and enact legislation providing for a broad review of proposed water district contracts.

## II. THE SOVEREIGN IMMUNITY PROBLEM

Even if state laws and policies are recognized as a limitation on a water district's ability to enter into contracts with the Bureau, the state still faces a problem in trying to enforce these limitations. The doctrine of federal sovereign immunity may bar suits to declare a water district's contract *ultra vires*.<sup>80</sup> Under this doctrine, if the state brings an action against a water district claiming that the district exceeded its authority in entering into a contract with the Bureau of Reclamation, the district may try to dismiss the suit. The district would argue that the Bureau is a necessary party but cannot be joined because the United States has not waived sovereign immunity.<sup>81</sup> Unless the United States waives its sovereign immunity by consenting to be sued, a court may find that the United States is a necessary party, and may dismiss the suit on the grounds that the United States is an indispensable party.

This article proposes that although the United States is a necessary party in a suit to invalidate water district contracts, the United States can be joined. Section 8 of the Reclamation Act of 1902<sup>82</sup> should act as a limited waiver of immunity when the state alleges that a water dis-

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79. *Id.* § 1350.

80. *See Dugan v. Rank*, 372 U.S. 609 (1963). (holding that the United States could not be made party to a riparian water right holder's suit against water districts and Bureau officials.)

81. Although the Bureau could voluntarily intervene in these suits, it is unlikely that it would do so. The Bureau's rights are protected under the contract without intervention since a judgment in the suit would not be *res judicata* or binding as to the Bureau, and the Bureau can still sue the district under its contract.

82. 43 U.S.C. § 383 (1970).

trict's contract is *ultra vires*. This construction of section 8 permits states to have maximum control over state-created water districts with minimal interference with federal water policy.

The Bureau of Reclamation is indeed a necessary party in a suit by the state to void a water district's contract as *ultra vires*. Necessary parties are those claiming a special interest in the subject matter of the action.<sup>83</sup> They are necessary because, as a practical matter, without them a final determination of the case would impede their ability to protect their interests<sup>84</sup> or would leave persons already parties subject to a risk of inconsistent obligations.<sup>85</sup> The Bureau's absence in a suit by the state against a water district would leave the water district subject to the risk of inconsistent obligations. If such a suit proceeded to judgment without joinder of the Bureau, a ruling that a water district's contract is *ultra vires* would not be binding on the United States. The issue of the validity of the contract thus would not be *res judicata*<sup>86</sup> as to the United States since it has not had its day in court. If a state court, without joinder of the Bureau, does indeed enjoin a water district from completing a contract with the Bureau, however, the district will be subject to suit by the United States for breach of contract.<sup>87</sup> A water district thus could face contradictory rulings as to the validity of the contract. A state court will have already ordered the contract enjoined; a federal court, at the insistence of the United States, could order the contract enforced. Because water districts face this risk of inconsistent obligations, the Bureau is a necessary party.

When a necessary party to an action is not joined, a court must choose between dismissing the suit and proceeding to judgment.<sup>88</sup> In deciding whether to proceed without a necessary party, courts consider whether those who are already parties will be prejudiced, whether the judgment rendered will be inadequate, and whether the plaintiff will

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83. CAL. CODE CIV. PROC. § 389 (West 1973).

84. *Id.*

85. *Id.*

86. *Res judicata* means that a final judgment or decree on the merits by courts of competent jurisdiction is conclusive of the rights of the parties to the suits in all later suits on matters determined in the earlier suit. *American S.S. Co. v. Wickwire Spencer Steel Co.*, 8 F. Supp. 562, 566 (D.C.N.Y. 1934).

87. To be applicable, *res judicata* requires identity of persons and parties to the action. *Freudenreich v. Mayor of Borough of Fairview*, 114 N.J.L. 290, 176 A. 162, 163 (1935). Here, since the United States is not a party to the suit between the state and the water district for breach of contract, it could still bring suit for damages or specific performance. The Bureau's position is likely to be that damages are an inadequate remedy, however, because of the harmful impact on federal water policy by a breach of the contract.

88. CAL. CODE CIV. PROC. § 389 (West 1973). The decision to proceed is a decision that the absent party is merely "necessary" while the decision to dismiss is a decision that the party is "indispensable". *Provident Tradesmen Bank & Trust Co. v. Paterson*, 390 U.S. 102, 118 (1968).

have any forum in which to litigate the cause of action.<sup>89</sup> Courts thus engage in a balancing process. In a suit by the state to invalidate a water district's contract in which the Bureau is not joined, a court would balance the interest of the state in having a forum to challenge the alleged unconstitutional action of its water district against the interest of the water district in having a definitive ruling on the validity of its contract. Many courts have dismissed such actions, holding that the United States is an indispensable party.<sup>90</sup> Courts need not make this decision, however, because section 8 of the Reclamation Act of 1902<sup>91</sup> can act as a limited waiver of sovereign immunity, permitting the Bureau to be joined in suits by the state against a water district.

While no general waiver of federal sovereign immunity exists,<sup>92</sup> section 8<sup>93</sup> should operate as a limited waiver of immunity where a state challenges a water district's contract with the Bureau as *ultra vires*. Sec-

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89. CAL. CODE CIV. PROC. § 389 (West 1973).

90. *E.g.*, the Ninth Circuit Court of Appeals stated in *State v. Rank*, 293 F.2d 340, 360 (1961), *aff'd sub nom.* *Dugan v. Rank*, 372 U.S. 609 (1963), that a suit against a water district must be dismissed because the United States was an indispensable party which could not be joined.

The interests which the court must balance are the state's interest in having a forum in which to litigate its alleged harm and the interest of the water district in having a conclusive determination on the validity of its contracts. The courts should not dismiss these suits but should proceed to judgment. The state's interest in having a forum to litigate its claim is of prime importance.

91. 43 U.S.C. § 383 (1970).

92. In 1952, Congress passed the McCarren Amendment to the Public Lands Statute, 43 U.S.C. § 666 (1970). This amendment states that the United States consents to be joined in a suit for the general adjudication of the rights to the use of a river system. *Id.* The United States consents to be sued in actions for the general adjudication of the rights to the river system where the United States is the owner or is in the process of acquiring water rights. In *Dugan v. Rank*, 372 U.S. 609 (1963), the Supreme Court gave the amendment a narrow reading and confined the waiver of immunity to suits in which the plaintiffs sought to settle their water right as against all other users of the river system. *Id.* See also *Miller v. Jennings*, 243 F.2d 159 (5th Cir. 1957) (the court dismissed a suit for declaratory judgment with respect to water rights where the United States was a necessary party for a determination and had not given its consent to be sued). Thus the impact of Congress' waiver of immunity is slight. See generally 2 CLARK, WATER AND WATER RIGHTS 93-98 (1967).

93. 32 Stat. 390, ch. 1093, § 8, June 17, 1902 (codified at 43 U.S.C. § 383 (1970)). It provides in full that:

Nothing in sections 372, 373, 381, 383, 391, 392, 411, 416, 419, 421, 431, 432, 434, 439, 461, 491 and 498 of this title shall be construed as affecting or intended to affect or to in any way interfere with the laws of any State or Territory relating to the control, appropriation, use, or distribution of water used in irrigation, or any vested right acquired thereunder, and the Secretary of the Interior, in carrying out the provisions of such sections, shall proceed in conformity with such laws, and nothing in such sections shall in any way affect any right of any State or of the Federal Government or of any landowner, appropriator, or user of water in, to, or from any interstate stream or the waters thereof.

*Id.*

tion 8 provides that "nothing [in this title] shall be construed as affecting or intending to affect or in any way interfere with the laws of any state relating to the control, appropriation, use or distribution of water."<sup>94</sup> Although section 8 is not an express waiver of sovereign immunity, such a waiver can be implied. The Reclamation Act of 1902<sup>95</sup> read as a whole seems to indicate that Congress intended section 8 at least to act as a limited waiver of sovereign immunity. Congress foresaw the involvement of state-created water districts in federal water projects from the inception of the Act. Congress authorized the Bureau to enter into contracts to sell water to such districts for resale to local users.<sup>96</sup> The districts were to be the agents of the federal government to collect repayment for the construction and maintenance of the federal projects.<sup>97</sup> Furthermore, Congress expressly stated in section 8 that it did not intend to interfere with state laws concerning the control and distribution of water.<sup>98</sup> Since the water district is the vehicle by which Bureau water will be distributed, section 8 must mean that Congress did not intend to interfere with state laws concerning the water district's ability to distribute water. However, the dismissal of *ultra vires* suits interferes with the enforcement of these very laws because the Bureau is an indispensable party<sup>99</sup> that cannot be joined because of the doctrine of sovereign immunity. To fulfill Congress' intent that the federal government not interfere with such state laws, therefore, section 8 must be construed as an implied waiver of immunity to permit the joinder of the Bureau in state suits against local water districts.

There are two reasons to construe section 8 as a waiver of sovereign immunity. The first justification arises from the legislative history of that section. One of the main reasons section 8 was enacted, according to the United States Supreme Court, was to insure that state law would control the distribution of water to individual landowners once the water had been released from a federal water project.<sup>100</sup> After more than fifty years of uncertainty, section 8 has been construed to mean what it says: state law must control the appropriation, use and distribution of water.<sup>101</sup> The United States Supreme Court has held, however, that a state may not put terms and conditions on the use of water given

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94. *Id.*

95. 43 U.S.C. §§ 371-616 (1970).

96. 43 U.S.C. § 511 (1970). It specifically refers to irrigation districts. However, the 1902 Reclamation Act authorizes the Secretary of the Interior to enter into contracts with other types of water districts to supply water from any project for non-irrigation purposes. *See* 43 U.S.C. § 521 (1970).

97. *See* 43 U.S.C. § 477 (1970). California authorizes the districts to be appointed agents of the United States. CAL. WATER CODE § 23203 (West 1956).

98. 43 U.S.C. § 383 (1970).

99. *See* text accompanying notes 82-88 *supra*.

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

101. *Id.*



to the Bureau of Reclamation if those terms and conditions are inconsistent with the congressional directives establishing the federal project. The only way to reconcile these two holdings is to assume section 8 was intended to operate as a waiver of sovereign immunity. When the state cannot put terms on the use of water by the Bureau, the state can exercise its mandated control only if it can sue those districts which are not complying with state law. The mere fact that a water district has contracted with the Bureau should not insulate it from suit by the state. Therefore, Congress must have intended section 8 to operate as an implied waiver of sovereign immunity.

A second justification for construing section 8 as an implied waiver of immunity is that Congress could not have intended that the Reclamation Act of 1902 be interpreted to disregard state sovereignty. Section 8 by its own terms says that "nothing [in this title] shall be construed as . . . intending to . . . interfere with the laws of any state. . . ." <sup>102</sup> Also, one of the strongest reasons to construe section 8 as a limited waiver of immunity is to preserve the state as an independent organ of government. Without such a construction, the state is powerless to bind the United States in any action it may bring against local water districts. It is thus not able to determine whether it or its subdivisions will enter into contracts with the United States. <sup>103</sup> The state should be sovereign in these decisions, however, for federal law cannot constitutionally displace state decisions to provide necessary governmental services in a particular way. <sup>104</sup> If a state-created water district can avoid the enforcement of state law by association with the Bureau of Reclamation, moreover, the state will effectively be rendered impotent to protect the public's interest in allocating scarce resources and managing the environment. The federal government should not in this way be able to interfere with the decisions of the state as a separate sovereign entity. To prevent this result, section 8 should be construed as a limited waiver of immunity to permit the United States to be joined as a defendant in state suits against local water districts.

#### CONCLUSION

The state must be allowed to determine the circumstances under which a water district may enter into a contract with the Bureau of Reclamation. Unless the state can control the conduct of water districts in entering into contracts, the districts can immunize themselves from state laws and policies designed to protect the public's interests in California's water resources. Without state control, water districts can waste

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102. 43 U.S.C. § 383 (1970).

103. See text accompanying notes 22-28 *supra*.

104. National League of Cities v. Usery, 426 U.S. 833, 842 (1976).

water, even if it means that California's salmon population will be destroyed. The districts can use fresh water instead of reclaiming water, despite the potential loss of a river for white water rafting. The districts can contract for water at any price, even if as a result they must later default on their bonds. Such mishaps must not be allowed to occur. The state should be able to control the district's conduct by the use of the *ultra vires* doctrine. The *ultra vires* doctrine will allow the state to regulate the use of its limited water resources by its water districts for the greatest public good.

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