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INTRODUCTION

In *California v. United States*,[1] the United States Supreme Court held that state water laws generally apply to federal reclamation projects. The decision has been widely perceived as establishing a new federal-state relationship concerning the control of water allocation and use. In fact, the decision reaffirmed the original relationship that Congress had in mind in enacting the basic reclamation law in 1902.[2] The *California* decision has spawned a line of recent case authority holding that California water laws apply to the federal Central Valley Project (CVP), the largest federal reclamation project in the nation. This article will describe the *California* decision and the recent case authority applying it to the CVP.

The *California* decision, beyond generating case authority relating to the CVP, has ushered in a new era of cooperation in federal-state water relations in California. Prior to the decision, federal-state water relations in California were marked by conflict and controversy,

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1. 438 U.S. 645 (1978).

2. *See generally* Walston, *Reborn Federalism in Western Water Law: The New Melones Dam Decision*, 30 HASTINGS L.J. 1645 (1979).

particularly over the application of California water laws and policies to the CVP. The *California* decision has put this controversy to rest, thus allowing federal and state agencies to concentrate on providing for more efficient water uses. To that end, these agencies have worked out a historic agreement that provides for coordinated operation of the federal and state water projects in California. This agreement, beyond increasing efficient water uses, signals a new era of relative tranquillity in federal-state water relations in California. This article, beyond describing the *California* decision and its progeny, will also describe the historic operating agreement that signals the new era.

I. State Control of Federal Water Uses: *California v. United States*

In *California v. United States*,[3] the United States Supreme Court held that the federal government, in operating its reclamation projects, must comply with state laws relating to appropriation and distribution of water, except where state laws are inconsistent with "specific congressional directives."[4] This result, the Court stated, is mandated by section 8 of the Reclamation Act of 1902,[5] which provides that the Secretary of the Interior, in operating the federal projects, must "proceed in conformity with" state laws relating to the "control, appropriation, use, or distribution" of water. To fully understand the significance of section 8 and the Supreme Court decision interpreting it, one must first understand the historical relationship of federal and state control of water allocation and use, and indeed the historical development of western water law.

A. The Appropriation and Riparian Doctrines

The riparian doctrine is the basic water law of the American states lying east of the Mississippi River. This doctrine, which originated in the English common law, holds that a landowner has the right to use water flowing contiguously to his land.[6] Thus, under the riparian

3. 438 U.S. 645 (1978).
4. *Id.* at 672-73.
5. 32 Stat. 390 (1902) (codified as amended at 43 U.S.C. §§ 372-383 (1982)).
6. Lux v. Haggin, 69 Cal. 255, 391 (1886); Herminghaus v. Southern Cal. Edison Co., 200 Cal. 81, 95 (1926); 1 S. Wiel, Water Rights in the Western States § 709, at 773-75 (3d ed. 1911).

doctrine, a water right is an incident of land ownership and is not created by use or lost by nonuse.

The riparian doctrine was ill-suited to the needs of the West. The early settlers often needed to divert water to lands for economic purposes, but could not assert a riparian right for this purpose. The early gold miners, for example, needed to divert water to their mining claims, which were located on public lands owned by the federal government; since the gold miners did not own the lands, they could not assert a riparian right. Similarly, the early farmers often needed to divert water to lands that were not contiguous to a waterway; since the lands were not contiguous, a riparian right could not be asserted for this purpose either. The early miners and farmers, ignoring riparianism, developed a simple custom that recognized the right of a person to divert water to "beneficial use." Under this custom, it was irrelevant whether the diverter was a landowner, or whether the lands were contiguous to the waterway. This custom ripened into the formal doctrine of appropriation, which is the basic water law of the West today. Under this doctrine, a water user has the right to "appropriate," or divert, water to a beneficial use, and the right continues to exist as long as the use continues to be beneficial; the priority among competing appropriators is governed by the principle, "first in time, first in right."[7] Thus, under the appropriation doctrine, unlike the riparian doctrine, a water right depends on actual use and need, not on land ownership.

B. Congress' Land Laws: The Severance Doctrine

Since the federal government was the original owner of the public domain lands in the West, it seemed doubtful that those who settled on such lands without a federal patent, such as the early gold miners, had valid claims. Indeed, the miners were commonly viewed as trespassers on the public domain. To protect the rights of the miners

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7. Environmental Defense Fund v. East Bay Mun. Util. Dist., 26 Cal. 3d 183, 195 (1980); National Audubon Soc'y v. Superior Court, 33 Cal. 3d 419, 441 (1983); United States v. Gerlach Live Stock Co., 339 U.S. 725, 742-49 (1950); Jennison v. Kirk, 98 U.S. 453, 458-59 (1878). Although most western states have adopted the appropriation doctrine as their exclusive water rights law, some states, following California's example, have adopted the appropriation doctrine but retained the riparian doctrine. People v. Shirokow, 26 Cal. 3d 301, 307 (1980); R. POWELL, REAL PROPERTY § 739, at 836 n.54 (1968). Under the California view, California retained the riparian doctrine when, in 1872, it adopted the English common law—the source of the riparian doctrine—as its rules of decision. Lux v. Haggin, 69 Cal. 225, 380-82 (1886). In effect, California, and other states following California, have dual systems of water rights.

and other settlers, or at least to redeem their hopes, Congress enacted several land laws in the nineteenth century upholding the validity of their claims, and particularly affirming their water rights. The first enactment, the Mining Act of 1866, as amended in 1870,[8] provided that the miners' water rights would be protected to the extent that they were recognized by the "local customs, laws and decisions of the courts, ..." The Desert Lands Act of 1877,[9] which required the issuance of patents to settlers who reclaimed the desert lands, provided that the settlers' water rights "shall depend on bona fide prior appropriation," and that "surplus water"—that is, water not already appropriated by the settlers—would remain "free for the appropriation and use of the public for irrigation, mining and manufacturing purposes subject to existing rights."[10] These enactments, in effect, provided congressional recognition of the appropriation doctrine adopted by the western states and territories, although the full scope and extent of such recognition was unclear.

The United States Supreme Court clarified the meaning of Congress' land laws in its landmark decision in *California Oregon Power Co. v. Beaver Portland Cement Co.*,[11] rendered in 1935. There, the Court held that the Desert Lands Act of 1877, if not the Mining Acts of 1866 and 1877, effected a "severance" of all waters on the public domain lands from the lands themselves.[12] As a result of the severance, each state has the right to adopt either the appropriation doctrine or the riparian doctrine; "Congress cannot enforce either rule upon any state."[13] Therefore, water rights on the public domain are controlled by the state, although the lands themselves remain subject to federal disposition and control. Hence, federal patentees who acquire lands from the federal government, such as homesteaders and desert-land entrymen, must acquire their water rights from the states, and their priority to the use of water depends on state law. In effect, Congress' land policy, as interpreted in *California Oregon Power*, allowed the states to adopt their own water rights policy, rather than establish a national policy.

The western states have adopted administrative or judicial systems to carry out their water rights laws. In California, for example, the

8. 14 Stat. 253 (1866) (amended by 16 Stat. 218 (1870)) (codified as amended at 43 U.S.C. § 661 (1982)).
9. 19 Stat. 377 (1877) (codified as amended at 43 U.S.C. §§ 321-323 (1982)).
10. *Id.*
11. 295 U.S. 142 (1935).
12. *Id.* at 158.
13. *Id.* at 164 (quoting Kansas v. Colorado, 206 U.S. 46, 94 (1907)).

Legislature has adopted a comprehensive scheme governing appropriative water rights.[14] Under this scheme, the State Water Resources Control Board (State Board) has "exclusive jurisdiction" to administer the appropriative rights system.[15] In exercising this authority, the State Board may issue an appropriative permit or license, subject to appropriate terms and conditions, if it determines that the proposed use is "reasonable and beneficial" and in the "public interest."[16] The State Board's decisions are subject to judicial review.[17]

C. *The Reclamation Act of 1902: Section 8*

In the spirit of progressivism and nationalism prevailing at the turn of the century, Congress enacted the Reclamation Act of 1902 (the Act),[18] which was designed to promote the West's economy by developing its sparse water supply. Under this Act, the federal government, acting by the Secretary of the Interior, is authorized to construct and operate reclamation projects in the western region. To prevent monopolies from acquiring the water developed by the projects, section 5 of the Act imposes an acreage limit on the amount of land held under single ownership that can receive water from the projects; the original limit was 160 acres, although the limit was recently increased.[19] To ensure that the states would have the right to control distribution and use of the water, section 8 provides that the Act "shall [not] be construed as affecting or intended to affect or to in any way interfere with the laws of any State or Territory relating to the control, appropriation, use, or distribution of water used in irrigation, or any vested right acquired thereunder," and further that the Secretary of the Interior, "in carrying out the provisions of this Act, shall proceed in conformity with [State and

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14. CAL. WATER CODE §§ 1000-2900 (West 1971 & Supp. 1988); Environmental Defense Fund v. East Bay Mun. Util. Dist., 26 Cal. 3d 183, 195 (1980); National Audubon Soc'y v. Superior Court, 33 Cal. 3d 419, 441 (1983); People v. Shirokow, 26 Cal. 3d 301, 306, 309 (1980).

15. CAL. WATER CODE § 179 (West 1971).

16. CAL. CONST. art. X, § 2; CAL. WATER CODE §§ 100, 1201, 1240, 1243, 1243.5, 1255, 1257 (West 1971 & Supp. 1988)); Joslin v. Marin Mun. Water Dist., 67 Cal. 2d 132, 138 (1967); Peabody v. City of Vallejo, 2 Cal. 2d 351, 367 (1935); Chow v. City of Santa Barbara, 217 Cal. 673, 698 (1933).

17. CAL. WATER CODE § 1360 (West 1971).

18. 32 Stat. 388 (1902) (codified as amended at 43 U.S.C. §§ 371-383 (1982)).

19. 43 U.S.C. § 431 (1982). In 1982, Congress increased the acreage limitation from 160 acres to 960 acres. *See* Reclamation Reform Act of 1982, 96 Stat. 1263, 1265 (1982) (codified as amended at 43 U.S.C. § 390dd (1982)).

Territorial] laws. . . ."[20] The legislative debates indicate that section 8 was intended to follow the pattern of the Mining Law Act of 1866 and 1870 and the Desert Lands Act of 1877, which, as noted earlier, establish the severance between land and water as articulated by the Supreme Court in *California Oregon Power*; these enactments were cited by the House floor leader as the model for section 8.[21] Indeed, several congressmen argued that section 8 reaffirmed the constitutional principle that the states acquire sovereign ownership and control of navigable waters upon admission to statehood, suggesting that state law would apply to project water whether Congress enacted section 8 or not.[22]

D. Judicial Construction of Section 8

In several early decisions, the Supreme Court stated that section 8 provides for federal deference to state water laws. In *Kansas v. Colorado*,[23] decided in 1907, the Court stated that the federal government lacks constitutional power to "override state laws in respect to the general subject of reclamation," adding that, in light of section 8, "Congress has [not] acted in disregard to this limitation."[24] In another case involving a dispute between Nebraska and Wyoming over the North Platte River, the Court stated that the Secretary of the Interior, in acquiring water rights for federal reclamation projects, "must obtain permits and priorities for the use of water in the same manner as a private appropriator or an irrigation district formed under the state law."[25] In these cases, however, the Court was not called on to construe the provision in a direct conflict between the federal government and a state over federal reclamation water uses.

A direct conflict finally arose in *Ivanhoe Irrigation District v. McCracken*,[26] decided in 1958. In that case, several large water

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20. 32 Stat. 390 (1902) (codified as amended at 43 U.S.C. §§ 372, 383 (1982)).

21. 35 CONG. REC. 6679 (1902) (remarks of Rep. Mondell) ("Every act since that of April 26, 1866, has recognized local laws and customs appertaining to the appropriation and distribution of water used in irrigation, and it has been deemed wise to continue our policy in that regard.").

22. *Id.* at 6770 (remarks of Rep. Sutherland). Representative Sutherland was subsequently appointed as an Associate Justice of the Supreme Court, and was the author of the Supreme Court's decision in *California Oregon Power* holding that the congressional land laws effected a "severance" of water from the public domain lands. 295 U.S. 142, 158 (1935).

23. 206 U.S. 46 (1907).

24. *Id.* at 92.

25. Nebraska v. Wyoming, 295 U.S. 40, 42-43 (1935). *See* Nebraska v. Wyoming, 325 U.S. 589, 629 (1945).

26. 357 U.S. 275 (1958).

districts in California argued that, since section 8 requires deference to state law and since California law contains no provision limiting water deliveries to lands not exceeding 160 acres, the acreage limitation does not apply in California. The Supreme Court rejected the argument, stating that the acreage provision is a "specific and mandatory" requirement of the reclamation laws and that therefore Congress did not intend for section 8 "to override the repeatedly reaffirmed national policy" contained in the acreage limitation.[27] The Court went beyond the immediate dispute by stating, in dictum, that section 8 "merely requires the United States to comply with state law when . . . it becomes necessary for it to acquire water rights or vested interests" for reclamation purposes; that "the acquisition of water rights must not be confused with the operation of federal projects;" and that "nothing in § 8 . . . compels the United States to deliver water on conditions imposed by the States."[28] In effect, the Court seemed to suggest that federal agencies must acquire their water rights under state law but that the states cannot impose any conditions on such water rights, and in particular cannot determine how or for what purpose such water will be used.

The Supreme Court applied the *Ivanhoe* analysis in two subsequent decisions rendered in 1963, *City of Fresno v. California*[29] and *Arizona v. California*.[30] In *City of Fresno*, the Court, citing *Ivanhoe*, ruled that California laws establishing preferential rights for counties and watersheds of origin, and establishing priorities for domestic uses over irrigation uses, do not apply to water delivered by federal agencies under the Reclamation Act of 1902.[31] In *Arizona*, the Court, again citing *Ivanhoe*, held that the Secretary of the Interior need not comply with state law in distributing Colorado River water in the states of Arizona and California.[32] In the latter case, the Court ruled that the Secretary's power to sign contracts with water users overrides the states' general power to control water allocation and use.[33]

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27. *Id.* at 291-92.
28. *Id.*
29. 372 U.S. 627 (1963).
30. 373 U.S. 546 (1963).
31. *City of Fresno*, 372 U.S. at 630.
32. *Arizona*, 373 U.S. at 585-88. In fact, the Court interpreted and applied sections 14 and 18 of the Boulder Canyon Project Act, 45 Stat. 1057 (1928) (codified at 43 U.S.C. §§ 617-617t (1982)), which governs the federal reclamation project on the Colorado River. Sections 14 and 18 contain language similar to that found in section 8 of the Reclamation Act of 1902. *See Arizona*, 373 U.S. at 585-88.
33. *Arizona*, 373 U.S. at 586.

E. The California Decision

In *California v. United States*,[34] the Supreme Court squarely held that section 8 requires federal compliance with state water laws—including state laws relating both to appropriation and distribution of water—and overturned its earlier dictum in *Ivanhoe* and *City of Fresno* suggesting otherwise.[35] In *California*, the United States Bureau of Reclamation (USBR), which operates the federal projects, applied to the State Board for permits to appropriate water for the New Melones Project on California's Stanislaus River. The State Board granted the permits, subject to several conditions restricting both appropriation and distribution of water; the major conditions prohibited the USBR from storing water for the project until it had developed a plan for consumptive water uses that met with the State Board's approval.[36] The United States brought an action against the State Board to overturn the conditions, arguing that under *Ivanhoe* and its progeny the Board lacked power to impose conditions on the federal right to store and use water. The United States' argument was upheld by the district court and by the Ninth Circuit Court of Appeals.[37]

The Supreme Court, after granting certiorari, reversed the lower ruling in a decision authored by then Associate Justice Rehnquist.[38] Tracing the history of federal and state water relations, the Court observed that "through it runs the consistent thread of purposeful and continued deference to the state water law by Congress."[39] The Court concluded that Congress meant to follow the same policy in

34. 438 U.S. 645 (1978).

35. The Court specifically "disavow[ed]" the "dictum" in *Ivanhoe* and *City of Fresno* stating that state law does not generally apply to federal reclamation projects. *California*, 438 U.S. at 673, 674. The Court distinguished the *Arizona* case on grounds that, because of "the unique size and multistate scope of the Project, Congress did not intend the States to interfere with the Secretary's power to determine with whom and on what terms water contracts would be made." *Id.* at 674. In light of the reasoning of the *California* decision and the absence of any unique federal interest relating to distribution of water from the Boulder Canyon Project, it is possible that the Court may reconsider its decision in *Arizona* interpreting the states' rights provisions of the authorizing act, assuming that an appropriate controversy is presented to the Court.

36. United States v. California, 694 F.2d 1171, 1173, 1182-85 (9th Cir. 1982).

37. United States v. California, 403 F. Supp. 874 (E.D. Cal. 1975), *aff'd with modifications*, 558 F.2d 1347 (9th Cir. 1977), *rev'd sub nom.* California v. United States, 438 U.S. 645 (1978).

38. 438 U.S. 645 (1978).

39. *Id.* at 653.

enacting section 8. Under this provision, the Court reasoned, state law applies to federal water appropriations in two ways: "First, . . . the Secretary would have to appropriate, purchase, or condemn necessary water rights in strict conformity with state law. . . . Second, once the waters were released from the dam, their distribution to individual landowners would again be controlled by state law."[40] The Court also stated, however, that state law cannot be applied if it is contrary to "congressional directives," such as the directive that project water not be available to lands exceeding 160 acres under single ownership.[41] Thus, although the Court overturned *Ivanhoe*'s dictum that state water laws are not generally applicable to federal water appropriations, it preserved *Ivanhoe*'s holding that state law cannot override the acreage limitation contained in the federal reclamation laws. The Court appeared to follow the general rule of statutory construction that, in a conflict between two statutory provisions, the more specific provision controls.[42] The Court remanded the case to the lower courts for determination of whether the conditions imposed by the State Board on the New Melones Project were inconsistent with "congressional directives."[43]

II. Effect of the *California* Decision Upon The Federal Central Valley Project in California

The main effect of the *California* decision has been upon the federal Central Valley Project (CVP) in California, one unit of which—the New Melones Project—was the focus of the *California* decision itself. The CVP was originally conceived as a State project during the Great Depression of the 1930s, but was taken over by the federal government after California was unable to sell the bonds necessary to finance the project.[44] The CVP, authorized by Congress in 1935 and reauthorized in 1937,[45] stores water from remote mountainous regions for agricultural and domestic use elsewhere in California. The project diverts water from the Sacramento-San Joaquin

40. *Id.* at 665, 667.
41. *Id.* at 672-73.
42. *E.g.*, Preiser v. Rodriguez, 411 U.S. 475, 488-90 (1973); Enzor v. United States, 262 F.2d 172, 174 (5th Cir. 1958).
43. *California*, 438 U.S. at 679.
44. E. Cooper, Aqueduct Empire 149 (Arthur H. Clark Co., Glendale, Cal. (1968)).
45. Rivers and Harbors Act of 1935, 49 Stat. 1028, 1038; Rivers and Harbors Act of 1937, 50 Stat. 844, 850.

Delta through a federal aqueduct to customers in central and southern California. The project is operated by the USBR, a branch of the United States Department of the Interior, although many units of the project have been built by the Army Corps of Engineers.

The CVP, as originally authorized, consisted primarily of the Shasta Dam and Reservoir, located on the upper Sacramento River. As California's population has increased and its economy grown, Congress has authorized additional units of the CVP to accommodate California's growing water needs. The additional units include, among others, the Friant Dam, the Folsom Dam, the Pine Flat Dam, and others. The New Melones Dam, which was the focus of the *California* decision, was authorized in 1944 and 1962 as part of the CVP.[46] As of 1978, the USBR held State water rights permits authorizing appropriation of 6.1 million acre feet of water annually for the CVP, and had received assignments from State agencies of permits authorizing appropriation of an additional 9.2 million acre feet annually.[47] The CVP is the largest source of California's developed water supply and thus has a major impact on California's economy.

Several recent court decisions have applied the *California* decision in specific controversies affecting the CVP, and held that the decision requires the USBR to comply with State water laws in operating the project. These recent court decisions form an increasingly broad matrix that affects the operation of the CVP, and will now be described more fully.

A. Remand of *California v. United States*

The *California* decision was first applied in the remanded proceeding of the *California* case itself. In the remanded proceeding, the Ninth Circuit upheld all conditions imposed by the State Board on USBR appropriations for the New Melones Project.[48] The main condition deferred water storage for the project until the USBR had developed a specific plan for consumptive water uses—particularly for irrigation—that met with the State Board's approval. The United States argued that the condition was invalid because Congress had

46. Flood Control Act of 1944, 58 Stat. 887; Flood Control Act of 1962, 76 Stat. 1180, 1191.

47. Memorandum, *Water Supply and Water Rights Data*, Governor's Commission to Review California's Water Rights Law, at 3, 6 (August 4, 1977).

48. United States v. California, 694 F.2d 1171 (9th Cir. 1982).

intended for the USBR to decide when project water should be stored. The Ninth Circuit rejected this argument, holding that Congress had not mandated storage prior to development of a plan for consumptive uses.[49] The court reasoned that, until such a plan was developed, the USBR was unable to demonstrate that it would put the water to beneficial use; under California law, water cannot be appropriated unless it is shown that the water will be put to beneficial use.[50] The court ruled that Congress had not intended to override state appropriation laws relating to the beneficial use requirement, and therefore that the USBR cannot store water until it satisfies this requirement.[51]

The United States argued, alternatively, that if it could not store water for *consumptive* uses—such as irrigation—until specific needs arose, it could store water for *hydropower* purposes because it had an immediate need for such storage. That is, although the USBR had not yet signed contracts with farmers for delivery of irrigation water, it had signed contracts with power companies for delivery of power generated by the project. The district court had upheld the United States' argument, thus authorizing immediate storage of water for power purposes.[52] The Ninth Circuit reversed the district court ruling. According to the Ninth Circuit, power was an "incidental" rather than primary purpose of the project, and thus water could not be stored for secondary power purposes where it could not be stored for the main purpose of irrigation.[53] In effect, the court held that the USBR could not store water for power until it could store

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49. *Id.* at 1177-79. The State Board conditions also prohibited the USBR from storing water until it had satisfied the Board that the benefits of the project outweigh its harm. *Id.* at 1177. California conceded that this condition was excessive if construed to authorize the State to permanently prevent full impoundment, since Congress had already weighed the project benefits and harm in authorizing the project. *Id.* California argued, however, that the condition should be construed narrowly to allow the State to defer impoundment until the USBR had developed a consumptive use plan that met with the Board's approval. *Id.* The court upheld the condition as so construed. *Id.* at 1177-78.

50. *Id.* at 1177-79.

51. *Id.* at 1178. The court also noted that the "precepts of federalism" established by section 8 "should produce mutual respect and accommodation for state interests;" that it was thus "incumbent on the United States to respond to California's request for a full showing of the benefits which were to be expected from operation of the dam at full capacity;" and that the United States had failed to meet this burden because it had "presented in remand . . . no evidence of impracticality or harmful consequences from any specific condition set by the California State Board." *Id.* at 1174, 1178.

52. United States v. California, 509 F. Supp. 867 (E.D. Cal. 1981), *rev'd*, 694 F.2d 1171 (9th Cir. 1982).

53. United States v. California, 694 F.2d 1171, 1179-80 (9th Cir. 1982).

water for irrigation, and that it could not store water for the latter purpose until specific needs arose.

The Ninth Circuit also upheld two other important conditions imposed by the State Board on the project, the first requiring the USBR to provide a preference for water uses for "counties of origin" and the second requiring the USBR to maintain downstream water quality needs.[54] The court held that neither condition was inconsistent with congressional directives, and indeed that the conditions "lead to results anticipated, and apparently encouraged, by Congress."[55] The United States had argued that Congress intended for federal operating agencies to make all decisions concerning the needs of counties of origin and of water quality, irrespective of whether the conditions were substantively consistent with Congress' goals. The Ninth Circuit rejected the argument, stating that the argument would potentially invalidate virtually all state conditions applied to federal projects and would conflict with the "federalism concerns" underlying section 8.[56] The Ninth Circuit, in effect, measured the validity of state law in terms of its substantive effect on the federal project, not in terms of its effect on the USBR's procedural operational authority.

On the other hand, the Ninth Circuit also stated that the state cannot take over the "actual operation" of federal projects, since Congress contemplated that federal agencies would operate the projects; hence, "a state cannot require an action solely because a federal agency, on its own initiative, could have decided to do it."[57] This line of demarcation, however, is unclear. Certainly a state cannot take over the physical operation of a project, since Congress clearly directed federal agencies to assume this responsibility. On the other hand, *any* state law applied to a federal project will affect its operation, and thus cannot be said to be invalid simply because it affects the project "operation." The Ninth Circuit's comment relating to the USBR's operational authority appears to suggest an indistinct line between policy choices relating to water allocation and use, on

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54. *Id.* at 1180-81.
55. *Id.* at 1181.
56. *Id.*
57. *Id.* at 1181, 1182. The court stated that:
> State law, where not inconsistent with federal law, was to control only the impoundment of water into the dam and the distribution of water from the dam to individual landowners. We doubt that California was intended to play a significant role in influencing the later operation of the dam.

Id. at 1182.

the one hand, and ministerial authority to physically operate the project, on the other. If so, the states would have authority to control water allocation and use within the larger framework of congressional policy, but would not have authority to otherwise control the physical operation of the project.[58]

B. The *South Delta* Case

In *South Delta Water Agency v. United States*,[59] the Ninth Circuit followed and applied the *California* decision in holding that the United States had waived sovereign immunity in an action brought by a private water user. In that case, the South Delta Water Agency (SDWA) brought an action against the United States, alleging that the USBR was operating the CVP in disregard of SDWA's prior water rights under California law.[60] The United States moved to dismiss the action on grounds that it had not waived its sovereign immunity and therefore the district court lacked jurisdiction in the matter. Under the Administrative Procedure Act,[61] Congress has waived sovereign immunity in non-damages actions against federal agencies or officers acting under color of federal law.[62] The waiver applies, however, only if there is "law to apply" to such federal agencies or officers.[63] The United States argued that there was no "law to apply" because state law was not applicable to the United States. Therefore, the sovereign immunity issue turned on whether

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58. The Ninth Circuit also stated in dictum that, "once the federal government has made binding contracts for delivery of water, California would be more restricted than it was when it originally regulated impoundment and distribution of water." 694 F.2d at 1182. This proposition appears more the function of federal constitutional guaranties relating to private property and contracts than of section 8. That is, the taking clause of the United States Constitution prohibits the states from taking property without payment of compensation. U.S. CONST. amends. V, XIV; Penn Central Transp. Co. v. New York City, 438 U.S. 104 (1978). Similarly, the contract clause prohibits the states from impairing private contracts. U.S. CONST. art. I, § 10, cl. 1; United States Trust Co. v. New Jersey, 431 U.S. 1 (1976). These provisions may limit state power to impose conditions on USBR water appropriations that affect contracts between the USBR and its customers. No such limit, however, seems to be found in section 8 itself.

59. 767 F.2d 531 (9th Cir. 1985).

60. The plaintiff also named the State of California as a defendant, alleging that the State was operating its own water project in disregard of the plaintiff's prior rights.

61. 5 U.S.C. §§ 701-706 (West 1982).

62. *Id.* § 702.

63. Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402, 410 (1971) (citing S. REP. No. 572, 79th Cong., 1st Sess. 26 (1945)); South Delta Water Agency v. United States, 767 F.2d 531, 536.

state law applies to the CVP under section 8 of the Reclamation Act of 1902.

The Ninth Circuit rejected the United States' sovereign immunity argument. Relying on the Supreme Court's decision in *California v. United States*, the court held that state law applies to the federal project under section 8.[64] The court also noted that the Rivers and Harbors Act of 1937,[65] which reauthorized the CVP, specifically provided that the provisions of "the reclamation law" govern the project; since section 8 is part of the reclamation law, the section is made applicable to the CVP under the 1937 reauthorizing Act.[66] The United States contended, however, that section 2 of the 1937 Act, which authorizes the United States to acquire water rights for the CVP by purchase or condemnation, authorizes the United States to acquire water rights "by seizure or otherwise," even where state law bars the acquisition.[67] The Ninth Circuit also rejected this argument. The court reasoned that section 2 of the 1937 Act is patterned after section 7 of the Reclamation Act of 1902, which also authorizes the federal government to acquire water rights by purchase or condemnation; since the Supreme Court in *California v. United States* specifically held that the federal government must comply with state law in acquiring water rights by purchase or condemnation,[68] neither section 7 of the 1902 Act nor section 2 of the 1937 Act can be construed differently.[69] In effect, the court held that the United States' authority to acquire water rights by purchase or condemnation, whether based on the general reclamation laws or the CVP authorizing legislation, cannot override the United States' specific obligation to comply with state law under section 8.

The Ninth Circuit also rejected the United States' argument that section 11460 of the California Water Code, which establishes a preference for CVP water for watersheds of origin, does not apply to the United States. The United States' argument was based on the Supreme Court's dictum in *City of Fresno v. California*,[70] which stated that California's watershed protection provisions do not apply to the United States.[71] The Ninth Circuit noted that the dictum was

64. *South Delta*, 767 F.2d at 536-59.
65. 50 Stat. 844, 850 (1937).
66. *South Delta*, 767 F.2d at 537.
67. *Id.*
68. 438 U.S. 645, 665 (1978).
69. *South Delta*, 767 F.2d at 537.
70. 372 U.S. 627 (1963).
71. *Id.* at 629-30.

expressly disavowed in *California v. United States*.[72] The court also ruled that the United States bears "the burden of proof . . . to show that compliance [with state law] would violate a relevant congressional directive,"[73] and held that the United States had failed to sustain its burden with respect to the watershed preference provision.[74]

C. *The Delta Decision*

In *United States v. State Water Resources Control Board*,[75] the United States challenged a landmark state water rights decision requiring the CVP to maintain water quality standards for the Sacramento-San Joaquin Delta, arguing that the requirement violated federal law. After Congress authorized the CVP in the 1930s, the USBR applied to the State Board for permits to appropriate water for the project and to divert the water from the Delta. The State Board, although issuing the permits, retained jurisdiction to impose conditions for the protection of Delta water quality. In 1978, the State Board issued Decision 1485, requiring the USBR to limit diversions as necessary to protect public uses and prior water rights in the Delta. Specifically, the conditions required the USBR to maintain certain water quality standards at selected Delta locations; the standards were regarded as necessary to prevent the intrusion of ocean salt water in the Delta. The United States brought a mandamus action against the State Board in state court, alleging that the conditions were inconsistent with congressional directives relating to the CVP.

The California Court of Appeal rejected the United States' argument, holding that the conditions were not inconsistent with congressional directives and hence were lawful under section 8.[76] The United States had argued, among other things, that the CVP au-

72. California v. United States, 438 U.S. 645, 673; *South Delta*, 767 F.2d at 538.

73. *South Delta*, 767 F.2d at 539.

74. *Id.* The Ninth Circuit also rejected the United States' argument that the courts lack jurisdiction to review federal acquisitions of water rights by purchase or condemnation. According to the United States, the Tucker Act, 28 U.S.C. § 1346, and the McCarran Amendment, 43 U.S.C. § 666, limit relief in such cases to damages for inverse condemnation, and do not authorize injunctive relief to prevent the acquisition. The court held, however, that recent amendments to the Administrative Procedure Act and other federal laws authorize complainants to seek injunctive relief, thus opening up new avenues of relief that might not have been otherwise permissible. *Id.* at 540.

75. 182 Cal. App. 3d 82 (1986).

76. *Id.* at 134-37.

thorizing act provided that project water would be stored and used only for certain specified purposes—including "river regulation"—and that salinity control was not among the specified purposes. The Court of Appeal ruled, however, that "river regulation" includes salinity control, relying on the relevant legislative history and presidential proclamations.[77] The court also held that the federal Clean Water Act,[78] which requires federal agencies to comply with laws relating to the "control and abatement of pollution,"[79] also requires the USBR to comply with state water quality standards. The court stated that the Clean Water Act provisions were relevant because, in the court's view, salinity intrusion is a form of water pollution within the purview of the federal act.[80] In effect, the court held that state law applies to the federal project under both the Reclamation Act of 1902 and the Clean Water Act.

The Court of Appeal's analysis of section 8, although seemingly correct in its conclusion, improperly focused on whether the State Board conditions were *consistent* rather than *inconsistent* with congressional directives. Under the court's analysis, the conditions were permissible because they were consistent with specific project purposes contemplated by Congress. In *California v. United States*, on the other hand, the Supreme Court held that state laws were valid unless they are *inconsistent* with Congress' goals. Similarly, the Ninth Circuit in the remanded *California* case upheld State conditions deferring water storage even though there was no indication that Congress had contemplated such deferral of storage. Indeed, the Ninth Circuit in the *South Delta* case specifically noted that the United States has the "burden of proof" to show that state law "would violate a relevant congressional directive."[81] Thus, under the proper view, state law is valid unless it is shown to be specifically contrary to a congressional directive, whether or not it is consistent with a specific congressional goal. Therefore, the California Court of Appeal should have properly considered only whether Congress forbade the use of CVP water for salinity control purposes, not whether Congress contemplated the use of water for such purposes. Perhaps it is understandable that the court applied the more stringent

77. *Id.* at 136-37.
78. 33 U.S.C. §§ 1251-1376 (West 1982).
79. Section 13, 33 U.S.C. § 1323. *See* Environmental Protection Agency v. California *ex rel.* State Water Resources Control Bd., 426 U.S. 200 (1976).
80. *State Water Resources Control Bd.*, 182 Cal. App. 3d at 136-37.
81. South Delta Water Agency v. United States, 767 F.2d 531, 539 (9th Cir. 1985).

standard, since its view that Congress contemplated the state-imposed condition strengthened its conclusion that the condition applies. Even so, from a purely analytical point of view, the kind of federalism contemplated by the Supreme Court in *California v. United States* provides a more potent recognition of state interests than the California Court of Appeal's analysis in the *Delta* case.

D. The Coordinated Operating Agreement

Long after the initial units of the CVP were operational, California built its own water project to redistribute water from areas of origin to areas of need. The State Water Project (SWP) was authorized by the Burns-Porter Act,[82] which was enacted by the California Legislature in 1959; this Act authorizes the issuance of $1.75 billion in general obligation bonds to finance the project. The bond issue was approved by the California electorate in 1960. The main feature of the SWP is a massive dam and reservoir located on the upper Feather River, a tributary of the Sacramento River. The water released from storage flows downstream to the Sacramento River and eventually to the Sacramento-San Joaquin Delta, where the water is commingled with water released from upstream CVP storage facilities. The SWP diverts water from the Delta through a state aqueduct to central and southern California, where the water is used for domestic and agricultural purposes. The SWP is designed to deliver 4.23 million acre feet of water annually to its customers.[83] This delivery capacity, however, has not been achieved because the project, as originally envisioned, has not been completed. Indeed, increasing political opposition has raised doubts as to whether the project will ever be completed. The largest contractor for SWP water is the Metropolitan Water District, which supplies water to local agencies in the southern California area, including the cities of Los Angeles and San Diego.[84]

The SWP and CVP overlap both in their goals and operations. Both projects store water from northern California rivers for domestic and agricultural use elsewhere in the State. Both use the Sacramento River as a conveyance channel, and both divert water from this channel at the Sacramento-San Joaquin Delta. The Delta, in essence,

82. CAL. WATER CODE §§ 12930-12944 (West 1971).

83. D. SECKLER, CALIFORNIA WATER: A STUDY IN RESOURCE MANAGEMENT 14 (edited by D. Seckler, 1971).

84. *Id.*

provides a common pool linking the supply and distribution systems of both projects. Because of the parallel nature of the projects and their dependency on the same pool, several important policy and technical questions have arisen concerning operation of the projects, and the project operators have attempted in recent years to resolve these operational questions by working out an agreement for coordinated operation of the projects.

Perhaps the major operational question was, originally, whether the federal project is subject to the same constraints of state law that apply to the state project. Must the federal project comply with state laws establishing a preference for counties and watersheds of origin? Must the federal project comply with Delta water quality standards imposed by the State Board? If the federal project is not required to comply with Delta water quality standards, the State project may be required to allocate a disproportionate share of its own yield for this purpose, thus impairing the State project's capability of achieving its own objectives. This operational question was, of course, resolved by the Supreme Court decision in *California v. United States* and its progeny, which make clear that the federal project must comply with state law except where Congress has directed otherwise, and in particular that the federal project must comply with the State Board's Delta water quality standards. Indeed, the Supreme Court in the *California* decision commented unfavorably on the possibility that a federal project may be operated under different requirements than other projects, stating that section 8 of the Reclamation Act of 1902 was intended to avoid "the legal confusion that would arise if federal water law and state water law reigned side by side in the same locality."[85]

Another operational question involves the allocation of water between the projects in times of water shortage. This question, unlike the first question described above, arises under state law rather than federal law. That is, assuming that the federal project must comply with California law, what are the respective obligations of the federal and state projects under California law to meet Delta water quality standards in times of water shortage? This question, in a larger sense, involves the relative priority of the projects' water rights under California law. If, for example, the CVP has prior water rights as against the SWP, the CVP may be able to export any available water

85. California v. United States, 438 U.S. 645, 669 (1978).

in the Delta to CVP customers in times of drought, thus placing the burden on the SWP to meet Delta water quality standards before exporting water to its own customers.

The relative priority of the projects' water rights is a difficult question. Under California's appropriation law, the priority belongs to the appropriator who commences his diversion first; to be "first in time" is to be "first in right."[86] Since the initial CVP units were operational before the SWP was built, the CVP would seem to be "first in time." Other units of the CVP, however, such as the New Melones Project, were built after the SWP was fully operational. Further, some CVP and SWP water rights derive from assignments of water rights from State agencies before either the CVP or SWP were operational.[87] These circumstances make it very difficult to sort out the relative priority of the projects' water rights. The difficulty is compounded by the fundamental principle of California water law—established by constitutional amendment enacted in 1928—that a water right exists only to the extent that the water is put to "reasonable and beneficial use."[88] This constitutional principle establishes a rule of reasonableness as California's basic water law.[89] The rule of reasonableness appears to temper priorities based on strict chronology of use—such as the "first in time, first in right" rule—particularly as applied to large water projects that serve important public needs. The reasonableness rule would appear to require a more qualitative evaluation of the needs of people, industries, and resources dependent on the projects' water supply, and of alternative ways in which such needs can be met. For these reasons, the relative priority of the projects' water rights is a highly complicated question, one that has never been fully answered.

The operators of the SWP and CVP have attempted for many years to resolve these operational questions through the medium of negotiation rather than litigation. In 1960, the project operators signed an interim agreement that provided for sharing of deficiencies in times of shortage, and that established a mechanism to resolve disputes over such shares.[90] The agreement recognized the need for

86. *See supra* note 7 and accompanying text.
87. *See supra* note 47 and accompanying text.
88. CAL. CONST. art. X, § 2; Joslin v. Marin Mun. Water Dist., 67 Cal. 2d 132, 138 (1967); Peabody v. City of Vallejo, 2 Cal. 2d 351, 367 (1935).
89. Joslin v. Marin Mun. Water Dist., 67 Cal. 2d 132, 138 (1967).
90. Statement of David N. Kennedy, Director, California Department of Water Resources, *Before the Subcomm. of Water and Power Resources of the House Comm. of Interior and*

a further agreement providing for coordinated operation of the projects, particularly for protection of Delta water quality.[91] In 1971, after further negotiations, the project operators signed an agreement providing for full coordinated operation of the projects, but the agreement never took effect because it was successfully challenged in a court action on grounds that adequate environmental documentation had not been completed.[92] The project operators, however, informally operated the projects in a coordinated manner on the basis of annual letters of agreement that essentially followed the 1971 agreement.[93] Finally, after continued negotiations, the project operators reached a final agreement in May 1985 for full coordinated operation of the projects, subject to approval by Congress.[94] This historic agreement is known as the Coordinated Operating Agreement (COA).

The main provision of the COA provides that the CVP and the SWP "will be operated in conformity with" current Delta water quality standards established by the State Board.[95] If the State Board amends the standards, the CVP shall comply with the new standards if the United States determines that the standards are "not inconsistent with congressional directives. . . ."[96] If the United States determines that the new standards are *not* consistent with congressional directives, it shall request the United States Attorney General to bring an action "for the purpose of determining the applicability of the new Delta standards" to the CVP.[97] These provisions thus require the CVP to comply with the State Board's existing Delta water quality standards, and provide that disputes involving future standards will be resolved by the courts applying the principles of *California v. United States*. In effect, these provisions reaffirm the significant principles of federalism laid down in the *California* deci-

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Insular Affairs, 99th Cong., 1st Sess. (1985) (this statement is included as part of Appendix A to *Draft Environmental Impact Statement/Report: Coordinated Operation Agreement* (July 1985) which is on file at the *Pacific Law Journal*).

91. *Id.*
92. *Id.*
93. *Id.*
94. *Id.*
95. *Agreement Between the United States of America and the State of California For Coordinated Operation of the Central Valley Project and the State Water Project* [hereinafter COA], art. 11(a). The COA is printed as Appendix A to the *Draft Environmental Impact Statement/Report: Coordinated Operation Agreement* (July 1985) (on file at the *Pacific Law Journal*).
96. *Id.*
97. *Id.* at art. 11(b).

sion, and make clear that these principles apply to the CVP. Although the COA provisions do not establish new law beyond that already laid down by the Supreme Court, the provisions reflect a commitment by federal officials to comply with California law and thus signify an era of cooperation with respect to the federal water program in California. The COA is thus a landmark achievement in the development of California water law.

The COA also establishes in specific terms the relative obligations of the CVP and SWP to meet Delta water quality needs, particularly in times of shortage. According to the COA, the CVP must release sufficient water from storage to meet seventy-five percent of the water needs of the Sacramento River basin—including the Delta—and the SWP must release sufficient water to meet the remaining twenty-five percent of such needs.[98] In times of shortage, the project operators shall confer on possible operational changes to minimize the shortages, and otherwise each project may export water only to the extent that it has met its above-described obligation to protect Delta water quality needs.[99] Thus, in times of shortage, the projects are required to proportionately reduce diversions from the Delta in order to protect Delta needs.

The COA also provides that the SWP, which has substantial conveyance capacity, shall be allowed to convey, or "wheel," CVP water from the Delta in exchange for reimbursement of the SWP's incremental costs for conveying the water.[100] Also, the COA provides that the project operators may negotiate a contract for sale of surplus CVP water to the SWP.[101]

The USBR took the position that, although it agreed in principle with the COA, it lacked authority to sign the agreement without congressional approval. Accordingly, the COA was submitted to Congress for approval. In October 1986, Congress authorized the Secretary of the Interior to sign the COA.[102] The authorization amended the Rivers and Harbors Act of 1937,[103] which had originally reauthorized the CVP, to provide that the Secretary is "authorized and directed" to operate the CVP, "in conjunction with the State

98. *Id.* at art. 6(c). The COA also provides that the federal project shall be allowed to capture 55% of the excess water flow, and that the SWP shall be allowed to capture the remaining 45% of the excess flow. *Id.* at art. 6(d)(1).
99. *Id.* at art. 9.
100. *Id.* at art. 10(a)-(c).
101. *Id.* at art. 10(h).
102. 100 Stat. 3050, 3051 (1986).
103. 50 Stat. 850 (1937).

of California water project, [and] in conformity with" state water quality standards for the Delta, unless the Secretary determines that such standards are "not consistent with the congressional directives applicable to the project;" in the latter event, the Secretary must request the United States Attorney General to initiate a judicial action "for the purposes of determining the applicability of such standards to the project."[104] Thus, Congress reaffirmed the principle established by the Supreme Court in *California v. United States*, and made the principle expressly applicable to the CVP. On November 24, 1986, amid considerable fanfare, representatives of the United States and the State of California signed the COA, thus completing the final step of this historic negotiation process.

Conclusion

The *California* decision, which held that state water laws generally apply to federal water projects, has resolved the major controversy that permeated the federal reclamation program during much of its history. In the wake of *California*, several courts have upheld specific state laws as applied to specific federal projects, particularly in California. The main impact of the *California* decision, however, may be in resolving the major jurisdictional dispute between federal and state water agencies, thus allowing these agencies to concentrate on increasing the efficient utilization of the West's sparse water resources. Indeed, in California itself, federal and state agencies have agreed on coordinated operation of the federal and state water projects, thus increasing efficient water uses and creating a model of cooperation that other states may wish to follow.

This is not to suggest that all federal-state conflicts have ended and that no differences remain. To the contrary, much has yet to be decided. The courts have yet to fully clarify the kind of congressional "directives" that will be held to preempt state laws under the *California* decision. For instance, the states' authority to require federal projects to allocate water for purposes not envisioned by Congress has not been fully defined, particularly where the exercise of state authority may affect the relative costs and benefits of the project as understood by Congress. Although future disputes may remain, however, it is increasingly clear that the era of conflict that

104. 100 Stat. 3050 (1986).

dominated much of the early federal reclamation program has given way to a new era of cooperation, one in which federal and state agencies focus more on areas of agreement rather than disagreement. That, perhaps, is the greatest legacy of the Supreme Court's jurisprudence.