DEVELOPMENTS IN WATER AND ENVIRONMENTAL LAW

Staging a Comeback — Section 8 of the Reclamation Act

*Amy K. Kelley**

Forced into early retirement in the late 1950's and early 1960's, the section of the 1902 Reclamation Act that recognizes a component of state control in the national reclamation program was revived in 1978. This Article traces the subsequent career of section 8 as it has performed to popular acclaim in the western states.

INTRODUCTION

The United States Congress enacted the Reclamation Act of 1902[1] to allow further development of arid regions in the western states through a series of reclamation projects. Earlier federal laws[2] had encouraged private parties and the states to settle lands and claim water rights. For certain large water projects, however, local resources were simply inadequate.[3] State or territorial laws establishing water rights systems were, nevertheless, in place, and concern over potential displacement of those laws existed. Section 8 of the Act was designed to address this concern:

> Nothing in this Act 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

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* Associate Professor of Law, Gonzaga University School of Law; B.A., College of St. Catherine, 1973; J.D., University of South Dakota, 1977.

[1] Ch. 1093, 32 Stat. 388 (codified as amended in scattered sections of 43 U.S.C.).

[2] *See, e.g.*, Desert Land Act of 1877, 43 U.S.C. §§ 321-323 (1982); Carey Act of 1894, 43 U.S.C. § 641 (1982).

[3] *See, e.g.*, Sax, *Federal Reclamation Law* in 2 WATERS AND WATER RIGHTS § 110.1 (R. Clark ed. 1967).

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> 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 this Act, shall proceed in conformity with such laws, and nothing herein 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 . . . . The right to use the water acquired under the provisions of this Act shall be appurtenant to the land irrigated, and beneficial use shall be the basis, the measure, and the limit of the right.[4]

Congress clearly envisioned a role for the states in the reclamation game, and no major federal-state controversies over the interpretation of section 8 arose for decades.[5] Then, in 1958, *Ivanhoe Irrigation District v. McCracken*[6] held that despite section 8, a state law concerning water distribution could be disregarded. In the states' view, their power over reclamation policy entered a period of continuing decline. In 1978 this decline was not only arrested but reversed. In *California v. United*

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[4] 43 U.S.C. §§ 383, 372 (1982).

[5] There were, however, other federal-state controversies. The complicated history of federal-state relations in western water law has been related frequently and exhaustively. *See, e.g.*, F. TRELEASE, FEDERAL-STATE RELATIONS IN WATER LAW, NATIONAL WATER COMMISSION, LEGAL STUDY NO. 5 (1971); Andrews & Fairfax, *Groundwater and Intergovernmental Relations in the Southern San Joaquin Valley of California: What Are All These Cooks Doing to the Broth?*, 55 U. COLO. L. REV. 145 (1984); Goldberg, *Interposition — Wild West Water Style*, 17 STAN. L. REV. 1 (1964); Hanks, *Peace West of the 98th Meridian — A Solution to Federal-State Conflicts Over Western Waters*, 23 RUTGERS L. REV. 33 (1968); Hostyk, *Who Controls the Water? The Emerging Balance Among Federal, State, and Indian Jurisdictional Claims and its Impact on Energy Development in the Upper Colorado and Upper Missouri River Basins*, 18 TULSA L.J. 1 (1982); King, *Federal-State Relations in the Control of Water Resources*, 37 U. DET. L.J. 1 (1959); Little, *Administration of Federal Non-Indian Water Rights*, 27B ROCKY MTN. MIN. L. INST. 1709 (1982); Martz, *The Role of the Federal Government in State Water Law*, 5 U. KAN. L. REV. 626 (1957); Morreale, *Federal-State Rights and Relations*, in 2 WATERS AND WATER RIGHTS, *supra* note 3, at 1; Morreale, *Federal Power in Western Waters: The Navigation Power and the Rule of No Compensation*, 3 NAT. RESOURCES J. 1 (1963); Sax, *Problems of Federalism in Reclamation Law*, 37 U. COLO. L. REV. 49 (1964) [hereafter Sax, *Federalism*]; Trelease, *Federal Limitations on State Water Law*, 10 BUFFALO L. REV. 399 (1961); Trelease, *Reclamation Water Rights*, 32 ROCKY MTN. L. REV. 464 (1960) [hereafter Trelease, *Reclamation*]; Note, *Federal State Conflicts Over the Control of Western Waters*, 60 COLUM. L. REV. 967 (1960).

Those venturing into this area of the law have been admonished: "If every speaker [writer] who has talked [written] in the last twenty years or so about federal-state relations in water law were laid end to end, it would be a good and merciful thing." Corker, *Federal-State Relations in Water Rights Adjudication and Administration*, 17 ROCKY MTN. MIN. L. INST. 579 (1972).

[6] 357 U.S. 275 (1958).

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States,[7] the United States Supreme Court set the stage for a more significant state law impact upon the reclamation program. In cases decided since 1978,[8] parties have capitalized on the potential to utilize state laws in challenging the Bureau of Reclamation (Bureau), or parties contracting with the Bureau for reclamation waters.

Part I of this Article reviews the history of section 8 over the initial seventy-five years of the reclamation program and examines the decision in *California v. United States*. Parts II and III of the Article analyze the subsequent procedural and substantive development of the law interpreting section 8.

I. Toward a General Deference to State Law

A. *Initial Supreme Court Interpretations of Section 8*

The section 8 directive that the United States should follow state law in dealing with the water for reclamation projects apparently was heeded during the first half-century of reclamation law.[9] Although a direct federal-state battle over the meaning of the section never reached the Supreme Court, the Court, in a number of cases, seemed to ac-

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[7] 438 U.S. 645 (1978). Seven cases entitled *California v. United States* or *vice versa* appear in this Article. The cases will be labeled as follows: United States v. California, 403 F. Supp. 874 (E.D. Cal. 1975), will be *California (District)*. United States v. California, 558 F.2d 1347 (9th Cir. 1977), will be *California (Circuit)*. The United States Supreme Court decision will, not surprisingly, be called *California (Supreme Court)*. The first district court case on remand, denying the state's motion for summary judgment, United States v. California, 521 F. Supp. 491 (E.D. Cal. 1980), will be *California (S.J.)*. The second district court case on remand, United States v. California, 509 F. Supp. 867 (E.D. Cal. 1981), will be *California (District Remand)*. The (presumably) final judicial chapter of the case, United States v. California, 694 F.2d 1171 (9th Cir. 1982), will be *California (Circuit Remand)*. A related case, United States v. California, 529 F. Supp. 303 (E.D. Cal. 1982), will be *California (Related)*.

[8] The major cases are, in addition to the cases on remand listed *supra* note 7, Jicarilla Apache Tribe v. United States, 657 F.2d 1126 (10th Cir. 1981); United States v. Alpine Land & Reservoir Co., 503 F. Supp. 877 (D. Nev. 1980), *aff'd as modified*, 697 F.2d 851 (9th Cir.), *cert. denied*, 104 S. Ct. 193 (1983); Environmental Defense Fund, Inc. v. East Bay Mun. Util. Dist., 26 Cal. 3d 183, 605 P.2d 1, 161 Cal. Rptr. 466 (1980). United States v. State Water Resources Control Bd., Judicial Council Coordination Proc. No. 548 (San Francisco County Super. Ct., Apr. 13, 1984) is an important trial court opinion currently on appeal. A significant pending case is South Delta Water Agency v. United States, Civ. No. S-82-567 MLS (E.D. Cal. Oct. 21, 1983) (denial of motion to dismiss).

[9] *See, e.g.*, United States v. Humboldt Lovelock Irrigation Light & Power Co., 97 F.2d 38, 42 (9th Cir. 1938); Pioneer Irrigation Dist. v. American Ditch Ass'n, 50 Idaho 732, 737, 1 P.2d 196, 201 (1931).

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knowledge the states' authority.[10] Thus, in 1957 one commentator could state "[t]he Bureau of Reclamation is required under § 8 of the Reclamation Act of 1902 to proceed in accordance with established state water law . . . . In recent years the Supreme Court has *unequivocally* reaffirmed that this is the policy the Congress really intended."[11] The states and the Bureau arrived at a *modus vivendi*,[12] and there was no general paranoia that "states' rights" were being trammeled.[13] With great confidence, the California Supreme Court, in *Ivanhoe Irrigation District v. All Parties and Persons*,[14] decided that the federal statutes prohibiting delivery of water to lands in excess of 160 acres[15] did not apply to irrigation districts and water agencies in California because the denial of water to such excess lands would contravene state law.

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[10] *See, e.g.*, United States v. Gerlach Live Stock Co., 339 U.S. 725, 734 (1950) ("Congress directed the Secretary of the Interior to proceed in conformity with state laws, giving full recognition to every right vested under those laws."); Nebraska v. Wyoming, 325 U.S. 589, 614 (1945) ("We have then a direction by Congress to the Secretary of the Interior to proceed in conformity with state laws. . . ."); Nebraska v. Wyoming, 295 U.S. 40, 43 (1935) ("[W]e know as a matter of law, that the Secretary and his agents . . . must obtain permits and priorities for the use of water from the State of Wyoming in the same manner as a private appropriator . . . .").

[11] Towner, *The Role of the State*, 45 CALIF. L. REV. 725, 739 (1957) (emphasis added). It must be stated unequivocally that to even use the word "unequivocal" when referring to the meaning of § 8 is asking to be proved wrong.

[12] Trelease, *Reclamation*, *supra* note 5, at 467-68, describes a state of polite accommodation. *California (District)*, 403 F. Supp. 874, 896-98 (E.D. Cal. 1975), contains numerous examples of Bureau statements relating to its (former) voluntary compliance with state law.

[13] A deft reader of tea leaves or Supreme Court opinions might have anticipated the day of reckoning. In Nebraska v. Wyoming, 325 U.S. 589, 615 (1945), the Court had stated tangentially that "[w]e do not suggest that where Congress has provided a system of regulation for federal projects it must give way before an inconsistent state system." Further, in First Iowa Hydro-Electric Coop. v. Federal Power Comm'n, 328 U.S. 152 (1946), the Court had construed language in the Federal Power Act that was extremely similar to § 8 in not subjecting federal power license applicants to state permitting procedures. One can make a clear case that *First Iowa*, a power case, is not particularly germane in the context of water rights disputes, *see* Sax, *Federalism*, *supra* note 5, at 57-59; *cf.* Corker, Sporhase v. Nebraska ex rel. Douglas: *Does the Dormant Commerce Clause Really Limit the Power of a State to Forbid (1) The Export of Water and (2) the Creation of a Water Right for Use in Another State?* 54 U. COLO. L. REV. 393, 439 (1983). However, the combined issues of power and water continue to arise. *See infra* text accompanying notes 420-46.

[14] 47 Cal. 2d 597, 306 P.2d 824 (1957).

[15] 43 U.S.C. §§ 423e, 431 (1982). The various federal statutes relating to acreage limitations have come to be known as the "excess lands laws." A new excess lands statute has recently been enacted. Reclamation Reform Act of 1982, Pub. L. No. 97-293, 96 Stat. 1263 (codified at 43 U.S.C. §§ 390aa-390zz-1 (1982)).

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The United States Supreme Court unanimously reversed.[16] The Court emphasized the general good relations between the United States and the State of California in the development of the Central Valley Project and noted that the case did not involve a direct confrontation between the two governments, but rather involved a difference in judicial interpretation of the scope of section 8.[17] The Court found that the 160 acre limitation was a "specific and mandatory prerequisite laid down by Congress."[18] The Court did "not believe that the Congress intended § 8 to override the repeatedly reaffirmed national policy" of deterring monopoly expressed in that limitation.[19]

In reaching this conclusion, the Court commented that it was not "passing generally on the coverage of § 8 in the delicate area of federal-state relations in the irrigation field."[20] Many of the Court's general statements, however, went beyond the "specific and mandatory" nature of the excess lands provision. The Court observed that section 8 "merely requires the United States to comply with state law when, in the construction and operation of a reclamation project, it becomes necessary for it to *acquire* water rights or vested interests therein. But the *acquisition* of water rights must not be confused with the operation of federal projects."[21] The Court further said that "[w]e read nothing in § 8 that compels the United States to *deliver* water on conditions imposed by the State."[22]

The Supreme Court next addressed the construction of the reclamation laws in *City of Fresno v. California*.[23] The city asserted that state

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[16] Ivanhoe Irrigation Dist. v. McCracken, 357 U.S. 275 (1958).

[17] *Id.* at 279-80. Indeed, the state joined the federal government in challenging the decision of the state supreme court. *Id.* at 279.

[18] *Id.* at 291.

[19] *Id.* at 292. The leading article on the national policy expressed in the reclamation laws is Taylor, *The Excess Land Law: Execution of a Public Policy*, 64 YALE L.J. 477 (1955).

[20] 357 U.S. at 292.

[21] *Id.* at 291 (emphasis added).

[22] *Id.* at 292 (emphasis added).

[23] 372 U.S. 627 (1963). A companion case to *City of Fresno* was *Dugan v. Rank*, 372 U.S. 609 (1963). *Dugan* affirmed the dismissal of the United States, based on a lack of consent, from a suit by water rights claimants to enjoin the United States and the Bureau from operating a reclamation dam. The claimants were relegated to a Tucker Act suit for compensation for any water rights taken. 372 U.S. at 611. The Tucker Act, 28 U.S.C. § 1346(a)(2) (1982), provides the traditional mechanism for suing the United States for damages in cases "not sounding in tort." It is used for cases in inverse condemnation, in which the United States has allegedly taken property without just compensation. *See, e.g.*, United States v. Dow, 357 U.S. 17, 21 (1958). Although *Dugan* certainly limited the ways in which state claimants could sue the United

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law protected certain water rights from federal government interference.[24] The Court responded that when water rights were acquired by condemnation, section 8 would merely leave "to state law the definition of the property interests, if any, for which compensation must be made."[25] Further, relying on a federal statute[26] providing for an irrigation preference, the Court rejected the city's claim of a state law preference for domestic and municipal uses.[27] The Court also upheld Bureau practices in fixing water rates as "in accordance with congressional mandate."[28]

Under any reading of the cases, claims for state law ascendancy had been defeated. The *coup de grace* was administered in *Arizona v. California*.[29] After many years of squabbling among the Colorado River basin states[30] over the rights to the Colorado River waters, Congress had enacted the Boulder Canyon Project Act in 1928.[31] The passage of the Act did not stop the disputes, but it did provide a new focal point for the states' debates: The Secretary of the Interior. The Act established a water apportionment scheme for the lower Colorado basin states and also delegated to the Secretary the authority to make contracts for water delivery. In *Arizona v. California* the Court acknowledged the power of Congress to so apportion the water, noting that Congress "made it clear that no one should use mainstream waters save in strict compliance with the scheme set up by the Act."[32] In this instance, strict compliance meant acquiring a right by contract from the Secretary.

The challenge to the allocation by contract scheme was based on sec-

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States absent its consent, 372 U.S. at 617-18, it did not directly address § 8.

[24] Fresno's claims were threefold: 1) a claim based on groundwater ownership; 2) a claim based on California's county of origin and watershed protection laws; and 3) a claim based on California's preference for domestic and municipal water uses. Fresno also challenged the rates charged for municipal water. 372 U.S. at 628-29.

[25] *Id.* at 630.

[26] 43 U.S.C. § 485h(c) (1982).

[27] 372 U.S. at 630-31. The county of origin and watershed claims were rejected as being factually inapplicable.

[28] *Id.* at 632.

[29] 373 U.S. 546 (1963).

[30] These are Arizona, California, Colorado, Nevada, New Mexico, Utah, and Wyoming.

[31] Ch. 42, 45 Stat. 1057 (codified as amended at 43 U.S.C. §§ 617-617t (1982)). A vivid history of the Colorado River wrangling, the Project Act, and *Arizona v. California* is found in N. HUNDLEY, JR., WATER AND THE WEST (1975).

[32] 373 U.S. at 579.

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tion 18 of the Project Act[33] and section 8 of the 1902 Act, both providing for noninterference with state laws. The state claimed that the Secretary was bound to follow the state laws of prior appropriation when contracting for delivery of water.[34] Citing the general language from *Ivanhoe*,[35] the Court rejected the argument and held that "the Secretary in choosing between users within each State and in settling the terms of his contracts is not bound by these sections to follow state law."[36] The Court further stated that "[w]here the Government, as here, has . . . undertaken a comprehensive project for the improvement of a great river and for the orderly and beneficial *distribution* of water, there is no room for inconsistent state laws."[37]

In retrospect, the language of the opinion left the states some room to maneuver. For instance, the Court noted that "the States were generally free to exercise some jurisdiction over these waters before the [Project] Act was passed"[38] and, the 1902 Act itself allowed "States to do things not inconsistent with the Project Act or with federal control of the river, for example, regulation of the use of tributary water and protection of present perfected rights. What other things the States are free to do can be decided when the occasion arises."[39] The reaction to the case at the time was mixed.[40] Only occasional voices, however, argued

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[33] 43 U.S.C. § 617q (1982).

[34] The United States Supreme Court has recently summarized the doctrine of prior appropriation as follows: "[W]ater rights are acquired by diverting water and applying it for a beneficial purpose. A distinctive feature of the prior appropriation doctrine is the *rule of priority*, under which the relative rights of water users are ranked in the order of their seniority." Colorado v. New Mexico, 459 U.S. 176, 179 n.4 (1982) (emphasis in original). *See generally* W. HUTCHINS, WATER RIGHTS LAWS IN THE NINETEEN WESTERN STATES (1971). The significance of the state's claim in *Arizona* is that water rights determined under the prior appropriation doctrine could differ markedly from those determined by secretarial contract.

[35] *See supra* text accompanying notes 21-22.

[36] 373 U.S. at 586.

[37] *Id.* at 587 (emphasis added) (footnote omitted). Congress, in adopting the Boulder Canyon Project Act, chose to recognize certain water rights, called "present perfected rights," created "by the actual diversion of a specific quantity of water" as of June 25, 1929. Arizona v. California, 376 U.S. 340, 341 (1964). Those rights, of course, were obtained under state law, but were preserved by congressional choice.

[38] 373 U.S. at 587.

[39] *Id.* at 588 (footnote omitted).

[40] Haber, Arizona v. California — *A Brief Review*, 4 NAT. RESOURCES J. 17 (1964), was generally favorable in tone. Trelease, Arizona v. California: *Allocation of Water Resources to People, States and Nation*, 1963 S. CT. REV. 158, leaned toward the critical. Meyers, *The Colorado River*, 19 STAN. L. REV. 1 (1966), lacked any enthusiasm whatsoever: "There is not much to support the majority's conclusion, either

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that the obituary notices for section 8 might be premature.[41] The more common view was that "after sixty years, § 8 is read out of the reclamation law."[42]

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on the face of the statute or in its legislative history." *Id.* at 58. The degree of Meyers' disdain was matched only by Justice Douglas' dissent in the case, where he decried "the baldest attempt by judges in modern times to spin their philosophy into the fabric of the law, in derogation of the will of the legislature." 373 U.S. at 628 (Douglas, J., dissenting).

[41] One commentator noted:

> [I]f we are to conclude anything about the intent of Congress, the historically proper view seems to be that where Congress has a federal reclamation policy, it wants it enforced and that section 8 can only properly be read to defer to state law insofar as that law is consistent with federal policy. Plainly neither the veto theory nor the proprietary theory accurately describes the intent of Congress in enacting the Reclamation Act as their proponents have claimed, and both theories should be rejected.

Sax, *Federalism*, *supra* note 5, at 68.

The "veto theory" is the hard line position of the states that § 8 meant the state had absolute "veto" power over reclamation operations. The "proprietary theory" is the hard line position of the United States that *Ivanhoe*, *Fresno*, and *Arizona* really meant nothing more than that the Bureau would have to compensate parties when it acquired water rights defined as protected property rights under state law. *Id.* at 57-68.

In stressing "consistency" as the proper test in section 8 cases, Professor Sax accurately predicted subsequent legal developments. *See infra* text accompanying note 82.

[42] Trelease, *supra* note 40, at 192. One commentator, more expansively, argued that

> [t]he practical effect of this decision is to eliminate the operation of state law under the Reclamation Act in all cases other than those in which the Government takes state-created water rights by eminent domain or inverse condemnation. Since it is unlikely that county-of-origin and watershed protection statutes create vested property rights compensable under state law, the federal government can ignore them with impunity. Similarly, the Bureau of Reclamation is no longer required to file with the state water resources agency to secure appropriative rights for its irrigation projects; the decision empowers the Bureau to seize the water it desires, leaving the state powerless to enforce its laws and leaving private proprietors with an action in the Court of Claims. The decision thus reverses sixty-four years of administrative interpretation and practice.

Meyers, *supra* note 40, at 64 (footnotes omitted).

The decade from 1955 until 1965 was one of *sturm und drang* for western state water lawyers in a number of ways. In addition to the § 8 cases, the case of Federal Power Comm'n v. Oregon, 349 U.S. 435 (1955), opened the doors for the United States to claim water rights for reserved federal lands other than Indian reservations. This case, the *Pelton Dam* case, caused such consternation that multiple bills to restrict or abolish such federal reserved water rights claims were introduced. None of the bills passed. The story of this chapter in water law history is related in Corker, *Water Rights and Federalism — The Western Water Rights Settlement Bill of 1957*, 45 CALIF. L. REV. 604 (1957); Morreale, *Federal-State Conflicts Over Western Waters — A Decade of Attempted "Clarifying Legislation,"* 20 RUTGERS L. REV. 423 (1966);

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B. The Road to California v. United States

Despite the dire predictions following *Arizona v. California*, the Supreme Court decisions did not obligate the Bureau to flaunt federal authority before the various state agencies charged with administering water rights or water quality. Further, the cases indicated a distinction between the acquisition of water rights and the distribution of water, with a greater emphasis on compliance with state law in the former instance.[43] For a number of years the Bureau continued to seek appropriations under state permit procedures.[44] Certainly, however, governmental agencies are not immune from the observation that "power tends to corrupt and absolute power corrupts absolutely,"[45] and at least in the view of California state water officials, the Bureau eventually became extremely cavalier. The good federal-state relations noted by the Court in *Ivanhoe* deteriorated markedly.[46] Several disputes over the

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Sato, *Water Resources — Comments Upon the Federal-State Relationship*, 48 CALIF. L. REV. 43 (1960). A recent review of proposals to curtail reserved rights is found in Little, *supra* note 5, at 1772-89.

A similar uproar occurred in the late 1970's, when Solicitor's Opinion No. M-36914, Federal Water Rights of the National Park Service, Fish and Wildlife Service, Bureau of Reclamation and the Bureau of Land Management, 86 I.D. 553 (1979), was issued, raising the spectre of yet another type of federal water right, the nonreserved right. *See, e.g.*, Simms, *National Water Policy in the Wake of* United States v. New Mexico, 20 NAT. RESOURCES J. 1 (1980); Comment, *Federal Non-Reserved Water Rights*, 15 LAND & WATER L. REV. 67 (1980); Note, *Federal Non-Reserved Water Rights: Fact or Fiction?*, 22 NAT. RESOURCES J. 423 (1982). The claim for nonreserved rights was weakened in a Supplement, 88 I.D. 253 (1981), and rescinded in yet another Supplement, Nonreserved Water Rights — United States Compliance With State Law, 88 I.D. 1055 (1981), so for the duration of the Reagan Administration, at least, this particular ghost has been laid to rest.

[43] *See supra* text accompanying notes 21-22, 37.

[44] Sax, *Federalism, supra* note 5, at 53 n.25.

[45] Letter from Lord Acton to Bishop Mandell Creighton (Apr. 5, 1887).

[46] A chronicle of the feud between the Bureau and the California State Water Resources Control Board and its predecessor board is contained in Walston, *State Regulation of Federal Water Appropriations: The California Experience*, 20 ROCKY MTN. MIN. L. INST. 721 (1975); Note, *Allocation of Water From Federal Reclamation Projects: Can the States Decide?*, 4 ECOLOGY L.Q. 343 (1975).

Even in the most strained times in federal-state relations over water, however, millions of dollars have been spent in the reclamation program, tons of concrete have been poured, and incalculable millions of acre feet of water have been delivered without resort to verbal fisticuffs. This Article focuses on the instances when there has been discord, but that is not a universal condition.

Further, in many of the cases involving bitter disputes over alleged attempts to violate state law, states, state agencies, or municipalities have not even been complaining parties. This is most vividly demonstrated in Jicarilla Apache Tribe v. United States,

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applicability of section 8 to conduct of the Bureau or its contracting entities reached the courts in the mid-1970's. Although none of the decisions confirmed the gloomy prediction that section 8 had been totally "read out" of the law, in each case the courts rejected the specific state law claims.

In *County of Trinity v. Andrus*,[47] the county raised numerous state law challenges to the Bureau's planned operation of the Trinity River Division of the Central Valley Project during the drought of 1976-77. The federal district court indicated that the delegated authority of the Secretary of the Interior was not sufficiently specific to override certain state rights.[48] In addition, the State Water Rights Control Board could have correctly determined that waters protected by the California county of origin statutes were exempt from appropriation by the United States.[49] But, when water is available, "*state agencies* may not guard such [state] rights by means of permit conditions or other enforcement devices which interfere with the operation and control of federal facilities."[50] The authority to protect such rights would be vested solely in the Secretary.[51]

The California Supreme Court attempted to reconcile the *Ivanhoe*, *Fresno*, and *Arizona* cases into a workable definition of state authority over reclamation projects in *Environmental Defense Fund, Inc. v. East Bay Municipal Utility District*.[52] The plaintiff sought invalidation of a water purchase contract between the utility district and the Bureau because the contract contemplated both the choice of a diversion point for

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657 F.2d 1126 (10th Cir. 1981), discussed *infra* text accompanying notes 318-36, in which the Tribe sued the Bureau, alleging that a certain water agreement violated New Mexico law. Albuquerque and the state intervened on behalf of the United States.

[47] 438 F. Supp. 1368 (E.D. Cal. 1977).

[48] *Id.* at 1385.

[49] *Id.* The court was careful to draw the distinction between appropriation and condemnation.

[50] *Id.* (emphasis added). The district and court of appeals decisions in United States v. California, 403 F. Supp. 874 (E.D. Cal. 1975), and 558 F.2d 1347 (9th Cir. 1977), *see infra* text accompanying notes 61-70, had been rendered and were cited in *Trinity*, 438 F. Supp. at 1385.

[51] 438 F. Supp. at 1385-86. The court decided that the Bureau, through the Secretary of the Interior, had "properly concluded" that the county's claims under the state law were unjustified.

[52] 20 Cal. 3d 327, 572 P.2d 1128, 142 Cal. Rptr. 904 (1977), *vacated*, 439 U.S. 811 (1978). The California Court of Appeals decision is found in Environmental Defense Fund, Inc. v. East Bay Mun. Util. Dist., 125 Cal. Rptr. 601 (1975) (opinion depublished by California Supreme Court). The subsequent fate of *East Bay* is discussed *infra* text accompanying notes 310-17.

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the water and the construction of a canal that would constitute unreasonable diversion methods under California law.[53] The complaint also alleged that the utility district had a duty to reclaim waste water.

The utility district argued the federal "proprietary" theory,[54] which limits state law to the definition of compensable property rights. The plaintiffs argued that section 8 allowed states to determine the conditions under which parties could receive water. The California Supreme Court found that *Ivanhoe*, *Fresno*, and *Arizona* did not support precisely either position. *Ivanhoe* and *Fresno*, the court stated, established a rule that a "specific and mandatory congressional directive"[55] may not be defeated by state laws. *Fresno* extended this to include a rule that state laws may not "impair powers delegated to the administrator."[56] *Arizona* then established that "Congress preempts state laws not only when direct conflict exists but also when danger exists in that state law either interferes with the secretary's expressly delegated powers, frustrates operation of the project or limits the benefits of the project."[57] In *East Bay*, the court concluded that federal law prevailed with regard to the diversion point and the canal; otherwise there would be interference with a congressionally-authorized project over which the Secretary and Bureau had been given control.[58] State law still governed the waste water issue, however, as it did not interfere with the Bureau's contract; that is, it did not involve federal activity.

C. California v. United States

Given the reluctance of the California Supreme Court to essay a strong pro-state interpretation of section 8 after being reversed in *Ivanhoe*, continuing victories for the United States would not have been surprising. The entire Central Valley Project was a hotbed of dispute and the Bureau was enjoying another triumph in the lower courts in litigation over the New Melones Reservoir. As part of the Central Valley Project, a general "plan of improvement" on the Stanislaus River had been authorized in 1944, and this New Melones Project authoriza-

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[53] 20 Cal. 3d at 333, 572 P.2d at 1130, 142 Cal. Rptr. at 906. The state laws on which the complaint was founded, CAL. CONST. art. X, § 2 and CAL. WATER CODE § 100 (West 1971), both related to beneficial use.

[54] *See supra* note 41.

[55] 20 Cal. 3d at 336, 572 P.2d at 1132, 142 Cal. Rptr. at 908.

[56] *Id.*

[57] *Id.* at 338, 572 P.2d at 1134, 142 Cal. Rptr. at 910.

[58] *Id.* at 340, 572 P.2d at 1135, 142 Cal. Rptr. at 911.

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tion was modified in 1962.[59] The Army Corps of Engineers began constructing the dam, and the Bureau actually filed permit applications to appropriate direct flow and to impound 2.4 million acre feet of water in the reservoir. The Bureau was affronted in 1973, when the California State Water Resources Control Board approved the applications only after imposing multiple conditions.[60] Proving that Hell hath no fury like a bureaucrat scorned, the United States filed suit in federal district court. The government sought a declaratory judgment that it need not comply with the state's permitting procedures to appropriate water; that the state board must grant the Bureau's voluntary application for a permit if any unappropriated waters were available; and that the board could not impose any conditions not specifically authorized by federal law. In response, the State of California raised several procedural[61] and substantive issues, the most important of which was section 8.

Few methods of interpreting section 8 have not been tried in the last ten years. The district court's approach furthered the trend of federal dominance begun in *Ivanhoe.* In *United States v. California — California (District),*[62] the court reviewed the legislative history and

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[59] Act of Dec. 22, 1944, ch. 665, § 10, 58 Stat. 887, 901; Flood Control Act of 1962, Pub. L. No. 87-874, § 203, 76 Stat. 1173, 1191-92.

[60] California State Water Resources Control Board Decision No. 1422 (1973). The decision is reprinted as an appendix to United States v. California (*California (District Remand)*), 509 F. Supp. 867, 888 (E.D. Cal. 1981).

The Water Resources Control Board, concerned about numerous matters, placed 25 conditions upon the permits. The Bureau had surplus water from other sources. Some of the water it sought to impound was for use outside the counties in the basin of origin, but there was no actual showing of need for such out of basin use. Full impoundment, primarily needed for generation of hydroelectric power, would destroy a stretch of the Stanislaus River known for exceptional white-water recreation and stream fishing. The conditions addressed those concerns and are discussed in depth *infra* text accompanying notes 266-73.

The Board was not the only entity concerned about the impact of the New Melones Dam. Environmentalists had tried unsuccessfully to enjoin construction of the dam itself (as opposed to the impounding of waters) in Environmental Defense Fund, Inc. v. Armstrong, 356 F. Supp. 131 (N.D. Cal.), *aff'd*, 487 F.2d 814 (9th Cir. 1973), *cert. denied*, 416 U.S. 974 (1974).

[61] These procedural issues were resolved in favor of the United States at the district court level and were not further disposed of by the court of appeals or Supreme Court. They were addressed on remand and are discussed in part II of this Article.

[62] 403 F. Supp. 874 (E.D. Cal. 1975). This case was the subject of a law review article, Attwater, *State Control Over Federal Reclamation Projects*, 8 NAT. RESOURCES LAW. 281 (1975), before the decision was issued. Mr. Attwater, chief counsel for the California Water Resources Control Board, was hardly an impartial commenta-

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previous judicial interpretations of section 8, other federal statutes that California alleged demonstrated congressional intent to defer to state laws, and a history of administrative actions offered to prove Bureau recognition of an obligation to defer. The court concluded that as a matter of comity the Bureau must apply for a state permit, but that if water was available, the permit would necessarily issue.[63] Finally, the court found that:

> Nothing contained in Section 8 of the 1902 Act or in any other presently existing federal law, regulation or administrative directive allows the California State Water Resources Control Board to impose any terms or conditions in permits issued to the United States as a result of applications to the Board by the United States for allocations of unappropriated water.[64]

The Ninth Circuit Court of Appeals affirmed in *California (Circuit)*.[65] The court held that section 8, not comity, required the Bureau to apply for a permit, but otherwise agreed with the district court opinion. The court of appeals also cited two recent Supreme Court decisions to support its decision.[66] Those cases interpreted sections of the Clean Air Act[67] and the Water Pollution Control Act Amendments of 1972[68] that directed compliance by federal agencies or installations with state requirements to the same extent as any person. The Supreme Court had held in the Clean Air Act case that it was unable to find "any clear and unambiguous declaration by the Congress that federal installations

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tor, but he does clearly articulate the state's concerns:

> [I]n requiring federal compliance with state appropriation laws, section 8 is based on sound public policy. Since the Bureau has the power to seize appropriated waters without regard to state law [a reference to *Fresno*], the State will have no opportunity to participate in decisions concerning the use of water distributed from federal projects unless it controls the unappropriated water sought by the Bureau. With such control, the State can jointly share, with the Bureau, the responsibility for managing the State's vital water resource. Without such control, the State will be powerless to share in this responsibility, even though its water resource has a dramatic impact on the quality of the State's environment and the nature and pace of its growth.

Id. at 291.

[63] 403 F. Supp. at 902.

[64] *Id.*

[65] 558 F.2d 1347 (9th Cir. 1977); *see* Comment, *Federal Appropriation and the Reclamation Act of 1902*, 57 NEB. L. REV. 403 (1978).

[66] EPA v. California, 426 U.S. 200 (1976); Hancock v. Train, 426 U.S. 167 (1976).

[67] Clean Air Act § 118, 42 U.S.C. § 1857f (1982).

[68] Water Pollution Control Act Amendments of 1972 § 313, 33 U.S.C. § 1323 (1976) (amended 1977; current version at 33 U.S.C. § 1323 (1982)).

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may not perform their activities unless a state official issues a permit."[69] In the Water Act case, this concept was stated in the affirmative: "federal installations are subject to state regulations only when and to the extent that congressional authorization is clear and unambiguous."[70] The court of appeals interpreted section 8 similarly.

The Supreme Court decision, *California v. United States — California (Supreme Court)*,[71] forms the basis of the current interpretation of section 8. A clear understanding of the precise issues before the Court is necessary. The issue of congressional power to disregard state laws in the pursuit of a reclamation program was not in question. Indeed, such power had been conceded in the district court proceedings.[72] The issue of ownership of water or water rights also was not before the Court. Thus, two questions causing inestimable confusion[73] were merci-

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[69] Hancock v. Train, 426 U.S. 167, 180 (1976).

[70] EPA v. California, 426 U.S. 200, 211 (1976).

[71] 438 U.S. 645 (1978). The articles analyzing the case are Walston, *Reborn Federalism in Western Water Law: The New Melones Dam Decision*, 30 HASTINGS L.J. 1645 (1979); Note, *State Control Over the Reclamation Waterhole: Reality or Mirage?*, 78 MICH. L. REV. 227 (1979) [hereafter Note, *State Control*]; Note, *Water Law — A State May Condition the Distribution of Water from a Federal Reclamation Project if Consistent with Specific Congressional Directives* — California v. United States, 52 TEMP. L.Q. 403 (1979) [hereafter Note, *A State May Condition*]; Note, *Water Resources — Reclaiming State Power Over Federal Reclamation Projects* — California v. United States, 54 WASH. L. REV. 743 (1979) [hereafter Note, *Reclaiming State Power*]; Comment, *Federal Water Projects: After* California v. United States, *What Rights Do the State and Federal Governments Have in the Water?* 11 U.C. DAVIS L. REV. 401 (1978); Comment, *Breathing New Life into Section 8 of the 1902 Reclamation Act:* California v. U.S., 50 U. COLO. L. REV. 207 (1979) [hereafter Comment, *Breathing New Life*].

[72] 403 F. Supp. 874, 883 (E.D. Cal. 1975); *see also California (Circuit Remand)*, 694 F.2d 1171, 1174-75 (9th Cir. 1982).

[73] Most authorities acknowledge multiple potential bases for federal supremacy in the area of water, e.g., the navigation power under the commerce clause, or even "pure" commerce clause power over nonnavigable water; taxing and spending for the general welfare; and the treaty and war powers where applicable. *See generally* F. TRELEASE, *supra* note 5, at 39-48. For the commerce clause statement, see Sporhase v. Nebraska, 458 U.S. 941 (1982). The power to spend for the general welfare is most frequently cited as the foundation for the reclamation program.

Another possible basis for federal control of western water is the property clause, and that brings us to the issue of water ownership. "Ownership" has been a perplexing concept in the setting of reclamation water rights since Ickes v. Fox, 300 U.S. 82 (1936), and it is not particularly useful to think in terms of ownership. Sax, *supra* note 3, § 117.3; *cf.* Trelease, *Government Ownership and Trusteeship of Water*, 45 CALIF. L. REV. 638 (1957). The problem has been most recently addressed in Nevada v. United States, 103 S. Ct. 2906 (1983).

Although it is probably pointless to argue over federal supremacy or whether water

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fully absent from the case.

Instead, the question before the Court was whether, in light of section 8, Congress had chosen to disregard state laws. The Bureau could have narrowed the issue in the lower courts by objecting only to those conditions ordered by the state board impeding the New Melones Project. The United States, however, had also argued successfully for a broader proposition: the state board could impose no conditions whatsoever.[74] It maintained this absolutist position before the Supreme Court:

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rights are "owned," such issues are the type that foment argument. The Sagebrush Rebellion predominantly concerned federal power over and ownership of public lands in the western states, but concern over control of western waters was a contributing factor. Recent articles on the Sagebrush Rebellion or public lands law include Babbitt, *Federalism and the Environment: An Intergovernmental Perspective of the Sagebrush Rebellion*, 12 ENVTL. L. 847 (1982); Brodie, *A Question of Enumerated Powers: Constitutional Issues Surrounding Federal Ownership of the Public Lands*, 12 PAC. L.J. 693 (1981); Coggins, *Some Disjointed Observations on Federal Public Land and Resources Law*, 11 ENVTL. L. 471 (1981); Coggins, Evans & Lindberg-Johnson, *The Law of Public Rangeland Management I: The Extent and Distribution of Federal Power*, 12 ENVTL. L. 535 (1982); Engdahl, *Some Observations on State and Federal Control of Natural Resources*, 15 HOUS. L. REV. 1201 (1978) [hereafter Engdahl, *Some Observations*]; Engdahl, *State and Federal Power Over Federal Property*, 18 ARIZ. L. REV. 283 (1976); Frank & Eckhardt, *Power of Congress Under the Property Clause to Give Extraterritorial Effect to Federal Lands Law: Will "Respecting Property" Go the Way of "Affecting Commerce?"*, 15 NAT. RESOURCES LAW. 663 (1983); Gaetke, *Congressional Discretion Under the Property Clause*, 33 HASTINGS L.J. 381 (1981); Leshy, *Unraveling the Sagebrush Rebellion: Law, Politics and Federal Lands*, 14 U.C. DAVIS L. REV. 317 (1980); Mollison & Eddy, Jr., *The Sagebrush Rebellion: A Simplistic Response to the Complex Problems of Federal Land Management*, 19 HARV. J. ON LEGIS. 97 (1982); Titus, *The Nevada "Sagebrush Rebellion" Act: A Question of Constitutionality*, 23 ARIZ. L. REV. 263 (1981); Wald & Temkin, *The Sagebrush Rebellion: The West Against Itself — Again*, 2 UCLA J. ENVTL. L. & POL'Y 187 (1982); Wilkinson, *Cross-Jurisdictional Conflicts: An Analysis of Legitimate State Interests on Federal and Indian Lands*, 2 UCLA J. ENVTL. L. & POL'Y 145 (1982); Wilkinson, *The Field of Public Land Law: Some Connecting Threads and Future Directions*, 1 PUB. LAND L. REV. 1 (1980); Note, *The Property Power, Federalism, and the Equal Footing Doctrine*, 80 COLUM. L. REV. 817 (1980); Note, *The Sagebrush Rebellion: Who Should Control the Public Lands*, 1980 UTAH L. REV. 505.

With regard to water rights in the context of the "Rebellion," consider the following: "The existence of the immense potential powers of Congress to upset these [state] property institutions makes it preferable for the Federal Government to expressly affirm the 'deference to state water law' doctrine by directly granting the ownership of water resources to the states." Backman, *Public Land Law Reform — Reflections From Western Water Law*, 1982 B.Y.U. L. REV. 1, 46.

[74] The question whether the Bureau was initially required to apply for a permit was not before the Court. The only issue on review was the holding below "that California cannot condition its allocation of water to a federal reclamation project." 438 U.S. at 647.

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"The United States suggests that . . . recent legislative enactments have subjected reclamation projects 'to a variety of federal policies that leave *no room* for state controls on the operation of a project or on the choice of uses it will serve.' "[75]

Thus, the Supreme Court was faced with a sweeping claim for federal control. Hindsight always provides superior perception, but a serious strategic error had been made. First, the Court was asked to give the Bureau carte blanche in developing reclamation projects. The request for such a broad ruling in favor of the United States invited an equally broad ruling for the State of California should it prevail. Second, because the United States framed the disputed issues so generally, the Court was insulated from the realities of planning, constructing, and operating reclamation projects. The problem of deciding how significantly state requirements would be allowed to affect the New Melones Dam or any other federal undertaking would be left to the lower courts.

The Supreme Court could instead relax and wax eloquent about more abstract principles, like "cooperative federalism,"[76] which it did,

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[75] 438 U.S. at 677-78 (citing the Brief for the United States at 89) (emphasis added).

[76] *Id.* at 650. This Article makes no pretense of delivering a comprehensive view of the federalism debate. The term "federalism" is not easily defined, causing many scholars simply to agree to disagree. There have been disagreements over the extent to which the concept should be "dynamic" (evolutionary) and the role to be played by the political and judicial branches of governments in defining its parameters. Some commentators suggest that the courts should vacate the field. *See, e.g.*, Choper, *The Scope of National Power Vis-a-Vis the States: The Dispensability of Judicial Review*, 86 YALE L.J. 1552 (1977). *Contra* Freeman, *Dynamic Federalism and the Concept of Preemption*, 21 DE PAUL L. REV. 630 (1972). Recent studies relating the history of federalism theory in the United States have emphasized the need to define federalism through the political process, reserving only a limited judicial role. *See, e.g.*, Kaden, *Politics, Money and State Sovereignty: The Judicial Role*, 79 COLUM. L. REV. 847 (1979); McGinley, *Federalism Lives! Reflections on the Vitality of the Federal System in the Context of Natural Resource Regulation*, 32 U. KAN. L. REV. 147 (1983); Tarlock, *National Power, State Resource Sovereignty and Federalism in the 1980's: Scaling America's Magic Mountain*, 32 U. KAN. L. REV. 111 (1983); Note, *Separating Myth from Reality in Federalism Decisions: A Perspective of American Federalism — Past and Present*, 35 VAND. L. REV. 161 (1982).

Whatever the proper institutional roles are in defining federalism, ultimately one must address the issue of allocation of power itself. Because this Article addresses the impact of *California (Supreme Court)*, the inquiry is what view of federalism was pronounced therein. "Cooperative federalism" traditionally evoked the concept of a partnership approach to government, stressing the interrelationships and interdependence at state and national levels. This is the famous "marble cake" analogy. *See generally* Fairfax, *Old Recipes for New Federalism*, 12 ENVTL. L. 945, 957 (1982). The individual identities of the states tend to get lost in a marble cake, however, and the pro-

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in an opinion by Justice Rehnquist. The decision traced a long history of federal statutes that demonstrated "the consistent thread of purposeful and continued deference to state water law by Congress."[77] The Court analyzed the Reclamation Act of 1902 in that context, and its review of the Act's legislative history established that state law controls in two areas: first, the appropriation, purchase, or condemnation of water rights; second, the distribution of waters once released from a reclamation dam.[78]

The Supreme Court then reviewed the previous case law interpreting section 8. *Ivanhoe* and *Fresno*, the Court stated, decided only whether state law could override "specific congressional directives to the Secretary of the Interior as to the operation of federal reclamation projects."[79] Statements in those cases not directly related to the conflict with specific congressional directives were disavowed as dicta.[80] The Court limited the scope of its *Arizona* decision "because of the unique size and multistate scope of the [Boulder Canyon] Project."[81]

After narrowing its previous decisions, the Court traced the consistent historical administrative practice of compliance with state law. The Bureau's broad contention that the state could impose no conditions was rejected on all fronts: legislative history, administrative history, and stare decisis. The test for invalidity of state conditions, the Court concluded, was one of inconsistency with specific, explicit, and clear congressional directives.[82]

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nouncements of Justice Rehnquist in *California (Supreme Court)* and other cases are more indicative, despite his use of the term "cooperative federalism," of a "dual federalism" approach. There are delineated spheres of authority for the state and national governments, and "dual federalism" safeguards the states' interests within their spheres. Tarlock, *supra*, at 116, 118; *see also infra* note 104. Therefore, while the author prefers a view of federalism that advocates protection of individual civil rights and freedoms as the primary goal, *see e.g.*, Huffman, *Governing America's Resources: Federalism in the 1980's*, 12 ENVTL. L. 863 (1982); *cf.* Note, *Recent Tenth Amendment Decisions — Judicial Retreat from a Metaphysical Universe and a Return of Federalism Analysis to the Congressional Forum*, 1983 UTAH L. REV. 359, the controversies over § 8 continue to be cast in terms of "states' rights" versus "federal interests."

[77] 438 U.S. at 653.

[78] *Id.* at 665-67.

[79] *Id.* at 670.

[80] *Id.* at 672-74.

[81] *Id.* at 674.

[82] Language to that effect can be found *id.* at 665 and on nearly every page from 668-79.

Clearly, the opinion in *California (Supreme Court)* meant that the decision in Trinity County v. Andrus, 438 F. Supp. 1368 (E.D. Cal. 1977), discussed *supra* text

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The reception to the *California (Supreme Court)* decision was predominantly enthusiastic, with only the dissenting Justices, one commentator,[83] and the Bureau strongly opposed.[84] A victory for "states' rights," or perhaps, more precisely, a retreat from potential total federal domination, was clearly one explanation for the favorable response. Proponents of this view did not look upon the case as a bold new step, but rather a return to an orthodox interpretation of section 8 after twenty years of aberration commencing with *Ivanhoe*.[85]

A concern for environmental protection, however, appears at least equally responsible for the positive response to *California (Supreme Court)*. Many commentators, in fact, stressed that the decision was correct because it allowed the State of California to address legitimate environmental concerns.[86] The environmentalist position regarding reclamation projects contains some substance.[87] The State Water Resources

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accompanying notes 47-51, had been in error with reference to its absolute rejection of permit conditions. The drought was over, however, so that particular controversy had passed.

[83] Clark, *Comments on* United States v. New Mexico *and* California v. United States, 11 ROCKY MTN. MIN. L. FOUND. WATER L. NEWSLETTER, No. 3, 1978, at 4.

[84] The Bureau has been strenuously resisting the application of the decision to its operations. *See infra* parts II and III. The Bureau has been considered intransigent by some writers. One commentator noted that the Bureau's resistance to *California (Supreme Court)* has "generated widespread resentment," 16 ROCKY MTN. MIN. L. FOUND. WATER L. NEWSLETTER, No. 2, 1983, at 7. Another commented upon the "continued reluctance of the United States to concede applicability of state law." 16 ROCKY MTN. MIN. L. FOUND. WATER L. NEWSLETTER, No. 3, 1983, at 3.

[85] *See, e.g.*, Walston, *supra* note 71, at 1680 ("The New Melones decision results in a new federalism in the field of reclamation, or, more exactly, a rebirth of the old federalism contemplated by Congress in 1902."). Mr. Walston had shepherded the entire case through the courts for the State of California and deserved a moderate celebration before flinging himself back into the trenches to handle the case on remand.

[86] *See, e.g.*, Comment, *Breathing New Life*, *supra* note 71, at 223; Note, *A State May Condition*, *supra* note 71, at 422-23; *see also infra* note 94; *cf.* Sisk, *State Environmental Protection versus the Commerce Power*, 13 U. RICH. L. REV. 197 (1979); Note, *State Environmental Protection Legislation and the Commerce Clause*, 87 HARV. L. REV. 1762 (1974).

[87] The Bureau has been sued numerous times for alleged failures to comply with federal environmental laws. *See, e.g.*, Environmental Defense Fund, Inc. v. Higginson, 655 F.2d 1244 (D.C. Cir. 1981); Badoni v. Higginson, 638 F.2d 172 (10th Cir. 1980), *cert. denied*, 452 U.S. 954 (1981) ; Colorado River Water Conservancy Dist. v. United States, 593 F.2d 907 (10th Cir. 1977); Trout Unlimited v. Morton, 509 F.2d 1276 (9th Cir. 1974). Occasionally, the suits have been successful. *See, e.g.*, Environmental Defense Fund, Inc., v. Andrus, 596 F.2d 848 (9th Cir. 1979); Save the Niobrara River Ass'n v. Andrus, 483 F. Supp. 844 (D. Neb. 1979); National Wildlife Fed'n v. Andrus, 440 F. Supp. 1245 (D.D.C. 1977). The conclusion that the Bureau is not overly solici-

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Control Board clearly wore the white hat in the New Melones dispute because of the Stanislaus River's unique aesthetic, recreational, and fish and wildlife preservation characteristics.

That many critiques of the case were entered into with the environmentalist spirit is bolstered by the reaction to *United States v. New Mexico*,[88] decided the same day. In *New Mexico*, the extent of federal reserved water rights for national forests was severely narrowed. Both *California (Supreme Court)* and *New Mexico* were drafted by Justice Rehnquist, and in general tenor the cases are quite consistent. *New Mexico* specifically cites *California (Supreme Court)* for the proposition that "[w]here Congress has expressly addressed the question of whether federal entities must abide by state water law, it has almost invariably deferred to the state law."[89] The Court's conviction that congressional dealings with state waters were, are, and should be restrained is central to its decision in *New Mexico*.

Yet the reaction of the commentators to the result in *New Mexico* was almost universally critical,[90] compared to the acclaim that greeted the result in *California (Supreme Court)*. Valid distinctions can be drawn between the cases,[91] but the decisions were certainly considered

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tous of environmental values is based on experience.

[88] 438 U.S. 696 (1978).

[89] *Id.* at 702.

[90] *See, e.g.*, Elliott, United States v. New Mexico: *Purposes that Hold No Water*, 22 ARIZ. L. REV. 19 (1980); Fairfax & Tarlock, *No Water for the Woods: A Critical Analysis of* United States v. New Mexico, 15 IDAHO L. REV. 509 (1979); Note, *Federal Acquisition of Non-Reserved Water Rights After* New Mexico, 31 STAN. L. REV. 885 (1979) [hereafter Note, *Federal Acquisition*]; Note, *Reserved Water Rights on National Forests After* United States v. New Mexico, 1979 UTAH L. REV. 609; Note, *Quantification of Water Rights Claimed Under the Implied Reservation Doctrine for National Forests*, 54 WASH. L. REV. 873 (1979); Comment, *Water Rights & National Forests — Narrowing the Implied Reservation Doctrine:* United States v. New Mexico, 40 OHIO ST. L.J. 729 (1979).

Recent articles on non-Indian reserved water rights include Meshorer, *Federal Reserved Water Rights Litigation*, 28 ROCKY MTN. MIN. L. INST. 1283 (1982); Robb, *Applying the Reserved Rights Doctrine in Riparian States*, 14 N.C. CENT. L.J. (1983); Samelson, *Water Rights for Expanded Uses on Federal Reservations*, 61 DEN. L.J. 67 (1983); Trelease, *Uneasy Federalism — State Water Laws and National Water Uses*, 55 WASH. L. REV. 751 (1980); Waring & Samelson, *Non-Indian Federal Reserved Water Rights*, 58 DEN. L.J. 783 (1981); Comment, *The Application of Federal Reserved Water Rights to Groundwater in the Western States*, 16 CREIGHTON L. REV. 781 (1983).

[91] Fairfax & Tarlock, *supra* note 90, at 530, note that there was no "deferential" statute to serve as a springboard for the Court in *New Mexico*, whereas in *California*, the Court was interpreting § 8, which despite its convoluted history, does expressly

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compatible by their author, and by all but one of the other Justices.[92] The decisions were also popularly perceived as consistent with a shift in comparative strengths in federal-state relations: *New Mexico* was hailed as a significant "states' rights" victory.[93] The two cases are dramatically inconsistent only in their impact on environmental concerns. In *New Mexico*, the United States wore the white hat as the party attempting to preserve water for wildlife preservation, recreation, and aesthetics. Downstream water users, claiming priority of their state law created water rights, opposed the federal claims. Although only speculation, one suspects that the disparate environmental impact goes a long way in explaining the disparate reactions to *New Mexico* and *California (Supreme Court)*.[94]

Clearly, then, one cannot safely analyze *California (Supreme Court)* based on satisfaction with the results under the particular fact pattern. Cheering for the "good guys" is naive. The opinion has not been limited to the dispute over the New Melones Reservoir. If one assumes that state law should prevail because the states will always better protect sensitive environments, *New Mexico* adequately warns that the door swings both ways.[95]

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defer to the states. The authors also noted that the federal interests were substantially dissimilar: managing public lands versus merely guarding federal spending. The latter interest was deemed less significant. It is, however, arguably worth some consideration. *See infra* text accompanying notes 447-62.

[92] Justice Powell was the only member of the majority in *California (Supreme Court)* who joined the dissent in *New Mexico*.

[93] *See* Comment, *Federal Non-Reserved Water Rights*, 48 U. CHI. L. REV. 758, 760 n.17 (1981). There was also one article on *United States v. New Mexico* that espoused a strong pro-state law position. Boles & Elliott, United States v. New Mexico *and the Course of Federal Reserved Water Rights*, 51 U. COLO. L. REV. 209 (1980).

[94] There is one instance that directly supports the suspicion. The author of *Supreme Court Strikes New Balance in Federal-State Tension Over Western Water Rights*, 8 ENVTL. L. REP. (ENVTL. L. INST.) 10182 (1978) stated: "The application of this 'new' [state] appropriation law to federal projects under *California* may prove a salutory addition to the basically haphazard environmental controls imposed by federal law. The decision in *New Mexico*, on the other hand, offers little cheer for environmentalists."

[95] Another example that illustrates this point is found in Stewart, *Interstate Resource Conflicts: The Role of the Federal Courts*, 6 HARV. ENVTL. L. REV. 241, 262 n.158 (1982), which describes the efforts of Utah to encourage strip mining adjacent to a national park.

Those who are concerned about preserving the states' ability to protect their environments should consider that it was the inability of the states to adequately address environmental issues that originally led to the federal entry into the field. *See, e.g.*, Goldsmith & Banks, *Environmental Values: Institutional Responsibility and the Supreme Court*, 7 HARV. ENVTL. L. REV. 1 n.2 (1983); McGinley, *supra* note 76, at

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When one leaves aside a purely result-oriented approach to *California (Supreme Court)*, what can be said for the opinion? The holding is correct, but it contains several analytical flaws. First, the opinion fails to deal effectively with important contrary authority. Second, Justice Rehnquist's preconceptions about "cooperative federalism" led him to write "a great deal of loose dicta about federal-state relations, the tenor of which is that federal interests are generally subordinated to state interests. Much of the dicta is wrong."[96] The combination of the two flaws resulted in an opinion that is no more well-defined than the line of cases it purports to correct.

Specifically, the failure to deal effectively with contrary authority was demonstrated in Justice Rehnquist's selective review of legislative history, his silence on cases that had been basic to the appellate court's decision, and his inadequate treatment of the preceding case law on section 8. The statement in *California (Supreme Court)* that there had been a "consistent thread of purposeful and continued deference to state water law by Congress,"[97] has taken on a life of its own.[98] There are virtues in simplicity, but the history of federal-state relations over western waters certainly is not reducible to a "consistent thread." A more accurate description is that the field "is a concoction of Byzantine politics and legalistic archaeology."[99] There is a treasure trove for the archaeologists, and one can dig up substantial support for almost any hypothesis. While conceding numerous instances of congressional deferral to state law, one commentator determined that "one can draw a compa-

159-60. Leman & Nelson, *The Rise of Managerial Federalism: An Assessment of Benefits and Costs*, 12 ENVTL. L. 981, 1025 (1982), describes the process by which "citizen political identification" shifts between the national and state governments.

This does not, of course, deny that the federal regulatory activities in the environmental context may sometimes be "arrogant, impractical, overly expensive and otherwise oppressive." McGinley, *supra* note 76, at 150.

[96] Tarlock & Fairfax, *Federal Proprietary Rights for Western Energy Development: An Analysis of a Red Herring?* 3 J. ENERGY L. & POL'Y 1, 34 (1982).

[97] California v. United States, 438 U.S. 645, 653 (1978); *see also id.* at 678 ("While later Congresses have indeed issued new directives to the Secretary, they have consistently reaffirmed that the Secretary should follow state law in all respects not directly inconsistent with these directives").

[98] The comment is typically accepted as an ultimate truth. For example, one commentator stated the basic proposition at least three times, with a bare citation to *California (Supreme Court)*, with no attempt to substantiate the proposition. Proctor, *Section 10 of the Rivers and Harbors Act and Western Water Allocations — Are the Western States Up a Creek Without a Permit?* 10 B.C. ENVTL. AFF. L. REV. 111, 111-12, 118, 121-22 (1982).

[99] Goldberg, *supra* note 5, at 36.

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rable list of occasions on which Congress chose *not* to defer to state law."[100] Moreover, some statutes only "show that Congress had generally *recognized* state water law, not that it had *deferred* to it . . . and in . . . others Congress subjected only private parties and not federal agencies to state law."[101] None of these conflicting statutes, however, were addressed in the *California (Supreme Court)* opinion.

Using the "background" of consistent deference that he had painted, Justice Rehnquist then examined the Reclamation Act of 1902, and found its legislative history equally "clear" regarding state law control.[102] Once again, however, the history narrated in the opinion reads like "selected excerpts." The district court opinion analyzed documents and statements from the same session of Congress and reached the opposite conclusion.[103] More than enough history exists to support either view; the issue is not one of absolute right or wrong. A balanced, thoughtful case can be made for Justice Rehnquist's reading, but the Justice did not make it.[104] Contrary historical evidence was not criti-

[100] Note, *Federal Acquisition*, *supra* note 90, at 909 (emphasis in original).

[101] *Id.* at 909-10 (emphasis in original).

[102] 438 U.S. at 665.

[103] United States v. California, 403 F. Supp. 874, 885-89 (E.D. Cal. 1975). An earlier review of the legislative history of § 8 agreeing with the position reached by the lower court in *California (District)* is found in Goldberg, *supra* note 5, at 25-31.

[104] The most balanced reading of the legislative history is found in Sax, *Federalism*, *supra* note 5, at 59-62, 66-68. The disturbing aspect of the recitation of history in *California (Supreme Court)* is not the finding of a predominantly pro-state congressional intent. That is probably the preferable reading of the 1902 Act. Further, Justice Rehnquist did eschew the absolutist state "veto theory" described *supra* note 41. 438 U.S. at 672 n.25. The problem in the opinion is the creation, by omission of any reference to conflict in the history, of a simple, uncomplicated world that did not exist.

One explanation for Justice Rehnquist's failure to address evidence contrary to his version of history is that the evidence does not comport with his view of federalism, on which he has focused much of his judicial energy. Early in his tenure on the Court, Justice Rehnquist declared: "Surely there can be no more fundamental constitutional question than that of the intention of the Framers of the Constitution as to how authority should be allocated between the National and State Governments." Fry v. United States, 421 U.S. 542, 559 (1975) (Rehnquist, J., dissenting). His solicitude for the states was most clearly enunciated in National League of Cities v. Usery, 426 U.S. 833 (1976) and is also visible in Hodel v. Virginia Surface Mining & Reclamation Ass'n, 452 U.S. 264 (1981) (Rehnquist, J., concurring in judgment). *See also* FERC v. Mississippi, 456 U.S. 742, 775 (1982) (Justice O'Connor's strongly worded concurring and dissenting opinion, in which Justice Rehnquist joined). One commentator has concluded that the maintenance of strong states is Justice Rehnquist's fundamental constitutional principle, and in pursuit of establishing deference to states, he "is clearly and consciously, *not* a strict constructionist and *not* a practitioner of judicial restraint." Powell, *The Compleat Jeffersonian: Justice Rehnquist and Federalism*, 91 YALE L.J.

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cally evaluated and discarded; it was simply ignored.

The Court was also silent concerning two cases, *Hancock v. Train*,[105] and *EPA v. California*,[106] relied upon by the court of appeals. Those cases had forcefully stated that federal installations were not required to comply with state permitting procedures under environmental statutes directing compliance with state requirements.[107] There are a number of possible explanations why these 1976 cases were not addressed by *California (Supreme Court)* in interpreting the language in section 8. One explanation is that the language in section 8 and the other statutes differs; section 8 is much more specific.[108] Another explanation is that the legislative histories are not comparable.[109] Yet another explanation is that in the wake of the decisions, one of the statutes had been amended.[110] Finally, nothing requires any court to address cases that

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1317, 1359 (1982); *see also* Shapiro, *Mr. Justice Rehnquist: A Preliminary View*, 90 HARV. L. REV. 293, 294 (1976) (Justice Rehnquist believes that "[c]onflicts between state and federal authority, whether on an executive, legislative or judicial level, should, whenever possible, be resolved in favor of the states.").

Recent shifts in relative federal-state power and a renewed interest in federalism have been important in the entire natural resources field, not only water law. *See, e.g.*, *Federalism and the Environment Symposium*, 12 ENVTL. L. 847 (1982); *Federalism and Natural Resources Symposium*, 43 MONT. L. REV. 155 (1982).

[105] 426 U.S. 167 (1976).

[106] 426 U.S. 200 (1976).

[107] These cases are described *supra* text accompanying notes 67-70.

[108] Section 8 directs the Secretary of the Interior to "proceed in conformity with" state laws "relating to the control, appropriation, use or distribution of water," and "nothing" in the Reclamation Act of 1902 was to "affect or to in any way interfere" with those laws. 43 U.S.C. § 383 (1982). The statutes analyzed in *Hancock* and *EPA* did not specify particular elements of state clean air or clean water laws for anyone to follow. They simply said that the federal government "shall comply" with those laws "to the same extent" as "any nongovernment entity." 42 U.S.C. § 1857f (1976) (present version codified at 42 U.S.C. § 7418 (1982)); 33 U.S.C. § 1323 (1976) (amended in 1977).

[109] *See States' Rights Revisited: The Ninth Circuit Leads the Bureau of Reclamation to Water*, 7 ENVTL. L. REP. (ENVTL. L. INST.) 10127, 10129 (1977) (criticizing decision in *California (Circuit)* for failure to distinguish legislative intent under Clean Air and Water Acts from that under § 8). This commentary predicted that addressing *Hancock* and *EPA* would be a "critical issue" in the Supreme Court's review in *California*. As it turned out, addressing the cases was a "non" issue. Shapiro, *supra* note 104, at 355, has criticized other instances of Justice Rehnquist's "near total failure . . . to deal candidly with contrary decisions."

[110] 33 U.S.C. § 1323 (1982), relating to water pollution control, was amended in 1977 to clarify the federal obligation to comply with state laws. Note, *A State May Condition*, *supra* note 71, at 419-21, summarizes the numerous ways in which *Hancock* and *EPA* are clearly distinguishable from *California (Supreme Court)*.

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are, at best, only related by analogy. Still, an analysis of *Hancock* and *EPA* constituted almost the entire decision in *California (Circuit).* Justice Rehnquist obviously disagreed with *Hancock* and *EPA*, as he had dissented in both cases. He could have disposed of them with dispatch, but once again, a divergent view was not neutralized, but ignored.

The majority opinion in *California (Supreme Court)* did address the prior Supreme Court opinions on section 8: *Ivanhoe*,[111] *Fresno*,[112] and *Arizona*.[113] Those cases were the basis of the conflict between the ma-

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[111] 357 U.S. 275 (1958) (discussed *supra* text accompanying notes 16-22).

[112] 372 U.S. 627 (1963) (discussed *supra* text accompanying notes 23-28).

[113] 373 U.S. 546 (1963) (discussed *supra* text accompanying notes 29-39).

The court in *California* limited *Arizona* to the "singular legislative history of the Boulder Canyon Project Act" relating to a "massive multistate reclamation project." The "unique size and multistate scope of the Project" made any general language in the *Arizona* opinion relating to § 8 unnecessary. 438 U.S. at 674.

The question arises as to the applicability of *California (Supreme Court)* to interstate projects; the New Melones Dam and the Stanislaus River are entirely intrastate. Is *Arizona* unique because the Project Act is "singular" in its language, *see* Hostyk, *supra* note 5, at 72; or are all interstate projects exempt because of their "multistate scope"?

The need for uniform water laws within a state was of concern in *California (Supreme Court)*: " '[I]f the appropriation and use were not under the provisions of the State law the utmost confusion would prevail.' . . . Different water rights in the same State would be governed by different laws and would frequently conflict." 438 U.S. at 667-68. Different concerns arise when a project is interstate in nature: "Subjecting the Secretary to the varying, possibly inconsistent, commands of the different state legislatures could frustrate efficient operation of the project and thwart full realization of the benefits Congress intended this national project to bestow." *Arizona*, 373 U.S. at 590. More recently the Supreme Court has indicated that any individual state's water laws in an interstate controversy should not be given absolute deference. In Sporhase v. Nebraska, 458 U.S. 941, 959-60 (1982) the Supreme Court stated:

> Although the 37 statutes [including section 8] and the interstate compacts demonstrate Congress' deference to state water law [citing *California*], they do not indicate that Congress wished to remove federal constitutional constraints on such state laws . . . . [There is no] persuasive evidence that Congress consented to the unilateral imposition of unreasonable burdens on commerce.

Justice Rehnquist dissented from this holding. Congress itself has shown no inclination to act on several bills introduced since *Sporhase* that would allow states to control the interstate transfer of water. H.R. 997 & 1207, 98th Cong., 1st Sess. (1983); *see also* Corker, *supra* note 13, at 440-41; *cf.* Colorado v. New Mexico, 459 U.S. 176, 184 (1982) ("[T]he just apportionment of interstate waters is a question of federal law that depends 'upon a consideration of the pertinent laws of the contending States and *all other relevant facts*.' ") (emphasis in original) (citation omitted).

It is, of course, likely in a complex interstate project (or even more especially in the

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jority and the dissent. Dissenting, Justice White insisted on perpetuating the distinction between acquisition and distribution, delivery, and use of water developed in the earlier Supreme Court decisions.[114] Part of his reason was to lambaste the majority for attempting to dismantle the existing law on condemnation of water rights — an issue not even remotely involved in *California (Supreme Court)*. The real complaint of the dissent, however, appears to be the majority's departure from the previous narrow interpretations of section 8. As will be demonstrated, it is unclear that a distinction between acquisition and distribution is fundamental to the type of narrow interpretation favored by the dissent. In any case, Justice Rehnquist correctly dismissed as dicta[115] much of the language from the earlier cases. Section 8 does not support the distinction; the language used is "control, appropriation, use, or distribution of water used in irrigation."[116] Additionally, it has been pointed out that the distinction does not, in reality, exist.[117]

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few projects that affect international waters) that Congress will take more care to give "explicit directives" to the Secretary, just as it did in the Boulder Canyon Project Act. Even absent crystal clarity of congressional directives, however, *California (Supreme Court)* should be limited if § 8 would entail subjecting multistate federal projects to laws from several states with differing requirements.

[114] 438 U.S. 645, 690 (1978) (White, J., dissenting).

[115] Justice Rehnquist cannot feel righteous about clearing the law of all dicta. The majority opinion in *California (Supreme Court)* is rife with its own dicta, especially the lengthy discussion of condemnation at 438 U.S. at 666 n.20, 668-69 n.21. On the condemnation issue, see *infra* note 451.

Unfortunately, the dicta in *California (Supreme Court)* relating to the condemnation rights of the United States has recently been taken seriously. In the case of South Delta Water Agency v. United States, Civ. No. S-82-567 MLS, slip op. at 11-12 (E.D. Cal. Oct. 21, 1983) (denial of motion to dismiss), the court, in denying the United States' motion, stated that "defendants are limited by state law in acquiring water rights, by whatever means [referring to condemnation], for use in the Central Valley Project" and that the "premise that state law imparted no substantive rights but merely defined the right for which compensation must be made" was "impliedly overruled by California v. United States." *See also id.* at 6 n.2. The court admitted, *id.* at 7 n.4, that its determination that the California Watershed Protection Act, CAL. WATER CODE § 11460 (West Supp. 1984), limited the Bureau's ability to acquire water was only preliminary. Thus, it reserved the right to reconsider. Nonetheless, *South Delta* presages an extremely significant departure from Dugan v. Rank, 372 U.S. 609 (1963) (discussed *supra* note 23), and *Fresno*. *See also infra* note 190.

[116] 43 U.S.C. § 383 (1982).

[117] *See, e.g.*, Walston, *supra* note 71, at 1667; Note, *Reclaiming State Power*, *supra* note 71, at 751 n.47. Limitations on water acquisition, such as the time of year it can be appropriated, whether direct flow or storage rights are granted, and the purposes for which water may be appropriated, directly affect how, when, and for what purposes water will be delivered or used. These are exactly the types of conditions placed on the

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In its continuing effort to simplify the complex, however, the majority intimates that after discarding dicta, all that transpired in the earlier cases was a circumscribed determination that specific federal statutes, such as the excess land law in *Ivanhoe* and the irrigation preference law in *Fresno*, prevailed over state laws. However, the earlier cases entailed more than an exercise in narrow statutory construction. There was a conscious recognition of a principle of deference to federal control over federal facilities, just as the opposite recognition of a principle of deference to state law control over state waters is the overriding theme of *California (Supreme Court)*.

This is best illustrated by an omission. In discussing a paragraph from *Ivanhoe* (also cited in *Arizona*) that it would soon dismantle, the majority opinion in *California (Supreme Court)* failed to mention these two sentences from the middle of the paragraph: "[T]he acquisition of water rights must not be confused with the *operation* of federal projects. As the Court said in *Nebraska v. Wyoming*, . . . 'We do not suggest that where Congress has provided a *system of regulation* for federal projects it must give way before an inconsistent state system.' "[118]

The concern for a "system of regulation" and the practical ability of the United States to "operate" the projects it builds appears to have been as important, if not more so, to the earlier interpretations of section 8 as the largely impractical distinction between acquisition and distribution of water. The United States relied upon such a concern in *California* when it took its absolutist stand that federal policies left no room for state controls,[119] or, specifically, that the state could place no conditions whatsoever on the Bureau's water permits. The United

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appropriation permits for New Melones Reservoir.

The final irony with regard to the acquisition/delivery distinction espoused by the dissent is that under that dichotomy, *California (Supreme Court)* was an "acquisition" case. Therefore, under *Ivanhoe*, state law would apply. Also, *California (Supreme Court)* was not a condemnation case. Therefore, the *Fresno* rule of merely compensating for rights taken would not dictate otherwise. The majority opinion duly noted that *Ivanhoe* could be used to support the state's rather than the United States' position. 438 U.S. at 673 n.26.

[118] 357 U.S. at 291, *cited in* 373 U.S. at 586 (emphasis added). Language concerning federal operation of projects (facilities, not water) is also discernable in a number of state and lower federal court opinions decided in the post-*Ivanhoe* pre-*California (Supreme Court)* decades. *See, e.g., supra* text accompanying notes 50 & 57; *see also California (District)*, 403 F. Supp. at 902 ("The primal question before this court is one of state versus federal power as to the operation and control of federal reclamation projects.").

[119] *See supra* text accompanying note 75.

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States had gone too far. It has been noted that its claim was analogous to an argument that Congress had "occupied the field," and the argument was correctly rejected.[120] Previous section 8 cases had never approved a theory of total preemption. Federal power to preempt under the supremacy clause[121] must be conceded, but the majority opinion in *California (Supreme Court)* was correct in emphasizing "inconsistency" of state laws with an exercise of that power as the preemption test.

If the conclusion was correct, why should the opinion be criticized? First, by ignoring conflicting evidence in the legislative history or cases appearing inconsistent with the present decision, by oversimplifying extremely complex issues, and by drafting an opinion no more free of dicta than *Ivanhoe*, *Fresno*, and *Arizona*, *California (Supreme Court)* did not deliver the definitive version of section 8. The analytical holes in the opinion are gaping, and *California (Supreme Court)* invites the same fate as those earlier cases. Perhaps in twenty years, it too, may be distinguished away by a future Court majority desiring to "set things right."[122] Secondly, the Supreme Court has set up a paradigm for analyzing section 8 that has no discernible connection with reality. The opinion fabricated a world where Congress has consistently deferred to state water laws, and in which section 8's mandates are eternally clear. The Court then remanded the case with instructions that the lower court should rule for the state unless it found inconsistency with specific, explicit, and clear congressional directives. Such clarity, however, is not a hallmark of the reclamation "system of regulation."

The reclamation statutes are, on the whole, a morass.[123] The 1902 Act has been frequently amended and supplemented. Many statutes are duplicative. Some are inconsistent. Frequently, numerous rules of statutory construction must be resorted to in interpretation; legislative history is always extremely important. Additionally, when one is dealing

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[120] Note, *Reclaiming State Power*, *supra* note 71, at 758 n.70; Note, *State Control*, *supra* note 71, at 239-41 (commenting that Congress had, however, "occupied the field" with regard to the Boulder Canyon Project).

[121] U.S. CONST. art. VI, cl. 2. Not all authorities agree that the supremacy clause is the basis for the preemption doctrine. Freeman, *supra* note 76, at 634-35. Part III of this Article addresses preemption in the reclamation program.

[122] *See* 438 U.S. at 695 (White, J., dissenting).

[123] *See* Walston, *supra* note 71, at 1661-65 (several examples of how reclamation law has grown up like Topsy); *see also* Sax, *supra* note 3, § 110.3. The dissent in *California (Supreme Court)* invited Congress to speak clearly and put an end to the feuding, 438 U.S. at 695, but Congress is unlikely to ever speak with one voice in this arena. Rhetoric is the rule in this bastion of pork barrel politics. *See infra* text accompanying notes 479-82.

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not with a section or sections of the general reclamation law, such as the excess lands law, but with the authorization of specific projects, statutes tend to be broad. Scores of projects have been approved based on studies and reports that Congress does not reproduce down to the finest points. Congressional intent can be determined, but not in meticulous detail.

Further, Congress has chosen, over the years, to delegate enormous responsibilities to the Secretary of the Interior.[124] This decision results from practical necessity. Congress cannot oversee the placement of every floodgate and dictate where every acre foot of water and kilowatt of power shall be distributed. The Secretary's decisions are not congressional directives, but they are decisions based on authority delegated by Congress. It is certainly not clear that every time the Secretary has been authorized to act since 1902, Congress intended section 8 to be broadly applied.

The issue, after all, is one of congressional intent. Whatever the intent of Congress was in 1902, it cannot be frozen for all time as of that instant. A whole system of reclamation regulation has developed, serving numerous national policies beyond those originally contemplated.[125] The policies are often broadly stated, the congressional directives purposefully rather generalized, and the administrative authority also deliberately immense. The federal and state courts have, however, been directed to search not simply for congressional intent, but intent expressed with specificity, explicitness, and clarity. Not surprisingly, the

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[124] *See, e.g.*, 43 U.S.C. §§ 373, 389, 421, 423d, 451j, 485b, 521-523 (1982). These are less than one quarter of the statutes that authorize the Secretary, *inter alia*, to perform any and all acts "to carry out reclamation laws"; to do what "in the judgment of the Secretary" is necessary; to act "in his discretion," or to contract upon such conditions "as he may deem proper." The importance of administrative authority in reclamation law had been recognized in Environmental Defense Fund, Inc. v. East Bay Mun. Util. Dist., 20 Cal. 3d 327, 339, 572 P.2d 1128, 1134, 142 Cal. Rptr. 904, 910 (1978) (discussed *supra* text accompanying notes 52-58).

The failure to address the issue of the Secretary's delegated powers is the most unrealistic aspect of the decision in *California (Supreme Court)*. Further discussion of the authority of the Secretary of the Interior is found *infra* text accompanying notes 490-529.

[125] *See* Sax, *Federalism*, *supra* note 5, at 67-75, 82-83. Indeed, Sax argues that even in the original 1902 decision to recognize state laws under § 8, "state law was being adopted not because the Congress felt impelled to subordinate its goals to state goals, but because *at the time* state law was thought *compatible with federal interests*." *Id.* at 67 (emphasis added). This approach clearly differs from one that commences with an assumption that Congress consistently defers to the states. *See* Note, *A State May Condition*, *supra* note 71, at 421-22.

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courts have had difficulty discerning such intent. Claims for state law applicability to reclamation projects have been raised in numerous cases decided under section 8 since *California (Supreme Court).* Those cases are analyzed in parts II and III of this Article.

II. RUNNING THE PROCEDURAL GAUNTLET

The Court in *California (Supreme Court)* remanded the case, noting that no court had yet decided whether the conditions placed upon the Bureau's permit for the New Melones Project were inconsistent with congressional directives. Further, California's position that the United States was collaterally estopped from raising the issue of consistency had not been definitively addressed.[126] In the subsequent treatment of the case, the lower court needed to address procedural questions to determine whether the United States could still challenge the conditions imposed by the State Board's decision. Only then could the substantive challenge itself — the "consistency" issue — be decided.

The distinction between the procedural and substantive implications of section 8 has been important in the development of the law of federal-state relations in the reclamation arena since *California (Supreme Court).* The majority of cases decided substantive issues, such as the degree of actual conflict required for federal preemption of state law or whether federal or state definitions of beneficial use apply. However, procedural issues were prominently raised in the remand of *California* and one other decision. These procedural decisions will be addressed

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[126] 438 U.S. at 679. The district court briefly addressed the collateral estoppel issue in *California (District)*, 403 F. Supp. 874, 900-01 (E.D. Cal. 1975). It stated that only a court of competent jurisdiction could deliver an opinion binding for purposes of collateral estoppel, and that the California State Water Resources Control Board lacked the requisite jurisdiction over the United States. This issue was lost in the shuffle at the court of appeals and Supreme Court levels.

The district court also addressed another intriguing argument of the state, that the Bureau was equitably estopped from challenging the jurisdiction of the Board or the Board's conditions because of the Bureau's long history of compliance with the state permit application procedure. 403 F. Supp. at 899-900. One assumes that this aspect of the case disappeared permanently because the state realized it was a losing argument. The issue of equitable estoppel against the government has recently received considerable national attention. *See, e.g.*, Schweiker v. Hansen, 450 U.S. 785 (1981); Parcel, *Making the Government Fight Fairly: Estopping the United States*, 27A ROCKY MTN. MIN. L. INST. 41 (1982); Note, *Equitable Estoppel of the Government*, 47 BROOKLYN L. REV. 423 (1981); Note, *Equitable Estoppel: Does Governmental Immunity Mean Never Having to Say You're Sorry?*, 56 ST. JOHN'S L. REV. 114 (1981); Comment, Schweiker v. Hansen: *Equitable Estoppel Against the Government*, 67 CORNELL L. REV. 609 (1982).

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first. The balance of this Article will then analyze the consistency issue in the remand of *California* and in other cases.[127]

The California Water Code mandates specific proceedings for water right permit applications and review of permit decisions.[128] The United States has not always strictly complied with the review process, and its failure to do so was addressed in two decisions. The issues in the decisions overlap, and the cases will be briefly summarized, then analyzed together.

A. *Summary of the Cases*

1. *United States v. California (California (S.J.))*

Upon remand, the State of California diligently pursued the argument that the United States should be collaterally estopped from challenging the decisions of the State Board based upon alleged inconsistency with federal law. In *United States v. California (California (S.J.))*,[129] the state pressed this and several related claims in support of motions for summary judgment and judgment on the pleadings.[130]

The claims were founded on the Bureau's previous actions. The Bureau had applied to the California State Water Resources Control Board for permits to appropriate water for the New Melones Dam, and when the Board approved the application in its Decision 1422, it imposed numerous conditions.[131] California law allows applicants to petition the Board for reconsideration within thirty days of a decision.[132] After the Board's decision was final, dissatisfied applicants have another thirty days to petition for a writ of mandate in the county superior court.[133] The United States, acting for the Bureau, had neither

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[127] The proposed dichotomy of analysis of the cases following *California (Supreme Court)* is actually misleading. A chronic problem that could arise in procedural decisions is the degree to which § 8 dictates utilization of state over federal forums and procedures. This, of course, leads directly to "consistency" problems — when would use of state courts or procedures conflict with important national laws or policies (or vice versa)? The consistency issue, as defined by Justice Rehnquist, is raised more clearly in the substantive law area, however. For that reason, and to avoid incessant running in circles, detailed analysis of the meaning of "consistency with congressional directives" is reserved for part III of the Article.

[128] CAL. WATER CODE §§ 1340-1360 (West 1971 & Supp. 1984).

[129] 521 F. Supp. 491 (E.D. Cal. 1980). A different district court judge handled the case on remand than under the original decision in 403 F. Supp. 874 (E.D. Cal. 1975).

[130] FED. R. CIV. P. 56(c), 12(c).

[131] *See supra* note 60.

[132] CAL. WATER CODE § 1357 (West Supp. 1984).

[133] *Id.* § 1360 (West 1971).

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filed for reconsideration nor petitioned the local court. Instead, over six months after Decision 1422 was rendered, the United States filed for declaratory relief in the United States district court, ultimately leading to the decision in *California (Supreme Court).*

On remand, California argued that the Board's decision was binding upon the Bureau. Unchallenged in state court, Decision 1422 was final, and res judicata barred the United States' claim for federal declaratory relief. Alternatively, collateral estoppel prevented the federal government from raising the issue of inconsistency in the district court.[134] Finally, the State contended that even if the federal court did review Decision 1422, the decision was supported by substantial evidence and must be upheld.[135]

The district court addressed as threshold issues the question of federal jurisdiction, and, if present, the use of federal versus state procedure in the federal forum. The court concluded that it had concurrent jurisdiction under 28 U.S.C. § 1345, and that section 8 was not "intended to curtail, by implication, the jurisdiction of federal courts [under section 1345] to entertain suits in which the United States is a plaintiff concerning its activities in the reclamation field."[136] The court then addressed the question of which procedural rules should be uti-

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[134] Res judicata, as used in the opinion in *California (S.J.)* and in this Article, refers to the preclusion of an entire claim. Res judicata or claim preclusion is also sometimes referred to as bar and merger. Collateral estoppel refers to the preclusion of an issue. The distinction between res judicata and collateral estoppel was set forth in the leading case of Cromwell v. County of Sac, 94 U.S. (4 Otto) 351, 352-53 (1876):

> In the former case the judgment, if rendered upon the merits, constitutes an absolute bar to a subsequent action. It is a finality as to the claim or demand in controversy, concluding parties and those in privity with them, not only as to every matter which was offered and received to sustain or defeat the claim or demand, but as to any other admissible matter which might have been offered for that purpose . . . .
>
> But where the second action between the same parties is upon a different claim or demand, the judgment in the prior action operates as an estoppel only as to those matters in issue or points controverted, upon the determination of which the finding or verdict was rendered. In all cases, therefore, where it is sought to apply the estoppel of a judgment rendered upon one cause of action to matters arising in a suit upon a different cause of action, the inquiry must always be as to the point or question actually litigated and determined in the original action . . . .

The distinction, as well as a preference for the more modern terminology of claim preclusion or issue preclusion, was most recently recognized by the Supreme Court in Migra v. Warren City School Dist. Bd. of Educ., 104 S. Ct. 892 (1984).

[135] 521 F. Supp. at 494-95.

[136] *Id.* at 496.

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lized in federal court. It recognized that "[t]he broad reach of the language employed by Justice Rehnquist in . . . *United States v. California* would tend to compel the conclusion that State procedural laws, as well as State substantive laws are mandated upon Federal courts by the terms of § 8 of the Reclamation Act of 1902."[137] Nonetheless, upon "closer examination," the court rejected the argument that section 8 compelled the United States not only to comply with substantive state water laws, but also to "subject itself to the differing, and often conflicting, procedural rules of the states."[138]

The res judicata, collateral estoppel, and substantial evidence arguments raised by California were treated summarily by the court. Although the United States and the Board were the same parties under Decision 1422 and the federal suit, the court stated there was no final judgment for res judicata purposes.[139] Further, although it recognized that administrative determinations could, under appropriate conditions, form the basis for res judicata or collateral estoppel, the court found no indication that the California legislature had authorized the Board to decide the "consistency" issue,[140] nor that the Board had even considered the issue.[141] Therefore, neither argument for preclusion advanced by the state prevailed.[142] Finally, the court rejected the contention that it should be limited to a "substantial evidence" review of the Board's decision, emphasizing once more that the Board had not addressed the issue of consistency of the state conditions with federal directives.[143] Having rejected all of the state's arguments, the court denied the motions for summary judgment and judgment on the pleadings.

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[137] *Id.* at 497.

[138] *Id.* at 498.

[139] *Id.*

[140] *Id.* at 499. The conclusion that there was no prior determination by a court of "competent jurisdiction" appears to be the same originally reached by the district court in 1975. *See supra* note 126.

[141] 521 F. Supp. at 494-95. Technically, if the Board had jurisdiction, the question whether it actually considered if its actions were consistent with congressional directives would only be relevant to collateral estoppel. As the court recognized, res judicata bars not only all matters pleaded and argued, but "all that might have been." *Id.* at 499 (citing Irving Nat'l Bank v. Law, 10 F.2d 721 (2d Cir. 1926)); *see also* 1B J. MOORE, J. LUCAS & T. CURRIER, MOORE'S FEDERAL PRACTICE ¶ 0.405, at 181 n.13 (2d ed. 1983).

[142] 521 F. Supp. at 499.

[143] *Id.*

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2. *United States v. California (California (Related))*

United States v. California (California (Related))[144] arose out of state conflicts with the Bureau concerning operations of units of the Central Valley Project other than the New Melones Dam and Reservoir. In Decision 1485,[145] the California State Water Resources Control Board exercised its reserved jurisdiction and amended Bureau permits by imposing conditions[146] to protect vested water rights and water quality in the Sacramento-San Joaquin Delta. It also placed conditions upon various other parties, including the California State Water Project. As a result, a plethora of petitions for writs of mandate were filed in the San Francisco County Superior Court.[147] Although the Bureau failed to follow this state review procedure in challenging Decision 1422 on the New Melones Dam and Reservoir, here it joined the flock and filed a timely state petition. But it also subsequently filed a declaratory judgment action in federal district court.

The declaratory judgment action was dismissed in *United States v. California (California (Related))*,[148] in an opinion whose basic tenor was the polar opposite of *California (S.J.)*. The court predicated dismissal upon three grounds. First, federal declaratory relief was inappropriate when the United States was pursuing adequate relief in a pending state court action.[149] Second, the Supreme Court decision in *Colorado River Water Conservation District v. United States*,[150] relating to "wise judicial administration" between federal and state courts in water rights suits, dictated dismissal of the federal action.[151] Third,

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[144] 529 F. Supp. 303 (E.D. Cal. 1982).

[145] California State Water Resources Control Bd. Decision No. 1485 (1978).

[146] The conditions primarily related to release of water from storage in reservoirs in the Central Valley Project or the California State Water Project and reduction of exports of water from the Delta area.

[147] The cases were consolidated in United States v. State Water Resources Control Bd., Judicial Council Coordination Proc. No. 548 (San Francisco County Super. Ct., Apr. 13, 1984). These cases are popularly called the "Delta Water Cases."

There were numerous parties other than the United States and California; therefore many of the issues raised in the Delta Water Cases address concerns beyond the scope of this Article. Other issues are extremely relevant. Two of the positions strenuously argued by the United States were that the Board lacked jurisdiction to adjudicate (or "reallocate") the United States' water rights, *see infra* text accompanying note 171, and that the conditions imposed were in conflict with congressional directives relating to the Central Valley Project, *see infra* note 258.

[148] 529 F. Supp. 303 (E.D. Cal. 1982).

[149] *Id.* at 306-08.

[150] 424 U.S. 800 (1976).

[151] 529 F. Supp. at 308-10.

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the interpretation of section 8 in *California (Supreme Court)* clearly stated that "[c]ompliance with state law, the form and the substance, requires compliance with state *procedural* law."[152] California law required that dissatisfied parties challenge a final decision of the Water Resources Control Board within thirty days. Because the United States' federal declaratory relief action was not timely filed, it was dismissed.[153]

B. *Analysis of the Procedural Issues*

The procedural issues addressed in the two cases, and likely to arise in other section 8 cases, can be arranged hierarchically for purposes of analysis. At the pinnacle of the hierarchy is the most extreme claim for state law prominence, that the federal court lacks jurisdiction. This was addressed only in *California (S.J.)*. If federal jurisdiction exists, the next tier consists of arguments that, although permissible, exercise of federal jurisdiction should be deferred. First, federal declaratory relief is inappropriate in view of pending state litigation. Second, the federal court should decline to exercise jurisdiction in pursuit of "wise judicial administration."[154] These claims were raised in *California (Related)*. The next level of the hierarchy consists of arguments that either 1) the entire claim of the United States is barred by res judicata, or 2) the issue of consistency, at least, is precluded by collateral estoppel. Res judicata and collateral estoppel were addressed in *California (S.J.)*. A similar contention is that although federal jurisdiction exists, state procedural rules must be utilized, barring the United States' suit under state statutes of limitations. This approach was argued successfully in *California (Related)*, but unsuccessfully in *California (S.J.)*. Finally, the claim that the federal court should, at a minimum, defer to the state board's decision under the "substantial evidence" test was raised and rejected in *California (S.J.)*. These arguments will be addressed in the order described.

1. Jurisdiction

In *California (S.J.)*, the court does not explain why it addressed whether the section 8 directive that the Secretary of the Interior conform with state laws[155] divests federal courts of jurisdiction. Perhaps it operated on the principle that federal district courts are courts of lim-

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[152] *Id.* at 311 (emphasis added).

[153] *Id.* at 312.

[154] *See supra* text accompanying notes 150-51.

[155] 43 U.S.C. § 383 (1982).

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ited jurisdiction and thus the judge may always raise the issue sua sponte.[156] More probably the court was addressing the state's contention that after Decision 1422 was rendered, "the *only* recourse for judicial review open to the United States was in the State court action."[157] This would be an extreme reading of section 8. The court correctly noted that Congress conferred jurisdiction upon district courts in cases in which the United States is a plaintiff,[158] and that repeals of jurisdiction by implication are disfavored.[159] Further, even in the reclamation program's early pre-*Ivanhoe* years, when section 8's protection of state laws was commonly assumed, federal jurisdiction was recognized.[160]

On the other hand, Congress can restrict jurisdiction.[161] It has been observed that the Burger Court is "deeply committed" to "limiting access to the federal forum."[162] But although there will undoubtedly be

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[156] C. WRIGHT, A. MILLER & E. COOPER, FEDERAL PRACTICE & PROCEDURE § 3522 (1975).

[157] 521 F. Supp. at 494 (emphasis added).

[158] *Id.* at 495 (citing 28 U.S.C. § 1345 (1976)). The court had little to say about 28 U.S.C. § 1331 (federal question) as a separate jurisdictional issue.

[159] *Id.* at 496-97 (citing Colorado River Water Conservation Dist. v. United States, 424 U.S. 800, 808-09 (1976)). *Colorado River* addressed and rejected a claim by the State of Colorado that the McCarren Amendment, 43 U.S.C. § 666 (1982) (consenting to the joinder of the United States as a defendant in state court general stream adjudications), repealed district court jurisdiction over federal water rights. If the McCarren Amendment, which expressly consents to state court jurisdiction over the United States, did not terminate concurrent federal jurisdiction, it is difficult to conceive how § 8, which does not address jurisdiction at all, could have that effect.

[160] *Cf.* North Side Canal Co. v. Twin Falls Canal Co., 12 F.2d 311 (D. Idaho 1926), *cited in* 521 F. Supp. at 495. When the court cited *North Side Canal* in *California (S.J.)*, it omitted the following pertinent language: "The acquiring of water rights . . . and the determination by courts of what those rights are . . . are *entirely different subjects*, and it is reasonable to conclude that section 8 has no application to the latter of this." 12 F.2d at 314 (emphasis added). In an investigation for possible implied repeal, it is highly relevant to the inquiry whether statutes (here, the § 1345 jurisdictional grant to federal courts and § 8) are irreconcilable. *See* Morton v. Mancari, 417 U.S. 535, 550 (1974); *see also* Kremer v. Chemical Constr. Corp., 456 U.S. 461 (1982); St. Martin Evangelical Lutheran Church v. South Dakota, 451 U.S. 772, 788 (1981).

[161] C. WRIGHT, A. MILLER & E. COOPER, *supra* note 156, § 3526. The section granting federal jurisdiction when the United States is a plaintiff does so "[e]xcept as otherwise provided by Act of Congress." 28 U.S.C. § 1345 (1982).

[162] Nichol, *Backing into the Future: The Burger Court and the Federal Forum*, 30 U. KAN. L. REV. 341, 342-43 (1982).

> Even the language of the Court's opinions reflects an aversion to broad federal court access. The Court now commonly chides litigants for choosing federal courts over local tribunals. At other times, distaste for federal oversight is communicated more directly. In *Huffman* [Huffman v.

great "deference to state water law"[163] in the wake of *California (Supreme Court)*, sufficiently important federal interests exist to prevent the elimination of the federal forum[164] in reclamation cases. This is especially true when there are less drastic means for closing the federal courthouse doors in individual cases. The district court in *California (Related)* utilized those means when it chose not to exercise its jurisdiction in light of the pending state "Delta Water Rights" litigation.[165]

2. Discretionary Declaratory Relief

The Declaratory Judgment Act[166] provides that a federal court with jurisdiction may declare the rights and legal relations of parties before it. The decision whether to entertain such an action has long rested within the court's sound discretion.[167] Federal Rule 57 states that the

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> Pursue, Ltd., 420 U.S. 592, 605-06 (1975)] the availability of a federal forum for the presentation of all constitutional claims was characterized as a "luxury" too costly for our dual system of government to countenance, while in *Sumner* [Sumner v. Mata, 449 U.S. 539, 543 (1981)] the habeas supervision provided by federal courts was deemed "unfortunate for the smooth functioning of our federal system."

Id. at 378 (footnotes omitted).

[163] 438 U.S. at 653.

[164] *Cf.* Goldberg-Ambrose, *The Protective Jurisdiction of the Federal Courts*, 30 UCLA L. REV. 542 (1983), (discussing non-diversity federal jurisdiction in cases involving state law claims); Hornstein, *Federalism, Judicial Power and the "Arising Under" Jurisdiction of the Federal Courts: A Hierarchical Analysis*, 56 IND. L.J. 563 (1981) (discussing the instances when federal jurisdiction is appropriate under our "federal," i.e., state/national, system).

It should be noted that the court in *California (Related)*, 529 F. Supp. 303 (E.D. Cal. 1982), in a decision clearly deferential to the state, did not so much as raise the possibility of a complete lack of federal jurisdiction. *See* Jicarilla Apache Tribe v. United States, 601 F.2d 1116, 1136 (10th Cir.) (*California (Supreme Court)* "does not, however, reach the state versus federal court jurisdictional issue."), *cert. denied*, 444 U.S. 995 (1979).

[165] This state of facts — the pending case of United States v. State Water Resources Control Board, Judicial Council Coordination Proc. No. 548 (San Francisco County Super. Ct., Apr. 13, 1984) — significantly distinguished *California (Related)* from *California (S.J.)*. In the latter case there was no pending state case or any possible future state proceeding. If the district court did not reach the merits, the merits would simply never be reached. While it is dangerous to ascribe ulterior motives to judicial decisions, the pressure to provide a continuing forum for a case that had already been the subject of district, circuit, and Supreme Court review must have been great.

[166] 28 U.S.C. §§ 2201, 2202 (1982).

[167] *See, e.g.*, Employers' Liab. Assurance Corp. v. Mitchell, 211 F.2d 441 (5th Cir.), *cert. denied*, 347 U.S. 1014 (1954); California Ass'n of Employers v. Building & Constr. Trades Council, 178 F.2d 175 (9th Cir. 1949); Panhandle E. Pipe Line Co. v.

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"existence of another adequate remedy does not preclude a judgment for declaratory relief in cases where it is appropriate."[168] The disagreement between the state and the United States revolved around whether it was "appropriate" to proceed. The district court in *California (Related)* held it was not, because the detachment of the "consistency" issue from the pending state case "would severely disrupt the state court proceedings"[169] and because the "United States has not demonstrated the inability of the state court to give it whatever relief to which it may ultimately be entitled."[170]

Regarding the latter point, the United States argued strenuously that the state court lacked jurisdiction to address the "consistency" issue because of its limited ability to review administrative decisions under a writ of mandate.[171] The federal district court held that a decision that was "inconsistent with Congressional directives would, of course, be in *excess of the agency's jurisdiction* and therefore reviewable in the Superior Court."[172] In other words, agencies by definition are limited to the authority delegated them.[173] The power to act unconstitutionally — in this case in violation of the supremacy clause[174] if a Board's decision

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Michigan Consol. Gas Co., 177 F.2d 942 (6th Cir. 1949).

[168] FED. R. CIV. P. 57.

[169] 529 F. Supp. at 308. The court emphasized that many parties had rights affected by Decision No. 1485 other than the United States.

[170] *Id.*

[171] CAL. WATER CODE § 1394 (West 1971) provides that the Board's decisions or orders in the exercise of reserved jurisdiction shall be subject to judicial review. CAL. CIV. PROC. CODE § 1094.5(b) (West Supp. 1984) limits review of writs of mandate to determine whether the agency acted without or in excess of jurisdiction, whether the proceedings were fair, and whether there was abuse of discretion.

The argument that the state court lacked jurisdiction should not be confused with the argument that the state Board lacked jurisdiction. The interrelationship is close, but the numerous technical challenges that might be made to the Board's jurisdiction were not addressed by the court in *California (Related)*. The state court ultimately determined that in ordering coordinated operation of the federal and state projects, the Board had exceeded its jurisdiction. United States v. State Water Resources Control Bd., Judicial Council Coordination Proc. No. 548, slip op. at 104 (San Francisco County Super. Ct., Apr. 13, 1984).

[172] 529 F. Supp. at 307 (emphasis added).

[173] B. SCHWARTZ, ADMINISTRATIVE LAW § 1.6 (2d ed. 1984). The laws establishing the California State Water Resources Control Board are contained in CAL. WATER CODE §§ 174-189 (West 1971). The California Supreme Court characterized the authority of the Board as "broad," "open-ended," and "expansive" in National Audubon Soc'y v. Superior Ct. of Alpine Cty., 33 Cal. 3d 419, 449, 658 P.2d 709, 730, 189 Cal. Rptr. 346, 366, *cert. denied*, 104 S. Ct. 413 (1983), but no agency has absolutely unreviewable authority.

[174] U.S. CONST. art. VI, cl. 2.

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has been preempted by a congressional directive — cannot be given to an agency. Therefore, the action would be ultra vires.[175] That is, "excess of jurisdiction" equals "excess of authority." The state court, then, theoretically could reach the consistency issue if it so chose. However, as the United States pointed out, that issue was not before the Board.[176] In California, raising new issues during judicial review causes procedural problems.[177] The state court should inquire whether there was evidence of inconsistency "which, in the exercise of reasonable diligence, could not have been produced"[178] before the Board. When the federal suit was filed, it was unclear whether the United States would prevail in state court on the "reasonable diligence" test.[179] If it did, the superior court might choose to remand the issue to the Board instead of admitting evidence before the court.[180] The possibility of determining the consistency issue in the pending state case was fraught with uncertainty. Although the state court did choose to reach the consistency issue several years later,[181] the United States' desire to settle the consis-

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[175] B. SCHWARTZ, *supra* note 173, § 8.34, at 511 notes that, "[t]he courts will respect agency action within the boundaries of the jurisdictional area marked out by the enabling statute. But once let it overstep those bounds, and its action is ultra vires and void."

[176] 529 F. Supp. at 307 n.8. The decision in *California (Supreme Court)*, 438 U.S. 645 (1978), establishing "consistency with clear congressional directives" as the test for validity of state regulation of the Bureau, was rendered on July 3, 1978. By then, the Board had finished taking evidence. It rendered its decision on August 16, 1978.

[177] Markley v. City Council, 131 Cal. App. 3d 656, 663, 182 Cal. Rptr. 659, 664 (1982); Fermin v. Department of Employment, 214 Cal. App. 2d 586, 29 Cal. Rptr. 642 (1963).

[178] CAL. CIV. PROC. CODE § 1094.5(e) (West Supp. 1984).

[179] Although *California (Supreme Court)* was not decided until six weeks before the Board issued its decision, the general issue of federal-state powers under § 8 had been a concern in the Central Valley Project for years. The Bureau had even entered into a stipulation with the Board postponing the enforcement of any conditions imposed upon the Bureau pending the *California (Supreme Court)* decision. 529 F. Supp. at 305 n.4. Thus, the United States was aware of the problem. A general discussion regarding the ability of the superior court to entertain new evidence is found in Windigo Mills v. California Unemployment Ins. Appeals Bd., 92 Cal. App. 3d 586, 155 Cal. Rptr. 63 (1979).

[180] CAL. CIV. PROC. CODE § 1094.5(e) (West Supp. 1984). In the state case, United States v. State Water Resources Control Bd., Judicial Council Coordination Proc. No. 548, slip op. at 112 (San Francisco County Super Ct., Apr. 13, 1984), the court did remand numerous issues to the Board, but the consistency issue was not one of them.

[181] Judicial Council Coordination Proc. No. 548. The court was not at all troubled by the failure of Decision No. 1485 to address the issue and proceeded to determine that none of the Board's actions were invalid under the § 8 consistency test. *See infra* note 258.

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tency issue in federal court was legitimate when the declaratory action was filed.

Balanced against this, however, were the concerns of the other parties affected by Decision 1485. In deciding whether to proceed with a federal declaratory action in view of a pending state suit, the "real question . . . is which will most fully serve the needs and convenience of the parties and provide a comprehensive solution of the general conflict."[182] Especially in light of substantial authority within the Ninth Circuit deferring to state litigation,[183] the federal district court's decision that the United States was not entitled to separate itself from the other parties and have its water rights "resolved in a vacuum"[184] was not an abuse of discretion.

3. *Colorado River*

The second reason advanced by the court in *California (Related)* for eschewing jurisdiction was the policy formulated in *Colorado River Water Conservation District v. United States.*[185] In that case the Supreme Court held that concurrent federal jurisdiction to determine federal reserved water rights existed under the McCarren Amendment,[186] but that valid reasons required dismissing the federal suit when a state general stream adjudication was in process.[187] The "most important"

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[182] C. WRIGHT, A. MILLER & E. COOPER, *supra* note 156, § 2758, at 637-38.

[183] Geni-Chlor Int'l, Inc. v. Multisonics Dev. Corp., 580 F.2d 981 (9th Cir. 1978); Shell Oil Co. v. Frusetta, 290 F.2d 689 (9th Cir. 1961); H.J. Heinz Co. v. Owens, 189 F.2d 505 (9th Cir. 1951), *cert. denied*, 342 U.S. 934 (1952).

[184] 529 F. Supp. at 308 n.9.

[185] 424 U.S. 800 (1976). Some of the more thorough commentaries on this case are found in Abrams, *Reserved Water Rights, Indian Rights and the Narrowing Scope of Federal Jurisdiction: The* Colorado River *Decision*, 30 STAN. L. REV. 1111 (1978); Palma, *Indian Water Rights: A State Perspective After* Akin, 57 NEB. L. REV. 295 (1978); Comment, *Viability of Stays of Federal Actions Pending the Outcome of Parallel State Litigation*, 54 CHI-KENT L. REV. 614 (1977); Comment, *Federal Court Stays and Dismissals in Deference to Parallel State Court Proceedings: The Impact of* Colorado River, 44 U. CHI. L. REV. 641 (1977).

The decision's significance was recently strongly reenforced in Arizona v. San Carlos Apache Tribe, 103 S. Ct. 3201 (1983).

[186] 43 U.S.C. § 666 (1982).

[187] Most water rights cases do not entail a general stream adjudication, but rather resolve disputes between a limited number of contesting parties. The cases of United States v. District Court in & for the County of Eagle, 401 U.S. 520, 525 (1971) and Dugan v. Rank, 372 U.S. 609, 618 (1963), as well as *Colorado River* itself, indicate what constitutes a general stream adjudication for purposes of the McCarren Amendment. The basic concept is that the suit will involve the determination of the rights of all of the water rights claimants in a given river or other water system.

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factor was the clear federal policy of "avoidance of piecemeal adjudication of water rights in a river system . . . . [T]he concern in such instances is with avoiding the generation of additional litigation through permitting inconsistent dispositions of property. This concern is heightened with respect to water rights, the relationships among which are highly interdependent."[188] The United States sought to distinguish *Colorado River* by arguing that review of Decision 1485 did not qualify as a "general stream adjudication" under the McCarren Amendment. The district court disagreed, holding that the policy of avoiding piecemeal litigation, the need for adjudication "in one forum, in a coherent fashion" remained, and could be served only by dismissal.[189]

The court's casual equating of the controversy in *California (Related)* with *Colorado River* may work subsequent mischief. First, the United States government has consented to be sued under the McCarren Amendment in general stream adjudications, but no absolute

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Although a federal suit was dismissed in *Colorado River*, the Supreme Court clearly did not view the case as an abstention case. 424 U.S. at 813-16. Although some argue that the rule established in *Colorado River* should be viewed as an extension of the abstention doctrine, Note, *Judicial Abstention and Exclusive Federal Jurisdiction: A Reconciliation*, 67 CORNELL L. REV. 219, 221 n.10 (1981) [hereafter Note, *Judicial Abstention*], the Supreme Court has shown no inclination to do so.

Cases may arise out of federal-state conflicts over reclamation waters falling under a traditional abstention analysis; however, that claim has yet to be addressed by a federal court. For example, under the *Pullman* doctrine (Railroad Comm'n of Texas v. Pullman Co., 312 U.S. 496 (1941)), federal courts will avoid deciding federal constitutional issues if the case could be adequately disposed of under state law. In the reclamation area, questions whether state regulation of the Bureau violated federal supremacy might be avoided if the state courts found that the Water Board exceeded its authority under state law. Another abstention ground, the *Burford* doctrine (Burford v. Sun Oil Co., 319 U.S. 315 (1943)), advocates deferring to state administration of disputes involving extremely significant state policies. Although the Court in *Colorado River* explains why a significant state interest in its waters does not itself necessarily merit *Burford* type abstention, 424 U.S. at 815-16, there may be cases sufficiently different from *Colorado River* to qualify.

[188] 424 U.S. at 819. That this was "[b]y far the most important factor" was reaffirmed in Moses H. Cone Memorial Hosp. v. Mercury Constr. Corp. 460 U.S. 1, 16 (1983). Other factors in *Colorado River* included: a) the inchoate nature of the federal proceeding; b) the extensive nature of state water rights involved (as opposed to purely federal water rights claims); c) the inconvenient location of the federal forum as opposed to the state forum; and d) the existing participation of the United States in similar state proceedings. 424 U.S. at 820. Although the district court opinion in *California (Related)* only directly analyzed the "avoidance of piecemeal adjudication of water rights" factor, it tangentially addressed the second and the fourth factors outlined above. 529 F. Supp. at 310.

[189] 529 F. Supp. at 310.

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consent or waiver of sovereign immunity exists in all water cases.[190] The district court recognized the distinction,[191] but, perhaps because the United States itself had filed in state court in this instance, did not concede its significance. The question of what would happen if the United States were named as a defendant in state court but chose to proceed in federal court, and if the case were not a general stream adjudication will undoubtedly arise, and *California (Related)* should not control.

Second, the court did not sufficiently address whether state proceedings could adequately consider the federal claims.[192] In *Colorado River*, it was clear that the state forum would indeed address reserved rights claims.[193] That was not so clear with the Bureau's claims in the pend-

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[190] 28 U.S.C. § 2409 a(a) (1982) provides:

> The United States may be named as a party defendant in a civil action under this section to adjudicate a disputed title to real property in which the United States claims an interest, other than a security interest or water rights. This section does not apply . . . to or affect actions which may be or could have been brought under . . . [naming various statutes].

The most recent decision concerning the immunity of the Bureau is South Delta Water Agency v. United States, Civ. No. S-82-567 MLS (E.D. Cal. Oct. 21, 1983) (denial of motion to dismiss). As indicated, *supra* note 115, the court in *South Delta* stated that certain pre-*California (Supreme Court)* decisions had been impliedly overruled. It proceeded to find that review of Bureau practices in the Central Valley Project was "proper under the Administrative Procedure Act [5 U.S.C. § 702 (1982)], and thus sovereign immunity has been waived." Slip op. at 11. The court did not address the potential conflict between 5 U.S.C. § 702 and 28 U.S.C. § 2409a(a). *See generally* Comment, *Sovereign Immunity: A Modern Rationale in Light of the 1976 Amendments to the Administrative Procedure Act*, 1981 DUKE L.J. 116.

Comment, *Water Districts Contracting for Water With the Bureau of Reclamation — Can a State-Created Entity Violate State Laws?* 11 U.C. DAVIS L. REV. 473, 488 (1978), suggests that "[t]he Reclamation Act of 1902 read as a whole seems to indicate that Congress intended section 8 at least to act as a limited waiver of sovereign immunity." Because this conclusion relies on reclamation statutes (43 U.S.C. §§ 477, 511, 521 (1982)) that were enacted from 12 to 20 years after § 8, it is difficult to perceive how Congress could have intended the 1902 law itself to be a waiver of sovereign immunity. Congress has, however, recently consented to jurisdiction in suits over contracts "executed pursuant to Federal reclamation law." Such suits are to be brought in United States district court. 43 U.S.C. § 390uu (1982).

[191] 529 F. Supp. at 309 n.11 (citing Dugan v. Rank, 372 U.S. 609 (1963)).

[192] An adequacy inquiry has been deemed a significant concern in abstention cases. *See, e.g.*, Middlesex County Ethics Comm. v. Garden State Bar Ass'n, 457 U.S. 423 (1982) (adequacy found).

[193] This is not to say that reserved water rights claims are settled quickly in the Colorado courts. *See* City & County of Denver v. United States, 656 P.2d 36 (Colo. 1982); United States v. City & County of Denver, 656 P.2d 1 (Colo. 1982).

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ing state "Delta Water Cases."[194] The state court deserved respect, considering the significant policy questions and number of state parties. The federal court, however, did not consider staying its proceedings or even remitting the issues to the state, either of which would have prevented undue disruption of the state suit while preserving a federal forum.[195]

4. Res Judicata and Collateral Estoppel

Assuming that a federal court exercises jurisdiction in a conflict between the Bureau and a state, many cases will reach courts following state agency proceedings.[196] The existence of prior agency decisions will frequently result in the federal court facing allegations of claim or issue preclusion.[197]

The court in *California (S.J.)* correctly observed that only a final decision can form the basis for preclusion.[198] It seemed, however, to equate its finding of concurrent federal and state jurisdiction — that the state court action was not the only recourse for review of Decision 1422 — with a finding that the Water Board decision was not a final adjudication.[199] The concepts, of course, are totally distinct. A decision

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[194] *See supra* text accompanying notes 176-81. The claims were addressed and, for the most part, decided adversely to the Bureau. *See infra* note 258.

[195] *See* Note, *Judicial Abstention*, *supra* note 187, at 220-21 n.7.

[196] For example, both *California (S.J.)*, 521 F. Supp. 491 (E.D. Cal. 1980), and *California (Related)*, 529 F. Supp. 303 (E.D. Cal. 1981), involved Bureau challenges to State Water Resources Control Board decisions. Environmental Defense Fund, Inc. v. East Bay Mun. Util. Dist., 26 Cal. 3d 183, 605 P.2d 1, 161 Cal. Rptr. 466 (1980), also involved a challenge to a Water Board decision. In United States v. Alpine Land & Reservoir Co., 697 F.2d 851, 858 (9th Cir.), *cert. denied*, 104 S. Ct. 193 (1983), the court held that certain issues should have been addressed first by a state administrator. The balance of part II of this Article, discussing res judicata, collateral estoppel, statutes of limitation, and substantial evidence review, presupposes that the Bureau has appeared before a state agency and, indeed, that it had to do so. There is, however, an extremely significant underlying issue. Subsequent to *California (Supreme Court)*, must the Bureau and the Secretary of Interior always proceed initially before a state agency when they are faced with a question involving state law? *See infra* text accompanying notes 514-24.

[197] *See supra* note 134.

[198] 521 F. Supp. at 498. *See generally* 1B J. MOORE, J. LUCAS & T. CURRIER, MOORE'S FEDERAL PRACTICE ¶ 0.409 (2d ed. 1983).

[199] 521 F. Supp. at 498. Neither issue nor claim preclusion was a problem in *California (Related)*, 529 F. Supp. 303 (E.D. Cal. 1981), because the state superior court case reviewing Decision No. 1485 was still pending. The state proceedings were clearly not final. The court did comment that in a given case, decisions concerning controversies between the Bureau and the Water Board arising from other factual situ-

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in one proceeding can be final even though other forums might have appropriately asserted jurisdiction.

The United States Supreme Court recently reiterated that "a federal court must give to a state-court judgment the same preclusive effect as would be given that judgment under the law of the State in which the judgment was rendered."[200] The necessary starting point for analysis, then, is California law relating to the finality of board decisions.

The California Supreme Court recently stated that although the subject is confused, "ordinarily" a decision by a board with appropriate authority "is res judicata, and as conclusive of the issues involved in the decision as though the adjudication had been made by a court of general jurisdiction."[201] The court reviewed for finality purposes a Department of Social Services fair hearing determination involving a thirty-day rehearing provision and a one-year period for a petition for mandamus review in superior court. The court held that when the deadline for the petition for mandamus passed, the administrative determination would collaterally estop relitigation in the criminal courts.[202] The California Water Code provides for reconsideration of Water Board decisions within thirty days, followed by thirty days in which to file a petition for a writ of mandate.[203] By analogy, the Board's decision should have precluded the federal suit in *California v. United States*, because the suit was filed long after the period for pursuing a writ of mandate.[204]

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ations in the Central Valley Project would obviously not have preclusive effect even though the parties were identical. *Id.* at 310 n.13.

[200] Migra v. Warren City School Dist. Bd. of Educ., 104 S. Ct. 892, 896 (1984). The duty of federal courts to give such effect to state judgments is mandated by the Federal Full Faith and Credit Statute, 28 U.S.C. § 1738 (1982).

[201] People v. Sims, 32 Cal. 3d 468, 478-79, 651 P.2d 321, 327, 186 Cal. Rptr. 77, 83 (1982) (quoting San Francisco v. Ang, 97 Cal. App. 3d 673, 679, 159 Cal. Rptr. 56, 59 (1979)). The court in *Sims* was quite relaxed about equating res judicata and collateral estoppel.

[202] *Sims*, 32 Cal. 3d at 486-87, 651 P.2d at 332, 186 Cal. Rptr. at 88.

[203] CAL. WATER CODE §§ 1357, 1360 (West 1971 & Supp. 1984).

[204] *See also* United States v. Fallbrook Pub. Util. Dist., 165 F. Supp. 806 (S.D. Cal. 1958) (holding that a board decision within its jurisdiction would not be subject to collateral attack in federal court).

Additional California rulings on finality seem to indicate that the existence of conditions in an agency decree do not detract from finality, Ginns v. Savage, 61 Cal. 2d 520, 393 P.2d 689, 39 Cal. Rptr. 377 (1964), and further, a reservation of jurisdiction to amend, revise, or supplement a permit pursuant to CAL. WATER CODE § 1394 (West 1971) (as what happened in *California (Related)*, 529 F. Supp. 303 (E.D. Cal. 1981)), does not insulate a board decision from review. Environmental Defense Fund, Inc. v. East Bay Mun. Util. Dist., 26 Cal. 3d 183, 605 P.2d 1, 161 Cal. Rptr. 466 (1980).

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Although the United States Supreme Court has recognized that agency decisions may form the basis for res judicata,[205] there are limitations. First, the agency must act in a "judicial capacity" with the parties having had an "adequate opportunity to litigate."[206] In the New Melones case, in which the state was deciding whether to issue specific permits to the Bureau, the decision was clearly adjudicatory as opposed to legislative or rulemaking.[207] This may not be true in every federal-state water conflict. A state agency conceivably could pass a regulation of general applicability that would raise widespread "consistency" problems. Even where there is clearly an adjudication — a determination of individual rights — there is still the question of the "adequate opportunity" or, as more recently stated, a "full and fair opportunity" to litigate.[208] "Redetermination of issues is warranted if there is reason to doubt the quality, extensiveness, or fairness of procedures followed in prior litigation."[209]

At one extreme, no preclusive effect should be given to an agency determination if there is no hearing, no testimony, no subpoenaed evidence, and no opportunity for confrontation or argument.[210] On the other hand, agency proceedings will normally lack the full panoply of

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Importantly, however, finality for purposes of ripeness for judicial review does not necessarily equal finality for purposes of preclusion. People v. Sims, 32 Cal. 3d 468, 485, 651 P.2d 321, 332, 186 Cal. Rptr. 77, 88 (1982).

[205] United States v. Utah Constr. & Mining Co., 384 U.S. 394, 422 (1966), *cited in California (S.J.)*, 521 F. Supp. at 498.

[206] 521 F. Supp. at 498 (quoting United States v. Utah Constr. & Mining Co., 384 U.S. 394, 421-22 (1966)). California has expressly addressed the *Utah Construction* tests in People v. Sims, 32 Cal. 3d at 479-81, 651 P.2d at 327-29, 186 Cal. Rptr. at 83-85.

Of course, collateral estoppel (issue preclusion) raises the question "was the issue actually litigated," not merely "was there an opportunity to litigate."

[207] The distinction is between proceedings that decide contested facts, or apply a law, as opposed to those that promulgate general rules or policies. *See generally* B. SCHWARTZ, *supra* note 173, § 5.6.

[208] *See, e.g.*, Sierra Club v. Alexander, 484 F. Supp. 455, 464 (N.D.N.Y.), *aff'd*, 633 F.2d 206 (2d Cir. 1980); *see also* Kremer v. Chemical Constr. Corp., 456 U.S. 461, 480-81 (1982) and cases cited therein. These cases, however, do not deal exclusively with agency decisions.

[209] Kremer v. Chemical Constr. Corp., 456 U.S. 461, 481 (1982) (quoting Montana v. United States, 440 U.S. 147, 164 n.11 (1979)).

[210] Delamater v. Schweiker, 721 F.2d 50, 54 (2d Cir. 1983). *See* C. WRIGHT, A. MILLER & E. COOPER, *supra* note 156, § 4475, at 764-65 ("An administrative decision commands preclusive effects only if it resulted from a procedure that seems an adequate substitute for judicial procedure.").

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procedural rights expected in a courtroom.[211] The question is "what process is due," and that is a flexible standard.[212] The California Water Code states that Board hearings need not apply "technical rules of evidence."[213] However, it does provide for, *inter alia*, notice,[214] the filing of protests,[215] hearings,[216] and direct and cross-examination under some circumstances.[217] On balance, Water Board proceedings sufficiently safeguard procedural rights, and decisions should thus be given the effect of adjudications.[218]

A second limitation on the ability of agency proceedings to form the basis for res judicata or collateral estoppel is the issue of authority to proceed.[219] The court in *California (S.J.)* rather tersely indicated that the Water Board lacked such authority.[220] The more appropriate course for the court, when unsure of the Board's authority as a matter of state law, would have been to certify the issue to the state courts.[221] The

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[211] *See generally* B. SCHWARTZ, *supra* note 173, §§ 5.26-.27.

[212] Kremer v. Chemical Constr. Corp., 456 U.S. 461, 481-83 (1982).

[213] CAL. WATER CODE § 1353 (West 1971).

[214] *Id.* § 1300.

[215] *Id.* § 1330.

[216] *Id.* § 1350. Hearings are not required for unprotested applications. Notice and hearing requirements are specifically set out for permit revocations, *id.* §§ 1226.4, 1410 (West Supp. 1984); or reversion of water rights, *id.* § 1241; or for an exercise of the Board's reserved jurisdiction, *id.* § 1394 (West 1971).

[217] CAL. ADMIN. CODE, tit. 23, R. 733(g) (1980).

[218] In the specific case of *California (S.J.)*, however, which commenced in 1972, the particular issue of consistency with congressional directives was not adequately addressed by the agency, or for that matter any forum prior to 1978, for the simple reason that that formulation of the law had not yet been enunciated in *California (Supreme Court)*. Although the reasoning is somewhat circular, the inability to know what issues should have been litigated arguably affects the analysis of what could have been "fully and fairly" litigated.

With reference to this point, at least one court has adopted a test that lists "expectations of the parties" as a consideration in deciding whether to give an agency decision preclusive effect. Gargiul v. Tompkins, 704 F.2d 661, 667 (2d Cir. 1983), *vacated*, 104 S. Ct. 1263 (1984). Expectations have, of course, changed since 1978.

[219] *See supra* text accompanying notes 171-75; *cf.* Kremer v. Chemical Constr. Corp., 456 U.S. 461, 482 (1982) ("A state may not grant preclusive effect in its own courts to a constitutionally infirm judgment, and other state and federal courts are not required to accord full faith and credit to such a judgment.").

[220] 521 F. Supp. 491, 499 ("[N]or does a review of the California legislative materials pertaining to the creation of the Board indicate that the California legislature intended that the Board was empowered to decide issues of law of the nature presented by the complaint of the United States.").

[221] *See* Estate of Madsen v. Commissioner, 659 F.2d 897, 899 (9th Cir. 1981) and cases cited therein; National Audubon Soc'y v. Superior Court, 33 Cal. 3d 419, 432-33,

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California Supreme Court has interpreted the authority of the Board very expansively.[222] The federal court's conclusion that the California Legislature did not intend the Board to engage in consistency type inquiries was probably incorrect;[223] in any case, its determination was totally devoid of analysis.

Finally, although state agencies may act in an adjudicatory capacity that complies with due process and with ample delegation of authority, a considerable body of federal decisions still denies claim preclusive effect in federal court to state agency determinations left unappealed in the state courts,[224] even while allowing *issue* preclusive effect to facts actually adjudicated by the agency.[225] The Supreme Court recently indicated that it sees little reason to differentiate in these instances between issue and claim preclusive effects.[226] In that case, however, a state court, as well as the state agency, had dealt with the litigation, although the specific federal claim had been omitted. The line of federal cases denying claim preclusion to unreviewed state agency determinations forms the best support for the decision against applying res judicata in *California (S.J.).*[227]

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658 P.2d 709, 717-18, 189 Cal. Rptr. 346, 354-55, *cert. denied*, 104 S. Ct. 413 (1983).

[222] National Audubon Soc'y v. Superior Court, 33 Cal. 3d at 449, 658 P.2d at 730, 189 Cal. Rptr. at 366, stated: "Having construed section 2501 to give the board broad substantive powers — powers adequate to carry out the legislative mandate of comprehensive protection of water resources — it would be inconsistent to read that statute so narrowly that the board lacked jurisdiction to employ those powers." Although the statement refers to § 2501 proceedings (stream adjudications), and not permit proceedings, it indicates the court's view of the Board's capabilities.

[223] CAL. WATER CODE § 1250 (West 1971) provides that the Board "shall do all things required or proper" relating to applications for water permits. The Code clearly contemplates that the Board may consider applications by the United States. *Id.* § 1252.5; *see also id.* § 2075 (allowing federal courts to refer matters to the Board). Presumably the state legislature took a broad view of the Board's competence.

[224] *See, e.g.*, Loudermill v. Cleveland Bd. of Educ., 721 F.2d 550, 559 (6th Cir. 1983), *cert. granted*, 104 S. Ct. 2384 (1984); Gargiul v. Tompkins, 704 F.2d 661, 666-67 (2d Cir. 1983), *vacated*, 104 S. Ct. 1263 (1984); Moore v. Bonner, 695 F.2d 799, 800-01 (4th Cir. 1982). The full faith and credit statute, 28 U.S.C. § 1738 (1982), does refer to proceedings of state courts.

[225] *See* Loudermill v. Cleveland Bd. of Educ. 721 F.2d 550, 559 n.12 (6th Cir. 1983), *cert. granted*, 104 S. Ct. 2384 (1984).

[226] Migra v. Warren City School Dist. Bd. of Educ., 104 S. Ct. 892 (1984). *But see* Kremer v. Chemical Constr. Corp., 456 U.S. 461, 470 n.7 (1982) (buttressing a view that state agency decisions unreviewed by a state court should not be given preclusive effect).

[227] Issue preclusion (collateral estoppel) would also fail since the Board did not address the "consistency" issue.

Commentators have urged caution in allowing preclusive effect. *See* Perschbacher,

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5. Statutes of Limitation

The only procedural issue addressed in both *California (S.J.)* and *California (Related)* was whether the California thirty day statute of limitations for review of Water Board decisions[228] bound the United States in its federal district court suit and thereby barred the action.[229] The decision in *California (S.J.)* was rendered first, and stated that the United States was not bound. Finding that he could not "concur in the opinion of my brother in the *New Melones* decision,"[230] the judge in *California (Related)* rejected that determination and dismissed as untimely the United States' suit.

Both cases commenced their discussion of the issue whether state procedural rules should apply in federal court by citing *California (Supreme Court)*,[231] which held only that substantive state laws on appropriation might apply to the Bureau. The court in *California (S.J.)* merely mentioned the "broad reach of the language" in the Supreme Court decision, which would "tend" to indicate the applicability of state procedural laws under section 8.[232] The court then rejected such a "tendency," based upon an analysis that will be examined shortly. In contrast, the court in *California (Related)* cited numerous specific portions of the decision that it found made "clear" that section 8 required compliance with state procedures.[233]

Both courts expressly indicated that significant policy implications influenced their decisions. *California (S.J.)* referred to the "desirability

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Rethinking Collateral Estoppel: Limiting the Preclusive Effect of Administrative Determinations in Judicial Proceedings, 35 U. FLA. L. REV. 422 (1983); *see also* Gold, *Clean Water, Federalism and the Res Judicata Impact of State Judgments in Federal Environmental Litigation*, 16 U.C. DAVIS L. REV. 1 (1982).

As res judicata-type (finality) issues arise more frequently in water rights cases, Indian tribes in particular are suffering serious setbacks. The United States, in representing the Bureau of Reclamation and other federal interests, has not always preserved Indian claims. Nevada v. United States, 103 S. Ct. 2906 (1983); Arizona v. California, 103 S. Ct. 1382 (1983). *See generally* Note, Arizona v. California: *Finality as a Water Management Tool*, 33 CATH. U.L. REV. 457 (1984).

[228] CAL. WATER CODE § 1360 (West 1971).

[229] The case in *California (S.J.)* was filed approximately six months after the 30 days had elapsed, the case in *California (Related)* nearly three and one-half years later. Such 30 day limits constitute a bar in California state courts. *See* Kupka v. Board of Admin., 122 Cal. App. 3d 791, 176 Cal. Rptr. 214 (1981) and cases cited therein.

[230] United States v. California, 529 F. Supp. 303, 311 (E.D. Cal. 1981).

[231] 438 U.S. 645 (1978).

[232] United States v. California, 521 F. Supp. 491, 497 (E.D. Cal. 1980).

[233] 529 F. Supp. at 311.

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of a uniform rule"[234] and the need, when "important federal policies" were involved, not to have the United States' rights and liabilities "vary with the laws of the several states."[235] *California (Related)* stressed the "policy of promoting comprehensive and coherent resolutions of competing claims to water," and the need to treat the United States the same as "all other interested parties" to prevent utter frustration of the "expeditious and fair resolution of questions of water entitlements."[236] This difference in outlook over whether special care should be given to protect important federal interests, or whether the United States should not be able to assert privileges unavailable to other litigants, is symptomatic of the entire federalism dispute. Each court stressed the ultimate goal it desired to achieve in balancing federal-state relations rather than offering logical means to arrive there. In doing so, each missed several important points.

First, if the question truly is, as both courts indicated, one of state versus federal procedural rules, then the authority cited in *California (S.J.)* is not directly on point. As the district court stated, *Clearfield Trust Co. v. United States*[237] is a seminal case on choice of law in federal court. In *Clearfield*, the Supreme Court held that state law should not determine the question of unreasonable delay in giving notice of forgery of a check issued by the United States. *Clearfield*, however, was not a procedural decision, but a choice of a substantive rule controlling the negotiability of federal commercial paper. The federal government's interest in having a uniform rule to predict the validity of its own instruments is not the same as its interest in determining how to challenge a Water Board Decision, when, after all, it knows of the conflict and is not taken by surprise. Additionally, the interstate water rights cases cited in *California (S.J.)* for the proposition that a uniform federal rule was necessary are not truly germane. The issues involved in a state versus state or several states versus each other and the United States controversy are not necessarily the same as in a state versus United States controversy.[238] Neither *Clearfield* nor the interstate waters cases provide an adequate basis for a conclusion in *California (S.J.)* that the ruling in *California (Supreme Court)* is completely pro-

[234] 521 F. Supp. at 497 (citing Clearfield Trust Co. v. United States, 318 U.S. 363 (1943)).

[235] 521 F. Supp. at 498.

[236] 529 F. Supp. at 311-12. The court in *California (Related)* did distinguish *California (S.J.)*, because the policy of protecting competing claimants of water was not in issue in the latter case. *Id.*

[237] 318 U.S. 363 (1943).

[238] *See supra* note 113.

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cedurally inapplicable.

On the other hand, *California (Related)* overstated the impact of section 8 and *California (Supreme Court)*. *California (Related)* adopted an absolutist position: compliance with state procedures is required. The Supreme Court decision, however, is not absolute, but allows state procedural rules to apply unless inconsistent with congressional directives. In other words, a "consistency" analysis should be required for procedural as well as substantive issues.[239]

The most serious deficiency of both opinions is their failure to recognize that they were not deciding a pure "state versus federal procedure" confrontation. Statutes of limitation fall in the gray area between substantive and procedural rules.[240] To a large extent, the courts created an issue that was not squarely before them: whether there is a different rule for procedure, whatever the rule may be under section 8 for state substantive law. The federal courts have developed a body of law specifically addressing the hybrid nature of statutes of limitation. The decisions in *California (S.J.)* and *California (Related)* ignored that unique body of precedent. The Rules of Decision Act[241] allows federal courts to adopt state rules in civil actions under certain circumstances. State rules have been adopted not only in diversity cases, but also occasionally in federal question litigation.[242] Federal courts have often been quite willing to utilize state statutes of limitation in the absence of a

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[239] 529 F. Supp. at 312 n.15 (court recognized the consistency problem, but did not address it).

A realist's assessment of the decisions in *California (S.J.)* and *California (Related)* is that a consistency analysis would make no difference. Its concern for uniformity would doubtless lead the first court to find that the 30 day limitation was inconsistent with some directive and therefore invalid. The second court would doubtless find nothing sufficiently specific in federal law to prevent the limitation from applying to the United States to the same extent as any other party. A review of § 8 cases over the years leads one to believe that "outcome determination" is often the most cogent explanation of the decisions. "Outcome determination" is used in the sense that the court "to reach a result . . . disregards or unfairly characterizes precedent." Simonett, *The Use of the Term "Result-Oriented" to Characterize Appellate Decisions*, 10 WM. MITCHELL L. REV. 187, 200 (1984), although the statement can be enlarged to include the improper use of legislative history or the mischaracterization of facts. Nonetheless, a purist can at least hope that the courts will phrase the issues correctly in pursuing the outcome.

[240] *See generally* Guaranty Trust Co. v. York, 326 U.S. 99 (1945).

[241] "The laws of the several states, except where the Constitution or treaties of the United States or Acts of Congress otherwise require or provide, shall be regarded as rules of decision in civil actions in the courts of the United States, in cases where they apply." 28 U.S.C. § 1652 (1982)

[242] *See, e.g.*, United States v. Polizzi, 500 F.2d 856, 907 (9th Cir. 1974); Hill, *State Procedural Law in Federal Non-Diversity Litigation*, 69 HARV. L. REV. 66 (1955).

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controlling time limitation established by Congress.[243] However, the Supreme Court has explained that it

> has not mechanically applied a state statute of limitations simply because a limitations period is absent from the federal statute. State legislatures do not devise their limitations periods with national interests in mind, and it is the duty of the federal courts to assure that the importation of state law will not frustrate or interfere with the implementation of national policies.[244]

As a matter of policy, courts have consistently held that when the United States is the plaintiff in a suit, "state statutes of limitations do not apply."[245] This rule was historically absolute and would seem to answer the questions raised in both *California (S.J.)* and *California (Related)*. The United States, as plaintiff, was not subject to the thirty day California statute of limitations for seeking review of Water Board decisions.[246]

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[243] *See, e.g.*, Johnson v. Railway Express Agency, Inc., 421 U.S. 454 (1975); Campbell v. Haverhill, 155 U.S. 610 (1895). *See generally* Blume & George, *Limitations and the Federal Courts*, 49 MICH. L. REV. 937 (1951); Note, *Limitation Borrowing in Federal Courts*, 77 MICH. L. REV. 1127, 1134 (1979).

Of course, the existence of a federal statute of limitations ends the matter. "The Congressional statute of limitations is definitive. . . . The rub comes when Congress is silent." Holmberg v. Armbrecht, 327 U.S. 392, 395 (1946) (refusing to apply the state statute).

[244] Occidental Life Ins. Co. v. EEOC, 432 U.S. 355, 367 (1977), *cited with approval in* Burnett v. Grattan, 104 S. Ct. 2924, 2931 (1984). *But cf.* Board of Regents of the Univ. of the State of N.Y. v. Tomanio, 446 U.S. 478 (1980). In *Tomanio*, federal courts were directed, within the civil rights statutes, to refer to state statutes when federal laws for the enforcement of civil rights were deficient. 42 U.S.C. § 1988 (1982). The Court held that the New York statute of limitations and tolling provisions must apply unless "inconsistent with the Constitution and laws of the United States." 446 U.S. at 485 (quoting Robertson v. Wegmann, 436 U.S. 584 (1978)). The analogy to § 8 is apparent, although 42 U.S.C. § 1988 uses different language in explaining when state law is to be utilized.

[245] *See* C. WRIGHT, A. MILLER & E. COOPER, *supra* note 156, § 3652 (1976) and cases cited therein; *see also* Note, *Immunity from Statutes of Limitations and Other Doctrines Favoring the United States as Plaintiff*, 55 COLUM. L. REV. 1177 (1955). The rationale is that the public, represented by the United States, should not be barred by the dilatory actions of a public servant in filing suit.

[246] Recently, the United States Court of Appeals for the Ninth Circuit has recognized a limited exception to the "absolute" rule, United States v. California, 655 F.2d 914 (9th Cir. 1980); United States v. Hartford Accident & Indem. Co., 460 F.2d 17 (9th Cir. 1972). The exception relates to time periods that are not classic limitations, i.e., a bar to an otherwise valid claim, but rather are defined by statute as an actual element of the cause of action itself. Therefore the exception should not apply to CAL. WATER CODE § 1360 (West 1971). Board of Regents of the Univ. of the State of N.Y. v. Tomanio, 446 U.S. 478 (1980), might be viewed as supporting the use of § 8 as

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6. Substantial Evidence Review

In *California (S.J.)*, the court held that "substantial evidence" review[247] of Water Board Decision 1422 was inappropriate because the question raised by the United States differed from those raised before the state agency and because the "consistency" with congressional directives was a question of law.[248] One of the hoariest chestnuts of administrative law is that in reviewing administrative decisions, courts will scrutinize legal questions more closely than factual questions.[249] However, even an agency decision of "pure law" will not be totally disregarded,[250] and a "sufficiently reasonable" interpretation by an agency will be given due deference.[251]

The construction under section 8 of federal and state laws to determine whether any inconsistency exists between them is arguably a legal question.[252] Further, since the Water Board never addressed that question in Decision 1422, there was no state agency interpretation[253] to defer to in *California (S.J.)*. The court correctly rejected substantial evidence review. One consideration for future federal-state reclamation controversies, however, should be noted. The failure of the parties to address consistency before the Water Board in the New Melones dispute might have been forgiven; the Supreme Court had not yet spoken. The issue on remand was necessarily "new and different." But gener-

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another exception to the rule exempting the United States as a plaintiff from state statutes of limitation, but *Tomanio*, although a federal question case, did not involve the United States as a party.

[247] Substantial evidence review of the facts of an agency decision by a court is deferential, determining the reasonableness of the agency decision based on the whole record and necessitating little more than a scintilla of evidence to support the decision. This has resulted in "affirmance of agency findings in almost every case." B. SCHWARTZ, *supra* note 173, § 10.9.

[248] 521 F. Supp. 491, at 499-500.

[249] *See, e.g.*, Interstate Commerce Comm'n v. Union Pac. R.R., 222 U.S. 541, 547 (1912) (administrative order not final if, *inter alia*, "based upon a mistake of law"). *See generally* B. SCHWARTZ, *supra* note 173, §§ 10.5, 10.7, 10.29.

[250] NLRB v. United Ins. Co., 390 U.S. 254, 260 (1968).

[251] *See* Federal Elections Comm'n v. Democratic Senatorial Campaign Comm., 454 U.S. 27, 39 (1981), and cases cited therein.

[252] Of course, when the inquiry goes beyond investigation for conflicts in the laws themselves, and proceeds to analyzing the impact of state laws on the operation of projects, factfinding will ensue. But the consistency issue is clearly more than just a question of fact.

[253] The Bureau had its own interpretation — that no state conditions on its operations were permissible — that was clearly not considered "reasonable" in *California (Supreme Court)*.

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ally, when a decision is committed initially to an agency (and section 8 requires the Bureau to appear before numerous state agencies),[254] issues may not be reserved and raised for the first time before the reviewing court.[255] If consistency problems continue to arise, the Bureau cannot again afford to fail to fully litigate the issue before state administrative bodies such as the Water Board.

7. Summary

Federal and state courts have concurrent jurisdiction over suits to determine if, under section 8 of the Reclamation Act, state rules are inconsistent with congressional directives. The federal courts should exercise their jurisdiction unless there is pending state litigation. Even when a state case is pending, the federal court should determine the adequacy of relief available in the state court. If the state case is comprehensive — involving litigants other than the state and federal governments — and if the United States has waived its immunity in the state suit, the court should decline to exercise its jurisdiction.

Although state administrative decisions may form the basis for res judicata or collateral estoppel, the court should not give *any* preclusive effect to those decisions if the agency proceedings did not afford a "full and fair opportunity to litigate," or if the agency lacked jurisdiction. Federal courts should not give claim preclusive effect to state agency decisions that were not reviewed by state courts.

California (Supreme Court) allows federal courts to utilize state procedural rules when they are not inconsistent with congressional directives and when interstate waters would not be subject to varying treatment. The United States, however, should be exempted from any state statutes of limitation when it is the plaintiff in the case.

When a state agency has fairly analyzed a consistency dispute, deference should be given to its reasonable decision. In any dispute arising after the 1978 decision in *California (Supreme Court)*, the issue should be initially raised before the appropriate, authorized state agency and not before the reviewing court.

The author suggests the following as a touchstone in deciding procedural issues arising under section 8: The consistency issue is of para-

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[254] Not all Bureau activities relate to water quantity (e.g., acquisition, distribution). For example, some activities affect water quality, others involve land acquisition, others construction activity. Different state agencies may have jurisdiction over these various activities.

[255] *See, e.g.*, Myron v. Martin, 670 F.2d 49, 51 (5th Cir. 1982) (citing United States v. L.A. Tucker Truck Lines, 344 U.S. 33, 36-37 (1952)).

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mount importance to both federal and state interests, deserving comprehensive factual expositions and legal argumentation. Federal jurisdiction exists, but an independent proceeding in federal court is unnecessary when there has been a "full and fair" hearing before a state agency, accompanied by a pending or completed state court review.

III. THE LEGACY OF *California v. United States* — STATE LAW UNDER SECTION 8

A number of cases subsequent to *California (Supreme Court)*[256] either have not involved procedural challenges or have resolved those issues and proceeded to decide the validity of state substantive laws as applied to Bureau operations.[257] The major cases interpreting section 8 include[258] *California* upon remand — *California (District Re-*

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[256] 438 U.S. 645 (1978).

[257] A few basic statistics help to illustrate the importance of "Bureau operations." Nearly 90% of the irrigation in the United States occurs in the western states. This involves some 47 million acres, of which 20% are served by federal reclamation projects. Pring & Tomb, *License to Waste: Legal Barriers to Conservation and Efficient Use of Water in the West*, 25 ROCKY MTN. L. INST. 25-1, -4, -33 (1979); *see also* Aiken, *The National Water Policy Review and Western Water Rights Law Reform: An Overview*, 59 NEB. L. REV. 327, 329 (1980).

In 1982, the Bureau of Reclamation delivered 28.8 million acre feet of water for irrigation and 1.9 million acre feet for municipal and industrial uses. *Energy and Water Development Appropriations for 1985: Hearings before a Subcomm. of the House Comm. on Appropriations*, 98th Cong., 2d Sess. 37 (1984). The budget request for fiscal year 1985 was $1,079,431,000. *Id.* at 38. The 1984 request for the Central Valley Project alone amounted to $93 million. *Energy and Water Development Appropriations for 1984: Hearings before the Senate Comm. on Appropriations*, 98th Cong., 1st Sess. 258 (1983). *See also infra* note 490.

[258] Cases holding state law applicable include: Kittitas Reclamation Dist. v. Sunnyside Valley Irrigation Dist., 626 F.2d 95, 99 n.1 (9th Cir. 1980) ("[w]ithdrawal of the dead storage water is subject to appropriate state laws and regulations"); Northport Irrigation Dist. v. Jess, 215 Neb. 152, 161, 337 N.W.2d 733, 739 (1983) ("Federal law specifically defers to state appropriation laws in determining the right of the United States to appropriate water within a state."); United States v. State Water Resources Control Bd. (The Delta Water Case), Judicial Council Coordination Proc. No. 548 (San Francisco County Super. Ct., Apr. 13, 1984); and South Delta Water Agency v. United States, Civ. No. 5-82-567 MLS (E.D. Cal. Oct. 21, 1983) (denial of motion to dismiss). *See also* Nevada v. United States, 103 S. Ct. 2906 (1983), discussed *infra* note 263.

The *Delta Water Case* upheld a number of state laws under the consistency test. Starting with the proposition that "California state water law is controlling," slip op. at 78, the court stated that "[f]or a regulation to be rejected, it must clash with either express or clearly implied congressional intent." *Id.* at 82. The burden was placed on

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the United States to show any inconsistency. The United States failed to do this with regard to state regulations for the prevention of saltwater intrusion, *id.* at 82-90; state fish and wildlife regulations, *id.* at 90-92; and conditions requiring the federal project to monitor water quality, *id.* at 93-96. The monitoring requirements were later held invalid under state law. *Id.* at 108-09. The United States had other partial victories under California water law. It had objected to orders concerning project water releases that applied equally to the Central Valley Project and the State Water Project, even though federal water permits were asserted as senior. As to consumptive uses, the court held that the United States had suspended its priorities under a 1960 agreement. As to non-consumptive uses, however, the court recognized the possibility of a federal priority. *Id.* at 96-105. The court also held that the Board could not order the federal and state project to coordinate in order to achieve certain Board imposed goals, and then hold them jointly and severally responsible. This could result in "taking water the federal project was entitled to and giving it to the state project." *Id.* at 108.

South Delta Water Agency v. United States, discussed *supra* notes 115 & 190, has the potential to become a major § 8 case when the court at trial decides the effect of the California Watershed Protection Act, CAL. WATER CODE §§ 11460-11463 (West 1971) (applied to the United States under *id.* § 11128); the Delta Protection Act, *id.* §§ 12200-12205; and the act protecting the San Joaquin River Valley, *id.* §§ 12230-12233. Determination of the validity of the Watershed Protection Act in the Central Valley Project has been one of the most chronically postponed issues in § 8 history. The Act was found to be factually inapplicable in City of Fresno v. California, 372 U.S. 627 (1963). United States v. California, Civ. No. S-83-264 MLS (E.D. Cal., dismissed Aug. 24, 1983), involved a challenge by the United States to California State Water Resources Control Board Decision No. 1587 (1982), which had found that the Watershed Protection Act and the County of Origin statute, CAL. WATER CODE § 10505 (West 1971) were binding upon the Bureau at Folsom and Auburn Units of the Central Valley Project. That suit was dismissed at the behest of the United States. The congressional authorization of the New Melones project specifically ordered protection of the basin of origin, Pub. L. No. 87-874, § 203, 76 Stat. 1191 (1962), so the question of state law was really beside the point in the remand of *California*. As indicated earlier, *South Delta Water Agency* has yet to be decided on the merits. The only decision rendered on the Watershed Protection issue is the *Delta Water Case*, slip op. at 49-66, and a superior court decision has little precedential value.

Cases holding state law inapplicable include: United States v. Tulare Lake Canal Co., 677 F.2d 713, 717 (9th Cir. 1982) (Section 46 of the Omnibus Adjustment Act of 1926, 43 U.S.C. § 423e (1982), an "excess lands law," was held "sufficiently clear, specific and explicit to pre-empt state law."), *vacated as moot*, 459 U.S. 1095 (1983); *see supra* note 15; United States v. Northern Colorado Water Conservancy Dist., 608 F.2d 422, 430-31 (10th Cir. 1979) (Denver waived its right to contend that the Colorado domestic preference statute applied to a reclamation project because of a stipulation incorporated in a 1955 and 1964 decree.). *Tulare Lake* would qualify as a major § 8 case except that the judgment was vacated and remanded to the district court to dismiss as moot because of amendments to the excess lands laws.

See also the excerpt from Sporhase v. Nebraska, 458 U.S. 941 (1982), *supra* note 113; Sierra Club v. Andrus, 610 F.2d 581, 598 (9th Cir. 1979) (Consistency analysis under section 8 and *California v. United States* "cannot be lifted from the context of *reclamation* so as to encroach upon" the Rivers and Harbors Act.) (emphasis in origi-

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mand)[259] and *California (Circuit Remand),*[260] *Environmental Defense Fund, Inc. v. East Bay Municipal Utility District,*[261] *Jicarilla Apache Tribe v. United States,*[262] and *United States v. Alpine Land & Reservoir Co.*[263] With few exceptions, state laws have been upheld. This part summarizes these cases and briefly reviews the law of federal preemption. The Article discusses how preemption doctrines, coupled with the broad language of deference to states in *California (Supreme Court)* and its instruction to lower courts to search for specific, explicit, and clear congressional directives to establish inconsistency of state laws, made the triumph of state claims inevitable. The Article concludes by analyzing whether the consistency test for section 8 litigation established in *California (Supreme Court)* is either realistic or likely to produce results that conform with congressional intent, given a reclamation program that relies heavily upon extensive administrative planning and supervision.

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nal), *rev'd for lack of private cause of action sub nom.* California v. Sierra Club, 451 U.S. 287 (1981). *See also infra* note 426.

[259] 509 F. Supp. 867 (E.D. Cal 1981).

[260] 694 F.2d 1171 (9th Cir. 1982).

[261] 26 Cal. 3d 183, 605 P.2d 1, 161 Cal. Rptr. 466 (1980).

[262] 657 F.2d 1126 (10th Cir. 1981).

[263] 503 F. Supp. 877 (D. Nev. 1980), *aff'd as modified*, 697 F.2d 851 (9th Cir.), *cert. denied*, 104 S. Ct. 193 (1983). *Alpine* involved federal claims to water rights in the Carson River in Nevada. The impact of a decree settling water rights in the Carson has probable repercussions for the Newlands Reclamation Project, the Washoe Reclamation Project, the Truckee-Carson Irrigation District, the Carson-Truckee Water Conservancy District, and the Pyramid Lake Paiute Indian Reservation because the waters of the Carson and Truckee Rivers are intertwined and absolutely vital to the existence of central Nevada. *See* Pyramid Lake Paiute v. Morton, 354 F. Supp. 252, 259 (D.D.C. 1973) (map). Therefore, reference should be made to some related cases.

United States v. Truckee-Carson Irrigation Dist., 649 F.2d 1286 (9th Cir. 1981), involved an adjudication of the waters in the Truckee River. It was affirmed in part and reversed in part in Nevada v. United States, 103 S. Ct. 2906 (1983). The Court strongly reaffirmed its statement in *California (Supreme Court)* that "state water law would control in the appropriation and later distribution of the water." *Id.* at 2914.

In Carson-Truckee Water Conservancy Dist. v. Watt, 537 F. Supp. 106 (D. Nev. 1982), 549 F. Supp. 704 (D. Nev. 1982), and 575 F. Supp. 467 (D. Nev. 1983), the court addressed the following claims: The Secretary of the Interior's duty to obtain reimbursement for the costs of the Stampede dam and reservoir on the Truckee River; the Secretary's authority to sell reservoir waters for municipal and industrial uses in the face of Pyramid Lake Paiute Indian Tribe claims under the Endangered Species Act; and for reserved water rights. The case is currently on appeal to the Ninth Circuit.

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A. *Summary of the Major Cases*

1. *California (District Remand)* and *California (Circuit Remand)*

California (District Remand)[264] and *California (Circuit Remand)*[265] finally addressed the impact of the numerous conditions contained in State Board Decision 1422 upon the Bureau and the New Melones Dam and Reservoir. Two major groups of conditions limited the storage of waters for consumption to the amount required for established uses until the Bureau demonstrated firm commitments for additional waters[266] and limited the storage of water for hydroelectric power generation.[267] Additional conditions limited water deliveries to the counties in the Stanislaus River Basin,[268] required periodic studies of reports by the Bureau,[269] limited the time of year when water could be collected,[270] protected water quality concerns,[271] established construction requirements,[272] and gave the Board the continuing authority and right to modify the permits.[273] In addition to its concern that only waters firmly committed to use should be stored, the Board's major concern was that the unique recreational assets of the Stanislaus River not be prematurely lost.[274]

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[264] 509 F. Supp. 491 (E.D. Cal. 1981).

[265] 694 F.2d 1171 (9th Cir. 1982).

[266] *See* California State Water Resources Control Bd. Decision No. 1422, at 15 (1973) ("By failing to present evidence of a specific plan to use the water . . . the Bureau has failed . . . to meet the statutory requirements."); *id.* at 18 ("any permits issued . . . [should] prohibit the impoundment of water . . . until the permittee has firm commitments to deliver water"). This concern was impliedly addressed in conditions 1-a, 1-d, and 2 of Decision No. 1422, *id.* at 29-30, in which use of water was limited to fish and wildlife, recreation, water quality, and (in condition 2 only) satisfaction of prior rights. The entire text of Decision 1422 is appended to the *California (District Remand)* opinion, 509 F. Supp. at 888-902.

[267] 509 F. Supp. at 888-902 (Conditions 1-b, 1-c, & 2).

[268] *Id.* (Conditions 4 & 25).

[269] *Id.* (Conditions 3, 7, 8, & 12).

[270] *Id.* (Conditions 1-a to 1-d & 14).

[271] *Id.* (Conditions 5, 6, & 21).

[272] *Id.* Conditions 10, 17, & 18).

[273] *Id.* (Conditions 6, 13, 20, & 22). Condition 9 is related in that it allowed reduction of water quantities permitted "if investigation warrants."

The Bureau did not contest conditions 12, 15, 16, 19, 23, and 24. *See California (Circuit Remand)*, 694 F.2d at 1174 n.3. Finally, condition 11 did not pose a problem, as it required actual application of water to use by 1990, not a pressing concern in the early 1980's. *Id.* at 1181-82.

[274] Decision No. 1422, at 17-20.

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After reviewing the authorizing statutes and the project's legislative history,[275] the district court addressed the validity of the conditions. First, the court upheld the limitation upon the Bureau's storage of water for consumption until it demonstrated firm commitments.[276] However, it invalidated the limitations on hydroelectric power generation. Among the considerations were, *inter alia*, that New Melones was a unit of the Central Valley Project and that the Project envisioned production of electricity wherever possible.[277] Additionally, although California certainly was aware of the Corps of Engineers' development proposal[278] and its impact upon the white water nature of the Stanislaus, it still heartily supported the plan in 1962.[279] "Since California did not mention [any desire to preserve the white water or any indication that it would deny an appropriation], the court can only deduce that Congress concluded that California . . . had no more beneficial use for the water than . . . power generation."[280] Further, the Act authorizing New Melones specifically addressed power generation, altering the normal law regarding preferential sales of power. Because Congress sought to favor certain customers, it "intended a steady and dependable year-round supply of power to be available."[281] The court was also troubled that although the Board contemplated allowing the Bureau to store additional waters for consumption when it could show firm commitments, the decision not to allow storage for power generation was more open-ended, an "indefinite denial."[282] Finally, the

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[275] 509 F. Supp. at 871-76, 878. The most significant item was H.R. DOC. No. 453, 89th Cong., 2d Sess. (1962). The document included an exhaustive Army Corps of Engineers' feasibility study for the New Melones Dam and Reservoir.

[276] 509 F. Supp. at 884. As of November, 1980, the maximum storage amount had been set at 438,000 acre feet for prior rights, fish and wildlife, and water quality. California State Water Resources Control Bd. Order WR 80-20, at 17 (1980). The Bureau had applied for 2.4 million acre feet. 509 F. Supp. at 887.

[277] 509 F. Supp. at 885; *see* Act of Aug. 26, 1937, ch. 832, § 2, 50 Stat. 844, 850 ("That the entire Central Valley Project . . . is hereby reauthorized [for numerous purposes] . . . and for the generation and sale of electric energy as a means of financially aiding and assisting such undertakings.").

[278] The Army Corps of Engineers constructs most projects and may direct flood control features of federal projects, even when the Bureau controls other matters. *See generally* 33 U.S.C. §§ 701-1, 701a-1, 701b (1982). The division of labor in the New Melones project is set forth specifically in the authorizing statute, the Flood Control Act of 1962, Pub. L. No. 87-874, § 203, 76 Stat. 1173, 1191.

[279] 509 F. Supp. at 873-74, 885-86.

[280] *Id.* at 886.

[281] *Id.*

[282] *Id.* at 886-87 n.37. By the time of trial, the Board had "consistently invited the Bureau to file new applications," but the Bureau had refused to present new arguments

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United States was denied "a very important source of revenue which it had intended to use for the repayment of the very substantial costs of this project."[283] The court concluded that "any limitation of the amount of water which the United States might appropriate for the generation of electrical energy up to and including 2,400,000 afa is *inconsistent with the congressional objective*."[284]

The remainder of the decision was anticlimactic. The condition limiting water delivery to Stanislaus Basin counties was approved because, although "Congress intended that ultimately surplus water" could be used elsewhere in the Central Valley Project, "ultimately" was not the same as "currently."[285] The limitation on the time of year when water could be stored was valid since no unappropriated water was available at those times.[286] Several conditions relating to construction were mooted,[287] and one was provisionally invalidated.[288] With minor exceptions, the remaining conditions were held to be "consistent with congressional intent."[289]

In contrast, the Ninth Circuit found that none of the state conditions were inconsistent, at least "at this time and on this record."[290] The court characterized the issue as one of preemption[291] and strove to give due regard to the states under the "precepts of federalism."[292] Unlike

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to the Board.

[283] *Id.* at 887.

[284] *Id.* (emphasis added).

[285] *Id.* at 884. The "surplus" is as important as the "ultimate." Congress specifically stated in the project authorization that "the Secretary of the Interior shall determine the quantity of water required within [the Stanislaus] basin and the diversions shall at all times be subordinate to the quantities so determined," Pub. L. No. 87-874, § 203, 76 Stat. 1173, 1191 (1962).

[286] 509 F. Supp. at 884.

[287] *Id.* at 888. The project had already been built by the time of the decision.

[288] The court stated:

> Condition 17 addresses a construction feature of the dam itself. Congress clearly intended the Army Corps of Engineers to build the dam according to the Corps' plans and specifications. This condition, if not mooted by prior compliance during the actual construction of the dam, is not binding upon the United States or its agencies.

Id.

[289] *Id.* Conditions 8b and 8c, requiring records on dissolved solids and oxygen levels, and condition 9, allowing reduction of water quantities, were invalidated.

[290] 694 F.2d 1171, 1174 (9th Cir. 1982); *see* Note, United States v. California: *Who's Minding the Dam?*, 14 GOLDEN GATE U.L. REV. 139 (1984) [hereafter Note, *Who's Minding the Dam?*].

[291] 694 F.2d at 1176.

[292] *Id.* at 1178.

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the district court opinion, which criticized California's change of heart after supporting the New Melones project when first authorized,[293] the appellate court decision denounced the obstinance of the Bureau[294] in refusing to cooperate with the Board:

> [T]he United States [would be required], at a minimum, to *attempt to reconcile* its interests with California *before a court* can override the state's position as conflicting with federal policy . . . . The United States may not justify its demands as a raw exercise of superior authority. . . . [I]t was incumbent on the United States to respond to California's request for a full showing [before the Board]. If a [state] decision predicated on an evaluation of state interests did not properly implement congressional intent, or if it clashed with significant federal policies, the *courts would have a record to judge the question.*[295]

The Bureau had not only failed to be forthcoming before the Board but "presented on remand to the district court no evidence of impracticality or harmful consequence from any specific condition set by the California Water Board."[296] It had not "demonstrated a need to impound water for power purposes only."[297] The conditions relating to county of origin and water quality demanded "substantive results which could have been imposed by the decision of federal agencies involved."[298] The court was unpersuaded by the United States' argument that Interior, not the state, should have made those decisions.[299] As to the remaining conditions, any issue relating to the time of year when water could be stored was "premature," whereas the conditions relating to construction were "moot."[300] The court held that five conditions "could be exercised inconsistently with congressional intent."[301] The Supreme Court "did not mention state control over the actual *operation* of the dam as one of the purposes intended by Congress . . . [and the court doubted] that California was intended to play a significant role in

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[293] *See supra* text accompanying notes 278-80.

[294] The district court had not entirely ignored the Bureau's petulance, stating that the "imprecation of a 'plague on both your houses' " was appropriate in this case. 509 F. Supp. at 887.

[295] 694 F.2d at 1178 (emphasis added).

[296] *Id.* at 1174.

[297] *Id.* at 1179.

[298] *Id.* at 1180 (citing the statute authorizing the New Melones Dam).

[299] *Id.* at 1181.

[300] *Id.*

[301] *Id.* at 1182. These were conditions 6 and 20 (allowing reallocation of waters for water quality control); conditions 9 and 13 (providing for continuing Board jurisdiction and power to modify permits); and condition 22 (requiring the United States to request Board approval for substantial changes in the project).

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influencing the later *operation* of the dam."[302] But the problems were hypothetical, and therefore not appropriately before the court.

The State of California had finally achieved its victory. Only twenty-five days after the opinion was rendered in *California (Circuit Remand)*, the Bureau finally requested that the Board reconsider its rulings,[303] and in asking for modifications of the conditions, finally appeared to be cooperative. However, the state's victory was largely a hollow one. The winter weather of 1982-83 brutalized California, destroying piers and washing magnificent beach homes into the sea. Danger of flooding was imminent and, in some instances, realized. Although federal operation of the New Melones Dam and Reservoir for flood control purposes had never been subject to state control under Decision 1422,[304] the Board had predicted that the flood space in the reservoir would frequently be empty, and "[d]egradation of the esthetic values" of the Stanislaus River from inundation for flood control purposes "is expected to be minimal."[305] By 1983, the reservoir was full of flood waters. The unique value of the white waters had "been substantially degraded or entirely destroyed."[306] Further, the Bureau finally had sufficiently firm commitments for the planned consumption of additional waters,[307] and "generation of electrical power [had become] a much more important benefit to be gained from that project."[308] In deciding whether to finally allow use of the New Melones Dam and Reservoir for new irrigation or hydroelectric power generation purposes in addition to delivering water only for fish and wildlife, the strong countervailing environmental considerations of water quality and preexisting rights no longer faced the Board. The permits were accordingly amended.[309] Thus, while *California v. United States* in all its manifestations remains a landmark of section 8 litigation, the Stanislaus River is largely a memory.

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[302] 694 F.2d at 1182 (emphasis added).

[303] California State Water Resources Control Bd. Order WR 83-3, at 3 (1983).

[304] Decision No. 1422, at 17 note, 19-20; Order WR 83-3, at 4.

[305] Decision No. 1422, at 19, 20.

[306] Order WR 83-3, at 18. The Board estimated that the river canyon would be inundated for "an indefinite time which could range from several months to several years." *Id.* at 7.

[307] *Id.* at 20.

[308] *Id.* at 14.

[309] *Id.* at 26-27.

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2. *Environmental Defense Fund, Inc. v. East Bay Municipal Utility District*

As discussed earlier,[310] although *Environmental Defense Fund, Inc. v. East Bay Municipal Utility District*[311] was a significant victory for the Bureau in the California courts, when the case came before the United States Supreme Court, the judgment was vacated and remanded for reconsideration in light of *California (Supreme Court).*[312] *East Bay* involved a challenge to the decision of the Bureau and the Utility District to deliver the district's water through the Folsom-South Canal, thereby rendering water unavailable to the lower reaches of the American River. The California Supreme Court, however, originally refused to recognize the challenge. The court held that the state law on reasonableness of diversion was preempted not only in the case of direct conflict with congressional directives, but also when it "interferes with the secretary's expressly delegated powers, frustrates operation of the project or limits the benefits of the project."[313] The Secretary had chosen a diversion point; that was the end of the matter.

On remand,[314] the court reaffirmed that the construction of the Auburn Dam and Folsom-South Canal was not subject to state law; the federal authorization statutes[315] were preemptive. The court, however, no longer found the Secretary's choice of a diversion point determinative. The congressional provision requiring the Secretary to consider the California Water Plan and consult with local interests[316] was sufficient to deprive the Secretary's decision of preemptive effect.[317]

3. *Jicarilla Apache Tribe v. United States*

In *Jicarilla Apache Tribe v. United States*,[318] the Tribe argued the applicability of state law against the combined opposition of the United

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[310] *See supra* notes 52-58 and accompanying text.

[311] 26 Cal. 3d 183, 605 P.2d 1, 161 Cal. Rptr. 466 (1980).

[312] 439 U.S. 811 (1978). The California court's *East Bay* decision had been issued several months before *California (Supreme Court)* was decided and had taken a broad view of federal powers.

[313] 20 Cal. 3d 327, 338, 572 P.2d 1128, 1134, 142 Cal. Rptr. 904, 910 (1977).

[314] 26 Cal. 3d 183, 193, 605 P.2d 1, 5, 161 Cal. Rptr. 466, 470 (1980).

[315] 43 U.S.C. §§ 616aaa-616fff (1982).

[316] *Id.* § 616ddd.

[317] 26 Cal. 3d at 193, 605 P.2d at 5, 161 Cal. Rptr. at 470.

[318] The Tribe is currently challenging yet another Bureau contract, this time for water for a coal gasification project. Jicarilla Apache Tribe v. United States, Civ. No. 82-1327 (D.N.M., filed Nov. 12, 1982).

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States, New Mexico, and the City of Albuquerque. The Tenth Circuit invalidated an agreement between the Bureau of Reclamation and the City of Albuquerque.[319] Under the agreement, the Bureau would have delivered the city's share of water from the San Juan-Chama Project, 48,200 acre feet per year after 1981, for storage in Elephant Butte Reservoir. Albuquerque would not fully use the water until sometime in the twenty-first century, and therefore over the years some 1,121,900 acre feet of "excess" water would accumulate and dissipate in storage.[320]

The critical issue was beneficial use. Citing *California (Supreme Court)* and the express requirement in the second part of section 8 that "beneficial use shall be the basis, the measure and the limit"[321] of reclamation water rights, the court stated that "it is clear that the Secretary of the Interior may not . . . knowingly release water to an individual or entity for a use which is not recognized as beneficial under state law, unless such use is specifically authorized by a congressional directive."[322] Thus, while the court recognized that Congress could order uses that were not beneficial under state law,[323] it appeared to assume that "beneficial use" in the first instance would be defined by the states. The concept that analysis under section 8 might start with a federal definition of "beneficial use" was not considered.[324]

In support of the agreement, the Bureau and the city argued that even if not immediately consumed by Albuquerque, the stored water would be put to beneficial use through sales to other users (perhaps on an exchange basis for return when the city required it), increased power generation, and recreation.[325] The court disagreed, finding that the city had sold only a very limited amount of water (700-800 acre feet annually), merely had hopes of possible future sales, and that storage would result in only a small increase in power production.[326] These factors, along with a probable ninety-three percent evaporation loss, supported the conclusion that the uses were too wasteful, remote, and

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[319] 657 F.2d 1126 (10th Cir. 1981).

[320] *Id.* at 1132-33. The case explains why Albuquerque wanted to control its unused water. First, it was safeguarding a future supply. Second, it had to pay for the water whether used or not.

[321] 43 U.S.C. § 372 (1982).

[322] 657 F.2d at 1137.

[323] That is, Congress could preempt state law, although that is not the terminology used in the decision.

[324] *See infra* text accompanying notes 407-19.

[325] 657 F.2d at 1134-36.

[326] *Id.*

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speculative to be beneficial under New Mexico law.[327] Further, there was no specific federal authorization to the contrary.[328] Whether an appropriation for recreation was a beneficial use was a more difficult question. The law of New Mexico was unclear, but the court found that even if permissible under state law such a use would "be at odds" with federal statutes.[329] Citing provisions of the Colorado River Storage Project Act[330] and the act authorizing the San Juan-Chama project,[331] the court stated that recreation could not be the primary purpose but only an incidental benefit of the project.[332]

The defendants argued that financial considerations prompted the congressional decision not to elevate recreation or fish and wildlife improvement to primary purposes. Allocation of project waters to such uses would have made portions of the project nonreimbursable,[333] while allocations to municipal use would be recovered.[334] The court concluded that the defendants relied too heavily on the importance of reimbursement and indicated that the legislative history only reiterated that recreation as a sole use was not authorized.[335] Since none of the uses contemplated by Albuquerque were found to be beneficial or authorized by Congress, the agreement for water delivery was null and void.[336]

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[327] *Id.* (citing numerous New Mexico cases). The court conceded that under other, less wasteful circumstances, storage for future municipal use, or for transfer, or for power generation, could be beneficial under New Mexico law. It appears that the lack of present beneficial consumptive use, along with the high evaporation loss potential of the proposed instream uses, were the critical factors in this case.

[328] *Id.* at 1136.

[329] *Id.* at 1137.

[330] 43 U.S.C. §§ 620, 620g (1982).

[331] 43 U.S.C. §§ 615ii, 615pp (1970).

[332] 657 F.2d at 1139.

[333] *Id.* at 1140 (citing 43 U.S.C. § 620g (1982)).

[334] 43 U.S.C. § 620e (1982). This was not meant, however, to prevent a municipal water purchaser from putting water to recreational uses after delivery.

[335] 657 F.2d at 1140-41. The court also rejected the argument that because Congress knew that the agreement between the Bureau and the city provided water in excess of Albuquerque's present needs, this amounted to permission for Albuquerque to use the water for any purposes not otherwise authorized. *Id.* at 1142.

[336] *Id.* at 1145. The court, in the latter part of the opinion, addressed some additional issues. It first construed apparent conflicts regarding recreational use raised by a number of other federal statutes. *Id.* at 1142-44. The final issue in the case related to the need for the United States to apply to the state engineer for any storage permits. While citing generally to *California (Supreme Court)* in support of such a requirement, the court largely avoided any discussion because it had already determined that the proposed storage was impermissible. *Id.* at 1144-45.

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4. *United States v. Alpine Land & Reservoir Co.*

United States v. Alpine Land & Reservoir Co.[337] is intrinsically interesting because it had been pending since 1925 and was, therefore, one of the oldest established floating water games in the West. The case addressed many issues that are beyond the scope of this Article,[338] and the district court even affirmatively stated that the question whether state laws conflicted with congressional directives was "a concern not relevant to this case."[339] Nonetheless, three issues raised in *Alpine Land* do have section 8 implications.

First, in determining the various water rights, the district court and circuit court recognized that beneficial use was the key issue.[340] The circuit court opinion made explicit what the district court had only implied: under *California (Supreme Court)* and the Reclamation Act, "beneficial use itself was intended to be governed by state law."[341] Second, in determining allowable amounts under beneficial use, both courts rejected contracts limiting water delivery to three acre feet per acre entered into by some irrigators and the Secretary of the Interior.[342] Although under the second clause of section 8 "the limit of water rights is beneficial use, not . . . contractual limitations,"[343] neither court deferred whatsoever to the Secretary's apparent determination that three acre feet per acre was the proper water duty to constitute a beneficial

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[337] 503 F. Supp. 877 (D. Nev. 1980), *aff'd as modified*, 697 F.2d 851 (9th Cir.), *cert. denied*, 104 S. Ct. 193 (1983).

[338] Those issues include a discussion of ownership of reclamation water rights, *see supra* note 73, claims for reserved rights, and, the major concern of the court, evidentiary matters in establishing a water duty for irrigated lands.

[339] 503 F. Supp. at 880.

[340] 697 F.2d at 853; 503 F. Supp. at 882, 887. The district court addressed not only the amount of water (water duty) available for irrigators, but also awarded the United States 30,000 acre feet of water for fishing and recreation on the Lahontan Reservoir, having found such uses beneficial under Nevada law. The court of appeals vacated and remanded that part of the lower court's opinion because it had not been properly raised. Nonetheless, the court of appeals did indicate that on the issue of recreational uses, it agreed with the decision in Jicarilla Apache Tribe v. United States, 657 F.2d 1126, 1138 (10th Cir. 1981), that recreation could only be an incidental purpose of a reclamation project. The Newlands Project was authorized in the same Act of June 17, 1902, ch. 1093, 32 Stat. 388, that established the reclamation program at a period when recreation was not a major consideration. But the court in *Alpine Land*, unlike *Jicarilla*, did not address the particular legislation involved. Apparently it considered the rule on recreational or other instream uses as a universal one for all projects. This is not necessarily true.

[341] 697 F.2d at 854.

[342] *Id.* at 855-56; 503 F. Supp. at 886-87.

[343] 503 F. Supp. at 887.

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use.[344]

Finally, the court had to decide whether the Nevada State Engineer or the Secretary of the Interior would have primary jurisdiction over applications for transfer of project water rights. Both district and circuit courts concluded that absent a preempting directive, "Congress intended transfers to be subject to state water law."[345] A significant sidelight, discussed only in the district court opinion, was its conclusion that state law could not apply retroactively, at least during the construction phase of a project.[346]

Thus, although *Alpine Land*, along with *California* upon remand, *East Bay*, and *Jicarilla*, held that state law applied, it also marked the second instance in which a court demonstrated concern that the states should not lightly alter the ground rules the Bureau is expected to observe.[347]

B. The Impact of the Preemption Doctrine

Although only *California (Circuit Remand)*, *East Bay*, and the appellate decision in *Alpine Land* specifically spoke in terms of preemption,[348] this doctrine is necessary to resolve section 8 controversies. This section will briefly summarize preemption rules and analyze the cases discussing the issue.

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[344] The district court simply rejected the administrative determination outright. The circuit court did consider the contracts, but found that the three acre foot per acre determination had not been "consistently maintained" in all contracts nor enforced, and was "entitled to little, if any, deference." 697 F.2d at 856.

[345] *Id.* at 858 (citing 503 F. Supp. at 884).

[346] The United States was

> entitled to . . . complete the Project under the Nevada law as it existed when the Project plan was formulated and activity commenced . . . . It would be unfair to allow the government to make decisions based on the applicable state law at [that time] and commence action on an enormously expensive project and then allow the state to change the rules for the government in midstream.

503 F. Supp. at 884-85.

[347] The first instance was in *California (District Remand)*, 509 F. Supp. at 885-87. *See supra* text accompanying notes 278-80; *see also* Note, *State Control*, *supra* note 71, at 245-46.

[348] *California (Circuit Remand)*, 694 F.2d at 1175-77; *East Bay*, 26 Cal. 3d at 191-93, 605 P.2d at 4-5, 161 Cal. Rptr. at 469-70; *Alpine Land*, 697 F.2d at 858.

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1. Preemptive Tests

Assuming Congress has constitutional authority in a given area,[349] as it does with regard to the reclamation program,[350] the question arises whether congressional action pursuant to that authority preempts state actions.[351] There are numerous different descriptions of the preemption tests.[352] The following is one possible analysis.

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[349] *See* Engdahl, *Preemptive Capability of Federal Power*, 45 U. COLO. L. REV. 51 (1973). One of the most surprising legal happenings of the 1970's was National League of Cities v. Usery, 426 U.S. 833 (1976), authored by Justice Rehnquist, in which federal regulation of state employees' wages and hours was invalidated because it did "not comport with the federal system of government embodied in the Constitution." *Id.* at 852. The opinion and the significant commentaries upon it are comprehensively reviewed in La Pierre, *The Political Safeguards of Federalism Redux: Intergovernmental Immunity and the States as Agents of the Nation*, 60 WASH. U.L.Q. 779 (1982). The case, however, has not yet produced the revolution in federal-state relations that some parties expected. *See, e.g.*, Lopach, *The New Federalism of the Supreme Court: Diminished Expectations of* National League of Cities, 43 MONT. L. REV. 181, 190 (1982) ("*National League of Cities* has not had a dynamic career before the Supreme Court"); Rotunda, *The Doctrine of Conditional Preemption and Other Limitations on Tenth Amendment Restrictions*, 132 U. PA. L. REV. 289, 291 (1984) ("[A]lthough *National League of Cities* may still stalk the night in prey of federal statutes to invalidate, its claws are dulled and its size has much diminished."). Rotunda notes, however, that many of the cases decided since 1976 have been by a margin of five to four and therefore only a slight shift in judicial personnel could revive *National League. Id.* at 322; *see also* Schwartz, National League of Cities v. Usery *Revisited — Is the Quondam Constitutional Mountain Turning Out to be Only a Judicial Molehill?*, 52 FORDHAM L. REV. 329, 348-49 (1983) ("Judicial decisions and congressional action since 1976 inexorably lead to the conclusion that *National League of Cities v. Usery* has not significantly shifted the balance in the federal system toward the states."). The court in *California (Circuit Remand)* noted the tenth amendment issues raised by *National League*, but did not "intimate any view on the appropriate application" of the case in the section 8 context. 694 F.2d at 1175 n.7.

[350] *See supra* notes 72-73 and accompanying text.

[351] The issue of preemption is related to the issue of federalism, *see supra* notes 76 & 104, although the connection is not always recognized. Several articles that do directly address the linkage are Freeman, *supra* note 76, Tarlock, *supra* note 76, and Note, *The Preemption Doctrine: Shifting Perspectives of Federalism and the Burger Court*, 75 COLUM. L. REV. 623 (1975) [hereafter Note, *Shifting Perspectives*].

[352] Among the best brief treatments of the topic are L. TRIBE, AMERICAN CONSTITUTIONAL LAW §§ 6-23 to -27, at 376-90 (1978); Catz & Lenard, *The Demise of the Implied Federal Preemption Doctrine*, 4 HASTINGS CONST. L.Q. 295 (1977); Hirsch, *Toward a New View of Federal Preemption*, 1972 U. ILL. L.F. 515; Note, *Shifting Perspectives*, *supra* note 351; Comment, *Preemption Doctrine in the Environmental Context: A Unified Method of Analysis*, 127 U. PA. L. REV. 197 (1978); Note, *A Framework for Preemption Analysis*, 88 YALE L.J. 363 (1978) [hereafter Note, *Framework*].

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First, if a federal statute expressly excludes or prohibits certain state activities, they are unquestionably preempted.[353] Section 8 does not fall into this category. Far from prohibiting state laws, section 8 envisions general compliance with them.[354] Second, even without a statute that facially excludes state involvement, certain schemes so pervasively control a given area of conduct,[355] or federal interests in an area may be so dominant,[356] that Congress is deemed to have intended to "occupy the field,"[357] leaving no room for state laws. This type of argument concerning the reclamation program was rejected in *California (Supreme Court)*.[358] Finally, even when Congress has neither expressly excluded the states nor entirely occupied the field, state laws in conflict with congressional actions actually taken are preempted.[359] The conflict analysis is the relevant preemption theory to apply to section 8 cases: courts have been directed to look for inconsistency with specific, ex-

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[353] *See, e.g.*, Aloha Airlines, Inc. v. Director of Taxation, 104 S. Ct. 291 (1983) (unanimous opinion); Jones v. Rath Packing Co. 430 U.S. 519, 530-31 (1977).

[354] Section 8, 43 U.S.C. §§ 372, 383 (1982), is a "saving clause" of sorts. The role of provisions saving state powers in the preemption context is not frequently addressed by the commentators, but is discussed *infra* text accompanying notes 371-80.

[355] *See, e.g.*, City of Burbank v. Lockheed Air Terminal, Inc., 411 U.S. 624 (1973); Napier v. Atlantic Coast Line R.R., 272 U.S. 605 (1926).

[356] *See, e.g.*, Pennsylvania v. Nelson, 350 U.S. 497 (1956); Hines v. Davidowitz, 312 U.S. 52 (1941). Both cases also addressed the "pervasiveness" test.

[357] The case most commonly cited for both the "pervasiveness" and "dominant interest" tests for occupying the field is Rice v. Santa Fe Elevator Corp., 331 U.S. 218 (1947). This is ironic because *Rice* involved a statute that expressly made federal regulation exclusive. The "occupy the field" tests have recently been losing ground in the Supreme Court. *See* Comment, *State Regulation of Nuclear Power Production: Facing the Preemption Challenge From a New Perspective*, 76 Nw. U.L. Rev. 134, 157 (1981). The Court, sometimes by large margins, has made distinctions to preserve state laws. *See, e.g.*, Silkwood v. Kerr-McGee Corp., 104 S. Ct. 615 (1984) (Congress occupied the field of nuclear safety, but not of remedies; state law on punitive damages upheld); DeCanas v. Bica, 424 U.S. 351 (1976) (Congress exclusively controls regulation of immigration, but not of aliens); New York Dep't of Social Serv. v. Dublino, 413 U.S. 405 (1973) (apparent comprehensiveness of legislative scheme insufficient for preemption). *But see* Exxon Corp. v. Eagerton, 103 S. Ct. 2296 (1983) (federal law occupies field of wholesale of natural gas in interstate, but not intrastate commerce); Chicago & N.W. Transp. Co. v. Kalo Brick & Tile Co., 450 U.S. 311 (1981) (Interstate Commerce Act pervasive). These two cases were couched in statutory preemption terms, while many interstate commerce cases are analyzed under the Commerce Clause itself, U.S. Const. art. I, § 8, cl. 3. Both approaches are addressed in Arkansas Elec. Coop. Corp. v. Arkansas Pub. Serv. Comm'n, 461 U.S. 375 (1983) (neither federal preemption nor commerce clause violation found).

[358] *See supra* notes 119-21 and accompanying text.

[359] *See e.g.*, Southland Corp. v. Keating, 104 S. Ct. 852, 858 (1984).

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plicit, and clear congressional directives.[360]

A general review of conflict cases reveals that an actual express conflict can arise between a federal and state law: the federal directive expressly mandates A, the state says not A.[361] *Ivanhoe Irrigation District v. McCracken* was such a case.[362] When section 5 of the Reclamation Act dictated that water would not be delivered to lands in excess of 160 acres and California law provided otherwise, the federal law prevailed.[363] For both laws to co-exist would be a physical impossibility.[364] An actual conflict can also impliedly occur even when a federal statute does not facially dictate certain acts, if a state rule would frustrate the accomplishment of the full purposes and objectives of Congress.[365] At one time, federal laws also may have had preemptive effect in light of potential conflicts, but the Supreme Court has lately rejected preemption in hypothetical or potential conflict situations.[366]

2. Rules for Preemption in the Reclamation Context

Although the previous discussion serves as an overview of the standard preemption tests, preemption doctrines may be more narrowly construed in reclamation cases. First, one might argue that with regard to real property generally,[367] and natural resources particularly,[368] state interests should receive enhanced protection. Water rights are an espe-

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[360] *See supra* text accompanying note 82.

[361] *See, e.g.*, Philko Aviation v. Shacket, 103 S. Ct. 2476, 2478-79 (1983); Townsend v. Swank, 404 U.S. 282 (1971).

[362] 357 U.S. 275 (1958).

[363] *Ivanhoe* still lives, as indicated in United States v. Tulare Lake Canal Co., 677 F.2d 713 (9th Cir. 1982), *vacated as moot*, 459 U.S. 1095 (1983) (discussed *supra* note 258).

[364] The claim that it is "physically impossible" for a state and federal law to coexist, or that they "cannot stand together," Kelly v. Washington, 302 U.S. 1 (1937), is generally unsuccessful. A good discussion of that test is found in Florida Lime & Avocado Growers, Inc. v. Paul, 373 U.S. 132, 142-43 (1963).

[365] *See, e.g.*, Jones v. Rath Packing Co., 430 U.S. 519, 540-43 (1977); Perez v. Campbell, 402 U.S. 637, 649 (1971). In Silkwood v. Kerr-McGee Corp., 104 S. Ct. 615, 626 (1984) and Pacific Gas & Elec. Co. v. State Energy Resources Conservation & Dev. Comm'n, 103 S. Ct. 1713, 1729-30 (1983), claims of "physical impossibility" and "frustration" were both rejected.

[366] *See, e.g.*, Arkansas Elec. Coop. Corp. v. Arkansas Pub. Serv. Comm'n, 461 U.S. 375, 389 (1983); Rice v. Norman Williams Co., 458 U.S. 654, 659 (1982); Exxon Corp. v. Governor of Md., 437 U.S. 117, 131 (1978).

[367] *See* Henkel & Dilworth, *Federal Pre-emption of State Due-on-Sale Clause Restrictions: Jurisdictional Considerations*, 47 Mo. L. Rev. 225, 240-41 (1982).

[368] *Cf.* Engdahl, *Some Observations*, *supra* note 73.

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cially sacred cow in the pantheon of western real property rights. The Supreme Court, however, has not chosen to create a separate preemption doctrine for real property,[369] although Justice Rehnquist, the drafter of *California (Supreme Court)*, disagrees.[370]

Second, section 8's language could require a preemption analysis that goes beyond the traditional rules. Section 8 is an example of a "saving clause" that provides for "the survival of state law."[371] A broad reading of such clauses — that they literally save "all state laws from preemption" — has proved "untenable."[372] Certainly a saving clause should prevent a finding that Congress has "occupied the field" and left nothing to the states.[373] The need to undertake a conflict preemption analy-

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[369] *See, e.g.*, Fidelity Fed. Sav. & Loan Ass'n v. De La Cuesta, 458 U.S. 141, 153 (1982) (citing Free v. Bland, 369 U.S. 663, 666 (1962)) (general preemption rules "are not inapplicable here simply because real property law is a matter of special concern to the States: 'The relative importance to the State of its own law is not material when there is a conflict with a valid federal law, for the Framers of our Constitution provided that the federal law must prevail.' "). *But cf.* Hisquierdo v. Hisquierdo, 439 U.S. 572, 581, 583 (1979) (citations omitted) (emphasis added):

> [T]his court has limited review under the Supremacy Clause to a determination whether Congress has '*positively* required by *direct enactment*' that state law be pre-empted . . . . A mere conflict in words is not sufficient. State family and family-property law must do '*major* damage' to '*clear* and *substantial*' federal interests before the Supremacy Clause will demand that state law be overridden . . . . The pertinent questions are whether the right as asserted conflicts with the *express terms* of federal law . . . .

Nonetheless, state law was held preempted in *Hisquierdo.*

[370] *See, e.g.*, Fidelity Fed. Sav. & Loan Ass'n v. De La Cuesta, 458 U.S. 141, 172 (1982) (Rehnquist, J., dissenting) (Congress did "not authorize the Federal Home Loan Bank Board to intrude into the domain of state property and contract law"); McCarty v. McCarty, 453 U.S. 210, 236 (1981) (Rehnquist, J., dissenting) (emphasizing the requirement that Congress move by "direct enactment").

[371] Hirsch, *supra* note 352, at 538.

[372] Hirsch writes, "[t]he Court must begin its analysis of a general saving clause by recognizing that Congress is not able to anticipate all of the preemption problems . . . . Accordingly, the Court should infer that a literal application of the clause would not serve the statutory purpose." *Id.* at 540. The Note, *Who's Minding the Dam?*, *supra* note 290, at 151, misstates the law in asserting that because Congress "expressly deferred to state law" in § 8, "the preemption doctrine has no application." Every saving clause case involves the interpretation of a statute "expressly deferring" to the state in some manner, but the courts still engage in a preemption analysis. *See generally* Comment, *Environmental Law: A Reevaluation of Federal Pre-Emption and the Commerce Clause*, 7 FORDHAM URB. L.J. 649, 658-65 (1979) (analyzing a number of saving clause cases).

[373] De Canas v. Bica, 424 U.S. 351, 362 (1976) (saving clause was "persuasive evidence that . . . Congress [was not] expressing its judgment to have uniform federal

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sis remains,[374] although the courts may be less inclined to discern a conflict.[375] Whatever state laws are protected,[376] saving clauses grant no additional authority to states.[377]

Thus, courts interpreting section 8 are left with no easy answer. A benediction upon all state laws cannot be substituted for a case by case consideration of conflicts or inconsistencies between state and federal rules. Additionally, one phrase in the section 8 saving clause has heretofore received scant attention, but might play a significant role in determining which laws are "saved." Section 8 provides in part that nothing in the reclamation laws shall affect or interfere with state laws relating to water used in irrigation, and the Secretary is to proceed in conformity with such laws.[378] A great amount of water in the West is used for purposes other than irrigation — municipal consumption by such metropolitan areas as Phoenix and Los Angeles springs immediately to mind — and some of the water delivered by the Bureau is for nonirrigation purposes.[379] Litigation over nonirrigation uses of reclama-

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regulations . . . therefore barring state legislation").

[374] Shaw v. Delta Air Lines, 103 S. Ct. 2890, 2902 n.22 (1983), demonstrates that the Court will not indulge in a simplistic, absolutist reading of savings clauses.

[375] "Where the [national] Government has provided for collaboration, the courts should not find conflict." Merrill Lynch, Pierce, Fenner & Smith v. Ware, 414 U.S. 117, 137 (1973) (quoting Union Brokerage Co. v. Jensen, 322 U.S. 202, 209 (1944)); *see also infra* note 393.

[376] *See* Pacific Gas & Elec. Co. v. State Energy Resources Conservation & Dev. Comm'n, 461 U.S. 190, 206-12 (1983) (recent analysis of a saving clause).

[377] *See* Arkansas Elec. Coop. Corp. v. Arkansas Pub. Serv. Comm'n, 461 U.S. 375, 387 n.11, 389 (1983); *see also* Ventura County v. Gulf Oil Corp., 601 F.2d 1080, 1086 (9th Cir. 1979). *Ventura County* is noteworthy because it demonstrated much more solicitude for federal interests in a saving clause preemption case than the court of appeals showed in the remand of *California*, 694 F.2d 1171 (9th Cir. 1982). Part of the explanation is that *Ventura County* analyzed a federal-state controversy over use of land actually owned by the United States, thereby implicating the United States' strong property clause interests. U.S. CONST. art IV, § 3, cl. 2; *see supra* note 73.

[378] 43 U.S.C. § 383 (1982) (emphasis added). Jicarilla Apache Tribe v. United States, 657 F.2d 1126, 1137 (10th Cir. 1981), cites this language, but does not address the problem raised by it. Walston, *supra* note 71, at 1663, states that legislative history subsequent to the 1902 Act demonstrates congressional intent to expand the scope of § 8 to uses other than irrigation.

[379] *See supra* note 257. The current pressure to convert from agricultural to other water uses is very high. *See, e.g.*, Clyde, *Allocation of Water for Resource Development*, 14 NAT. RESOURCES L. 519 (1982); Gould, *Conversion of Agricultural Water Rights to Industrial Use*, 27B ROCKY MTN. MIN. L. INST. 1791 (1982); Pring & Edelman, *Reclamation Law Constraints on Energy/Industrial Uses of Western Water*, 8 NAT. RESOURCES L. 297 (1975).

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tion waters is commonplace,[380] but the specific impact of the "water used in irrigation" language in section 8 has not been decided.

The third basis for an argument that reclamation cases should be treated differently from other preemption cases arises from language in *California (Supreme Court).* The Court stated that "state law could not override the *specific* directives of Congress;"[381] that legislation "may *by its terms* signify congressional intent";[382] that "the 160-acre limitation on irrigation water deliveries [was] *expressly written* into § 5 of the Reclamation Act of 1902";[383] that "§ 8 did not require the Secretary of the Interior to ignore *explicit* congressional provisions";[384] and that "Congresses have indeed issued new directives to the Secretary, [but] they have consistently reaffirmed that the Secretary should follow state law in all respects not *directly inconsistent with these directives.*"[385] The meaning of these statements is unclear. Perhaps they were intended to set up a particularized conflict analysis under section 8. Conflicts could arise only if the federal directive was explicitly stated upon the face of a statute.[386] This would eliminate the finding of implied conflicts through

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[380] One area of dispute over nonirrigation uses is whether they are "beneficial" uses. *See, e.g., supra* text accompanying notes 325-32. The major controversies, however, have involved whether the Secretary of the Interior was delegated sufficient authority to contract for nonirrigation uses. *See, e.g.*, Environmental Defense Fund, Inc. v. Morton, 420 F. Supp. 1037 (D. Mont. 1976), *aff'd in part and rev'd in part sub nom.* Environmental Defense Fund, Inc. v. Andrus, 596 F.2d 848 (1979); Missouri v. Andrews, 586 F. Supp. 1268 (D. Neb. 1984).

The *Environmental Defense Fund* cases upheld a broad delegation of authority to the Secretary, allowing the marketing of reclamation water for industrial purposes when such use was not expressly stated in the authorization for the projects from which the water would be drawn. The water would be used for energy development. At least two commentators have assumed that in the wake of *California (Supreme Court)*, the states could curtail the Secretary's efforts to market water for industrial purposes. Hostyk, *supra* note 5, at 76; Tarlock, *Western Water Law and Coal Development*, 51 U. COLO. L. REV. 511, 547 n.139 (1980).

[381] 438 U.S. at 665 n.19 (emphasis added). "Specific" is also used *id.* at 670.

[382] *Id.* at 669 n.21 (emphasis added).

[383] *Id.* at 671 (emphasis added).

[384] *Id.* (emphasis added). "Explicit" is used again *id.* at 673.

[385] *Id.* at 678 (emphasis added). The case does not always utilize the terms "specific," "express," "explicit," or "direct." Sometimes the phraseology is "clear" directive, *id.* at 672, or no adjective at all.

[386] A "conflict" analysis is generally characterized as a two-step process. The first step is simply ascertaining what the federal and state laws dictate, an arduous process in itself. Only as a second step do the courts determine "the constitutional question whether they are in conflict." Perez v. Campbell, 402 U.S. 637, 644 (1971), *cited with approval in* Chicago & N.W. Transp. Co. v. Kalo Brick & Tile Co., 450 U.S. 311, 317 (1981).

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interpretation of legislative history, or in cases involving "frustration of purposes and objectives" of Congress[387] that were not expressly stated. Second, only congressional acts could raise the preemption issue; any possible administrative preemption would be precluded.

Although Justice Rehnquist probably intended the first consequence — that conflicts must arise directly from the express terms of a federal statute[388] — this has generally not been required in the section 8 cases[389] decided after *California (Supreme Court).* Since the majority of the Supreme Court has frequently reiterated that conflicts may be explicit or implicit,[390] and has shown a proclivity to entertain legislative

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To refuse to find a conflict in the absence of unambiguous congressional intent involves a decision about relative institutional responsibilities that the Court may have made. One commentator recently observed that a popular presumption is "that Congress did not intend to interfere with the traditional power and authority of the states unless it signaled its intention in neon lights." Wald, *Some Observations on the Use of Legislative History in the 1981 Supreme Court Term*, 68 IOWA L. REV. 195, 208 (1983). But to refuse to even recognize such congressional intent unless stated upon the face of a statute is a more drastic delineation of responsibilities.

[387] *See supra* note 365 and accompanying text.

[388] This belief is based on his insistence on "direct" congressional enactments in such cases as McCarty v. McCarty, 453 U.S. 210, 236 (1981). *See supra* note 370. Of course, legislative history was heavily utilized in *California (Supreme Court)* itself, so perhaps Justice Rehnquist is not totally committed to express statutory statements.

[389] The need for an "explicit" directive was raised and rejected in *California (District Remand)*, 509 F. Supp. 867, 880 (1981) and *California (Circuit Remand)*, 694 F.2d 1171, 1175-76 (1982). Both courts demonstrated a willingness to address legislative history and policy as well as statutory language. Little, *supra* note 5, at 1758, characterizes the district court's work in *California (District Remand)* as an "exercise of combing back through the prelegislation engineering reports in a punishing attempt to divine how the Congress intended the [New Melones] project to be operated," and suggests that such searches are often "an unrewarding and frustrating task [with] 'something for everybody.'" Jicarilla Apache Tribe v. United States, 657 F.2d 1126, 1136-37 (10th Cir. 1981), involved a search for "specifically authorized" uses, although the case analyzed not only statutory terminology, but also legislative history.

United States v. Alpine Land & Reservoir Co., 503 F. Supp. 877 (D. Nev. 1980), *aff'd as modified*, 697 F.2d 851 (9th Cir.), *cert. denied*, 104 S. Ct. 193 (1983), may, however, indicate an acceptance of the "no conflict unless expressly stated" approach. The district court opinion refers to the search for "explicit" congressional directives, 503 F. Supp. at 880, 884; the circuit court opinion to "specific" directives, 697 F.2d at 855; and both refer to the absence of directives in the Reclamation Act itself as helping to "impel" a pro-state law conclusion. 503 F. Supp. at 884, *cited in* 697 F.2d at 858.

[390] *See, e.g.* Jones v. Rath Packing Co., 430 U.S. 519, 525 (1977), *cited with approval in* Shaw v. Delta Air Lines, Inc., 103 S. Ct. 2890, 2899 (1983) ("Preemption may be *either* express *or* implied, and is compelled whether Congress' command is explicitly stated in the statute's language or implicitly contained in its structure and purpose.") (emphasis added); *see also* De Canas v. Bica, 424 U.S. 351, 358 (1976) (No

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history of every possible description,[391] the *California (Supreme Court)* language regarding explicitness should not be taken literally. Nonetheless, under general preemption rules, clear intent would still be demanded,[392] and conflicts will not easily be found.[393] Specifically, the burden in section 8 litigation apparently has been placed squarely on the United States to prove very concrete instances of inconsistency or conflict.[394] While not creating a new preemption rule, the above quoted

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intent found in "wording or the legislative history.").

[391] *See, e.g.*, For example, the Court has used Senate and House Reports, Silkwood v. Kerr-McGee Corp., 104 S. Ct. 615, 622-23 (1984); Philko Aviation v. Shackett, 103 S. Ct. 2476, 2479 (1983); hearings, *Silkwood*, 104 S. Ct. at 625; Aloha Airlines v. Director of Taxation, 104 S. Ct. 291, 293-94 (1983); and floor debates, Shaw v. Delta Air Lines, 103 S. Ct. 2890, 2901 (1983); Pacific Gas & Elec. Co. v. State Energy Resources Conservation & Dev. Comm'n, 461 U.S. 190, 208 n.19 (1983).

Although the Court has occasionally invoked the "plain language" rule, *see, e.g.*, *Aloha Airlines*, 104 S. Ct. at 294, *Shaw*, 103 S. Ct. at 2900-01, the Court still proceeded to investigate legislative history. Note, *Framework*, *supra* note 352, at 382-84, decries the use of such history to determine preemptive intent (or lack thereof), but the Court regularly turns to it.

[392] For examples of where "clear and manifest" intent has been required, see, e.g., Pacific Gas & Elec. Co. v. State Energy Resources Conservation & Dev. Comm'n, 461 U.S. 190, 207 (1983) (this part of *Pacific Gas*, however, was devoted to analysis of an "occupy the field," not a conflict claim); Ray v. Atlantic Richfield Co., 435 U.S. 151, 157 (1978). Both of these cases reviewed legislative history in determining intent. "Unmistakable" congressional intent has been required. *See, e.g.*, Chicago & N.W. Transp. Co. v. Kalo Brick & Tile Co., 450 U.S. 311, 317 (1981) (citing Florida Lime & Avocado Growers, Inc. v. Paul, 373 U.S. 132, 142 (1963)).

[393] The Court has stated that federal supremacy is "not lightly to be presumed." New York Dep't of Social Serv. v. Dublino, 413 U.S. 405, 413 (1973) (quoting Schwartz v. Texas, 344 U.S. 199, 203 (1952)). It is "reluctant to infer pre-emption." Exxon Corp. v. Governor of Md., 437 U.S. 117, 132 (1978). Courts should not seek "out conflicts between state and federal regulation where none clearly exists." Huron Cement Co. v. Detroit, 362 U.S. 440, 446 (1960), *cited with approval in Exxon Corp.*, 437 U.S. at 130. "[T]he proper approach is to reconcile 'the operation of both statutory schemes with one another rather than holding one completely ousted.' . . . [C]onflicting law, absent repealing or exclusivity provisions should be pre-empted . . .'only to the extent necessary.'" Merrill Lynch, Pierce, Fenner & Smith v. Ware, 414 U.S. 117, 127 (1973) (quoting Silver v. New York Stock Exch., 373 U.S. 341, 357, 361 (1963)). Both Shaw v. Delta Air Lines, 103 S. Ct. 2890 (1983) and Ray v. Atlantic Richfield Co., 435 U.S. 151 (1978), involved cases in which only partial preemption was found and are good examples of the court striking conflicting state laws "only to the extent necessary."

[394] *California (Circuit Remand)*, 694 F.2d 1171, 1174, 1178-79 (9th Cir. 1982). Note, *Shifting Perspectives*, *supra* note 351, at 645, suggests that, as a general proposition, the recent Supreme Court cases have "switched the burden of proof to the federal side," although the observation was made specifically with reference to "occupy the field" preemption cases, not conflict cases.

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language from *California (Supreme Court)*,[395] along with the emphasis on deference to the states, has affected the application of the standard rules.

The second possible consequence evolving from the language in *California (Supreme Court)* — that any federal preemption must arise from a congressional directive — has been widely accepted.[396] This deprives the Secretary not only of the discretion to determine what federal interests should be promoted, or how to promote them,[397] but also of any authority to interpret the requirements of state laws in instances when there was an attempt to "proceed in conformance" with such laws.[398] As will be demonstrated in the final section of this Article, the decision of the courts to ignore federal administrative determinations has been reached with inadequate concern for legislative and practical realities. Before addressing the problem of administrative discretion, however, three other questions will be reviewed. First, have the analyses of beneficial use in the section 8 cases been accurate? Second, has adequate attention been given to the unique nature of hydroelectric power generation? Third, is the search for clear congressional intent under the preemption doctrine truly a device for effectuating congressional policies, or rather a mechanism for replacing them with policies preferred by the judiciary?

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[395] *See supra* text accompanying notes 381-85.

[396] *See infra* text accompanying notes 501-03; *see also* Jicarilla Apache Tribe v. United States, 657 F.2d 1126, 1142 (10th Cir. 1981) ("The contract [between the Bureau and Albuquerque] alone cannot be a basis for storage."). The appellate decision in United States v. Alpine Land & Reservoir Co., 697 F.2d 851, 856 (9th Cir. 1983), however, intimated that an administrative interpretation might be considered if it were consistently maintained and enforced, criteria that were not met in that case.

[397] For instance, in the remand of *California*, the Bureau's desire to produce hydroelectric power at the New Melones Dam, although protected in the district court, 509 F. Supp. at 887-88, was thwarted by the court of appeals, 694 F.2d at 1179-80. Similarly, contracts entered into by the Bureau setting the amount of water to be delivered to certain parties were invalidated in *Jicarilla*, 657 F.2d at 1145 and *Alpine Land*, 697 F.2d at 856.

[398] *See infra* text accompanying notes 514-24. For example, the *Alpine Land* court decided that the Nevada State Engineer, not the Secretary, would determine the right to change the place of diversion or place of use of reclamation waters. "Fundamental principles of federalism require the national government to consult state processes and weigh state substantive law in shaping and defining a federal water policy." 697 F.2d at 857-58. Similarly, in *California (Circuit Remand)*, the court also noted that supremacy clause issues would "not even be reached until the federal government has made a full attempt to comply with the *forms* of state law." 694 F.2d at 1179 n.13 (emphasis added).

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3. Defining "Beneficial Use"

The *California (Supreme Court)* opinion noted that the original 1902 reclamation law provided certain explicit congressional directives that are binding upon the states.[399] Subsequent reclamation legislation, including both general laws[400] and specific project authorizations,[401] also contains explicit directives. The provision causing the most controversy is the section 8 directive that "beneficial use shall be the basis, the measure, and the limit of [any reclamation water] right."[402] All of the major cases decided subsequent to *California (Supreme Court)* have involved the issue of beneficial use, either openly, as in *Jicarilla Apache Tribe v. United States*[403] and *United States v. Alpine Land & Reservoir Co.*,[404] or inferentially, as in *Environmental Defense Fund, Inc. v. East Bay Municipal Utility District*[405] and *California* on remand.[406]

When enacted in 1902, section 8's beneficial use requirement imposed a duty upon some states that might not otherwise have existed, for the states' laws were not uniform.[407] All of the western states now

[399] 438 U.S. 645, 678 n.31 (1978) (directives included appurtenance, beneficial use, and the 160 acre limit). The appurtenance requirement could become a fertile ground for litigation for a number of reasons. First, appurtenance is not a common requirement as a matter of western state water laws. Second, as previously noted, the current trend is to convert water from irrigation to other uses — which would be non-appurtenant. *See supra* note 379. The issue of appurtenance was raised in *Alpine Land*, 697 F.2d at 858, and the court determined that the federal interest in maintaining that requirement could receive "full vindication" from state agencies.

[400] Probably the most famous general directives are the excess lands laws that were enacted over the years. 43 U.S.C. §§ 390aa-390zz, 418, 423e, 431 (1982).

[401] *See, e.g., id.* §§ 615nn, 620c (temporarily prohibiting water delivery to lands producing surplus crops).

[402] *Id.* § 372.

[403] 657 F.2d at 1131.

[404] 697 F.2d at 853.

[405] 26 Cal. 3d at 192, 605 P.2d at 4, 161 Cal. Rptr. at 469. The plaintiffs alleged that the diversion point agreed upon by the Bureau and the utility district violated CAL. CONST. art X, § 2 and CAL. WATER CODE § 100 (West 1971). Those sections contain state requirements of beneficial use, including a prohibition on unreasonable methods of diversion.

[406] The district court opinion, 509 F. Supp. at 876-77 n.14, cites several sections of the CAL. WATER CODE (§§ 1382, 1390, 1391, 1241, 1242.5, 1243, 1254, 1257) that were the basis of the California State Water Resources Control Board's authority to proceed when it imposed conditions upon the Bureau in Decision No. 1422. Most of those sections refer to the Board's duty to ensure that water is beneficially used.

[407] *Goldberg*, *supra* note 5, at 28-29, notes that at the turn of the century some states measured water rights by ditch capacity, not by beneficial use.

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have adopted a beneficial use requirement.[408] The court in *Alpine Land*, however, went on to comment that "on the point of *what is* beneficial use the law is 'general and without significant dissent.' "[409] This is not necessarily true. For example, whether recreational use is a beneficial use, a specific question arising in *Alpine Land* and *Jicarilla*, there are some differences among the western states.[410] Other instances of possible divergence exist.[411]

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[408] W. HUTCHINS, *supra* note 34, at 438-40.

[409] *Alpine Land*, 697 F.2d at 854 (citing 1 WATERS & WATER RIGHTS § 19.2, at 85 (R. Clark ed. 1967)).

[410] The district court in *Alpine Land* recognized recreation as a beneficial use, 503 F. Supp. at 883, but the appellate court determined that resolution of the issue would be premature. 697 F.2d at 859-60. The court in *Jicarilla* found that recreational use of unappropriated water was beneficial under New Mexico case law, but that it was not clear whether water could be appropriated for such uses. Statutes in other jurisdictions vary. For example, Colorado recognizes that impoundment of water for recreational purposes is beneficial. COLO. REV. STAT. § 37-92-103(4) (1973). Idaho law provides that the preservation of instream flows for purposes including recreation is a beneficial use, but only if done pursuant to the Idaho Code, which requires the Idaho Water Resources Board to make an instream appropriation. IDAHO CODE § 42-1501 (Supp. 1984). The statute does not refer specifically to impoundment. Concern has been expressed that Wyoming has not moved to protect such instream rights as recreation at all. Comment, *Statutory Recognition of Instream Flow Preservation: A Proposed Solution for Wyoming*, 17 LAND & WATER L. REV. 139 (1982). Montana has recognized that recreation is a beneficial use, MONT. CODE ANN. § 85-2-102(2)(1983), but the statutes indicate that there has not been a legislative determination that such uses prior to July 1, 1973 were beneficial. *Id.* § 85-2-223.

[411] For example, Montana has provided that use of water for coal slurries is not a beneficial use. MONT. CODE ANN. § 85-2-104 (1983). This would not necessarily be true in all western states. In fact, South Dakota has diligently attempted to provide water for a large coal slurry project. The South Dakota Conservation District granted a permit for 50,000 acre feet of water from the Oahe Reservoir, a reclamation project, to Energy Transportation Systems, Inc. (ETSI) in 1982. An accompanying permit for use of those reclamation waters, which was issued by the Secretary of the Interior, was invalidated in Missouri v. Andrews, 586 F. Supp. 1268 (D. Neb. 1984). ETSI abandoned the project late in the summer of 1984.

Another example of variations in the law of beneficial use relates to appropriating water for future municipal use. In *Jicarilla*, 657 F.2d at 1135, the court stated that "until the City can apply the water it cannot be said to have a beneficial use, nor, for that matter, a completed appropriation." The court cited Colorado River Water Conservation Dist. v. Vidler Tunnel Water Co., 197 Colo. 413, 594 P.2d 566 (1979), a case that dismissed as "speculative" attempted appropriations for future use. In California, permits for the future may be granted to municipalities, but permits to use the excess of water over existing municipal needs may be temporarily granted to others. When the municipality eventually desires to take the waters, it must compensate the interim users for the diversion and storage facilities they may have constructed. CAL. WATER CODE §§ 1462-1463 (West 1971). On the other hand, Washington simply

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If one assumes that there are different meanings of beneficial use, then the question whether state or federal law defines it becomes very significant. In *Alpine Land*, the court held that the "beneficial use" requirement of section 8 "was intended to be governed by state law."[412] Although the *Jicarilla* court was less bold in its approach, it did state that the section 8 language was similar to that of the New Mexico constitutional requirement of beneficial use,[413] and proceeded to analyze New Mexico law first. Only then did it examine federal law to determine if "Congress intended to authorize uses of water otherwise prohibited under state law."[414] Arguably, section 8 dictates a different approach, one commencing with an analysis of federal law.[415] Analyzing the two parts of section 8[416] as both simply mandating the supremacy of state law is somewhat pointless. The redundancy is apparent, and statutes are not to be construed in such a manner as to render parts of them meaningless.[417] Additionally, by perpetuating traditional usages of water, the beneficial use requirement, as developed in the states, actually promotes waste and inefficiency.[418] While the Bureau is not known for its diligent dedication to efficiency, *Alpine Land* itself involved a fact pattern in which the United States proposed delivery of lesser quantities of water than demanded by the recipients under state law.[419]

The meaning of beneficial use as a matter of federal law will not always be ascertainable. In such cases, state law should serve as a

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allows a municipal water rights applicant to apply for the "future requirement of the municipality." WASH. REV. CODE ANN. § 90.03.260 (1962). In Utah, holding a water right for future municipal uses is a sufficient excuse for nonuse to avoid forfeiture, but only if appropriate five year extensions are granted by the state engineer. UTAH CODE ANN. § 73-1-4 (1980).

[412] 697 F.2d at 854.

[413] N.M. CONST. art. XVI, § 3.

[414] 657 F.2d at 1136. While faulting the court on its methodology, it is almost impossible not to agree with a result that prevented a 93% loss of water in an arid state.

[415] *See generally*, Comment, *Reclamation Subsidies and Their Present-Day Impact*, 1982 ARIZ. ST. L.J. 497, 515-18 [hereafter Comment, *Reclamation Subsidies*].

[416] 43 U.S.C. §§ 372, 383 (1982).

[417] *See, e.g.*, *In re* Surface Mining Regulation Litig., 627 F.2d 1346, 1362 (D.C. Cir. 1980) (citing 2A J. SUTHERLAND, STATUTES AND STATUTORY CONSTRUCTION, § 46.06 (Sands 4th ed. 1973)) ("'[E]ffect must be given, if possible, to every word, clause and sentence of a statute' . . . so that no part will be inoperative or superfluous, void or insignificant.").

[418] Shupe, *Waste in Western Water Law: A Blueprint for Change*, 61 OR. L. REV. 483 (1982).

[419] Two recent articles discreetly intimate that the amounts (determined under state law) allowed by the decree in *Alpine Land* might be wasteful. Little, *supra* note 5, at 1760; Comment, *Reclamation Subsidies*, *supra* note 415, at 517-18.

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guide. The 1902 beneficial use requirement, however, is clearly an example of congressional intent to exercise its power to preempt the states. Therefore, state law should not serve as a substitute for the initial search for a federal definition of such use, whether found in authorizing statutes, legislative history, or duly authorized decisions of the Secretary of the Interior.

4. The Perplexing Issue of Hydroelectric Power Generation

Two of the major section 8 cases decided since *California (Supreme Court)* discussed the effect of state laws on the United States' ability to use water for hydroelectric power generation at federal dams. Neither case allowed such use to occur.[420]

Federal hydroelectric power generation can have a serious impact on a state's control of its waters.[421] Thus, section 8 and the *California (Supreme Court)* decision have a role to play. The 1946 decision of *First Iowa Hydro-Electric Cooperative v. Federal Power Commission*[422] is also implicated. That case held that under the Federal Power Act,[423] parties with a federal license for a hydro power project need not comply with state licensing procedures.[424] The result was reached notwithstanding a saving clause in section 27 of the Federal Power Act[425] containing language recognizing state law that is very similar to the language in section 8. The Power Act and the Reclamation Act were

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[420] *California (Circuit Remand)*, 694 F.2d at 1180 ("On this record, we are unable to invalidate the [state] restrictions on appropriation of water for purposes of power generation."); *Jicarilla*, 657 F.2d at 1136 ("Power generation is too wasteful and speculative to constitute a beneficial use under the state law.").

[421] Strangely, considering the immense potential federal presence, few western state legislatures have chosen specifically to address the issue. *But see* OR. REV. STAT. § 543.140 (1981) (Oregon laws regarding hydroelectric projects inapplicable to federally constructed projects).

[422] 328 U.S. 152 (1946).

[423] Federal Power Act, ch. 285, 41 Stat. 1063 (1920) (current version codified at 16 U.S.C. §§ 791a-828c (1982)).

[424] 328 U.S. at 170.

[425] 16 U.S.C. § 821 (1982):

> Nothing contained in this chapter shall be construed as affecting or intending to affect or in any way to interfere with the laws of the respective States relating to the control, appropriation, use, or distribution of water used in irrigation or for municipal or other uses, or any vested right acquired therein.

Cf. 43 U.S.C. § 383, *supra* text accompanying note 4. The major distinction in the language is the absence in the former section of a directive to "proceed in conformity" with state laws.

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enacted eighteen years apart, for different purposes, and with different legislative histories. Thus, section 27 and section 8 can be interpreted differently despite the similar terminology. Unfortunately, the discrepancy was not commented upon in *California (Supreme Court)*. Thus, subsequent cases have had to consider whether, in deciding the validity of state law constraints on federal use of water, cases involving hydroelectric power should be analyzed differently; that is, by using *First Iowa* as a basis for greater deference to federal interests.

In cases not involving reclamation projects, courts have stated that the compliance with state laws mandated by *California (Supreme Court)* is inapplicable to the context of hydroelectric power,[426] and that federal control[427] over licensing remains plenary.[428] The Supreme Court has yet to address the impact of *California (Supreme Court)* upon *First Iowa*, but it has twice implied that the concern expressed for federal authority in *First Iowa* is intact.[429] Superficially, it appears that nothing

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[426] *See, e.g.*, Board of Elec. Light Comm'rs v. McCarren, 563 F. Supp. 374, 378 (D. Vt. 1982), *aff'd*, 725 F.2d 176 (2d Cir. 1983); Springfield v. McCarren, 549 F. Supp. 1134, 1154-56 (D. Vt. 1982), *aff'd*, 722 F.2d 728 (2d Cir. 1983); Springfield v. State Envtl. Bd., 521 F. Supp. 243, 250 (D. Vt. 1981) (federal preemption related not only to power generation itself, but also to road relocation and recreational improvements). The courts addressed and rejected the argument that *California (Supreme Court)* indicated a retreat by the Supreme Court from the finding of federal preemption in *First Iowa*. Wolfe, *Hydropower: FERC Licensing and Emerging State-Federal Water Rights Conflicts*, 29 ROCKY MTN. MIN. L. INST. 851, 888-95 (1983) and Comment, *Hydroelectric Power, the Federal Power Act, and State Water Laws: Is Federal Preemption Water Over the Dam?*, 17 U.C. DAVIS L. REV. 1179, 1198-1200 (1984), suggest that the argument is correct, and that the states should use *California (Supreme Court)* to press for more control over hydropower development. On the impact of *California (Supreme Court)* upon power issues, see also Citizens v. Secretary, Dep't of Energy, 683 F.2d 1171, 1180-81 (8th Cir. 1982); Columbia Basin Land Protection Ass'n v. Schlesinger, 643 F.2d 585, 605 (9th Cir. 1981). *First Iowa*'s preemption of state law, however, specifically involved a hydroelectric project and does not necessarily apply to power projects possibly using water in some other way. *See, e.g.*, Chemehuevi Tribe of Indians v. Federal Power Comm'n, 420 U.S. 395 (1975) (use of water for cooling thermal-electric plant not covered by the Federal Power Act).

[427] The parties exercising federal control have changed in the last decade, with the Secretary of Energy and the Federal Energy Regulatory Commission taking over the role of the former Federal Power Commission. Under 42 U.S.C. § 7152(a) (1982), many functions relating to power generated at reclamation projects were transferred from the Secretary of the Interior to the Secretary of Energy, but the commands to the Secretary of the Interior contained in the reclamation laws still apply. *See* Colorado River Energy Distrib. Ass'n v. Lewis, 516 F. Supp. 926, 931 (D.D.C. 1981).

[428] Springfield v. McCarren, 549 F. Supp. 1134, 1156 (D. Vt. 1982), *aff'd*, 722 F.2d 728 (2d Cir. 1983).

[429] Pacific Gas & Elec. Co. v. State Energy Resources Conservation & Dev.

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has changed: the United States controls the licensing and operation of plants; the states safeguard proprietary water rights.[430] Unfortunately, the line is not always clearly distinguishable. One case characterized federal licensing authority as limited to questions of "building dams."[431] Citing *California (Supreme Court)*, the court stated that a federal license provision preventing abandonment of water rights could not override the Idaho law on abandonment.[432] Another case, however, presented a more expansive view of licensing authority, noting that licenses go beyond specifications for dam building to such matters as operation conditions, releases of water, provision of recreational facilities, concerns for fish and wildlife, and other environmental protections.[433]

These two cases, however, were at least united in their recognition that the federal government has assumed an active interest in hydroelectric power generation. Therefore, the interest must be addressed with special care. One might think this consideration should apply when the power is generated at a federally "owned" project, not a federally licensed project as in *First Iowa*. But the point was lost in the reclamation cases decided since *California (Supreme Court)*. In *Jicarilla*, the issue was totally omitted. The court extensively discussed whether Congress had authorized recreation as a purpose of the San Juan-Chama project, even when such a use was not beneficial under

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Comm'n, 461 U.S. 190, 223 n.34 (1983); New England Power Co. v. New Hampshire, 455 U.S. 331, 338 n.6 (1982).

[430] *See, e.g.*, Board of Elec. Light Comm'rs v. McCarren, 563 F. Supp. 374, 378 (D. Vt. 1982), *aff'd*, 725 F.2d 176 (2d Cir. 1983); Springfield v. McCarren, 549 F. Supp. 1134, 1156 (D. Vt. 1982), *aff'd*, 722 F.2d 728 (2d Cir. 1983); Idaho Power Co. v. Idaho, 104 Idaho 575, 587-89, 661 P.2d 741, 753-55 (1983).

The Federal Power Act envisions a meshing of the concerns by requiring applicants for licenses to describe their entitlement to water rights. 16 U.S.C. § 802(b) (1982). The cautionary step has not prevented disputes.

[431] *Idaho Power Co.*, 104 Idaho at 587, 661 P.2d at 753.

[432] *Id.* at 589, 661 P.2d at 755.

[433] *Springfield v. McCarren*, 549 F. Supp. at 1155 n.9. The facts in the *California v. United States* dispute are not of the same genre as either *Idaho Power Co.* or *Springfield v. McCarren*, or, for that matter, *First Iowa*, because in *California*, the United States, through the Army Corps of Engineers and the Bureau, would be building and operating the dam, and not licensing someone else's endeavor. *California* does illustrate the difficulty in drawing a line between operational concerns and questions of water rights. All of the conditions in Decision No. 1422 were justified under California laws designed to protect water rights. The condition that related to releasing water to protect water quality could affect dam operations, as would the condition limiting storage for water delivery. The conditions limiting storage for power generation, and dictating a construction deadline, even more obviously relate to operational concerns.

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state law.[434] Neither the court nor the parties, however, inquired into the preemptive effect of federal law with regard to hydroelectric power generation.[435] The specific language of the Colorado River Storage Project Act would forestall such a preemptive effect,[436] but the case should not serve as general precedent for avoiding the issue.

The court in *California (Circuit Remand)* acknowledged that congressional intent regarding the use of the New Melones project for power generation needed to be addressed, but the opinion does not indicate that hydroelectric power might be of special interest to the United States. Stating that such power generation was "probably" intended only as "incidental" when New Melones was authorized,[437] the court

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[434] *See supra* text accompanying notes 329-32.

[435] The United States and the other appellants conceded the question. 657 F.2d at 1137-38.

[436] 43 U.S.C. § 620 (1982) appears to identify power generation as an incidental purpose, although the placement of commas might create an ambiguity. Section 620f provides that:

> Subject to the provisions of the Colorado River Compact, neither the impounding nor the use of water for the generation of power and energy at the plants of the Colorado River storage project shall preclude or impair the appropriation of water for domestic or agricultural purposes pursuant to applicable state law.

Both sections foreclose a hydro power issue in *Jicarilla*, but the latter raises some even more intriguing questions for students of § 8. If § 8 is as broad as the language in *California (Supreme Court)* seems to dictate, why did the Congress in this statute (enacted in 1956) have to specifically protect rights under applicable state law? Is it because § 620f goes beyond § 8 and gives state domestic and agricultural (what about industrial?) water uses an actual preference, and if so, does it do so prospectively? Does it provide a preference not only at a stage when the state might decide between competing water rights applicants, but in the future, when the United States was exercising a prior right but could be cut off in favor of a new state domestic or agricultural water user? If the state law is given "super protection" against power generation uses in this section, has the inclusion of one excluded the other, and are other federal uses, e.g., regulation of the river flow, reclamation, flood control, therefore arguably strengthened? Section 8 analysis, determining the relative authority of state versus federal law, is one of many areas of the law where a statutory attempt to clarify matters may only complicate it further.

[437] 694 F.2d at 1180. The court cited four different authorities, only one of which was connected with the 1962 authorization of the New Melones project, and provided no analysis. The district court, to the contrary, had analyzed the language of the project authorization itself and concluded that Congress intended the power supply at New Melones to be "steady and dependable." 509 F. Supp. at 886; *see also id.* at 878.

As to the other three authorities cited by the court of appeals for the proposition that power generation was only an incidental concern, all of them dated to the late 1930's and early 1940's. Thus, they were decided before the *First Iowa* decision and also before power revenues became extremely significant in the reclamation program. *See*

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characterized the issue as governmental failure to meet its burden of proving a need for water for power at the present time.[438] The result of the decision is that it is insufficient for Congress to authorize projects for enumerated purposes. Congress must also specifically state that it wants the projects to be actually used for those purposes and when the project should be implemented. This would presumably create a sufficiently specific, explicit, and clear directive to preempt state laws.

In the meantime, however, a multitude of federal projects have already been authorized with hydroelectric power generation as one of their purposes.[439] The court in *California (Circuit Remand)* may have been slightly naive when it suggested that power generation, even in 1962, was merely an "incidental" concern in congressionally authorized reclamation projects. Although this suggestion aptly describes the original reclamation program,[440] it cannot be accepted as an accurate current characterization. By the 1930's, the United States was deeply involved in hydropower development,[441] and the reclamation laws began to reflect this involvement.[442] Power revenues support the reclamation program[443] by subsidizing the cost of irrigation waters.[444] Specifically,

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infra notes 443-46 and accompanying text.

[438] 694 F.2d at 1179. Therefore, the court stated, there was no basis to address the question of financial feasibility of the project. *Id.* One can sympathize with the court's aggravation with the United States for its refusal to document its hardships, particularly since the Bureau eventually did produce the requested data. *See supra* text accompanying note 303 and *infra* note 446. If courts completely confuse the task of demonstrating actual federal "needs" at a particular time with that of ascertaining congressional intent the reclamation program could be destroyed. The funding, planning, and operating stages of a project take years, and even when a project is operational, modifications may be under consideration, and budgeting for future years will already be of concern. Demanding that a project reach a point of concrete, demonstrable frustration before a court will determine the validity of state laws may entail the expenditure of millions of dollars by the United States while functioning in an information vacuum. *See also infra* text accompanying notes 491-97.

[439] *See, e.g.*, 43 U.S.C. §§ 614, 616(a) (1982).

[440] Sax, *supra* note 3, § 122.3, at 249.

[441] *See, e.g.*, Tennesee Valley Authority Act of 1933, ch. 32, 48 Stat. 58 (codified as amended at 16 U.S.C. §§ 831-831dd (1982)); Flood Control Act of 1936, ch. 688, § 1, 49 Stat. 1570 (codified in scattered sections of 33 U.S.C. (1982)).

[442] *See, e.g.*, 43 U.S.C. § 485h(c) (1982).

[443] Sax, *supra* note 3, § 123.2(I), at 272. Comment, *Reclamation Subsidies*, *supra* note 415, at 520, notes that power revenues have paid over one-half of the construction costs of the entire reclamation program. The Commissioner of the Bureau of Reclamation reported that in 1982, 49 billion kilowatt hours of hydroelectricity were generated at reclamation dams, the equivalent of 80.7 million barrels of oil. *Energy and Water Development Appropriations for 1985: Hearings before a Subcomm. of the House Comm. on Appropriations*, 98th Cong., 2d Sess. 37 (1984).

[444] Roughly, the states believe that the United States is not in a position to complain

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when New Melones was authorized, power revenues were projected to account for over one-third of project benefits.[445] The State of California itself recently recognized the increasing importance of those revenues.[446]

At some point, the courts entertaining section 8 cases must grapple more effectively with the financial realities of reclamation projects. The role of power revenues is only one of those problems. The federal government spends well over a billion dollars a year on the reclamation program.[447] An impact on funding does not by itself establish federal preemption.[448] But the magnitude of the financial commitment, coupled with scattered comments in the legislative history of the reclamation programs on the prerogatives of the United States as financier[449] should shed some light on the question of federal intent. The supposition that

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about state restrictions on its abilities to raise revenue through power generation (or any other means) as long as it is essentially giving away water. The "subsidization" of irrigation water costs by power revenues (and also M & I contracts) has been a chronic source of complaints about the reclamation program. *See, e.g.*, NATIONAL WATER COMM'N, WATER POLICIES FOR THE FUTURE 257 (1973); Pring & Tomb, *supra* note 257, at 25-40. There have been some recent indications that Congress is concerned about decreasing the subsidy. *See, e.g.*, 43 U.S.C. § 390ee(a) (1982) (under new contracts, water to be delivered at "full cost" to amortize expenditures for construction allocable to irrigation). On the other hand, arguments can be made in favor of low cost water, in recognition of factors worth considering other than economic return, for example, promotion of family farming or preservation of the environment. *See, e.g.*, NATIONAL WATER COMM'N, *supra*, at 259; *see also* Ellis & DuMars, *The Two-Tiered Market in Western Water*, 57 NEB. L. REV. 333, 354 n.81 (1978).

In the context of a preemption dispute, however, the whole controversy over the worthiness of the subsidy is beside the point. The issue is not the wisdom, but the intent of Congress. If Congress intended to finance a project primarily through power revenues, not water user charges, that should be sufficient, regardless of whether other revenues are or could be made available. If the subsidization is more a matter of administrative practice, the issue still is not the wisdom of the practice, but rather whether the practice has been authorized or ratified.

[445] *California (District Remand)*, 509 F. Supp. at 873.

[446] California State Water Resources Control Bd. Order WR 83-3, at 5, 13 (1983). The Board estimated the annual value of power to the New Melones project at $45,000,000.

[447] *See infra* note 490. A large amount of money is also appropriated for Army Corps of Engineers projects.

[448] *Cf.* Delta Water Cases, Judicial Council of Coordination Proc. No. 548, slip op. at 93-96 (San Francisco County Super. Ct. Apr. 13, 1984). Whether appropriations measures are a reflection of legislative intent is hotly disputed. The most famous discussion in the context of water projects was in the case of Friends of the Earth v. Armstrong, 485 F.2d 1 (10th Cir. 1973), *cert. denied*, 414 U.S. 1171 (1974).

[449] *Sax, Federalism*, *supra* note 5, at 74 lists several indications of concern for federal monies. *See also California (District Remand)*, 509 F. Supp. at 878.

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Congress expressly authorizes the construction of projects of a certain capacity, but then, in the absence of further manifestations of "clear intent"[450] does not care whether the projects acquire water rights[451] or can operate at the authorized capacity[452] assumes that Congress blithely wishes to spend money for no reason. Although a favorite observation about Congress and a good basis for jokes, it is hardly a rational foundation for a theory of statutory construction. Nor does the fact that Congress has chosen to subsidize some uses of reclamation waters[453] justify a conclusion that Congress never cares whether any of its reclamation expenditures produce results.

Finally, it must be borne in mind that reclamation projects are not forced upon the states, nor even dangled before them like many federal grant programs.[454] From the very inception of the reclamation program,

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[450] *See infra* text accompanying notes 463-89.

[451] The opinion in *California (Supreme Court)* fosters this impression. The Court stated that under § 8 the Secretary must follow state law in the condemnation of water rights. Therefore, when a project is authorized, no water rights can be condemned unless the legislation "*by its terms* signif[ies] congressional intent that the Secretary condemn." 438 U.S. at 668-69 n.21 (emphasis added). This is despite 43 U.S.C. § 421 (1982), which has long been considered a general authorization to the Secretary to condemn water rights as well as land. *See, e.g.*, California v. Rank, 293 F.2d 340 (9th Cir. 1961), *modified*, 372 U.S. 609 (1963); United States v. O'Neill, 198 F. 677 (D. Colo. 1912). Thus, when Congress authorizes a project on a developed water course, does not intend the project to operate unless it specifically orders the Secretary to acquire the water rights.

[452] This is the result of *California (Circuit Remand)*, in which a reservoir with a storage capacity of 2.4 million acre feet had been held to a fraction of that capacity. *See supra* note 276. The court did say that the state could not "permanently" prevent full impoundment, 694 F.2d at 1177, but when impoundment did occur it was only fortuitously, due to floods. How much longer short of "permanently" the Bureau and the state would otherwise have remained at loggerheads is unknown. The issues in *East Bay*, *Jicarilla*, and *Alpine* are more complicated because the questions of intent there involve secretarial, not congressional, actions.

[453] *See supra* note 444.

[454] Many federal grants are foisted upon the states by making funds so attractive that the states cannot resist the temptation to participate in the grant program. It is considered typical, although bad form, for the United States to spike the roses with thorns in the form of conditions with which the states must comply to keep the funds. The Supreme Court has attempted to stop this behavior in the case of conditions not obviously directly related to the grant. If the United States wishes to place conditions on the grant of its money, "it must do so unambiguously." Pennhurst State School & Hosp. v. Halderman, 451 U.S. 1, 17 (1981). One commentator has advocated that all ambiguities should be resolved against the United States, lest it abuse its spending power. Brown, *Federalism from the "Grant Law" Perspective*, 15 URB. LAW. ix, xiii-xiv (1983). The reclamation program, however, has been more a case of state solicitation of funding than federal procurement. Additionally, reclamation project ownership is main-

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the states have inveigled, cajoled, wheeled, dealed, and begged for projects.[455] The Central Valley Project is a classic example.[456] The states have greeted with cries of outrage any intimation by the federal government that certain projects might be too inefficient to waste further federal funds.[457] Further, although the need for more federal-state cost sharing was proposed over a decade ago[458] and is also espoused by the current administration,[459] the states have not eagerly responded to the call for increased participation in the financing of federal reclamation projects.[460] Yet, they have successfully utilized section 8 to obtain state control of those projects.[461] Years ago it was suggested that the states' demands to control and criticize "would be immeasurably strengthened if they assumed a bigger share of the funding."[462] Without doing so, they have nonetheless arrived at a status *ne plus ultra*, able to exercise their rights, while bearing little financial responsibility.

5. In Search of "Clear Intent"

The opinion in *California (Supreme Court)* indicated that state conditions on reclamation projects would be invalid only if in conflict with

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tained by the federal government. "Grant law" is distinguishable, and should not apply.

[455] This custom probably offended the court in *California (District Remand)*, when it took the state to task for changing its mind in 1972 on a project it had enthusiastically promoted in 1962. *See supra* text accompanying notes 278-80.

[456] *See* Ivanhoe Irrigation Dist. v. McCracken, 357 U.S. 275, 280 (1958); *see also infra* note 481.

[457] On February 22, 1977, President Carter announced the infamous "hit list," a list of over a dozen water development projects he felt unworthy of continued federal support. DELETION OF WATER RESOURCE PROJECTS FROM THE FISCAL YEAR 1978 BUDGET: MESSAGE FROM THE PRESIDENT OF THE UNITED STATES, H.R. DOC. NO. 84, 95th Cong., 1st Sess. (1977). Despite years of complaining about federal inefficiency, the western states did not support the notion. In fact, the "hit list" may well have been one of the more damaging political moves of the Carter Administration.

[458] NATIONAL WATER COMM'N, *supra* note 444, at 485-94.

[459] *Energy and Water Development Appropriations for 1985: Hearings before a Subcomm. of the House Comm. on Appropriations*, 98th Cong., 2nd Sess. 4, 50 (1984).

[460] Some states, of course, engage in their own water development projects. The most spectacular is the California State Water Project, which frequently connects with the federal Central Valley Project.

[461] There is one significant, well established exception: flood control. *See supra* notes 278, 304. Construction may be another exception. *See infra* note 504 and accompanying text.

[462] Engelbert, *Federalism and Water Resources Development*, 22 LAW & CONTEMP. PROBS. 325, 347-48 (1957).

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specific, explicit, and clear congressional directives.[463] The search for "clear intent" is generally required under recent preemption cases.[464] Courts deciding section 8 cases since 1978 have certainly been alert to the "clear intent" requirement, and, with the exception of the district court in the remand of *California*,[465] have not found any congressional intent to preempt state law.[466] The problem is that only two of the cases, *California (District Remand)* and *Jicarilla*, indicate an effort on the part of the courts to ascertain congressional intent.[467] *East Bay* was totally conclusory, with limited review of the statutory language authorizing the Auburn-Folsom project, and contained no review of legislative history or administrative practices.[468] Similarly, *Alpine Land* only searched for explicit statutory language[469] and finding none, found no preemption. Finally, the decision in *California (Circuit Remand)* rushed so quickly to the "second step" in conflict preemption analysis[470] — finding no conflict between state and federal law because the Bureau had not carried its burden of showing "harmful consequences"[471] —

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[463] *See supra* note 82 and accompanying text.

[464] *See supra* notes 392-93.

[465] *See supra* text accompanying notes 277-84.

[466] *See supra* text accompanying notes 290-99, and notes 437-38 and accompanying text (discussion of *California (Circuit Remand)*). The court did state that, hypothetically, certain state conditions might conflict with congressional intent. *See supra* notes 301-02 and accompanying text; *see also supra* text accompanying notes 316-17 (discussion of *East Bay*). Stopping the construction of two structures expressly authorized by Congress was held to be beyond state control, *supra* note 315, but that was not strongly disputed. *See also supra* text accompanying notes 329-35 (discussion of *Jicarilla*); *supra* text accompanying note 345 (discussion of *Alpine Land*).

[467] Both courts diligently searched legislative history in addition to vigorously analyzing statutory language. 509 F. Supp. at 871-76, 878, 885-87; 657 F.2d at 1138-42.

[468] 26 Cal. 3d at 191-93, 605 P.2d at 4-5, 161 Cal. Rptr. at 469-70. The statement, to be fair, must indicate that the earlier *East Bay* decision, *see supra* text accompanying notes 52-58, which had upheld the decision of the Secretary of the Interior, did not review the "intent" issue any more thoroughly.

[469] *See supra* note 389.

[470] *See supra* note 386.

[471] 694 F.2d at 1174. The court's insistence that the Bureau prove a "need" or "harm" with regard to hydroelectric power generation is chronicled *supra* text accompanying note 438. The insistence is also evident throughout the balance of the opinion. *See supra* text accompanying notes 290-96.

Both the district and circuit courts upheld the state's requirement that the Bureau not store water for consumption until it demonstrated "firm commitments." 509 F. Supp. at 884; 694 F.2d at 1177-78. The federal reclamation laws do recognize that projects will sometimes have "surplus" or "excess" waters that the Secretary may contract to deliver out of a project. Warren Act, 43 U.S.C. §§ 523-524 (1982). Therefore, for the state not to actually release the water to the Secretary until it could be used

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that it never stopped at the "first step" of ascertaining what Congress intended in authorizing the New Melones Dam and Reservoir.[472] A court cannot conclude whether the purposes and objectives of Congress have been frustrated in any degree if those purposes and objectives have not been investigated. To illustrate with a *reductio ad absurdum*, it is as if in *Ivanhoe* the United States had been forced, to even have its case heard, to demonstrate what "harm" would flow from the delivery of water to excess lands or why there was a "need" to limit deliveries, rather than first proving that Congress prohibited them and then that state law conflicted.

Both jurists and scholars espouse the view that policy decisions, specifically the appropriate allocation of authority in a federal system, should be left to the political branches of government and eschewed by the courts.[473] Indeed, some members of the legislature have introduced

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under the contracts (i.e., the Secretary would contract only for useable waters; in the meantime, others could use the waters under a state scheme) would appear consistent with the Warren Act, without a need to address the clause of the Act deferring to state law. *Id.* § 524.

In the New Melones project, the Secretary's authority to contract would also be restricted by a "basin of origin" protection contained in the authorization statute, Pub. L. No. 87-874, § 203, 76 Stat. 1191 (1962).

[472] As noted previously, the court chose not to analyze the New Melones authorization, but only briefly (and arguably erroneously) noted what was "probably" intended. *See supra* note 437. The case is puzzling, because the court states that no "particular form of clear statement" of intent is required, and that "implied" intent is sufficient. 694 F.2d at 1176-77. The opinion just does not search for intent in any form.

[473] For example, the Court in Pacific Gas & Elec. Co. v. State Energy Resources Conservation & Dev. Comm'n, 461 U.S. 190, 223 (1983), stated: "[I]t is for Congress to rethink the division of regulatory authority in light of its possible exercise by the states to undercut a federal objective. The courts should not assume the role which our system assigns to Congress." *See also supra* note 76. McGinley, *supra* note 76, at 159, wrote:

> [O]ur federalism is safeguarded not by the courts, but by extremely vibrant, and over the long term, effective *political* constraints. The power of states, local governments, business trade associations, environmentalists and common citizens to effectively bring pressure on those who legislate and regulate in state and national governments is the nucleus of federalism. The remedy . . . [is] political and not judicial.

Some authorities, to the contrary, support the concept of an active judiciary. *See, e.g.*, A. MILLER, TOWARD INCREASED JUDICIAL ACTIVISM: THE POLITICAL ROLE OF THE SUPREME COURT (1982); *cf.* Bodenheimer, *The Role of Federal Judges: Their Duty to Enforce the Constitutional Rights of Individuals When the Other Branches of Government Default*, 18 VAL. U.L. REV. 1, 8-10, 19 (1983).

Justice Rehnquist's views on the subject are expressed in his article, *The Notion of a Living Constitution*, 54 TEX. L. REV. 693 (1976), in which he professes a view of

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bills to protect their bailiwick by stripping the federal courts of jurisdiction over issues that have historically caused federal-state tension.[474] The requirement that courts enforce only those legislative actions in which the "clear intent" of Congress is manifest is in accordance with this view of institutional responsibility. All policy choices are made by a representative, accountable branch of government.[475] The appointed judicial branch simply enforces those choices, avoiding the danger of setting policy itself by not moving when the law is unclear. Congress is given the option to act further if it determines that its will has not been fulfilled.[476]

The "clear intent" standard, however, has several flaws when applied in section 8 reclamation litigation. First, that standard, along with the aura of "deference to states," has invited courts to avoid investigating congressional intent at all,[477] or at least to ignore significant developments, such as financing practices,[478] that reflect on intent.

Second, it is absolutely unrealistic to expect clarity in the reclamation laws in the first instance,[479] or to expect Congress to clarify those laws

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judicial deference to the will of elected representatives. Rydell, *Mr. Justice Rehnquist and Judicial Self-Restraint*, 26 HASTINGS L.J., 875, 909-11, 914 (1975), characterizes the deference as an "overriding theme." The Rehnquistian philosophy was expressed in terms of constitutional, not statutory interpretation, but it is very difficult to divorce the two issues. A judge's concept of the *constitutional* separation of powers will affect any stated opinions concerning constricted or free wheeling construction of legislation. Rehnquist's inclinations, as expressed in *California (Supreme Court)*, have affected subsequent § 8 cases. *But see infra* text accompanying notes 484-89.

[474] *See, e.g.*, S. 139, 98th Cong., 1st Sess. (1983) (busing); S. 26, 98th Cong., 1st Sess. (1983) (abortion); H.R. 183, 253, 525, 98th Cong., 1st Sess. (1983) (prayer in public schools). None of the bills has passed. *See generally* Symposium, *Congressional Limits on Federal Court Jurisdiction*, 27 VILL. L. REV. 893 (1982).

[475] The representative branches will act at both state and national levels. Congress will be in charge of protecting federal interests from state interference.

[476] *See, e.g.*, Stewart, *supra* note 95, at 258: "Congress retains ample constitutional authority to override state law in order to achieve national objectives such as energy development. For the sake of political accountability, Congress should exercise that authority through explicit legislation. When Congress is silent or fails to reach explicit agreement, courts should favor state autonomy." *See also* Note, *Shifting Perspectives*, *supra* note 351, at 654:

> Forceful arguments have been made in favor of a strict intent standard. To preempt where Congress is silent and has not in terms covered the field creates a gap in needed regulation and leaves the state powerless to fill it. Permitting state regulation still allows Congress the option to reverse the Court legislatively.

[477] *See supra* text accompanying notes 468-72.

[478] *See supra* text accompanying notes 443-53.

[479] *See supra* note 123 and accompanying text.

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in the future. Water development projects are even more susceptible to "log rolling" and "vote trading"[480] than most federal legislation.[481] It is expedient to muddy the expression of intent in such instances. The courts may not like the pork barrel polka, but it is disingenuous to pretend it is not a popular dance step. Demanding clear legislation simply will not produce it. Further, Congress cannot feasibly review and revise the entire befuddled reclamation law.[482] This law has accumulated for eighty-two years, occupying a large part of an entire title of the United States Code and three annotated volumes published by the Department of the Interior,[483] yet only directly affects the western states. Congress, as a whole, has more pressing affairs, at least until there is greater concern about national water supplies.

Finally, and most importantly, although the theory of the "clear statement" rule is that it will "forestall the transformation of judicial interpretation into judicial 'legislation,' "[484] practice may provide a different result:

> So-called clear-statement techniques of statutory interpretation function in part to free a court from its duty to abide by the results of its investigation into the meaning of the statute. That is, the court's demand for clarity on

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[480] *See* Posner, *Economics, Politics and the Reading of the Constitution*, 49 U. CHI. L. REV. 263 (1982).

[481] Sax, *Federalism*, *supra* note 5, at 71, notes that the language in a reclamation statute may become "the worst sort of evasion, circumlocution and plain double talk" to keep everyone placated. Taylor, *California Water Project: Law and Politics*, 5 ECOLOGY L.Q. 1 (1975), relates the political history of the Central Valley Project and California State Water Project.

[482] *See* Note, *Intent, Clear Statements, and the Common Law: Statutory Interpretation in the Supreme Court*, 95 HARV. L. REV. 892, 905 (1982) (citations omitted) [hereafter Note, *Intent*]:

> The clear statement model rests on an unrealistic conception of the legislative process. The model assumes that Congress will continually reinterpret all legislation and will respond effectively to new problems as they arise . . . . [W]hile the realities of legislative process constrain Congress from constant reexamination of all its statutes. Congress' inability to revise and maintain the currency of every piece of legislation means that the Court's insistence on clear congressional statement actually diminishes legislative lawmaking power.

43 U.S.C. §§ 390ww, 485j (1982) typify the manner in which Congress approaches revision of the reclamation laws. Both sections provide that other reclamation statutes remain in effect except when "inconsistent with" the new statutes. No attempt is made to identify possible inconsistencies.

[483] DEP'T OF THE INTERIOR, FEDERAL RECLAMATION AND RELATED LAWS ANNOTATED (1972).

[484] *See* Note, *Intent*, *supra* note 482, at 902.

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> the part of the legislature if a certain result is to obtain may in fact result in disregard of the actual legislative intent which has been expressed in the constitutionally mandated manner, though with less precision than required by the court. To that extent the principle of legislative supremacy is subordinated.[485]

A clear intent requirement even allows judges to "enforce their own values and policies."[486] The opportunity is particularly ripe in an area of the law as historically confused as the reclamation program. One of the judicial values "passively" implemented by some members of the present Supreme Court is a concept of federalism more protective of the states.[487] Thus, in the guise of restraint, judicial activism occurs[488] and the deference to states epitomized in *California (Supreme Court)* continues to dominate section 8 analysis, with an ever decreasing concern for the discovery or effectuation of actual congressional intent.[489]

6. The Missing Issue — Preemptive Authority of the Secretary of the Interior

The final problem with the search for intent, not only in *California (Supreme Court)* but also in the subsequent cases, is the failure to define the role of the Secretary of the Interior in the reclamation program. Substantial sums continue to be appropriated for water development projects,[490] and in searching for congressional intent with regard

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[485] Luneberg, *Justice Rehnquist, Statutory Interpretation, the Policies of Clear Statement, and Federal Jurisdiction*, 58 IND. L.J. 211, 217 (1982); *see also* Posner, *The Meaning of Judicial Self-Restraint*, 59 IND. L.J. 1, 22 (1983) ("[S]trict statutory construction" may actually retard "separation of powers . . . by curtailing the legislature's power.").

[486] Luneberg, *supra* note 485, at 222; *see also* Note, *Intent*, *supra* note 482, at 912.

[487] Note, *Intent*, *supra* note 482, at 912; *see also supra* note 104. Goldsmith & Banks, *supra* note 95, at 32-33, 37, argue that another value the Court imposes is its own view of the proper national role in environmental protection.

[488] The debate whether courts should be activist is another matter. The concern discussed here is how judges can impose their values while claiming the role of strict constructionist.

A recent collection of essays maintains that the present court has neither been activist, nor shifted legal trends, V. BLASI, THE BURGER COURT: THE COUNTER-REVOLUTION THAT WASN'T (1983), but a review strongly disagrees, Bender, *Is the Burger Court Really Like the Warren Court?*, 82 MICH. L. REV. 635 (1984).

[489] It is unlikely that very many of the judges entertaining the § 8 cases have considered this problem. It was sufficient that the *California (Supreme Court)* decision was drafted with a conscious effort to set policy. Stare decisis has done the rest.

[490] For fiscal year 1985, $740 million were appropriated for the construction and rehabilitation of reclamation projects, nearly $150 million for their operation and maintenance, $67 million for reclamation loans, and almost $59 million for general adminis-

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to the reclamation program, courts might wish to understand how the program works.

There are a number of brief descriptions of the process by which reclamation (and other water development) projects historically were planned, authorized and constructed.[491] The "Principles and Guidelines" have recently been extensively revised[492] and shortened to only some 130 pages. The Bureau is engaged in a new planning process that hopefully will reduce the time invested in planning before construction by about one-third to one-half of the present seventeen years.[493] Both before and after the new processes, a great deal of agency energy is needed to determine the feasibility[494] of a project before it is authorized.[495] After the authorization, much effort is placed into construction and ultimately into operation. These "before and after" agency activities, often spanning several decades, never have been closely supervised by Congress, and it is doubtful that Congress would want to try. General congressional directives are issued and the Secretary and compeers (for example, the Secretary of Defense, in charge of the Army Corps) or subordinates (for example, the Bureau) proceed to implement them.

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trative expenses of the Bureau of Reclamation. Energy and Water Development Appropriation Act, 1985, Pub. L. No. 98-360, 98 Stat. 403, 407-09 (1984); *see also infra* note 495. Even larger sums were appropriated for Army Corps of Engineers projects, 98 Stat. at 403-05, which frequently have reclamation features.

[491] *See, e.g.*, Attwater, *supra* note 62, at 293-95; Jaffe, *Benefit-Cost Analysis and Multi-Objective Evaluation of Federal Water Projects*, 4 HARV. ENVTL. L. REV. 58 (1980); Sax, *Reclamation Law*, *supra* note 3, § 112 (Initiation and Authorization of Projects).

[492] UNITED STATES WATER RESOURCES COUNCIL, ECONOMIC AND ENVIRONMENTAL PRINCIPLES AND GUIDELINES FOR WATER AND RELATED LAND RESOURCES IMPLEMENTATION STUDIES (1983) [hereafter PRINCIPLES AND GUIDELINES].

[493] *Energy and Water Development Appropriations for 1984, Hearings Before the Senate Comm. on Appropriations* 269, 98th Cong., 1st Sess. (1983).

[494] Feasibility may include engineering related concerns, including: porosity of geologic formations and earthquake hazards; "economic" concerns, expressed in terms of cost-benefit ratios; and financial concerns, that is, whether costs can be retrieved or "reimbursed". This is not the same as economic feasibility. *See* Clyde, *Legal Overview, Current Problems in Water Acquisition*, in ROCKY MOUNTAIN MINERAL LAW FOUNDATION SPECIAL INSTITUTE ON WATER ACQUISITION FOR MINERAL DEVELOPMENT 2 (1978).

[495] *Id. See generally* authorities cited *supra* note 491. In 1984, over $35 million were appropriated for the Bureau to use on engineering and economic investigations, which generally occur before project authorization. Energy and Water Development Appropriation Act, 1985, Pub. L. No. 98-360, 98 Stat. 403, 407 (1984). About four times as much was appropriated for studies of Army Corps projects, but some of those funds were for projects already authorized. *Id.* at 403.

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Sometimes the directives are phrased in terms of the Secretary utilizing discretion;[496] other times Congress even adopts an agency plan or regulation as its own.[497] It is inconceivable that all the broad delegation of authority legislatively granted to the Secretary should be automatically nullified by invocation of section 8. But apparently this may become the rule.

The failure of the recent section 8 cases to grapple with the issue of secretarial authority can be traced directly to the opinion in *California (Supreme Court)*. The Court noted that the Bureau, prior to the "unnecessarily broad language" of *Ivanhoe*, has always complied with state law.[498] Further, since 1902, when Congress issued directives to the Secretary, it "consistently reaffirmed that the Secretary should follow state law."[499] The direction for subsequent judicial analysis of the issue of

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[496] *See supra* note 124.

[497] *See, e.g.*, 42 U.S.C. § 1962d-17 (1982) (setting the interest discount rate for project financing by a formula contained in 18 C.F.R. 704.39 (1984)); 43 U.S.C. § 616(a) (1982) (directing the same for the Fryingpan-Arkansas Project); the New Melones authorization, Pub. L. No. 87-874, § 203, 76 Stat. 1191 (1962) (directing that the project be built in accordance with Army Corps plans).

[498] 438 U.S. at 675. The Court implies that the only reason the Bureau began to resist complying with state laws was the temptation to assert itself after the *Ivanhoe* decision. No one has adequately addressed the possibility that the Bureau stepped up its resistance in response to increased lack of cooperation on the part of the states, such as the reversal of support by the state for New Melones, chronicled in the district court opinion on remand. 509 F. Supp. at 885-86.

The California State Water Resources Control Board consistently reserves jurisdiction under its authority in CAL. WATER CODE § 1394 (1971). The state's regulations imposed on the Bureau are always subject to change. The potential for alteration of existing projects has concerned not only the court in *California (District Remand)*, but also the district court in *Alpine Land*, *see supra* text accompanying note 346, and commentators, *see, e.g.*, Note, *State Control*, *supra* note 71, at 245-46.

Finally, with regard to the question of the Bureau's change in position, compare it with the observation in Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc., 104 S. Ct. 2778, 2792 (1984):

> The fact that the agency has from time to time changed its interpretation . . . does not, as respondents argue, lead us to conclude that no deference should be accorded the agency's interpretation of the statute. An initial agency interpretation is not instantly carved in stone. On the contrary, the agency, to engage in informed rulemaking, must consider varying interpretations and the wisdom of its policy on a continuing basis.

[499] 438 U.S. at 678. Actually, considering the number of reclamation statutes, there is relatively infrequent reference to state laws. When a statute does defer to the states, it sometimes raises as many questions as it answers. *See supra* note 436. A particularly intriguing statute is 43 U.S.C. § 485h-4 (1982), enacted in 1956. It is practically identical to § 8, except it specifies that nothing in §§ 485h-1 to h-5 shall interfere with state laws. Section 485h-5 provides that h-1 to h-5 are supplements to the reclamation law,

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the Secretary's power was thereby established. The courts did not have to worry about any two-step analysis — determining whether Congress might have delegated authority to the Secretary that might have been discretionarily exercised in conflict with state laws. Congress had consistently reaffirmed otherwise. The courts need only look for a one-step process — clear conflicts with state law apparent solely from congressional actions.

The best example is *East Bay*. Congress had explicitly authorized the Auburn Dam and Reservoir and the Folsom South Canal.[500] Therefore, state law was preempted. But the Secretary also decided to locate a diversion at a point not explicitly mentioned in the authorizing act. No preemptive effect was given that determination, nor was the possibility considered.[501] The court demanded a direct congressional order; a one-step conflict analysis. It did not even discuss the language of the authorizing act in which "[t]he Secretary is authorized to include . . . such additional works or capacity *as he deems necessary* and economically justified to provide for the future construction of the East Side Division of the Central Valley Project."[502] The entire thrust of the *East Bay* decision ignores the almost complete control over construction that the Secretary has been given over the years of the reclamation program.[503] At least one of the other section 8 cases, however, realized that construction might be an area in which the United States was not intended to be subjected to state control.[504]

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so theoretically, § 8 already applied, and h-4 was unnecessary. Is the specific "reenactment" of a § 8 type protection just a "consistent reaffirmation," as termed by Justice Rehnquist? Or is it an indication that Congress was worried that § 8 might not apply, so the protection needed to be expressly stated? *See* Walston, *supra* note 71, at 1663.

[500] Act of Sept. 2, 1965, Pub. L. No. 89-161, 79 Stat. 615 (currently codified at 43 U.S.C. § 616aaa (1982)).

[501] 26 Cal. 3d at 194, 605 P.2d at 5, 161 Cal. Rptr. at 470.

[502] Act of Sept. 2, 1965, Pub. L. No. 89-161, 79 Stat. 616 (currently codified at 43 U.S.C. § 616aaa (1982)). This type of directive is not unusual. *See, e.g.*, 43 U.S.C. § 593b (1982).

Alpine Land was similar to *East Bay* in utilizing a "one-step" analysis; the search was for "explicit congressional directives." 503 F. Supp. at 884.

[503] *See, e.g.*, 43 U.S.C. §§ 387-390, 505, 593a, 612a (1982) (citations to both general reclamation laws and specific project authorizations). The delegation to the Secretary of a great amount of authority in the construction area began in the original 1902 Act. *Id.* §§ 411, 419, 421.

[504] *California (District Remand)*, 509 F. Supp. at 888. *See supra* note 288 (text of the court's opinion). *California (Circuit Remand)* expressed concern for project operations, 694 F.2d at 1182.

The Court in Pacific Gas & Elec. Co. v. State Energy Resources Conservation & Dev. Comm'n, 461 U.S. 190, 223 n.34 (1983), explained the basis for the *First Iowa*

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This is a critical issue. In *East Bay*, the court used a California law that focused on the reasonableness of means of diversion as the basis for arguing that a construction decision of the Secretary affected state water rights and thus was subject to section 8. Such laws on means or methods of diversion are common in the West.[505] Another common requirement is that to perfect a water right, construction of diversion works must be commenced and continued with diligence, often within a defined time period.[506] But federal laws frequently commit timing to the Secretary's discretion.[507] Are all of those laws automatically undone by section 8? One can imagine the scenario: "Sorry, you did not complete your eight million dollar project in three years, you have now lost all the water."[508]

The importance of the secretarial role in construction goes beyond the physical actions involved. The Secretary has been given immense latitude in setting, varying, amending, extending, and collecting construction charges.[509] Early in the reclamation era, the Secretary was ordered by Congress not to deliver water to water rights applicants in arrears on payments[510] and was further authorized to cancel the water rights applications.[511] Currently, the directive is that

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case: "requiring compliance with state requirements would have reduced the project to a size that the Federal Power Commission had determined was inadequate, and compliance with state engineering requirements could handicap the financial success of the project." The Court went on to state that although the California regulations for nuclear power plants under consideration in *Pacific Gas* were valid: "State regulations which affected the *construction* and *operation* of federally approved nuclear power plants would pose a different case." *Id.* (emphasis added).

[505] W. HUTCHINS, *supra* note 34, at 644-48. The concept is to promote the most beneficial use of the water.

[506] *Id.* at 373-75; *see, e.g.*, N.M. STAT. ANN. §§ 75-5-8, 75-5-14 (1978); OR. REV. STAT. § 537.230 (1983). Requiring due diligence assures that water will be beneficially used and not merely serve as an object of speculation.

[507] *See, e.g.*, 43 U.S.C. §§ 388, 470, 615b, 616(c) (1982).

[508] Although Sax, *Reclamation Law*, *supra* note 3, § 117.2, at 176, deems it "most unlikely" that such state due diligence requirements would be upheld, the scenario is not imaginary. *See* Pioneer Irrigation Dist. v. American Ditch Ass'n, 50 Idaho 732, 737, 1 P.2d 196, 201 (1931). On the related question of the Bureau performing sufficient acts to manifest a fixed intent to appropriate (a required element of appropriation in Colorado), see Colorado River Water Conservation Dist. v. Rocky Mountain Power Co., 174 Colo. 309, 486 P.2d 438 (1971), *cert. denied*, 405 U.S. 996 (1972); Four Counties Water Users Ass'n v. Middle Park Water Conservancy Dist., 161 Colo. 429, 425 P.2d 262 (1967).

[509] *See, e.g.*, 43 U.S.C. §§ 423d, 462, 466, 485b (1982).

[510] *Id.* § 479.

[511] *Id.* § 480.

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> No funds appropriated to the Bureau of Reclamation for operation and maintenance, except those derived from advances by water users, shall be used for the particular benefit of lands (a) within the boundaries of an irrigation district, (b) of any member of a water users' organization, or (c) of any individual, when such district, organization, or individual is in arrears for more than twelve months in the payment of charges due under a contract entered into with the United States pursuant to laws administered by the Bureau of Reclamation.[512]

The Secretary could set charges, a water user could default, funds could be pulled from delivery systems "for the particular benefit" of the user, and the water could disappear. Assume, however, that the state does not recognize nonpayment of the charges (set by the Secretary and not expressly by Congress) as a basis for the forfeiture of a water right. Does section 8 compel the delivery of the water?[513]

Even if section 8 truly does hold that only congressional directives constitute a conflict with state laws, and the Secretary must scrupulously comply with those laws in every case when a "direct" order[514] from Congress is absent, an equally important question is who decides what is required by the state law. Courts will give the final answer, but an initial decision must be made. Section 8 states that the "Secretary of the Interior . . . shall proceed in conformity" with state laws,[515] but that is ambiguous. Does it mean that the Secretary shall proceed, guaranteeing that there is conformity with state laws? Or, does it mean that the Secretary shall let a state agency (such as the California State Water Resources Control Board) make the decisions that involve state law, if they so insist?

When the Court stated in *California (Supreme Court)* that the Bureau had consistently complied with state law, it cited a Bureau manual providing that "Project plans must comply with State legal provisions

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[512] *Id.* § 377a.

[513] A similar hypothetical can be based on *id.* 485h(d):

> (d) No water may be delivered for irrigation of lands in connection with any new project, new division of a project, or supplemental works on a project until an organization, satisfactory in form and powers to the Secretary, has entered into a repayment contract with the United States, in a form satisfactory to the Secretary . . . .

Assume the organization refuses to enter into the contract, claiming certain terms violate state law. Yet, the organization insists on water delivery. Since Congress did not set the contract terms, they are not a "congressional directive." Congress, however, did order the organization to enter into a contract "in a form satisfactory to the Secretary." *Id.* A "two-step" analysis is required, delving into the "contracting authority" of the Secretary. *Cf.* Arizona v. California, 373 U.S. 546 (1963).

[514] "Direct" order is in contrast to a "general delegation" of authority.

[515] 43 U.S.C. § 383 (1982).

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. . . the Bureau [is required] to proceed in conformity . . . [and] it is necessary to reach an understanding with the States."[516] The ambiguity is unresolved. The current "Principles and Guidelines" for water development studies are a little clearer regarding federal-state cooperation in planning, but do not specifically address state laws as such:

> 1.4.1 Federal-State Relationship in Planning.
> (a) The responsible Federal planning agency is to contact the Governor or designated agency for each affected State before initiating a study and enter into such agreements as are appropriate to carry out a coordinated planning effort.
> (b) The State agency or agencies responsible for or concerned with water planning are to be provided with appropriate opportunities to participate in defining the problems and opportunities, in scoping the study, and in review and consultation.[517]

Federal statutes are not of much assistance. They may simply repeat section 8's requirement that the Secretary "conform,"[518] or provide that the states be given an opportunity to "cooperate" in project planning, and that the states submit their recommendations to Congress.[519] The laws do not, however, seem to clearly require that all state law decisions be made by the states, and at least one case prior to *California (Supreme Court)* affirmed the authority of the Secretary to interpret state law.[520]

Subsequent cases, however, mandate that decisions involving state law will be made by state agencies, although Congress may have authorized the Secretary to engage in certain transactions. Thus, in *California (Circuit Remand)*, the Secretary of the Interior had been congressionally ordered to determine the amount of water needed to satisfy the Stanislaus River Basin before initiating out-of-basin diversions, and the Secretary of the Army was directed to consider water quality problems. Neither was allowed the sole authority to make those decisions; the circuit court held that control was held by the state

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[516] 438 U.S. at 675 (citing DEP'T OF THE INTERIOR, BUREAU OF RECLAMATION, RECLAMATION INSTRUCTIONS §§ 116.3.1, 231.5.1 (1957)).

[517] PRINCIPLES AND GUIDELINES, *supra* note 492, at 3.

[518] *See, e.g.*, 43 U.S.C. § 485h-4 (1982).

[519] *See, e.g.*, 33 U.S.C. § 701-1 (1982).

[520] Trinity County v. Andrus, 438 F. Supp. 1368 (E.D. Cal. 1977); *supra* notes 47-51.

The report of the NAT'L WATER COMMISSION, *supra* note 444, at 462, recommends that the United States should "proceed in conformity with State laws and procedures" but that "where State law conflicts with accomplishment of the purposes of a Federal program or project," the federal official "should be able to exercise his discretion in determining whether such inconsistency exists."

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board.[521] In *Alpine Land*, the authority to allow (or disallow) the transfer of water rights held under contract with the Secretary of the Interior was determined to be with the Nevada State Engineer.[522] In *East Bay*, a statute directing consultation with local interests was used to cancel the Secretary's authority.[523] The question is not purely academic. It has an immense impact because the question of the scope of a state law is often debatable, and the agency that makes the initial determination will have an immense advantage in subsequent litigation.[524]

This Article does not purport to decide whether in fact there is ever any room for administrative discretion under section 8, either to proceed in some instances without conforming with state laws, or at least to decide what the state laws entail. If there were, hypothetically, any role for the Secretary, it would certainly not permit the Department of Interior to run roughshod over the states; other mechanisms exist for their protection. Some of the Secretary's decisions might be ultra vires, even absent section 8 constraints.[525] There has been a recent revival of interest in the nondelegation doctrine.[526] Providing some discretion does not prevent the Secretary from being accused, in an appropriate case, of

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[521] 694 F.2d at 1181; *see id* at 1178, quoted *supra* text accompanying note 295 (requiring the Bureau to appear before the state board).

[522] 697 F.2d at 858; *see supra* note 398.

[523] *See supra* text accompanying notes 500-02.

[524] With regard to any factfinding, judicial review will likely be on the record made before the agency, and entail substantial evidence review. *See supra* note 247; *see also* Baltimore Gas & Elec. Co. v. Natural Resources Defense Council, Inc., 103 S. Ct. 2246, 2257 (1983) ("Our only task is to determine whether the Commission has considered the relevant facts and articulated a rational connection between the facts found and the choice made.").

Although the Supreme Court has recently indicated that it may more vigorously review administrative actions, especially regarding questions of law, *see infra* note 527, it would still be an advantage to be the agency asking for affirmance, rather than the challenging agency.

[525] *See, e.g.*, Missouri v. Andrews, 586 F. Supp. 1268 (D. Neb. 1984); National Wildlife Fed'n v. Andrus, 440 F. Supp. 1245 (D.D.C. 1977); Solicitor's Opinion No. M-36902, Authority to Divert Flows from Hunter Creek Tributaries, Fryingpan-Arkansas Project, Colorado, 85 I.D. 326 (1978).

[526] *See, e.g.*, American Textile Mfrs. Inst., Inc. v. Donovan, 452 U.S. 490, 543, 545 (1981) (Rehnquist, J., dissenting); Industrial Union Dep't, AFL-CIO v. American Petroleum Inst., 448 U.S. 607, 646 (1980) (plurality opinion); *id.* at 675 (Rehnquist, J., concurring); Aranson, Gellhorn & Robinson, *A Theory of Legislative Delegation*, 68 CORNELL L. REV. 1 (1983); Schwartz, *Some Recent Administrative Law Trends: Delegations and Judicial Review*, 1982 WIS. L. REV. 208; Note, *Rethinking the Nondelegation Doctrine*, 62 B.U.L. REV. 257 (1982).

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acting arbitrarily and capriciously and of abusing that discretion.[527] The courts should be concerned that the interests of states are protected. The automatic assumption that, although all laws are equal, section 8 is more equal, must be reconsidered. The power of agencies to preempt state laws has been judicially recognized.[528] A case by case conflict analysis of the authority and actions of the Secretary concerning a particular project should not be avoided by a retreat to comfortable

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[527] The Supreme Court has recently called a number of federal agencies to task, finding one administrative interpretation of the law "unreasonable," Commissioner v. Engle, 104 S. Ct. 597, 609 (1984); rejecting another agency's "unauthorized assumption of power," Bureau of Alcohol, Tobacco & Firearms v. Federal Labor Relations Auth., 104 S. Ct. 439, 450 (1983); and holding that a standard promulgated by yet another agency was "arbitrary and capricious." Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co., 103 S. Ct. 2856, 2868 (1983). *See generally* Coffman, *Judicial Review of Administrative Interpretations of Statutes*, 6 W. NEW ENG. L. REV. 1 (1983); Pierce & Shapiro, *Political and Judicial Review of Agency Action*, 59 TEX. L. REV. 1175 (1981).

[528] The power of administrators to preempt state law was most recently affirmed in Capital Cities Cable, Inc. v. Crisp, 104 S. Ct. 2694 (1984) (FCC regulations preempted Oklahoma prohibition of cable television retransmission of alcoholic beverages commercials), but the most significant recent analysis of the question of administrative preemption is contained in Fidelity Fed. Sav. & Loan Ass'n v. De La Cuesta, 458 U.S. 141 (1982). The Court held that the Federal Home Loan Bank Board's due-on-sale regulations preempted conflicting state regulation of federally chartered savings and loan institutions. The Court stated:

> Federal regulations have no less pre-emptive effect than federal statutes. Where Congress has directed an administrator to exercise his discretion, his judgments are subject to judicial review only to determine whether he has exceeded his statutory authority or acted arbitrarily . . . . When the administrator promulgates regulations intended to pre-empt state law, the court's inquiry is similarly limited:
>
> > "If [h]is choice represents a reasonable accommodation of conflicting policies that were committed to the agency's care by the statute, we should not disturb it unless it appears from the statute or its legislative history that the accommodation is not one that Congress would have sanctioned."

Id. at 153-54 (quoting United States v. Shimer, 367 U.S. 374, 383 (1961)).

Of course, *De La Cuesta* did not involve a statute such as § 8 that directed the administrators to conform with state law. Nonetheless, even under § 8, the Secretary of the Interior's ability to regulate state waters was recognized in Fresno v. California, 372 U.S. 627, 632 (1963). The case involved a challenge, based on state law, to an exercise of authority under 43 U.S.C. § 485h(c) (1982), which orders that the efficiency of irrigation projects not be impaired. The Court held that: "the Reclamation Bureau officials were acting entirely within the scope of their authority in operating the Project in this manner and fixing the rates for water in accordance with congressional mandate, all of which has specifically received our approval." 372 U.S. at 632.

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oversimplifications drawn from *California (Supreme Court)*.[529]

CONCLUSION

Section 8 litigation has been plagued by a failure on the part of everyone — the states, the Bureau, the courts, and many of the commentators — to deal with all of the intricacies of the reclamation program. Section 8 cases commencing with *Ivanhoe* emphasized a distinction between acquisition and delivery of waters that made no legal or practical sense and demonstrated less concern for the interest of states in protecting their waters. The pendulum has now swung too far in the opposite direction. *California (Supreme Court)* inadequately addressed legislative history, precedent, and the issue of administrative authority, and established a "clear intent" test for determining conflict preemption that does not comport well with legislative reality. Subsequent cases have been handicapped by the Supreme Court opinion. Courts have failed to inquire sufficiently into congressional intent in such areas as defining beneficial use, producing hydroelectric power and assuring financial feasibility, and into secretarial authority in any area. The quest for federal-state cooperation in the development of western waters is laudable. It is to be fervently hoped, but perhaps not expected, that Congress will eventually turn its attention to establishing an apolitical comprehensive national water policy. Part of that comprehensive legislative endeavor could include clarification of the reclamation laws. In the meantime, the administrators and judges at both the state and federal level facing section 8 problems should approach their decisions with sensitive appreciation of the complexity of their task.

[529] In his comprehensive review of *California (Supreme Court)* in 1979, Walston, *supra* note 71, at 1674-76, identified determination of "the limits of discretionary powers of federal officials" as one of the "major problem areas" with which courts would have to grapple. However, they have yet to do so.

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