

COMMENTS

California Water for National Forests: Reserved Rights, Riparian Rights, and Instream Appropriations

The federal law reserved water rights doctrine directs the United States Forest Service to obtain state law water rights to preserve minimum instream water flows — for aesthetic, recreational, fish, and wildlife purposes — through national forests. In California the Forest Service encounters the state's dual water rights system, which includes both riparian and appropriative rights. The California courts of appeal have held that state statutory law prohibits instream appropriations, but that the common law recognizes riparian rights for federal lands. This Comment explores the legal basis for, and practical ramifications of, California's instream appropriations prohibition. It also examines the consequences of recognizing federal land riparian rights. The Comment argues that such recognition will allow hydroelectric developers on federal land to acquire water in circumvention of California's CEQA and public trust reviews. Finally, this Comment proposes that California lawmakers deny federal land riparian rights and allow, instead, instream appropriations for public purposes.

INTRODUCTION

The United States Forest Service owns approximately twenty percent of California's land.¹ Forest Service lands need water for various pur-

¹ See FINANCIAL AND ECONOMIC RESEARCH UNIT, STATE DEP'T OF FIN., CALIFORNIA STATISTICAL ABSTRACT 2-3 (24th ed. 1983). Of California's 100,206,720 acres, the United States government owns 45,218,649 acres. *Id.* An estimated 61% of the water supply in the Western states originates on federal land, and 95% of the

poses, including fish and wildlife enhancement, recreational uses, timber production, and scenic preservation.² To satisfy many of these needs, the Forest Service must preserve minimum "instream" water flows against appropriation by competing users.³ Current law makes the Forest Service's task difficult. Federal law water rights do not encompass instream flow protection for national forests' wildlife and aesthetic purposes.⁴ Furthermore, the California Supreme Court has not determined if state law recognizes instream flow water rights for national forest land.⁵

Under federal law, the Forest Service holds a limited "reserved right" to use appurtenant stream water for the forest's primary purposes.⁶ The Supreme Court has held that Congress reserved national forests for only two purposes: to secure favorable water flow conditions for local water needs, and to furnish a continuous timber supply.⁷ The

population depends on such water to some extent. Shupe, *Reserved Instream Flows in the National Forests: Round Two*, in W. NAT. RESOURCE LITIGATION DIG. 23, 23 (Spring 1985). Furthermore, runoff from national forests accounts for nine-tenths of the total water originating upon federal lands in the West. *Id.*

² See, e.g., *United States v. New Mexico*, 438 U.S. 696, 704 (1978); *United States v. Alpine Land & Reservoir Co.*, 697 F.2d 851, 859 (9th Cir. 1983).

³ Free flowing water satisfies many beneficial uses: navigation, fish spawning and migration, recreation, scenic and aesthetic enjoyment, and preservation of rare and endangered species. A. SCHNEIDER, CALIFORNIA GOVERNOR'S COMM'N TO REVIEW CALIFORNIA WATER RIGHTS LAW, LEGAL ASPECTS OF INSTREAM WATER USES IN CALIFORNIA 1 (1978). An instream flow is the water left to run freely in the water course. *Id.*

⁴ *United States v. New Mexico*, 438 U.S. at 704.

⁵ "While it is well settled that the Forest Service has reserved water rights which it may use for the primary purposes for which the forest lands were withdrawn from the public domain, the argument that it concurrently received riparian rights is novel." *In re Hallett Creek Stream Sys.*, State Water Resources Control Bd., Findings and Order of Determination, at v (1983) (on file with U.C. Davis Law Review). Furthermore, in *Fullerton v. State Water Resources Control Bd.*, 90 Cal. App. 3d 590, 153 Cal. Rptr. 518 (1979), the court interpreted the Water Code to prohibit instream flow appropriations. See *infra* notes 72-73 and accompanying text. Thus, the California Supreme Court has yet to determine whether state law permits the federal government to claim either riparian or appropriative rights to instream flows.

⁶ *United States v. New Mexico*, 438 U.S. at 702.

⁷ See *id.* at 707 n.14. The upland forest acts like a sponge. It holds water and then releases it in a gradual flow that downstream users can harness and control. Interview with Harrison Dunning, Professor of Law, School of Law, University of California, Davis (Jan. 15, 1987). By protecting forests against destruction, Congress sought to encourage regular stream flows and to prevent erosion and floods. *United States v. New Mexico*, 438 U.S. at 705. To achieve this purpose, as well as to furnish continuous timber supplies, Congress created the national forests. *Id.* Thus, the Forest Service

Court's narrow construction denies the Forest Service a federal water right protecting instream flows against appropriation by competing users.⁸ Once the Forest Service acquires sufficient water to satisfy primary purpose needs, federal law does not prevent other parties from diverting water out of the stream for agricultural, municipal, or other beneficial uses.⁹ Federal law permits those diversions even though insufficient water might remain instream for fish, wildlife, or aesthetic purposes.¹⁰

Congress is not likely to expand federal reserved rights to protect instream water flows through Forest Service lands.¹¹ This doctrine is part of a general policy of federal deference to local laws regulating water resources.¹² By deferring to the states, Congress has recognized that state water laws may often vary to reflect differing physiographic and climatic conditions.¹³ Consequently, the Forest Service must turn to

secures favorable water flow conditions by preserving national forests against destruction. *Id.* at 712.

⁸ See *United States v. New Mexico*, 438 U.S. at 705. One article contends that, in addition to reserved rights, Congress has delegated administrative water powers to the Forest Service. Wilkinson & Anderson, *Land Resource Planning in the National Forests*, 64 OR. L. REV. 1, 230-31 (1985). The authors suggest that Congress has delegated to the Forest Service the authority to establish instream flow levels in national forests. *Id.* at 231-35. Instream flows set pursuant to delegated administrative authority would differ in two ways from the instream flow reserved rights rejected in *United States v. New Mexico*. First, administrative instream flows would be site specific. *Id.* at 233. In contrast, the instream reserved rights claimed in *United States v. New Mexico*, if recognized, would have applied to every national forest water course. *Id.* at 232-33. Second, administrative instream flows would have a prospective priority date, being the date the Forest Service gives public notice that it is establishing minimum instream flow levels. In comparison, the reserved right has a retroactive priority, dating back, in most cases, to the proclamation date of each national forest. *Id.* The authors concede that the notion of congressionally delegated authority to set instream flow levels is "not free from uncertainty," *id.* at 234-35, and has generated considerable commentary, see *id.* at 231 & n.1218. The theory seems inconsistent with the reserved rights doctrine, because the argument relies on the 1897 Organic Act, the same statute the Court construed narrowly in *United States v. New Mexico*. See *id.* at 227, 230-34; see also *infra* note 13.

⁹ *United States v. New Mexico*, 438 U.S. at 712 & n.20.

¹⁰ See *id.* at 708.

¹¹ "Congress shall have the power to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States" U.S. Const. art. IV, § 3, cl. 2.

¹² See, e.g., *infra* notes 33, 110, 125-27.

¹³ In a companion case to *United States v. New Mexico*, the Supreme Court discussed federal deference to state water law:

The very vastness of our territory as a Nation, the different times at which

state water law to preserve secondary purpose instream flows.¹⁴

In California the Forest Service faces a unique situation. Unlike other western states, California maintains a dual system of water rights, recognizing both riparian and appropriative rights.¹⁵ A riparian right is incident to owning land on the banks of a waterway.¹⁶ Since the

it was acquired and settled, and the varying physiographic and climatic regimes which obtain in its different parts have all but necessitated the recognition of legal distinctions corresponding to these differences The history of the relationship between the Federal Government and the States in the reclamation of the arid lands of the western States is both long and involved, but through it runs the consistent thread of purposeful and continued deference to state water law by Congress.

California v. United States, 438 U.S. 645, 648-49 (1978). Accordingly, this Comment examines California law water rights for instream, secondary purposes. For more detailed analyses of the reserved rights/primary purposes doctrine and speculation about federal law nonreserved rights, see F. TRELEASE, NATIONAL WATER COMMISSION LEGAL STUDY NO. 5, FEDERAL-STATE RELATIONS IN WATER LAW 104-60 (1971); Hanks, *Federal-State Rights and Relations*, in 2 WATERS AND WATER RIGHTS § 102.1 (R. Clark ed. Supp. 1978); King, *Federal Non-Reserved Water Rights: Fact or Fiction*, 22 NAT. RESOURCES J. 423 (1982); Note, *Federal Acquisition of Non-Reserved Water Rights after New Mexico*, 31 STAN. L. REV. 885 (1979). The Court has stated that "except where the reserved rights or navigation servitude of the United States are invoked, the state has total authority over its internal waters." California v. United States, 438 U.S. at 662. While instream uses may be within the primary purposes of some forest reservations, courts generally deny instream reserved rights to national forests. See, e.g., United States v. New Mexico, 438 U.S. at 708. In United States v. Alpine Land & Reservoir Co., 697 F.2d 851 (9th Cir. 1983), the United States claimed a reserved right to the instream flow of the Carson River for the Toiyabe National Forest. The court denied the United States implied reserved rights to instream flows, and found that minimum instream flows were not necessary to fulfill the primary purposes of the forest. *Id.* at 859.

¹⁴ United States v. New Mexico, 438 U.S. at 702.

¹⁵ People v. Shirokow, 26 Cal. 3d 301, 307, 605 P.2d 859, 864, 162 Cal. Rptr. 30, 34 (1980); W. HUTCHINS, THE CALIFORNIA LAW OF WATER RIGHTS 40, 55-56 (1956). Idaho, Montana, Nevada, Utah, Wyoming, Colorado, Arizona, and New Mexico have rejected riparianism and embraced the appropriation system exclusively. 1 R. CLARK, WATERS AND WATER RIGHTS 237 (1967). California, Washington, Oregon, North Dakota, South Dakota, Nebraska, Kansas, Oklahoma, and Texas have retained some form of riparian rights coupled with appropriative rights. *Id.* at 237. However, most of these "dual system" states have significantly restricted their riparian rights, so that California is now the only western state to recognize both appropriative and traditional riparian principles. 5 *id.* at 11-19. Furthermore, wide differences exist among the water laws of the dual system states. 5 *id.* at 420. This Comment focuses on the Forest Service's water rights under California law.

¹⁶ Gin S. Chow v. City of Santa Barbara, 217 Cal. 673, 689, 22 P. 5, 14 (1933); Lux v. Haggin, 69 Cal. 255, 391, 10 P. 675, 753 (1886). The word "riparian" means "pertaining to the bank of a river." FUNK & WAGNALLS, NEW COLLEGE STANDARD

common law creates the riparian right, the riparian landowner may assert her right to water without State Water Resources Control Board authorization.¹⁷ Her riparian status entitles her to use a reasonable quantity of water on her land.¹⁸ California law allows the riparian landowner to divert water from the source or maintain minimum water levels for instream recreational and aesthetic purposes.¹⁹

In contrast, an appropriative right is not incidental to land ownership. The appropriator acquires her right by permit from the State Water Resources Control Board (Board).²⁰ The Board may issue a permit to appropriate available water if the proposed use is reasonable,

DICTIONARY 1009 (1950). It derives from the Latin *riparius*, which stems from *ripa*, meaning "bank." *Id.* A landowner, as an incident of her property ownership, has the right to the natural flow of water abutting her land, diminished only by the reasonable use of upstream riparians. *Lux*, 69 Cal. at 391, 10 P. at 753.

¹⁷ "Title to the riparian right is acquired by the owner of riparian land as a part of the transaction by which he acquires title to the land, because the right is 'part and parcel' of the soil." W. HUTCHINS, *supra* note 15, at 179; *see also Lux*, 69 Cal. at 390-91, 10 P. at 753. "The right of the riparian proprietor to the flow of the stream is inseparably annexed to the soil, and passes with it, not as an easement or appurtenance, but as part and parcel of it." *Lux*, 69 Cal. at 390, 10 P. at 753; *see infra* notes 20-23 and accompanying text (discussing the State Water Resources Control Board's role in authorizing water rights).

¹⁸ *National Audubon Soc'y v. Superior Court*, 33 Cal. 3d 419, 441, 658 P.2d 709, 724, 189 Cal. Rptr. 346, 361 (1983). Reasonableness depends on the circumstances:

[T]he length of the stream, the volume of water in it, the extent of each ownership along the banks, the character of the soil owned by each contestant, the area sought to be irrigated by each—all these, and many other considerations, must enter into the solution of the problem.

Harris v. Harrison, 93 Cal. 676, 681, 29 P. 325, 326 (1892). The riparian right is proportionate. The law measures the riparian right by a specific quantity of water only when an apportionment decree adjudicates the rights of riparians among themselves or against appropriators. W. HUTCHINS, *supra* note 15, at 40-41.

¹⁹ *See, e.g., Elsinore v. Temescal Water Co.*, 36 Cal. App. 2d 116, 129-30, 97 P.2d 274, 280 (1939) (riparian rights may operate to maintain shoreline's natural condition); *Los Angeles v. Aitken*, 10 Cal. App. 2d 460, 473-75, 52 P.2d 585, 591-92 (1935) (maintaining water levels to preserve recreational opportunities is beneficial use of water). The riparian landowner must use diverted water on land contiguous to the river and within the watershed. *Anaheim Union Water Co. v. Fuller*, 150 Cal. 327, 330, 88 P. 978-80 (1907) (land outside river's watershed has no riparian entitlement to use or benefit of river's water). The watershed is the ridge or crest line dividing two drainage areas; the region or area drained by a river or stream. THE RANDOM HOUSE DICTIONARY OF THE ENGLISH LANGUAGE (unabr. ed. 1966).

²⁰ CAL. WATER CODE §§ 1250-1258 (Deering 1977). The exclusive method of appropriating water in California is through the statutory procedure. *Fullerton v. State Water Resources Control Bd.*, 90 Cal. App. 3d 590, 599-600, 153 Cal. Rptr. 518, 525 (1979).

beneficial, and in the public interest.²¹ The Board may impose conditions on the permit²² and retain continuing jurisdiction to prevent uses that are unreasonable, wasteful, or threatening to the public interest.²³

An appropriation usually entails diversion or physical control of water. However, protection of fish resources and aesthetic values typically requires only "instream" flow maintenance, that is, preservation of a minimum amount of instream water flow. Current California case law does not permit instream appropriations.²⁴ This prohibition re-

²¹ The general welfare requires water's reasonable and beneficial use in the interest of the people and for the public welfare. CAL. WATER CODE § 100 (Deering 1977). A water right includes only the amount reasonably required for beneficial uses. It does not extend to waste or unreasonable uses. *Id.* "The board shall allow the appropriation for beneficial purposes of unappropriated water under such terms and conditions as in its judgment will best develop, conserve, and utilize in the public interest the water sought to be appropriated." *Id.* § 1253. The Board must reject an application when the proposed appropriation would not serve the public interest. *Id.* § 1255.

²² The Board may subject appropriations to "such terms and conditions as in its judgment will best develop, conserve, and utilize in the public interest, the water sought to be appropriated." *Id.* § 1257; *see also id.* §§ 1390-1394 (detailing permit terms and conditions).

²³ *Id.* §§ 275, 1394. If two or more appropriators compete for a finite water supply, the first to manifest the intent to use the water owns the superior appropriative right. The California Supreme Court declared the "first in time, first in right" rule in *Irwin v. Phillips*, 5 Cal. 140 (1855):

[T]he policy of the State, as indicated by her legislation, has conferred the privilege to work the mines, it has equally conferred the right to divert the streams from their natural channels, and as these two rights stand upon an equal footing, when they conflict, they must be decided by the fact of priority upon the maxim of equity, *qui prior est in tempore, potior est in jure*. The miner who selects a piece of ground to work, must take it as he finds it, subject to prior rights If it is upon a stream, the waters of which have not been taken from their bed, they cannot be taken to his prejudice; but if they have been already diverted . . . he has no right to complain, no right to interfere with the prior occupation of his neighbor

Id. at 147. The court later modified the "first in time" rule to protect investment-backed expectations:

The making of a dam was necessary before water could be taken, and this frequently required considerable time and the expenditure of large sums of money. . . . To meet this condition, the courts held that the person who first began the construction of such works and did so in such manner that his intent to divert water thereby was manifest, was entitled to priority in the diversion subsequently made by him, provided he acted in good faith and prosecuted the work with reasonable diligence.

Palmer v. Railroad Comm'n, 167 Cal. 163, 171, 138 P. 997, 1000 (1914).

²⁴ *California Trout, Inc. v. State Water Resources Control Bd.*, 90 Cal. App. 3d 816, 818-20, 153 Cal. Rptr. 672, 673-75 (1979).

quires the Forest Service to obtain riparian rights, instead of appropriative rights, for the same purposes.²⁵

California courts only recently determined whether state law confers riparian rights on federally owned land.²⁶ In late 1986 a California court of appeal held that the Forest Service qualifies for riparian rights because it owns lands appurtenant to California rivers and streams.²⁷ This Comment recommends that the California Supreme Court reconsider both the legal and the practical ramifications of recognizing riparian rights for federal land in California. Forest Service riparian rights would significantly increase federal claims on state water resources and would circumvent the state's regulatory power. Thus, this Comment urges California to take an alternative avenue to satisfy the national forest lands' secondary water needs.²⁸

This Comment proposes that California recognize instream flow appropriative rights for public purposes. Part I reviews the federal reserved rights doctrine, which encourages the Forest Service to seek state law instream flow water rights.²⁹ This part then examines California's

²⁵ E.g., *In re Hallett Creek Stream Sys.*, 187 Cal. App. 3d 863, 868, 232 Cal. Rptr. 208, 211 (1986), *review granted*, Mar. 26, 1987 (the Forest Service claimed riparian water rights for wildlife purposes).

²⁶ See *id.* at 871, 232 Cal. Rptr. at 213.

²⁷ *Id.* at 866, 232 Cal. Rptr. at 209-10. The trial court opinion reveals that the Forest Service claimed riparian rights to 300 gallons per day for wildlife enhancement on federal reserved land. *In re Hallett Creek Stream Sys.*, No. 3 Civ. 24,355, slip. op. (Lassen County Super. Ct. 1983), *argued* (Third App. Dist. 1985). This Comment suggests that the California Supreme Court consider the potential uses and quantities of federal riparian right water before affirming the *Hallett Creek* decision.

²⁸ Riparian rights and appropriative rights constitute the principal California water rights available to the Forest Service. This Comment does not discuss pueblo water rights claimed by cities formerly under Mexican rule, see W. HUTCHINS, *supra* note 15, at 256-62, or groundwater rights, see *Los Angeles v. San Fernando*, 14 Cal. 3d 199, 537 P.2d 1250, 123 Cal. Rptr. 1 (1975).

²⁹ Since *United States v. New Mexico*, 438 U.S. 696 (1978), see *infra* notes 32-40 and accompanying text, the Forest Service has advanced a hydrology-based argument that instream flow maintenance qualifies for federal reserved rights. Shupe, *supra* note 1, at 27-28. The Forest Service claims that: "(1) instream flows of a certain magnitude are needed to transport sediment downstream; (2) transport of a stream's sediment load is required in order to maintain a viable stream channel; and (3) viable stream channels are essential in securing favorable condition of flow from the National Forests." *Id.* at 28. Basically, the Forest Service is asserting that instream flow maintenance is necessary for securing favorable water flow conditions. *Id.* Since insuring favorable water flow conditions is a primary national forest purpose, the Forest Service reasons that it has a reserved right to instream flow water. *Id.* While the Supreme Court specifically denied reserved rights to instream flows in *United States v. New Mexico*, see *infra* notes 37-40 and accompanying text, the Court did not then consider the "channel

dual water rights system and its application to Forest Service land. Part II considers the legal and policy implications of federal riparian right recognition. It also explores problems of California's current case law prohibition against instream appropriations. Finally, part III recommends that California recognize instream appropriations for public purposes.

I. BACKGROUND: WATER RIGHTS FOR FEDERAL LAND IN CALIFORNIA

A. *The Federal Law Reserved Water Right*

Settling and developing the arid West depended on water.³⁰ Historically, the federal government deferred to state laws controlling water's acquisition and use.³¹ However, one recognized exception to state control is the "reservation" theory of federal water rights.

Under federal law, the Forest Service enjoys a "reserved right"³² to use appurtenant stream water on national forest land reservations.³³

maintenance" argument. *See id.* at 30-31. However, the Supreme Court's narrow construction of the reserved water right casts doubt on the Forest Service's chances of obtaining reserved instream flow rights for channel maintenance purposes. *See id.* at 30. Nonetheless, the Forest Service has claimed such rights in state water adjudications in Wyoming and Colorado. *See id.* at 28-30.

³⁰ *California Or. Power Co. v. Beaver Portland Cement Co.*, 295 U.S. 142, 156-58 (1935).

³¹ *See supra* notes 12-13 and accompanying text.

³² *Winters v. United States*, 207 U.S. 564 (1908). The United States sought to restrain Winters, a would-be appropriator, from diverting waters that flowed through an Indian reservation. The Court found that the government's policy was to transform Indians into "a pastoral and civilized people." *Id.* at 576. Since water was necessary to achieve this goal, the Court implied a reservation of water along with the express reservation of the land. *Id.* at 577. "The power of the Government to reserve the waters and exempt them from appropriation under the state laws is not denied, and could not be. That the Government did reserve them we have decided, and for a use which would be necessarily continued through years." *Id.*

³³ Public domain lands and reserved lands are different. See 16 U.S.C. § 796 (1982). The public domain includes lands that are open to settlement, public sale or other disposition under the federal public land laws. *Federal Power Comm'n v. Oregon*, 349 U.S. 435, 443 (1955). The Bureau of Land Management administers public domain lands. Taylor Grazing Act, 43 U.S.C. §§ 315-316o (1982); Federal Land Policy and Management Act, 43 U.S.C. §§ 1701-1784 (1982). Reserved lands, however, are lands withdrawn from the public domain by statute, executive order, or treaty, and dedicated to specific federal purposes. *Federal Power Comm'n*, 349 U.S. at 443, 456. Reservations include national forests, Indian reservations, military reservations, water power sites, and other lands withheld from private appropriation. *Id.* The reserved right is available only for reserved federal land. *Id.* at 448.

The Supreme Court has held that when the United States creates a land reservation, such as a national forest, it reserves water sufficient to satisfy the reservation's purposes.³⁴ The reserved water right requires the reservation's appurtenance to the water source.³⁵ In this sense it is

Public land acts, passed by Congress during the settlement of the American west, facilitated the transfer of federal lands to private ownership through patent or homestead. See Act of July 26, 1866, ch. 262, §§ 1, 9-10, 14 Stat. 251, 253; Act of July 9, 1870, ch. 235, § 17, 16 Stat. 217, 218; and Desert Land Act of 1877, ch. 107, 19 Stat. 377. A land patent is a muniment of title issued by a government or state for the conveyance of some portion of the public domain. BLACK'S LAW DICTIONARY 1013 (5th ed. 1979). The United States Supreme Court stated that the Desert Land Act allowed "the entry and reclamation of desert lands" within the western states. *California Or. Power Co. v. Beaver Portland Cement Co.*, 295 U.S. 142, 156 (1935). While federal law disposed of the land, state law governed rights to the water:

As the owner of the public domain, the government possessed the power to dispose of land and water thereon together, or to dispose of them separately . . . Congress intended to establish the rule that for the future the land should be patented separately; and that all non-navigable waters thereon should be reserved for the use of the public under the laws of the states and territories named.

Id. at 162 (citation omitted). Thus, Justice Sutherland announced the "severance theory." The Desert Land Act "effected a severance of all waters upon the public domain, not theretofore appropriated, from the land itself." *Id.* at 158. The Court noted that the Acts of 1866 and 1870 also manifested congressional deference to state water laws. *Id.* at 154-55. Therefore, for nonreserved land in the public domain, "the grantee will take the legal title to the land conveyed, and such title, and only such title, to the flowing waters thereon as shall be fixed or acknowledged by the customs, laws, and judicial decisions of the state of their location." *Id.* at 162. However, the public land acts of the nineteenth century did not apply to lands reserved by the federal government. *Federal Power Comm'n v. Oregon*, 349 U.S. 435, 448 (1955).

The Desert Land Act severed, for purposes of private acquisition, soil and water rights *on public lands*, and provided that such water rights were to be acquired in the manner provided by the law of the state of location. . . . [But] the lands before us in this case are not "public lands" but "reservations."

Id. (emphasis in original).

³⁴ See *supra* note 6 and accompanying text. In *Arizona v. California*, 373 U.S. 546, 600-01 (1963), the United States Supreme Court held that the United States intended to reserve water for national recreation areas, wildlife refuges, and national forests, as well as for Indian reservations.

³⁵ The Court has stated:

[W]hen the Federal Government withdraws its land from the public domain and reserves it for a federal purpose, the Government, by implication, reserves *appurtenant* water then unappropriated to the extent needed to accomplish the purpose of the reservation. In doing so the United States acquires a reserved right in unappropriated water which vests on the date of the reservation and is superior to the rights of future

akin to the riparian right. Unlike the riparian right, however, the reserved right includes only the amount of water needed for the reservation's primary purposes.³⁶

In *United States v. New Mexico*,³⁷ the Supreme Court determined that the national forests' primary purposes were securing favorable water flow conditions and furnishing a continuous timber supply.³⁸ The Court found that the federal government had not reserved national forests for aesthetic, environmental, recreational, or wildlife preservation purposes.³⁹ Hence, the Forest Service may not claim reserved rights to protect secondary purpose instream water against competing appropriators.⁴⁰

Expanding federal reserved rights to include instream water flow protection for fish, wildlife, aesthetic, and recreational purposes is unlikely after *United States v. New Mexico*.⁴¹ Other recent Supreme Court opinions, as well as congressional legislation, demonstrate a clear trend of federal deference to state water laws.⁴² Consequently, the Forest Service must acquire water for any secondary purposes under state law.⁴³

appropriators.

Cappaert v. United States, 426 U.S. 128, 138 (1976) (emphasis added).

³⁶ *United States v. New Mexico*, 438 U.S. 696, 702 (1978).

³⁷ *Id.* at 696.

³⁸ *Id.* at 702. The United States claimed reserved water rights for instream uses in the Gila National Forest. *Id.* at 698. The United States claimed entitlement to a minimum instream flow for aesthetic, environmental, recreational, and fish preservation purposes. *Id.* at 704. However, the Court restricted reserved rights water use to the primary national forest purposes of supplying timber and securing favorable water flow conditions. *Id.* at 700. Reserved rights provide water "for domestic use at ranger stations and other facilities; for fire protection; for road construction; for irrigation of tree nurseries; for stockwatering and pasture irrigation for Forest Service stock; and for domestic use by permittees." *Wilkinson & Anderson, supra* note 8, at 228.

³⁹ *United States v. New Mexico*, 438 U.S. at 708. The Court also considered water for livestock outside the primary purpose range: "There is no indication . . . that Congress foresaw any need for the Forest Service to allocate water for stockwatering purposes, a task to which state law was well suited." *Id.* at 717.

⁴⁰ *Id.* at 705.

⁴¹ "In light of the recent developments in the reserved rights doctrine in the Supreme Court, it is doubtful that the United States will be able to overcome the legal hurdles it faces in obtaining National Forest instream flow rights." Shupe, *supra* note 1, at 30.

⁴² See *supra* note 13; *infra* notes 110, 125-27.

⁴³ *United States v. New Mexico*, 438 U.S. at 702. California recognizes recreation, fish and wildlife enhancement, and aesthetic and environmental preservation as beneficial water uses. See CAL. WATER CODE §§ 1243 (Deering 1977), 13,050(f) (Deering Supp. 1986); CAL. PUB. RES. CODE § 5093.50 (Deering Supp. 1987).

B. California Water Rights for Federal Land

1. Restraints on Water Rights

In California, the Forest Service, like all water users, is subject to state law restraints on water rights. Three of the principal restraints on California water rights are the California Constitution, the public trust doctrine, and the California Environmental Quality Act.

The California Constitution⁴⁴ requires "beneficial use" of the state's water resources and prohibits water's "waste or unreasonable use."⁴⁵ These requirements apply to both riparian and appropriative rights.⁴⁶ Most instream uses comply with these constitutional standards.⁴⁷

In addition to the Constitution's beneficial and reasonable use requirements, California's public trust doctrine also limits appropriative water rights. Under the public trust doctrine, the state has an affirmative duty to protect streams, lakes, marshlands, and tidelands.⁴⁸ Public trust values include fish, wildlife, natural land preservation, navigation, commerce, and recreation.⁴⁹ The Board protects the public trust through its administration of water appropriations. Before the Board

⁴⁴ CAL. CONST. art. X, § 2.

⁴⁵ The following cases illustrate unreasonable uses prohibited by the Constitution: *Joslin v. Marin Mun. Water Dist.*, 67 Cal. 2d 132, 138 Cal. Rptr. 377, 429 P.2d 889 (1967) (a riparian used river flow to transport sand and gravel when municipal and domestic uses required water); *Herminghaus v. Southern Cal. Edison Co.*, 200 Cal. 81, 252 P. 607 (1926) (riparian landowner used entire San Joaquin River flow for irrigation, acidification, and fertilization of her property); *State Water Resources Control Bd. v. Forni*, 54 Cal. App. 3d 743, 126 Cal. Rptr. 851 (1976) (riparian landowner diverted waters of Napa River to prevent grape leaf frost damage, when storing water during rainy season was more efficient alternative); and *Erickson v. Queen Valley Ranch Co.*, 22 Cal. App. 3d 578, 99 Cal. Rptr. 446 (1971) (leaky diversion ditch, with excessive carriage losses amounting to five-sixths of water flow, was unreasonable method of use).

⁴⁶ CAL. CONST. art. X, § 2.

⁴⁷ "The use of water for recreation and preservation and enhancement of fish and wildlife resources is a beneficial use of water." CAL. WATER CODE § 1243 (Deering 1977). Beneficial uses of water include recreation; aesthetic enjoyment; and preservation and enhancement of fish, wildlife, and other aquatic resources. *Id.* § 13,050(f) (Deering Supp. 1987); *see also* CAL. PUB. RES. CODE § 5093.50 (Deering Supp. 1987) (preserving certain rivers in their free flowing state, to maintain their scenic, recreational, fishery, or wildlife values, is beneficial and reasonable use of water).

⁴⁸ *National Audubon Soc'y v. Superior Court*, 33 Cal. 3d 419, 440, 658 P.2d 709, 718, 189 Cal. Rptr. 346, 355 (1983).

⁴⁹ *See generally* Dunning, *The Public Trust Doctrine and Western Water Law: Discord or Harmony?*, 30 ROCKY MTN. L. INST. §§ 17.01-17.08 (1984) (discussing evolution of public trust doctrine and doctrine's application to water rights law in California and other western states).

approves a water diversion, it must consider the diversion's effect on public trust interests, and try to avoid or minimize harm to those interests.⁵⁰ Water appropriations sometimes may unavoidably harm trust uses.⁵¹ Such appropriations are permissible so long as the Board considers trust uses, and protects them when feasible.⁵² The Board's role, however, is primarily regulatory. Absent a water appropriation application, the Board does not initiate a public trust review.

The California Environmental Quality Act ("CEQA")⁵³ establishes a third limit on California water rights. CEQA's principal purposes are preserving and enhancing the environment.⁵⁴ Under CEQA, the Board prepares an environmental impact report when an appropriation may significantly effect the environment.⁵⁵ The report addresses the project's cumulative effect.⁵⁶ If a project will have significant environmental effects, the Board may withhold project approval.⁵⁷ Like the public trust review, the role of the CEQA environmental impact report is regulatory, addressing appropriative rights applications.⁵⁸ In contrast, the riparian water right, based on land ownership rather than agency authorization, exists independently of both CEQA and public trust

⁵⁰ *National Audubon Soc'y*, 33 Cal. 3d at 426, 658 P.2d at 712, 189 Cal. Rptr. at 349.

⁵¹ *Id.* at 426, 658 P.2d at 712, 189 Cal. Rptr. at 349.

⁵² *Id.* at 446-47, 658 P.2d at 727-28, 189 Cal. Rptr. at 364-65.

⁵³ CAL. PUB. RES. CODE, §§ 21,000-21,177 (Deering Supp. 1986).

⁵⁴ *Id.* § 21,000(e).

⁵⁵ *Id.* § 21,100. The Environmental Impact Report must contain the following information:

- (a) The significant environmental effects of the proposed project.
- (b) Any significant environmental effects which cannot be avoided if the project is implemented.
- (c) Mitigation measures proposed to minimize the significant environmental effects
- (d) Alternatives to the proposed project.
- (e) The relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity.
- (f) Any significant irreversible environmental changes which would be involved in the proposed project should it be implemented.
- (g) The growth-inducing impact of the proposed project.

Id.

⁵⁶ *Citizens Ass'n for Sensible Dev. of the Bishop Area v. County of Inyo*, 172 Cal. App. 3d 151, 165, 217 Cal. Rptr. 893, 901-02 (1985).

⁵⁷ The Board may approve the project only when the proponent mitigates the environmental effect, another agency has responsibility, or social considerations make mitigation measures unfeasible. CAL. PUB. RES. CODE § 21,081 (Deering Supp. 1986).

⁵⁸ See CAL. PUB. RES. CODE § 21,100 (Deering Supp. 1986).

review.⁵⁹

2. The Instream Appropriations Prohibition

California case law prohibiting instream appropriations hinders the Forest Service's efforts to secure minimum water flows through its California lands. In *California Trout, Inc. v. State Water Resources Control Board*,⁶⁰ a nonprofit corporation of fishermen and conservationists applied to the Board to appropriate water in the Redwood Creek in Marin County. The group sought an appropriation to reserve a certain amount of naturally flowing water in the stream to preserve and enhance fish and wildlife.⁶¹ The Board rejected the proposed instream appropriation and the court of appeal affirmed.⁶²

The court found that a legal appropriation required possessing the water through diversion or physical control.⁶³ In reaching its decision, the court interpreted two provisions of the California Water Code. First, the court held that the application form authorized in Water Code section 1260 compelled physical control.⁶⁴ Section 1260 required every appropriation application to set forth the location and description of ditches, canals, and other diversion works.⁶⁵ However, the *California*

⁵⁹ See *supra* note 17 and accompanying text.

⁶⁰ 90 Cal. App. 3d 816, 153 Cal. Rptr. 672 (1979).

⁶¹ The plaintiff applied for an appropriation of three cubic feet per second as the minimum flow needed for juvenile anadromous fish to survive and migrate to the sea. *Id.* at 818, 153 Cal. Rptr. at 673.

⁶² The court cited W. HUTCHINS, *supra* note 15, at 108 in stating that a valid appropriation required "an actual diversion from the natural channel." See 90 Cal. App. 3d 820, 153 Cal. Rptr. 675. Professor Hutchins cited *Simons v. Inyo Cerro Gordo Min. & Power Co.*, 48 Cal. App. 524, 537, 192 P. 144, 150 (1920). W. HUTCHINS, *supra* note 15, at 108. Thus the *California Trout* decision rested on an appropriative rights conception expounded in a 1920 appellate court decision. The court also noted that the Water Code (CAL. WATER CODE §§ 1243, 1243.5, 1257 (Deering 1977)) already required the Board to consider the amount of water needed for fish and wildlife preservation, whenever acting upon an appropriation application. *California Trout*, 90 Cal. App. 3d at 821, 153 Cal. Rptr. at 675.

⁶³ See *id.* at 819, 153 Cal. Rptr. at 674. The court furnished various examples of physical control sufficient to qualify for an appropriative water right: impounding water in a reservoir, using water to power a water wheel, diverting water for milling purposes, and supplying drinking water for livestock grazing on the banks. *Id.*

⁶⁴ See *id.* at 820, 153 Cal. Rptr. at 674.

⁶⁵ See CAL. WATER CODE § 1260 (Deering 1977), which requires every water appropriation application to set forth the location and description of the proposed headworks, ditch, canal, and other works, the proposed place of diversion, and the construction timetable.

Trout applicant had left this portion of the application form blank.⁶⁶ The court determined that the group had filed an application that “on its face” failed to state a legally recognized appropriation.⁶⁷

In addition to section 1260’s requirements, the court found that other Water Code provisions impliedly disallowed instream appropriations. The court determined that the Water Code authorized the Board to ascertain what levels of instream flows should remain in a water-course.⁶⁸ In particular, sections 1243 and 1243.5 required the Board, when determining water availability, to consider the amounts required for recreation and fish and wildlife preservation.⁶⁹ Therefore, the court found no need to recognize an affirmative instream water right.⁷⁰

In denying an instream appropriation to a private party, the *California Trout* court did not address the issue of a public agency’s standing to apply for a similar appropriation.⁷¹ However, *Fullerton v. State Water Resources Control Board*,⁷² another court of appeal decision announced the same week as *California Trout*, prohibited public agencies from appropriating instream flows.⁷³ Thus, *California Trout* and *Fullerton* deter the United States Forest Service from seeking appropriative water rights to protect fish resources, recreation, and other instream values. Consequently, the Forest Service has sought state law riparian rights.⁷⁴

⁶⁶ *California Trout*, 90 Cal. App. 3d at 820, 153 Cal. Rptr. at 674.

⁶⁷ *See id.* at 820, 153 Cal. Rptr. at 675.

⁶⁸ *See id.* at 821-22, 153 Cal. Rptr. at 675.

⁶⁹ *Id.* at 820-21 & n.2, 153 Cal. Rptr. at 675 & n.2.

⁷⁰ *Id.* at 821-22, 153 Cal. Rptr. at 675.

⁷¹ *See id.* at 822, 153 Cal. Rptr. at 676.

⁷² 90 Cal. App. 3d 590, 153 Cal. Rptr. 518 (1979).

⁷³ The State Department of Fish and Game applied to the Board for an instream appropriation to protect fish and recreation in the Mattole River. *Id.* at 593-94, 153 Cal. Rptr. at 520-21. The Board returned the Department’s application because the proposed water use did not include a diversion. The court held for the Board, stating that a valid appropriation required some form of physical control. *Id.* at 598, 153 Cal. Rptr. at 524. *Fullerton*, decided two days before *California Trout*, denies instream appropriations to public agencies, like the Forest Service.

⁷⁴ *See supra* note 25.

3. State Law Riparian Rights for the Forest Service⁷⁵

In the 1886 case of *Lux v. Haggin*,⁷⁶ the California Supreme Court held that California had adopted the common law doctrine of riparian rights.⁷⁷ Specifically, the court's holding protected a riparian water user against interference from an upstream diverter.⁷⁸ In discussing the riparian rights doctrine, the court asserted that riparian rights attach to federal land.⁷⁹ California Supreme Court decisions of 1914,⁸⁰ 1915,⁸¹

⁷⁵ The federal reserved right has consumed any federal law riparian right, if it ever existed, for reserved land. See *United States v. New Mexico*, 438 U.S. 696, 698 (1978); *Cappaert v. United States*, 426 U.S. 128, 138 (1976); *United States v. Rio Grande Irrigation Co.*, 174 U.S. 690, 706 (1899); see also *supra* note 35.

⁷⁶ 69 Cal. 255, 10 P. 674 (1886).

⁷⁷ *Id.* at 361-79, 10 P. at 735-46.

⁷⁸ *Id.* at 264-65, 10 P. at 724-25.

⁷⁹ The court reasoned:

[W]hile vested rights could not be taken away, yet if the innavigable rivers and their beds belonged to the state when admitted into the Union, the state could grant or surrender them to the riparian proprietors, of whom the United States was one It has often been held by this court and its predecessors that a grant of a tract of land bounded by a river or creek not navigable conveys the land to the thread of the stream. And from a very early day the courts of this state have considered the United States government as the owner of such running waters on the public lands of the United States, and of their beds And if the United States since the date of the admission of the state has been the owner of the innavigable streams on its lands, and of the subjacent soils, grants of its lands must be held to carry with them the appropriate common law use of the waters of the innavigable streams thereon, except where the flowing waters have been reserved from the grant. To hold otherwise would be to hold . . . that the United States as a riparian owner with the state, has other and different rights than other riparian owners, including its own grantees.

Id. at 338-40, 10 P. at 721-22.

⁸⁰ In *Palmer v. Railroad Comm'n*, 167 Cal. 163, 138 P. 997 (1914), a water company posted notices declaring it would appropriate water. The notices designated certain "places of intended use" of the water. The court held that the water company had not, by posting the notices, dedicated the appropriated waters to public use. *Id.* at 174, 138 P. at 1001. In its discussion, the court stated, "The United States, with respect to the lands which it owns in this state, is a riparian proprietor as to the streams running through such lands And its right and power in that respect is no greater and no less than that of any other riparian proprietor." *Id.* at 168, 138 P. at 999.

⁸¹ In *Duckworth v. Watsonville Water & Light Co.*, 170 Cal. 425, 150 P. 58 (1915), a common grantor transferred her riparian water rights to A, and her riparian land to B. The court held that B was estopped from asserting an appropriative right against the riparian rights of A's successor in interest. *Id.* at 433, 150 P. at 60-61. The court reasoned that a statutory water appropriation divests no existing water right, but

and 1921⁸² repeated this assertion.

The *Lux* line of cases indicates that, at one time, the California Supreme Court acknowledged riparian rights for United States land. The court viewed the federal government's riparian right as the basis of the private landowner's riparian right.⁸³ The court reasoned that as land passed from federal to private ownership, the United States riparian rights passed to the new landowner.⁸⁴ Indeed, the court stated that all California water rights, both riparian and appropriative, existed by permission of the federal government.⁸⁵ Despite these statements, none

merely gives a preference over subsequent appropriations. *Id.* at 431, 150 P. at 59. The court reiterated the theory espoused in *Lux* and *Palmer*:

These decisions show that while an appropriation or diversion made upon lands of the United States gives the appropriator or the diverter a right to the water as against the United States it does so solely because, by the act of Congress of July 16, 1866 (14 U.S. Stats. 253), the United States declared that such diversion, if recognized by local laws, should be effectual to confer upon the diverter the riparian rights in the stream pertaining to the land of the United States abutting thereon, that it gives no right as against other landowners, that this does not take place upon the theory that the water is held by the United States for public use, but because, as proprietor of the land, the United States by that act, granted a part of its property in its land to such diverter.

Id. at 432, 150 P. at 59-60.

⁸² In *Holmes v. Nay*, 186 Cal. 231, 199 P. 325 (1921), downstream riparians sought to establish rights against an upstream riparian. The court held that a diversion below riparian lands cannot create a prescriptive right against the upstream riparian owner. *Id.* at 234, 199 P. at 327. This conclusion followed from the rule that a riparian owner cannot complain of a diversion made after the water passes his land. Consequently, the downstream diverter cannot gain prescriptive rights against the upstream riparian. *Id.* The court also acknowledged riparian rights of the United States: "[T]he act of Congress of July 26, 1866 . . . was intended simply to validate such appropriations or diversions as constituted an invasion of the government's rights as a riparian owner." *Id.* at 234-35, 199 P. at 327.

⁸³ See *supra* notes 79-82 and accompanying text.

⁸⁴ *Holmes*, 186 Cal. at 235, 199 P. at 237; *Ducksworth*, 170 Cal. at 432, 150 P. at 61; *Palmer*, 167 Cal. at 168-69, 138 P. at 999; *Lux*, 69 Cal. at 336-40, 10 P. at 720-22.

⁸⁵ *Lux*, 69 Cal. at 338-39, 10 P. at 721-22.

[F]rom a very early day, the courts of this state have considered the United States government as the owner of such running waters on the public lands of the United States, and of their beds. Recognizing the United States as the owner of the lands and waters, and as therefore authorized to permit the occupation or diversion of the waters as distinct from the lands, the state courts have treated the prior appropriator of water on the public lands of the United States as having a better right than a subsequent appropriator, on the theory that the appropriation was allowed or licensed

of the *Lux* cases posed the specific issue of riparian water rights for United States land.⁸⁶ Moreover, these early federal riparian rights statements were attempts by the California Supreme Court to interpret congressional legislation.⁸⁷ Subsequent congressional legislation and United States Supreme Court decisions supercede these early California interpretations of federal law. First, in *California Oregon Power Co. v. Beaver Portland Cement Co.*,⁸⁸ the Supreme Court determined that congressional land acts had severed federal law water rights from public domain land.⁸⁹ This ruling undercut the *Lux* theory that the United States transferred appertenant federal law water rights to public domain patentees. Second, the Supreme Court has denied a federal law riparian right, recognizing only federal reserved rights for primary purposes.⁹⁰ The reserved rights doctrine supersedes the *Lux* theory that federal law confers riparian rights on federal lands. Therefore, the *Lux* federal riparian rights theory, based on a superseded interpretation of federal law, does not resolve the issue of state law riparian rights for federal land.

The California Supreme Court revised its definition of riparian rights in *McKinley Bros. v. McCauley*.⁹¹ The court stated that riparian rights do not attach to riparian land until the federal government "transmits" such land to private ownership.⁹² Under *McKinley Bros.*, a

by the United States.

Id.; accord *Holmes*, 186 Cal. at 234-35, 199 P. at 327; *Ducksworth*, 170 Cal. at 432, 150 P. at 61; *Palmer*, 167 Cal. at 170, 138 P. at 999-1000.

⁸⁶ See *supra* notes 78, 80-82 and accompanying text.

⁸⁷ *Lux*, 69 Cal. at 339, 10 P. at 721. The court stated:

And since the act of Congress granting or recognizing a property in the waters actually diverted and usefully applied on the public lands of the United States, such rights have always been claimed to be deraigned by private persons under the act of Congress, from the recognition accorded by the act, or from the acquiescence of the general government in previous appropriations made with its presumed sanction and approval.

Id.; accord *Holmes*, 186 Cal. at 234-35, 199 P. at 327; *Ducksworth*, 170 Cal. at 432, 150 P. at 61; *Palmer*, 167 Cal. at 168, 138 P. at 999.

⁸⁸ 295 U.S. 142 (1935).

⁸⁹ See *supra* note 33.

⁹⁰ See *United States v. New Mexico*, 438 U.S. 696, 698 (1978); *California v. United States*, 438 U.S. 645, 662 (1977); *Cappaert v. United States*, 426 U.S. 128, 138 (1976); *California Or. Power Co. v. Beaver Portland Cement Co.*, 295 U.S. 142, 159 (1935); *United States v. Rio Grande Irrigation Co.*, 174 U.S. 690, 706 (1899); see also *supra* notes 6-10, 32-43, 75 and accompanying text.

⁹¹ 215 Cal. 229, 9 P.2d 298 (1932).

⁹² See *id.* at 231, 9 P.2d at 299. The McKinley brothers operated a flour mill and an electric generating plant near Putah Creek. *Id.* at 230, 9 P.2d at 298-99. They were

state law riparian right arises only when the federal government disposes of its land.⁹³

Since *McKinley Bros.* concerned riparian rights on the public domain, one commentator has argued that the case does not apply to federal land reservations.⁹⁴ However, an alternate reading of *McKinley Bros.* is possible. By requiring federal land disposition to establish riparian rights, the court implied that California does not recognize riparian rights for federal reserved lands. Under this interpretation of *McKinley Bros.*, state riparian rights cannot attach to federal land reservations. Nevertheless, *McKinley Bros.* involved a dispute between a private riparian and a private appropriator.⁹⁵ Thus, the case did not present a claim of riparian rights for federal lands.⁹⁶

Recently, such a claim came before the California courts, in *In re*

successors in interest to an appropriative right established in 1862. *Id.* at 230, 9 P.2d at 299. McCauley owned riparian land located upstream from the McKinleys. McCauley's land carried an 1882 patent date. *Id.* at 231, 9 P.2d at 299. During the low-flow season, McCauley's diversions deprived the McKinley brothers of their appropriated amount. *See id.* at 232, 9 P.2d at 299. The brothers sued to quiet title to the water. *Id.* at 230, 9 P.2d at 298. The court held for the McKinley brothers, because their appropriative right predated McCauley's riparian right. *Id.* at 230-31, 9 P.2d at 299. The McKinleys' predecessor in interest first diverted the water in 1862. *Id.* at 230, 9 P.2d at 299. The priority date for McCauley's riparian right was the 1882 patent date. *See id.* at 231, 9 P.2d at 299. McCauley's patent, being subsequent in time to the McKinley brothers' appropriation, gave rise to no riparian right as against the appropriative right. *Id.* at 231, 9 P.2d at 299. If McCauley had succeeded to a riparian right of the United States, his land would have had an 1848 priority date — when Mexico transferred the lands that became California to the United States. (The Treaty of Guadalupe Hidalgo, signed February 2, 1848, officially ended the Mexican War. The United States paid Mexico \$15,000,000 and obtained the territory that now makes up the states of California, Nevada, and Utah, most of New Mexico and Arizona, and part of Colorado and Wyoming. *See Treaty of Peace, Friendship, Limits, and Settlement with the Republic of Mexico*, Feb. 2, 1848, United States-Mexico, 9 Stat. 922-43.) McCauley's riparian right would then have had priority over the McKinley brothers' 1863 appropriative right. However, the California Supreme Court recognized that McCauley's state law riparian right attached to his land upon transmittal from the federal government. *McKinley Bros.* 215 Cal. at 231, 9 P.2d at 299.

⁹³ The court adopted a riparian rights theory that a court of appeal had expressed in a previous opinion. "As to land held by the government it is not considered that a riparian right has attached until the land has been transmitted to private ownership." *Rindge v. Crags Land Co.*, 56 Cal. App. 247, 252, 205 P. 36, 38 (1922).

⁹⁴ Comment, *The Application of California Riparian Water Rights Doctrine to Federal Lands in the Mono Basin*, 34 HASTINGS L.J. 1293, 1310 (1983); *see supra* note 32 (distinguishing the public domain from reserved land).

⁹⁵ *See supra* note 92.

⁹⁶ *In re Hallett Creek Stream Sys.*, 187 Cal. App. 3d 863, 871-72, 232 Cal. Rptr. 208, 213 (1986), *review granted*, Mar. 26, 1987.

Hallett Creek Stream System.⁹⁷ The Forest Service asserted riparian rights to the waters of Lassen County's Hallett Creek for wildlife preservation purposes.⁹⁸ The Third District Court of Appeal determined that the United States holds a "defeasible riparian water right" to the extent that unappropriated water is available.⁹⁹

Judge Sparks, writing for a unanimous court, noted that no prior California cases had squarely addressed an assertion of riparian rights for federal land.¹⁰⁰ Dismissing the *McKinley Bros.* statement as "dictum,"¹⁰¹ he identified two principal considerations. First, he discerned no justification for holding that riparian rights inhere in some lands, but not in others, based solely on the landowner's identity.¹⁰² Second, he could not envisage any "calamitous consequences" resulting from recognizing federal riparian rights.¹⁰³ Accordingly, the court recognized the Forest Service's riparian rights claim.¹⁰⁴

The California Supreme Court recently granted petitions to review the *Hallett Creek* decision.¹⁰⁵ Thus, the California Supreme Court will have an opportunity to decide an issue that courts have discussed without resolution for a century: whether California law confers riparian water rights on federally owned land.

⁹⁷ See *id.* at 871, 232 Cal. Rptr. at 213.

⁹⁸ *Id.* at 867-68, 232 Cal. Rptr. at 210-11.

⁹⁹ The court defined a "defeasible" riparian right:

[T]he United States holds unreserved water on its lands open for the free appropriation and use of the public and its riparian right must be regarded as secondary to all other approved uses. However, to the extent that there is available unappropriated and unused water the United States must be regarded as free to use such water as an other riparian might.

Id. at 876, 232 Cal. Rptr. at 217.

¹⁰⁰ *Id.* at 871, 232 Cal. Rptr. at 213.

¹⁰¹ *Id.*

¹⁰² *Id.* at 873, 232 Cal. Rptr. at 214-15.

¹⁰³ *Id.* at 874-76, 232 Cal. Rptr. at 215-17.

¹⁰⁴ See *id.* at 876-77, 232 Cal. Rptr. at 217.

¹⁰⁵ California Official Reporter Advance Sheets, No. 11, Apr. 23, 1987, Green Page § 6, Summary of Cases Accepted by Supreme Court, at (1).

II. CONSEQUENCES OF THE PRESENT LAW: FEDERAL RIPARIAN RIGHT HYDRODEVELOPMENT AND PIECEMEAL STATUTORY INSTREAM PROTECTION

A. *Forest Service Riparian Rights: Water for Hydroelectric Projects Without California's CEQA and Public Trust Reviews*

Two aspects of the *Hallett Creek* opinion require further examination. First, the court refused to distinguish the United States from private riparian land proprietors.¹⁰⁶ However, the United States differs in important respects from the private landowner. The United States holds and disposes of land independently of local law; it cannot lose its land through tax seizure, condemnation, adverse possession, or creditor action; and it can protect its land by enacting criminal statutes.¹⁰⁷ In addition to these special proprietary rights and powers, the sheer magnitude of United States landholdings sets the federal government apart from the private landowner. The United States owns forty-five percent of all California land.¹⁰⁸ The Forest Service manages twenty percent of the total California land area.¹⁰⁹ A riparian water right attached to such an enormous property interest differs quantitatively from any private riparian right. Furthermore, on the average, more water flows through a given area of federally reserved land than through an equal area of privately owned land.¹¹⁰

¹⁰⁶ *Hallett Creek*, 187 Cal. App. 3d at 872-73, 232 Cal. Rptr. at 213-15.

¹⁰⁷ Professor Trelease compared the United States to the private landowner: Smith holds his property by virtue of local law; the United States holds lands by virtue of its own fiat. Smith's property is subject to involuntary loss through seizure for taxes, condemnation, adverse possession or action by his creditors; the public domain can only be lost with the consent of Congress. The private owner can dispose of his land only within the framework of local law, but the United States enacts new laws at will. The United States mixes concepts of sovereignty with its proprietorship, and enacts criminal statutes for the special protection of the public domain, but Smith must look to local law to regulate conduct on his land. . . . It can thus readily be seen that government ownership is not the same as private ownership.

Trelease, *Government Ownership and Trusteeship of Water*, 45 CALIF. L. REV. 638, 649-50 (1957).

¹⁰⁸ G. FAY, LIPOW & FAY, CALIFORNIA ALMANAC, table 8.1 (1986-87).

¹⁰⁹ *Id.*, table 8.2.

¹¹⁰ In *United States v. New Mexico*, 438 U.S. 696, 699 n.3 (1977), the Supreme Court stated:

Because federal reservations are normally found in the uplands of the western States rather than the flatlands, the percentage of water flow originating in or flowing through the reservations is even more impressive.

A second problem in the *Hallett Creek* opinion is the court's failure to foresee any "calamitous consequences" that might follow from recognizing riparian rights for federal lands.¹¹¹ Federal riparian right recognition under California law risks significant environmental consequences. If California recognizes riparian rights for federal lands, the federal water claim will encompass diversionary uses, such as hydro-power generation.¹¹² California law permits a riparian proprietor to convey her water rights to another party.¹¹³ Thus, the developer of a private hydroelectric power project on federal riparian land would no longer have to apply to the Board for an appropriation permit.¹¹⁴ Instead, the developer could acquire water under the federal riparian right.¹¹⁵ This arrangement would prevent California from subjecting the hydrodeveloper's water appropriations to CEQA and public trust scrutiny.¹¹⁶

More than 60% of the average annual water yield in the 11 western States is from federal reservations.

These considerations guided the Supreme Court when it restricted the reserved right in *United States v. New Mexico*. *Id.* at 699. Recognizing a state common law riparian right for federal land would conflict with the policy behind restricting the federal common law reserved right. Justice Rehnquist noted that federal reservation water claims competed with other public and private claims for the arid West's limited water supply. *Id.* The Court refused to base a federal water right solely on acreage because the federal government owned too much land:

In the arid parts of the West, however, claims to water for use on federal reservations inescapably vie with other public and private claims for the limited quantities to be found in the rivers and streams. This competition is compounded by the sheer quantity of reserved lands in the western States, which lands form brightly colored swaths across the maps of these States.

Id. If California were to allow riparian rights for federal lands, it would give the federal government what the Supreme Court deemed a potentially disproportionate share of water.

¹¹¹ *Hallett Creek*, 187 Cal. App. 3d at 874, 232 Cal. Rptr. at 215.

¹¹² Hydropower generation is a reasonable and beneficial use of water. CAL. WATER CODE § 13,050(f) (Deering Supp. 1986).

¹¹³ W. HUTCHINS, *supra* note 15, at 193.

¹¹⁴ CAL. WATER CODE § 1250.5 (Deering Supp. 1986) governs water appropriations for hydroelectric facilities.

¹¹⁵ *E.g.*, *Sayles Hydro Assocs. v. United States*, No. CIVS-86-0868 LKK *argued* (E.D. Cal. 1986). The developer claimed water under an alleged California riparian right for federal land.

¹¹⁶ CEQA applies only to "discretionary projects proposed to be carried out or approved by public agencies." CAL. PUB. RES. CODE § 21,080(a) (Deering Supp. 1986). Since riparians may use water without Board approval, the Board's CEQA responsibilities would not apply to a hydrodeveloper operating under a federal riparian water

The Federal Power Act of 1920 (FPA)¹¹⁷ creates a comprehensive¹¹⁸ program for regulating the development of hydroelectric facilities.¹¹⁹ Under the FPA, the Federal Energy Regulatory Commission (FERC)¹²⁰ licenses¹²¹ the construction and operation of hydroelectric projects on navigable waters, public lands, and federal reservations.¹²² FERC's jurisdiction extends to power projects on reserved lands of the United States.¹²³ FERC's exclusive hydrodevelopment licensing authority preempts any conflicting state regulation.¹²⁴ However, developers

right. See *supra* note 17; *infra* note 123 and accompanying text.

¹¹⁷ Originally enacted as the Federal Water Power Act of 1920, 41 Stat. 1063, *codified at* 16 U.S.C. §§ 791a - 828c (1982).

¹¹⁸ The FPA "was the outgrowth of a widely supported effort of the conservationists to secure enactment of a complete scheme of national regulation which would promote the comprehensive development of the water resources of the Nation." *First Iowa Hydroelectric Coop. v. Federal Power Comm'n*, 328 U.S. 152, 180 (1946).

¹¹⁹ *Federal Power Comm'n v. Union Elec.*, 381 U.S. 90, 100-01 (1964).

¹²⁰ FERC is the successor to the Federal Power Commission (FPC). 16 U.S.C.A. § 792 note (West 1985) (Transfer of Functions).

¹²¹ A project proponent applies for a preliminary permit, which enables her to secure data for the project's development. 16 U.S.C. §§ 797(f), 798 (1982). FERC may subsequently issue a license to the developer, and attach conditions. *Id.* §§ 797(e), 803.

¹²² *Id.* § 797(e). FERC's licensing power in relation to navigable waters derives from the commerce clause of the United States Constitution. The same power, in relation to public lands and reservations of the United States, springs from the property clause. *Federal Power Comm'n v. Oregon*, 349 U.S. 435, 442-43 (1955).

¹²³ The Federal Power Commission has constitutional and statutory authority to grant a valid license for a power project on reserved lands of the United States. *Federal Power Comm'n v. Oregon*, 349 U.S. 435, 444-46 (1955). Project authorization is within the exclusive jurisdiction of the Federal Power Commission. *Id.* The Forest Service may issue a special use permit to allow a developer's use of a river or part of the National Forest System. 36 C.F.R. § 261.1a (1985). The Forest Service, through the Secretary of Agriculture, may also recommend specific license conditions to FERC for projects on Forest Service land. 16 U.S.C. § 797(e) (1982). The FPA provides that FERC licenses "shall contain such conditions as the Secretary of the department under such reservation falls shall deem necessary for the adequate protection and utilization of such reservation." *Id.* In *Escondido Mut. Water Co. v. La Jolla Indians*, 466 U.S. 765 (1984), the Court stated, "while Congress intended that [FERC] would have exclusive authority to issue all licenses, it wanted the individual Secretaries to continue to play the major role in determining what conditions would be included in the license in order to protect the resources under their respective jurisdictions." *Id.* at 775. The Secretary has no power to veto FERC's decision to issue a license. *Id.* at 777-78. However, if the Secretary concludes that the conditions are necessary to protect the reservation, FERC must incorporate the conditions in the license. *Id.* at 778.

¹²⁴ "Congress had created an agency and centralized in it all federal authority for licensing federal water power projects. This exclusive licensing authority preempted any conflicting state regulation and precluded any concurrent federal jurisdiction." *Monongahela Power Co. v. Alexander*, 507 F. Supp. 385, 388 (D.D.C. 1980).

still must obtain their water rights pursuant to state law.¹²⁵ Section 27 of the FPA states that the Act's provisions shall not "interfere" with state water rights laws.¹²⁶ Under section 27 of the FPA, a California hydrodeveloper that does not own riparian land must apply for a state appropriation permit.¹²⁷ The developer may appropriate available

¹²⁵ Section 9(b) of the FPA requires each FERC license applicant to submit evidence that she has complied with applicable state laws regarding the appropriation, diversion, and use of water for power purposes. 16 U.S.C. § 802 (1982).

¹²⁶ Section 27 of the FPA states:

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.

Id. § 821.

¹²⁷ In *Sayles Hydro Assocs. v. United States*, No. CIVS-86-0868 LKK argued (E.D. Cal. 1986) the developer claimed water pursuant to a federal land riparian right under state law. *See supra* note 115. Alternatively, the developer contended that his FERC license preempts California's authority to deny or condition his application to appropriate water. The developer relied on *First Iowa Hydroelectric Coop. v. Federal Power Comm'n*, 328 U.S. 152 (1946). The *First Iowa* court held that, despite the language of FPA § 9(b), a FERC license precludes duplicative state permitting activities. The Court reasoned that § 9(b) addresses only the marshalling of information needed for FERC to act on a license application. *Id.* at 175. The Court construed § 27 as a savings clause, protecting existing holders of state water rights from competing claims by FERC licensees. *Id.* at 175-76. Despite this language, the state permit requirement at issue was not a water right requirement. *Id.* at 165-66. Furthermore, none of the cases following *First Iowa's* rule of FPA preemption (*Federal Power Comm'n v. Oregon*, 349 U.S. 435 (1955); *Granite Rock Co. v. California Coastal Comm'n*, 768 F.2d 1077 (9th Cir. 1985); *Portland Gen. Elec. Co. v. Federal Power Comm'n*, 328 F.2d 165, (9th Cir. 1964); *Town of Springfield v. McCarren*, 549 F. Supp. 1134 (D. Vt.), *aff'd* by order, 722 F.2d 728 (2d Cir. 1982), *cert. denied*, 464 U.S. 942 (1983); *Town of Springfield v. Vermont Env'tl. Bd.*, 521 F. Supp. 243 (D. Vt. 1982)) expressly held that a FERC license preempts state authority effecting the licensee's water rights. "The Federal Power Act does preempt some state laws relating to the building of dams on navigable streams and particularly those state laws which require a state license as a predicate for building a dam." *Idaho Power Co. v. Idaho*, 661 P.2d 741, 753 (Idaho 1983). However, "perfection of water rights depends not only on [FERC] licenses, but also upon granting of state water licenses." *Id.* at 746. Finally, FPA § 27 is markedly similar to § 8 of the Reclamation Act (43 U.S.C. § 383 (1980)). In *California v. United States*, 438 U.S. 645 (1978), a Reclamation Act case, the Court determined that § 8 required the Bureau of Reclamation to comply with state law in the control, appropriation, use or distribution of water. *Id.* at 675. Only specific congressional directives that are contrary to state law override the state law. *Id.* at 672 n.25. A state may impose any condition on a water right not inconsistent with a clear congressional directive. *Id.* at 676.

The *California v. United States* reading of Reclamation Act § 8 probably applies to

water, provided she does not threaten those interests protected by CEQA and the public trust.¹²⁸

California's Board-administered appropriative rights system provides the state's only opportunity to regulate the water use aspects of hydroelectric development on California rivers.¹²⁹ The protections that FPA section 27 affords to California would disappear if California courts recognize riparian rights for United States lands.¹³⁰ A federally licensed

the similar language of FPA § 27. Although the 1945 *First Iowa* restrictive interpretation of § 27 may suggest the existence of a "FERC" water right, the 1978 *California v. United States* decision demonstrates the present policy of federal deference to state water law. Commentators have recently concluded that *California v. United States* indicates that FERC licensees must comply with state water law requirements. *E.g.*, Whittaker, *The Federal Power Act and Hydropower Development: Rediscovering State Regulatory Powers and Responsibilities*, 10 HARV. ENVTL. L. REV. 135, 167-78 (1986). Whittaker states that *California v. United States* has precedential value for interpreting similar provisions in other statutes. The FPA should preempt state law regarding the construction and operation of federally licensed hydropower projects. However, water allocation and distribution rules should be those of the states. *See also* Comment, *States' Rights in Hydroelectric Development: The Interrelation Between California Water Law and Section 27 of the Federal Power Act*, 18 U.S.F. L. REV. 535 (1984). The author argues that *First Iowa* construction of FPA § 27 is dictum, because the precise issue before the court was the scope of § 9(b). Section 27 should be read as an affirmative grant of authority to the states. Thus, state water law should control appropriations destined for hydroelectric development. With the *California v. United States* decision, the Supreme Court has adopted a presumption that Congress intends to defer to state laws. The FPA reveals no congressional intent to create an exception to states' control of their waters. *Id.* at 545-53; 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, 1185, 1198 (1984) (FERC applicants should be denied license if they fail to comply with state permit requirements; *California v. United States* indicates that Supreme Court has begun to limit *First Iowa*). Accordingly, this Comment assumes that FPA § 27 requires proponents of federally licensed hydroelectric projects to comply with state water rights law.

¹²⁸ *See supra* notes 48-59 and accompanying text.

¹²⁹ *See supra* notes 117-24 and accompanying text, discussing FPA preemption of state hydrodevelopment regulation.

¹³⁰ A recent FERC declaratory order, which concerns the Rock Creek project in El Dorado county, states that FERC has the exclusive authority to establish minimum water flow releases for hydropower projects. FERC, Order in Response to Request for Declaratory Order and Providing for Hearing 4 (Project No. 3189-04) 38 FERC ¶ 61,240 (1987) (on file with *U.C. Davis Law Review*). The FERC project license requires the licensee to discharge a continuous minimum flow of 11 cubic feet per second (cfs) from May through September, and 15 cfs from October through April. *Id.* at 1 n.3. However, the Board issued a water permit requiring seasonal flow releases of 30 and 60 cfs. *Id.* at 3. The Board acted pursuant to a study by the California Department of Fish and Game, which contended that FERC relied on a flawed methodology to determine flow levels for fishery management purposes. *Id.* at 2 & n.4. The conflict

hydrodeveloper on Forest Service land could divert water to the power plant pursuant to the riparian right.¹³¹ Riparian rights would exist independently of the Board's permitting authority.¹³² Therefore, federal riparian right recognition will allow hydrodevelopers on federal land to circumvent California's CEQA and public trust reviews.¹³³

The *Hallett Creek* opinion suggested that the court might deny California riparian rights for federal land if recognizing such rights risked "calamitous consequences."¹³⁴ Unfortunately, the court did not see the potential problem of federal riparian right hydrodevelopment in circumvention of state environmental regulation.¹³⁵ Perhaps this consequence of recognizing federal land riparian rights qualifies as a calamity.

B. Instream Appropriations Reconsidered

1. The Physical Control Rule

In *California Trout* and *Fullerton*, the courts of appeal held that legal appropriation of water requires possession of the water, evidenced by diversion or other physical control.¹³⁶ The courts' holdings denied appropriative rights to maintain minimum flows for fish and wildlife.¹³⁷ The courts considered physical control necessary to give notice of the appropriation,¹³⁸ to acquire a possessory right,¹³⁹ and to fill in all the blanks on the statutory application form.¹⁴⁰

between FERC and the Board in *Rock Creek*, like the one in *Sayles Hydro*, stems from the uncertain preemptive effect of the FPA on state water rights laws. *See supra* note 127. The Board relies on FPA § 27, while FERC asserts its authority under *First Iowa*. FERC, Order in Response to Request for Declaratory Order and Providing for Hearing 5 n.7 (Project No. 3189-04) 38 FERC ¶ 61,240 (1987). Arguably, if *Rock Creek* is litigated and goes before the Supreme Court, the Court would reverse FERC's declaratory order. *See supra* note 127 (discussing application of *California v. United States* deferential interpretation of Reclamation Act § 8 to FPA § 27).

¹³¹ *See, e.g., supra* note 112-15 and accompanying text.

¹³² *See supra* note 17 and accompanying text.

¹³³ *See supra* note 116 and accompanying text.

¹³⁴ *Hallett Creek*, 187 Cal. App. 3d at 874, 232 Cal. Rptr. at 215.

¹³⁵ *See id.* at 874-76, 232 Cal. Rptr. at 215-16.

¹³⁶ *See California Trout*, 90 Cal. App. 3d at 819, 153 Cal. Rptr. at 674; *Fullerton*, 90 Cal. App. 3d at 598, 153 Cal. Rptr. at 524.

¹³⁷ *See California Trout*, 90 Cal. App. 3d at 818, 153 Cal. Rptr. at 673; *Fullerton*, 90 Cal. App. 3d at 598-99, 153 Cal. Rptr. at 524.

¹³⁸ *See California Trout*, 90 Cal. App. 3d at 819, 153 Cal. Rptr. at 674.

¹³⁹ *See Fullerton*, 90 Cal. App. 3d at 598-99, 153 Cal. Rptr. at 524.

¹⁴⁰ *See California Trout*, 90 Cal. App. 3d at 820, 153 Cal. Rptr. at 674; *see also*

Judge Reynoso, then sitting on the Third District Court of Appeal, offered a different view of physical control in his *California Trout* dissent. He acknowledged that physical control once served to demonstrate prior rights.¹⁴¹ However, physical control, the means of notifying pioneers of prior water use, is an obsolete requirement.¹⁴² In today's complex society, the Board allocates appropriative rights through the workings of a governmental machinery, not through priority claims staked on the land.¹⁴³ In addition, physical control, such as a diversion ditch, fails to indicate the quantity of water already appropriated.¹⁴⁴ One must still consult the Board to determine how much water is available for a proposed appropriation.¹⁴⁵

Reynoso's *California Trout* dissent rejected the majority's physical control standard.¹⁴⁶ He argued that the true test of an appropriative right is the successful application of the water to a beneficial use.¹⁴⁷

supra notes 64-67 and accompanying text (discussing statutory application form requirements).

¹⁴¹ See *California Trout*, 90 Cal. App. 3d at 823, 153 Cal. Rptr. at 676 (Reynoso, J., dissenting).

¹⁴² *Id.*

¹⁴³ *Id.*

¹⁴⁴ The original function of the diversion requirement was to notify subsequent appropriators of existing appropriations. Modern agency administration performs this function better than the diversion requirement. Tarlock, *Appropriation For Instream Flow Maintenance: A Progress Report on 'New' Public Western Water Rights*, 1978 UTAH L. REV. 211, 225.

¹⁴⁵ See *id.* at 220-25. The *Fullerton* and *California Trout* majority opinions declared that the right to appropriate water is a possessory property right. *California Trout*, 90 Cal. App. 3d at 819, 153 Cal. Rptr. at 674; *Fullerton*, 90 Cal. App. 3d at 598, 153 Cal. Rptr. at 524. Therefore, some physical act over the water is necessary for a valid appropriation. *California Trout*, 90 Cal. App. 3d at 819, 153 Cal. Rptr. at 674; *Fullerton*, 90 Cal. App. 3d at 599 n.8, 153 Cal. Rptr. at 524 n.8. Reynoso responded, "As appellants concede, an appropriative right is a usufructuary right and therefore an incorporeal hereditament. An appropriation, as an intangible, cannot be physically possessed, as the majority believes it must, before it can become an appropriation right." *California Trout*, 90 Cal. App. 3d at 823 n.1, 153 Cal. Rptr. at 676 n.1 (Reynoso, J., dissenting).

¹⁴⁶ *California Trout*, 90 Cal. App. 3d at 822-23, 153 Cal. Rptr. at 676 (Reynoso, J., dissenting).

¹⁴⁷ *Id.* at 822, 153 Cal. Rptr. at 676.

Clearly, the law views beneficial use as the sine qua non of an appropriative right: the water can be used by diverting it from the main channel or by allowing it to flow in the stream, whichever is appropriate. As elements of an appropriative right, diversion, possession, or physical control are then significant only insofar as they demonstrate that the water is to be put to beneficial uses.

Reynoso relied on the California Constitution¹⁴⁸ and Water Code¹⁴⁹ to underscore his argument.

Court decisions from other western states also regard beneficial use, not physical control, as the proper measure of a water right. The Idaho Supreme Court reasoned that diversion serves no practical purpose when the proposed water use does not require a diversion to render it effective and beneficial.¹⁵⁰ The court refused to require the superfluous effort of constructing diversion works as a precondition for obtaining an appropriation.¹⁵¹ Similarly, the Colorado Supreme Court has held that when the appropriator applies the water to beneficial use, a water appropriation does not require physical control.¹⁵²

The majority in *California Trout* reasoned that because Water Code section 1260 required every appropriation application to describe ditches, canals and other diversion works,¹⁵³ physical control was necessary for all appropriations.¹⁵⁴ However, Reynoso concluded that the section required diversion and construction information only if the applicant contemplated diversion or construction.¹⁵⁵ Diversion and construction information is inappropriate for applicants contemplating either watering livestock directly from the stream, or powering a waterwheel.¹⁵⁶

Id. at 823, 153 Cal. Rptr. at 676.

¹⁴⁸ CAL. CONST. art. X, § 2 declares that the general welfare requires that the state's water resources be put to beneficial use to the fullest extent of which they are capable.

¹⁴⁹ "The board shall allow the appropriation for beneficial purposes of unappropriated water under such terms and conditions as in its judgment will best develop, conserve, and utilize in the public interest the water sought to be appropriated." CAL. WATER CODE § 1253 (Deering 1977). "The use of water for recreation and preservation and enhancement of fish and wildlife resources is a beneficial use of water." *Id.* § 1243.

¹⁵⁰ State Dep't of Parks v. Idaho Dep't of Water Admin., 530 P.2d 924, 933-34 (Idaho 1974) (Bakes, J., concurring); see *infra* note 152 (discussing Idaho's statutory requirement of diversion work descriptions in permit applications).

¹⁵¹ See *Parks*, 530 P.2d at 933-34.

¹⁵² *Genoa v. Westfall*, 141 Colo. 533, 349 P.2d 370 (1960). The legislature subsequently amended Colorado statutory law to permit appropriations without actual diversion. See 2 Colo. Sess. Laws ch. 442 (1973), *codified at* 15 COLO. REV. STAT. §§ 37-92-102, 37-92-103 (1974).

¹⁵³ See *supra* notes 65-67 and accompanying text. Other state statutes require diversion work descriptions in permit applications, but courts do not view these provisions as water right requirements. See, e.g., *Parks*, 530 P.2d at 929.

¹⁵⁴ See *supra* note 64 and accompanying text.

¹⁵⁵ *California Trout*, 90 Cal. App. 3d at 823-24, 153 Cal. Rptr. at 677 (Reynoso, J., dissenting).

¹⁵⁶ See *id.* at 819, 153 Cal. Rptr. at 674; *Fullerton*, 90 Cal. App. 3d at 598, 153

Section 1260 is within a Water Code article that details the contents of appropriations application forms.¹⁵⁷ No Water Code section defining water subject to appropriation,¹⁵⁸ or containing general provisions concerning appropriative rights,¹⁵⁹ expressly requires physical control. To the contrary, other code sections suggest that the code allows instream appropriations. First, the code declares that all unappropriated water is available for appropriation.¹⁶⁰ Second, the code establishes recreation and fish and wildlife preservation as beneficial uses.¹⁶¹ Finally, the code instructs the Board to allow appropriations for beneficial uses.¹⁶² These statutory provisions imply that an applicant may appropriate available water to preserve instream flows.

Thus, the case law that establishes the physical control requirement has little statutory or policy support. Both California's Constitution and Water Code regard beneficial use, not physical control, as the sine qua non of an appropriative right.¹⁶³ The Water Code application form's inquiry into diversion and construction works should not be construed as an express physical control requirement.¹⁶⁴

2. Alternative Protections for Instream Flows

The *California Trout* and *Fullerton* courts noted that California statutory law already protects instream values.¹⁶⁵ In light of these code provisions, the courts found no need to recognize an affirmative instream water right.¹⁶⁶ However, California water rights observers have questioned the efficacy of statutory instream value protections.¹⁶⁷

Cal. Rptr. at 524.

¹⁵⁷ Section 1260 is located in CAL. WATER CODE Div. 2 (Water), Part 2 (Appropriations of Water), ch. 2 (Applications to Appropriate Water), art. 2 (Contents of Applications).

¹⁵⁸ See *id.* Div. 2, Part 2, ch. 1 (General Provisions), art. 1 (Water Subject to Appropriation), §§ 1200-1203.

¹⁵⁹ See *id.* §§ 1000-1801, 1200-1248.

¹⁶⁰ *Id.* § 1201. All available water "flowing in any natural channel . . . is hereby declared to be public water of the State and subject to appropriation" *Id.*

¹⁶¹ *Id.* § 1243.

¹⁶² The Board shall allow appropriations for beneficial purposes, in the public interest. *Id.* § 1253.

¹⁶³ See *supra* notes 146-49 and accompanying text.

¹⁶⁴ See *supra* notes 157-62 and accompanying text.

¹⁶⁵ See *supra* notes 68-70 and accompanying text.

¹⁶⁶ *California Trout*, 90 Cal. App. 3d at 821-22, 153 Cal. Rptr. at 675; *Fullerton*, 90 Cal. App. 3d at 603-04, 153 Cal. Rptr. at 527-28.

¹⁶⁷ Public resource administrators are increasingly dissatisfied with current instream protection mechanisms. Despite a variety of tools for instream value protection, the

California substantially bases its statutory instream protection on the "application and protest" system.¹⁶⁸ The Water Code instructs the Board, when determining water availability, to consider the amounts required for recreation and fish and wildlife preservation.¹⁶⁹ The Board must notify the Department of Fish and Game of any appropriation application.¹⁷⁰ The Department of Fish and Game then recommends the amounts required to protect fish and wildlife.¹⁷¹ Upon receiving the recommendation, the Board considers the instream flow level necessary to protect beneficial uses.¹⁷² The Board weighs the relative benefits derived from competing beneficial uses, including fish and wildlife preservation.¹⁷³ Any interested party may protest the approval of an appropriation permit.¹⁷⁴

The case-by-case¹⁷⁵ "application and protest" procedure does not activate Board instream needs determination until an applicant brings a planned project before the Board.¹⁷⁶ Even the use of permit and license terms and conditions provide little permanent protection to fish and wildlife. As one commentator observed, the Department of Fish and Game must protest each succeeding application and make its case anew.¹⁷⁷ The Department could prevail nine times out of ten, but lose on the tenth water application. Thus, the tenth loss could impair the

impairment and loss of instream values continues to grow. CAL. GOVERNOR'S COMM'N TO REVIEW CALIFORNIA WATER RIGHTS LAW, FINAL REPORT 111-12 (1978) [hereafter GOVERNOR'S FINAL REPORT].

¹⁶⁸ *Id.* at 106.

¹⁶⁹ CAL. WATER CODE § 1243 (Deering 1977).

¹⁷⁰ *Id.*

¹⁷¹ *Id.*

¹⁷² In determining water availability, the Board shall consider "in the public interest, the amounts of water needed to remain in the source" to protect beneficial uses. *Id.* § 1243.5.

¹⁷³ *Id.* § 1257. The Board shall also consider the benefits of reusing or reclaiming the appropriated amount after the applicant's proposed water use. *Id.* Section 1257 allows the Board flexibility when acting on competing water use proposals. *See, e.g., Johnson Rancho County Water Dist. v. State Water Rights Bd.*, 235 Cal. App. 2d 863, 45 Cal. Rptr. 589 (1965) (Board may determine that one applicant's proposed water use is more in public interest than competing applicant's proposed use).

¹⁷⁴ CAL. WATER CODE § 1330 (Deering 1977).

¹⁷⁵ The Board and the Department of Fish and Game should ascertain, on a case-by-case basis, what instream flow levels should remain in a water course when competing appropriation rights are sought. *California Trout*, 90 Cal. App. 3d at 822, 153 Cal. Rptr. at 675 (1979).

¹⁷⁶ Robie, *Modernizing State Water Rights Law*, 1974 UTAH L. REV. 760, 770.

¹⁷⁷ *See* A. SCHNEIDER, *supra* note 3, at 44-45.

stream's fishery resources.¹⁷⁸

The "application and protest" procedure's ad hoc nature complicates instream flow protection.¹⁷⁹ Usually, would-be appropriators have completed designing their projects before the protest phase occurs.¹⁸⁰ As a result, protestors encounter difficulty including instream protections in project designs.¹⁸¹ Consequently, state water administrators have found that the statutory mechanism for protecting instream values is largely fragmentary and reactive.¹⁸²

III. PROPOSAL: INSTREAM APPROPRIATIONS FOR PUBLIC PURPOSES

The Forest Service has a legitimate interest in protecting fish, wildlife, and environmental resources.¹⁸³ Nevertheless, California would suffer if it fulfilled Forest Service water needs by adopting unwise laws. Some environmentalists seek to protect instream water flows by supporting Forest Service riparian rights recognition.¹⁸⁴ However, California lawmakers should consider the potential environmental risks of federal land hydrodevelopment pursuant to riparian rights.

California law should deny federal riparian rights and instead allow instream appropriations. If the Forest Service could appropriate instream water for fish, wildlife, aquatic vegetation, recreation, and scenic preservation, the Board could scrutinize the application and condition the appropriation.¹⁸⁵ Without federal riparian rights, hydroelectric developers on federal land would also continue to appropriate water through the statutory process. The Board thus could continue to review and condition the developers' permit applications under CEQA and public trust guidelines.¹⁸⁶ This Comment proposes both common law and statutory recognition of instream appropriations.

¹⁷⁸ *Id.*

¹⁷⁹ GOVERNOR'S FINAL REPORT, *supra* note 167, at 106.

¹⁸⁰ *Id.*

¹⁸¹ *Id.*

¹⁸² *Id.* at 112.

¹⁸³ See *supra* notes 43, 148-49 and accompanying text.

¹⁸⁴ *E.g.*, the Sierra Club supported the Forest Service claim to riparian rights. See *In re Hallett Creek Stream Sys.*, No. 3 Civ. 24,355 (Lassen County Super. Ct. 1983) tentative slip op. 2 (on file with *U.C. Davis Law Review*), *aff'd*, 187 Cal. App. 3d 863, 232 Cal. Rptr. 208 (1986), *review granted*, Mar. 26, 1987.

¹⁸⁵ See *supra* note 22 (discussing the Board's authority to condition appropriations).

¹⁸⁶ See *supra* notes 112-16 and accompanying text.

A. A Judicial Remedy

The California courts of appeal have rendered decisions that diminish both instream flow protection and state hydroproject water use regulation. *California Trout* and *Fullerton* block Forest Service appropriations of instream flows. *Hallett Creek* diminishes California's ability to regulate federal land hydroproject water use. Thus, the courts of appeal denied instream appropriations and recognized federal riparian rights, when they should have recognized instream appropriations and denied federal riparian rights.

Simply reversing *Hallett Creek* would leave the Forest Service without reserved, riparian, or appropriative instream flow rights. Therefore, if the California Supreme Court reverses *Hallett Creek*, it should concurrently repudiate *California Trout*'s physical control requirement.

Arguably, the California Water Code does not explicitly allow or forbid instream appropriations.¹⁸⁷ However, the Code does establish the protection of instream values as a beneficial water use.¹⁸⁸ Furthermore, California's Constitution and Water Code establish beneficial use, not physical control, as the proper test of a legal water right.¹⁸⁹ Accordingly, the California Supreme Court should direct the Board to entertain Forest Service applications to appropriate nonreserved water for both instream flow preservation and "physical control" uses. Instream appropriations, coupled with physical control appropriations, will obviate the need for Forest Service riparian rights recognition.

B. Statutory Instream Appropriations

To facilitate this result, this Comment proposes that the California legislature add the following section to the Water Code:

Section 1243.6: Appropriations to preserve instream water flows.

The Board shall allow reasonable instream water flow appropriations for public purposes. Appropriations under this section are subject to the requirements of this Division.

Section 1243.6 would operate in conjunction with existing appropriative rights law.¹⁹⁰ The Board could condition an instream appropriation

¹⁸⁷ See *supra* notes 157-62 and accompanying text.

¹⁸⁸ See CAL. WATER CODE §§ 1243, 1243.5 (Deering 1977).

¹⁸⁹ See *supra* notes 146-49 and accompanying text.

¹⁹⁰ This proposal locates § 1243.6 in CAL. WATER CODE Div. 2 (Water), Part 2 (Appropriation of Water), ch. 1 (General Provisions), art. 4 (Beneficial Use). See *id.*, Detailed Analysis, at lxxxii-lxxxv (preceding § 1). Article 4, Beneficial Use, includes two other sections that concern instream flow protection. Section 1243 recognizes recreation and fish and wildlife preservation as beneficial uses. Section 1243.5 instructs the

permit so that piscatorial appropriations would not interfere with agricultural and municipal needs in times of water scarcity.¹⁹¹ The Board would retain flexibility to weigh the benefits of a proposed instream appropriation against competing beneficial water uses.¹⁹² The California Constitution, CEQA, and the public trust could operate to restrain or prohibit instream appropriations.¹⁹³

Under the Water Code, any person may apply to the Board to appropriate water.¹⁹⁴ Section 1243.6 would not alter this provision. Critics of instream appropriations may question the wisdom of allowing private parties to appropriate instream flows.¹⁹⁵ However, California's Constitution limits all water rights to amounts reasonably required for beneficial uses.¹⁹⁶ Therefore, the private instream appropriator could appropriate only as much water as beneficial instream uses require.¹⁹⁷ Furthermore, section 1243.6 allows only public purpose instream appropriations. Therefore, no one may appropriate instream flows for private use.

Instream flow appropriations will affirmatively protect the public trust¹⁹⁸ in fish, wildlife, and other environmental resources.¹⁹⁹ Once the Board issues a permit, water appropriated to preserve instream flows generally will not be available for subsequent appropriation.²⁰⁰ Thus, instream appropriations will create stability and certainty²⁰¹ in place of

Board to consider what amounts of water should remain in the source to protect beneficial uses. *Id.* §§ 1243, 1243.5. Section 1243.6 would follow these two sections.

¹⁹¹ *Fullerton*, 90 Cal. App. 3d at 604 n.14, 153 Cal. Rptr. at 528 n. 17.

¹⁹² *See supra* note 173 and accompanying text.

¹⁹³ *See supra* notes 44-58 and accompanying text.

¹⁹⁴ CAL. WATER CODE § 1252 (Deering 1977).

¹⁹⁵ *See California Trout*, 90 Cal. App. 3d at 822, 153 Cal. Rptr. at 676.

¹⁹⁶ *See supra* notes 44-47 and accompanying text.

¹⁹⁷ Ultimately, § 1243.6 does not inquire into the identity of the applicant seeking an instream appropriation. Although the Forest Service is the most probable applicant, a private party could also seek appropriative rights preserving instream flows through Forest Service land. In either case, the Board most likely would consult with the Forest Service to determine how much water beneficial instream uses require.

¹⁹⁸ The public trust easement is not a water "right" in the usual sense of the term. Dunning, *The Significance of California's Public Trust Easement for California Water Rights Law*, 14 U.C. DAVIS L. REV. 357, 382 (1980).

¹⁹⁹ *California Trout*, 90 Cal. App. 3d at 824, 153 Cal. Rptr. at 677 (Reynoso, J., dissenting).

²⁰⁰ The Board must find that unappropriated water is available before it can issue an appropriation permit. CAL. WATER CODE § 1375 (Deering 1977).

²⁰¹ Uncertainty concerning the rights of water users has pernicious effects. It inhibits long-range planning and investment for the development and use of waters in a stream system. It also fosters recurrent, costly, and piecemeal litigation. Finally, uncertainty

the erratic, reactive, and case-by-case approach the present "application and protest" system imposes.²⁰²

California law entitles the public to minimum flows for instream uses.²⁰³ At the same time, California supports and encourages hydrodevelopment.²⁰⁴ The law entitles hydroelectric developers to notice of existing water uses.²⁰⁵ Instream appropriations will help the Board quantify existing water rights and inform hydrodevelopers of water available for appropriation.²⁰⁶ Thus, instream appropriations will facilitate hydrodevelopment planning as well as public interest water flow preservation.

CONCLUSION

Federal law requires the Forest Service to obtain state law water rights to protect instream values.²⁰⁷ Indeed, the *United States v. New Mexico* decision impliedly assumed state law would allow instream appropriations.²⁰⁸ However, California case law has prohibited them.²⁰⁹ Consequently, the Forest Service has asserted a potentially enormous riparian claim to satisfy instream needs.²¹⁰ In *Hallett Creek*, the court of appeal recognized the claim.²¹¹ However, recognizing federal riparian rights will provide water for hydroelectric developments on federal land, in circumvention of CEQA and public trust regulation. Further-

impairs the State's administration of water rights. *In re Long Valley Creek Stream Sys.*, 25 Cal. 3d 339, 355-56, 599 P.2d 656, 666-67, 158 Cal. Rptr. 350, 360 (1979).

²⁰² See *supra* notes 175-82 and accompanying text.

²⁰³ Beneficial water uses include recreation and fish and wildlife preservation. CAL. WATER CODE § 1243 (Deering 1977). The Board shall consider how much water must remain in the source. *Id.* § 1243.5.

²⁰⁴ State policy supports and encourages the development of "environmentally small hydroelectric projects as a renewable energy source." *Id.* § 106.7 (Deering Supp. 1986).

²⁰⁵ Tarlock, *supra* note 144, at 214.

²⁰⁶ The Board provides appropriation applicants with information concerning the state's water resources. See CAL. WATER CODE § 1251 (Deering 1977). Before the Board can issue an appropriation permit, it must determine that unappropriated water is available. *Id.* § 1375.

²⁰⁷ *United States v. New Mexico*, 438 U.S. 696, 702, 704-05 (1978).

²⁰⁸ The Court found that aesthetic, environmental, recreational and wildlife preservation water uses constituted secondary purposes. *Id.* at 704-05. At the same time the Court held that the United States should acquire water for secondary purposes under state law. *Id.* at 702.

²⁰⁹ See *supra* notes 60-73 and accompanying text.

²¹⁰ See *supra* notes 97-99, 108-110 and accompanying text.

²¹¹ See *supra* note 99 and accompanying text.

more, Forest Service riparian rights will significantly increase the federal claim on state water resources. Therefore, the California Supreme Court may reverse *Hallett Creek*, finding that federal riparian rights recognition is environmentally unwise. If so, the court should also correct the *California Trout* misreading of section 1260 and hold that the Forest Service may appropriate available instream flows even without a diversion or physical control of water.

In the meantime, the legislature should facilitate this desirable outcome by amending the Water Code so that it clearly permits instream appropriations. Instream flow appropriations would allow the Forest Service sufficient water to protect instream values. Instream water rights would also replace the unsuccessful "application and protest" system. Both federal and state interests, and both hydroelectric developers and environmentalists, would benefit from recognition of instream flow appropriations in California.

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