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State Control over the Reclamation Waterhole: Reality or Mirage?

Many a less-than-epic Western novel has climaxed in a shootout over a waterhole. While little remains of the West of yesteryear, the feud over the waterhole is still very much alive. Today, however, the combatants are not gun-slinging cowboys, but brief-toting attorneys. The past three decades have witnessed several courtroom showdowns between the Western states and the Department of the Interior's Bureau of Reclamation over water appropriation for the Bureau’s reclamation projects. The states drew the battle lines by trying to use their laws to regulate the Bureau's activities. The Constitution declares a clear winner in most conflicts between state and federal law: the supremacy clause ordains that where Congress exercises constitutional power, its laws are the supreme law of the land. Thus, if every act of the Bureau had the force of an act of Congress, the states would have conceded subservience long ago. But in section 8 of the Reclamation Act of 1902, Congress itself limited the Bureau's independence from state control. It stipulated that federal reclamation plans were not totally exempt from state water laws.

This Note assesses how much state law section 8 saves from preemption. Section I reviews the interplay of state and federal water law in the West. It begins with a brief description of appropriation, the system of water rights found in the Western states, outlines the Reclamation Act of 1902, and then traces the Supreme Court's evolving construction of the Act. It culminates in a discussion of California v. United States, the Court's latest gloss on section 8. Section II expands the analysis of the California decision, integrating it with traditional preemption doctrine. It shows that section 8 respects state law unless a project cannot comply with both a state and federal law or the state law is clearly inconsistent with a federal reclamation goal. Section III then turns to three specific questions left open in California: (1) whether state water law provisions other than those involving appropriation may be applied to federal projects; (2) whether changes in state law may affect a completed federal project;


3. U.S. Const. art. VI.


and (3) whether a state law may block construction of a federal project. The Note concludes that although California does not foreclose all future disagreement, it provides a coherent model for analyzing disputes between the Bureau and the western states.

I. THE HISTORY OF STATE WATER LAW AND THE BUREAU OF RECLAMATION

A. The Appropriation System

The Western states use the appropriation system of water rights, rather than the riparian system common in Eastern states. Under the appropriation system, water rights do not attach to the land bordering a stream or river, but vest in the individual who actually diverts water. Statutes in all the Western states, and the constitutions of many, limit water rights to the amount that an individual beneficially uses. And in times of shortage, earlier appropriators have


7. The riparian doctrine is the system . . . in which owners of lands along the banks of a stream or water body have the right to reasonable use of the waters and a correlative right protecting against unreasonable use by others that substantially diminishes the quantity or quality of water. The right is appurtenant to the land and does not depend upon prior use.

8. See, e.g., CAL. WATER CODE § 1240 (West 1971): "The appropriation must be for some useful or beneficial purpose, and when the appropriator or his successor in interest ceases to use it for such a purpose the right ceases." Both Nevada and New Mexico provide that "[b]eneficial use shall be the basis, the measure and the limit of the right to the use of water." NEV. REV. STAT. § 533.035 (1973); N.M. STAT. ANN. § 72-1-2 (1978).

9. The California provision, CAL. CONST. art XIV, § 3, is typical:

It is hereby declared that because of the conditions prevailing in this State the general welfare requires that the water resources of the State be put to beneficial use to the fullest extent of which they are capable . . . . The right to water . . . is and shall be limited to such water as shall be reasonably required for the beneficial use to be served . . . . See, e.g., ARIZ. CONST. art XVII, § 2; COLO. CONST. art. XVI, § 6; IDAHO CONST. art. XV, §§ 1, 3; MONT. CONST. art. III, § 15.

10. The definition of "beneficial use" is necessarily vague. Several states have attempted to codify a definition. For example:

"Beneficial use" means a use of water for the benefit of the appropriator, other persons or the public, including but not limited to agricultural (including stock water), domestic, fish and wildlife, industrial, irrigation, mining, municipal, power, and recreational uses. A use of water for slurry to export coal from Montana is not a beneficial use.

MONT. REV. CODES ANN. § 89-2911 (4) (Supp. 1977). The statute formerly provided that a " [b]eneficial use' means any economically or socially justifiable withdrawal or utilization of water." MONT. REV. CODES ANN. § 89-2911(d) (1947) (amended 1973). In addition, see Tex. WATER CODE ANN. tit. 2, § 5.023 (Vernon 1972). Examples of judicially defined beneficial uses include the use of water power to operate a flouring mill, Isaacs v. Barber, 10 Wash. 124, 38 P. 871 (1894), and to develop and maintain a power plant. Thompson Co. v. Pennebaker, 173 F. 849 (9th Cir. 1909).

Courts have held the following uses not to be beneficial: diversion of water solely for drainage, Maeris v. Bicknell, 7 Cal. 262 (1857); a claim to water for speculation, Weaver v.
superior claims to those who began using the water later.\textsuperscript{11}

To obtain a right to use water, an individual must apply to a state agency, often the state engineer.\textsuperscript{12} The agency reviews the application, determining whether any unappropriated water in the stream is available. If so, the agency examines the proposed use and may impose conditions to ensure that the water will satisfy the beneficial use requirement.\textsuperscript{13} In several states, the state agency must also ensure that the proposed use is in the "public interest."\textsuperscript{14} If the agency is

Eureka Lake Co., 15 Cal. 271 (1860); the application of water to sage brush land without significantly increasing the growth of native grasses, Vineyard Land & Stock Co. v. Twin Falls Salmon River Land & Water Co., 245 F. 9 (9th Cir. 1917); winter irrigation of land for the purpose of drowning gophers in an area greatly needing water, Tulare Irrig. Dist. v. Lindsey-Strathmore Irrig. Dist., 3 Cal. 2d 489, 568, 45 P.2d 1007 (1935).

South Dakota uses still another statutory route to defining "beneficial use," limiting the amount of irrigation water to two acre-feet of water per acre annually (up to three acre-feet if the method of irrigation or the type of soil requires it). Any use in excess of three acre-feet is per se not a beneficial use. S.D. CODIFIED LAWS ANN. §§ 46-5-4 to -6 (1967 and Supp. 1979). Moreover, an appropriator may be denied his full allocation if he fails to use the entire amount beneficially.

An appropriator's allocation is determined by one of two methods. Water rights antedating modern permit systems are quantified in court-issued decrees arising out of a general adjudication involving the water users on a particular stream. The rights of individuals seeking appropriations after the permit system had been established are quantified in a state-issued permit.

11. See, e.g., Tex. WATER CODE ANN. tit. 2, § 5.027 (Vernon 1972) ("As between appropriators, the first in time is the first in right."). As a result of this basic principle of the appropriation system, the oldest rights to divert from a stream have a much greater economic and practical worth than do relatively recent appropriations.

12. See, e.g., OR. REV. STAT.§ 537.130 (1) (1977); UTAH CODE ANN.§§ 73-3-1, -2 (1953); WASH. REV. CODE § 90.03.250 (1974).

13. The authority of a state agency to attach beneficial use conditions is generally not stated expressly in the statute, but is implied from the duty imposed on the agency by the state statute or constitution prohibiting appropriations unless the beneficial use requirement is satisfied. Tanner v. Bacon, 103 Utah 494, 136 P.2d 957 (1943).

14. The basic difference between the beneficial use and public interest requirements lies in the fact that in-stream values historically have not been accounted for in defining "beneficial use." See note 15 infra and accompanying text. The beneficial use requirement generally balances the relative merits of the proposed water use only against other competing out-of-stream uses. On the other hand, the public interest evaluation is much broader, weighing the proposed use against its impact on the local environment. For example, some statutes order a public interest evaluation even if the beneficial use requirement is satisfied: KAN. STAT. ANN. § 82a-711 (1977). Accord, NEV. REV. STAT. § 533.370(1) (1977); OR. REV. STAT.§ 537.190(1) (1977); WASH. REV. CODE § 90.03.290 (1974). Oklahoma's similar provision applies only to withdrawals of water by the United States:

1. Have the authority to reduce the amount requested for withdrawal; and/or
2. Reject the request for withdrawal in its entirety.

satisfied, it issues a permit authorizing the proposed use for so long as it meets the statutory conditions.

A significant shortcoming of the appropriation system is that until recently an appropriator had to actually divert water from the stream to obtain a vested right in water. Thus in-stream uses — for recreation, fish, and wildlife, among others — could not be valid appropriations. In theory, appropriators could withdraw all the water from a stream, leaving none for in-stream uses. Due in part to growing ecological concerns, several states have recently altered their appropriation systems to protect in-stream uses.

B. The Reclamation Act of 1902

Until late in the nineteenth century, the federal government took a passive role in the development of the West's water resources. Congress's first attempt to help develop irrigation was the ill-fated Carey Act of 1894, which demonstrated that large scale reclamation...
tion projects were not profitable undertakings. To reclaim the West, 
an alternative to private funding would be needed.

The search for a feasible means of reclaiming the arid lands of 
the West bore fruit in the Reclamation Act of 1902. The Act 
created the Bureau of Reclamation (then the Reclamation Service) 
to administer projects that would be funded from the sale of public 
lands. Congress intended to recoup its investment, with the project 
costs to be repaid eventually by the users of the reclamation water. 
Since the turn of the century, Congress has amended the Act several 
times and has authorized specific projects by individual acts. 
There are presently over 165 federal reclamation projects in operation.

In drafting the Reclamation Act of 1902, one of the major ques­
tions was the role state water law would play in the federal reclama­
tion scheme. Congress's ambiguous answer was section 8:

Nothing in this Act shall be construed as affecting or intending 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 rights acquired thereunder, and the Secretary 
of the Interior, in carrying out the provisions of this act, shall proceed 
in conformity with such laws, and nothing herein shall in any way affect 
any right of any state or of the Federal Government or of any 
landowner, appropriator, or user of water in, to, or from any inter-state 
stream or the waters thereof: Provided, the right to the use of water 
acquired under the provisions of this act shall be appurtenant to the 
land irrigated, and beneficial use shall be the basis, the measure, and 
the limit of the right.

419, 421, 431, 432, 434, 439, 461, 491, & 498 (1976)).


(Arch Hurley Conservatory District Project, New Mexico); Act of Dec. 29, 1950, ch. 1183, § 1, 
64 Stat. 1124 (codified at 43 U.S.C. § 600b (1976)) (Canadian River Reclamation Project, 
Texas); Act of Feb. 25, 1956, ch. 71, § 1, 70 Stat. 28 (codified at 43 U.S.C. § 615 (1976)) 
(Washita River Basin Reclamation Project, Oklahoma); Act of Aug. 6, 1956, ch. 980, § 1, 70 
Stat. 1058 (codified at 43 U.S.C. § 615f (1976)) (Crooked River Federal Reclamation Project, 
Oregon).

21. See U.S. DEPT. OF THE INTERIOR, BUREAU OF RECLAMATION, WATER & LAND RE­

43 U.S.C. § 383 (1976), the enumeration "sections 372, 373, 383, 392, 411, 416, 419, 421, 431, 432, 
434, 439, 461, 491 and 498 of this title" is substituted for the words "this Act" that appear in 
the Statutes at Large. These enumerated sections were the original sections of the 1902 Act. It 
is generally assumed that the acts supplementing and amending the 1902 Act incorporated § 8, 
so the specific enumeration in 43 U.S.C. § 383 (1976) should not be taken as a limitation of its 
effect. See Sax, Problems of Federalism in Reclamation Law, 37 U. COLO. L. REV. 49 (1964), 
for an analysis of the effect of § 8 before California.
If Congress had desired, it could have preempted the application of state law to Bureau projects entirely. Section 8, however, indicates that Congress did not exercise its full power, but instead intended state law to govern some aspects of the reclamation projects. The question is, what aspects?

C. The Supreme Court and Section 8

_Ivanhoe Irrigation District v. McCracken_ was the Supreme Court's first significant opportunity to construe section 8, nearly fifty-six years after its enactment. Section 5 of the Reclamation Act imposed a 160-acre limitation on water deliveries from federal reclamation projects. In _Ivanhoe_, the Supreme Court of California had determined that California law forbade such a limitation and had held that section 8 required the Bureau to comply with state law — to deliver water without regard to the 160-acre limitation. The Supreme Court reversed, explaining that “Section 5 is a specific and mandatory prerequisite laid down by the Congress as binding in the operation of reclamation projects . . . . [W]e do not believe that Congress intended § 8 to override the repeatedly reaffirmed national policy of § 5.” The Court cautioned that it was not “passing generally on the coverage of § 8 in the delicate area of federal-state relations in the irrigation field,” but then proceeded to do exactly that: As we read § 8, it merely requires the United States to comply with state law when . . . it becomes necessary for it to acquire water rights or vested interests therein. But the acquisition of water rights must not

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23. Two sources of congressional power would justify the total preemption of state water law affecting federal reclamation projects. First, the commerce clause gives Congress the ability to regulate commerce on navigable streams. U.S. Const. art. I, § 8, cl. 3. See _The Daniel Ball_, 77 U.S. (10 Wall.) 557 (1870); _United States v. Appalachian Elec. Power Co._, 311 U.S. 377 (1940). Second, Congress created Bureau projects under its power to tax and spend for the general welfare, contained in U.S. Const. art. I, § 8, cl. 1. See _United States v. Gerlach Live Stock Co._, 339 U.S. 725 (1950). However, it may be noted that congressional power over reclamation was much less certain in 1902, and § 8 may have been an attempt by Congress to assure that the 1902 Act would not be ruled unconstitutional.

24. Over the years, commentators have expressed a wide variety of views on the extent to which § 8 recognizes state law. These theories have ranged from a “veto theory,” contending that § 8 allows a state to prevent any Bureau project not fully complying with state law, to a “proprietary theory,” which reads § 8 only to require that state law be used for defining the property interests that the Bureau must compensate when it exercises its power of eminent domain. For an explanation of the basis for the veto theory (although not an endorsement of it), see _Sax_, supra note 22, at 62-69. For an elaboration on the proprietary theory, see the Supreme Court opinions discussed in the text at notes 26-40 & 61 infra.


26. 32 Stat. 389 (1902) (codified at 43 U.S.C. § 431 (1976)). Congress inserted the 160-acre limitation into the Act to ensure that one of its major purposes, the settlement of the West by small farmers, would not be frustrated by monopolization and speculation. See _Sax_, supra note 17, at 210.


29. 357 U.S. at 292.
be confused with the operation of federal projects. . . . We read nothing in § 8 that compels the United States to deliver water on conditions imposed by the state.30

The Supreme Court reiterated the Ivanhoe dicta five years later in City of Fresno v. California.31 Fresno had sought a declaratory judgment that California's statutory priority of domestic use over irrigation and watershed-of-origin uses,32 coupled with section 8, prohibited the Secretary of the Interior from giving priority to irrigation users and charging more for municipal water than for irrigation water.33 The Secretary had claimed authority to favor irrigation under section 9(c) of the Reclamation Project Act of 1939.34 Instead of limiting its opinion to the specific conflict between section 9(c) and section 8, and explaining that section 8 was not intended to override specific mandates of subsequent reclamation laws, the Court painted in much broader strokes: "The effect of § 8 . . . is to leave to state law the definition of the property interests, if any, for which compensation must be made."35

The Court continued to espouse a proprietary interpretation of section 8 in Arizona v. California,36 a case arising under the Boulder Canyon Project Act.37 In Arizona, the Court was asked whether state or federal law would govern the distribution of project water to users within the three states principally involved in the project.38 The Court explained:

The argument that § 8 of the Reclamation Act requires the United States in the delivery of water to follow priorities laid down by state law has already been disposed of by the Court in Ivanhoe . . . and reaffirmed in City of Fresno . . . . Since § 8 of the Reclamation Act did not subject the Secretary to state law in [Ivanhoe], we cannot, consistently with Ivanhoe, hold that the Secretary must be bound by state law in disposing of water under the Project Act.39

31. 372 U.S. 627 (1963). Fresno was decided the same day as Dugan v. Rank, 372 U.S. 609 (1963), which involved the same fact situation. The Court's opinion in Dugan provides a more comprehensive review of the issues and factual background than Fresno.
32. CAL. WATER CODE §§ 11460, 11463 (West 1971).
33. 372 U.S. at 629-30.
34. Ch. 418, § 9(c), 53 Stat. 1195 (1939) (codified at 43 U.S.C. § 48h(c) (1976)) provides that "[n]o contract relating to municipal water supply . . . shall be made unless in the judgment of the Secretary, it will not impair the efficiency of the project for irrigation purposes."
35. 372 U.S. at 630.
37. Ch. 42, § 1, 45 Stat. 1057 (1928) (codified at 43 U.S.C. § 617 (1976)). Section 14 of the Boulder Canyon Project Act incorporates the 1902 Act: "This subchapter shall be deemed a supplement to the reclamation law, which said reclamation law shall govern the construction, operation, and management of the words herein authorized . . . ." Ch. 42, § 14, 45 Stat. 1065 (1928) (codified at 43 U.S.C. § 617m (1976)).
38. The Court was also confronted with apportionment of the waters of the Colorado River among the various states of the lower Colorado Basin. 373 U.S. at 551.
39. 373 U.S. at 586-87.
The Court was heavily influenced by the multistate nature of the Project.\textsuperscript{40} It believed that Congress did not intend section 8 to frustrate its comprehensive plan for the distribution of water within a multistate area.

Taken together, \textit{Ivanhoe}, \textit{Fresno}, and \textit{Arizona} appeared to lay to rest any notion that states could regulate federal reclamation projects. After fifteen years of hibernation, however, the savings clause of section 8 reasserted its vitality in \textit{California v. United States}.\textsuperscript{41}

\subsection*{D. \textit{California v. United States}}

In 1933, California authorized the Central Valley Project to reclaim Central California.\textsuperscript{42} The Project "envisioned the coordinated development of the Sacramento and San Joaquin Rivers and their tributaries through a system of physical works to regulate and distribute water needed for agriculture, industrial, and municipal uses in the Central Valley of California."\textsuperscript{43} The state found itself unable to finance the Project, however, and in 1935 it sought and received federal aid.\textsuperscript{44} As phases of the original Central Valley Project were completed, Congress authorized additional units. In 1944,\textsuperscript{45} and again in 1962,\textsuperscript{46} it authorized the New Melones Project, the specific unit whose activities ultimately gave the Supreme Court another look at section 8.

\begin{itemize}
\item \textsuperscript{40} 373 U.S. at 587-88.
\item \textsuperscript{41} 438 U.S. 645 (1978).
\item \textsuperscript{42} Central Valley Project Act of 1933, 1933 Cal. Stat. ch. 1042. For a detailed factual background of the Central Valley Project, see Ivanhoe Irrig. Dist. v. McCracken, 357 U.S. 275, 279-84 (1958); Decision 1422, California State Water Resources Control Board (1973).
\item \textsuperscript{43} United States v. California, 403 F. Supp. 874, 878-79 (E.D. Cal. 1975). Referring to the scope of the Project, the Supreme Court noted that Central Valley is the largest single undertaking yet embarked upon under the federal reclamation program. It was born in the minds of farseeing Californians in their endeavor to bring to that State's parched acres a water supply sufficiently permanent to transform them into a veritable garden for the benefit of mankind. Ivanhoe Irrig. Dist. v. McCracken, 357 U.S. 275, 280 (1958).
\item \textsuperscript{46} The Flood Control Act of 1962, which reauthorized the Project, provides that "the [New Melones] project shall become an integral part of the Central Valley Project, and be operated and maintained by the Secretary of the Interior pursuant to the Federal reclamation laws." Flood Control Act of Oct. 23, 1962, Pub. L. No. 87-874, 76 Stat. 1180, 1191. The New Melones Project provides for a dam on the Stanislaus River, approximately 35 miles northeast of Modesto, California, to create a reservoir impounding 2.4 million acre-feet of water for irrigation, flood control, municipal use, domestic use, industrial use, power, recreation, and water quality control. The waters involved originate and flow totally within the state of California.
\end{itemize}
In issuing appropriation permits for the New Melones Project, the California Water Resource Control Board imposed twenty-five conditions on water use.\(^{47}\) These conditions, attached in the ordinary course of permit evaluation,\(^{48}\) reflected the Board's desire that the proposed use be beneficial and further the public interest.\(^{49}\) The Board was not convinced that the Bureau of Reclamation needed water;\(^{50}\) it feared that the proposed use would interfere with recreational and commercial interests\(^{51}\) and it questioned the value of

47. Ironically, the dispute might have been avoided had California chosen to protect in-stream uses by a method other than attaching conditions to an appropriation permit. If California had used a statute allowing a state agency to set aside water for in-stream use, as Colorado does, the level of water necessary to safeguard in-stream uses would have already been appropriated by the state. See note 16 supra. There simply would not have been as much unappropriated water available for the Bureau. Consequently, the question of the validity of state-imposed conditions would not have arisen.

48. Under California law, an appropriator must apply for and receive a permit before any water is withdrawn. See CAL. WATER CODE §§ 1201, 1250-1258 (West 1971). The Board will issue permits if it determines that there is sufficient unappropriated water and that the proposed use will be reasonable, beneficial, and in the public interest. See CAL. WATER CODE §§ 1240, 1255 (West 1971).

The Bureau has regularly applied to the Board for appropriation permits and has acquired at least 41 since 1945, each containing various conditions. Petitioner’s Brief for Certiorari at 8, California v. United States, 438 U.S. 645 (1978). Until recently, it has consistently complied with these conditions.

In 1972, the Bureau applied for four appropriation permits for the New Melones Project. Numerous individuals, corporations, public agencies, and private associations entered protests to those applications. They objected primarily to the manner in which the Project would be operated, especially regarding the protection of downstream rights, the preservation of water quality, the location of areas to be served by the Project, and the purposes for which water would be used.


50. The lack of evidence the New Melones Project will be needed for consumptive use outside the four basin counties... at any definite time in the future, raises substantial doubt whether permits should be issued to impound more water in New Melones Reservoir, at least at this time, than is needed for satisfaction of prior rights and nonconsumptive purposes — protection and enhancement of fish and wildlife, water quality, recreation and generation of power. Decision 1422, at 17 (1973). The Board noted that the “Bureau has presented no specific plan for applying project water to beneficial use for consumptive purposes at any particular location. Furthermore, the record shows that the CVP has substantial quantities of water that are not being used and are not under contract.” Decision 1422, at 14 (1973).

51. In view of the preponderance of the adverse consequences of maintaining a reservoir of the size proposed by the Bureau, the public interest requires that any permit issued pursuant to applications 14858 and 19304 prohibit the impoundment of water in New Melones Reservoir for consumptive purposes until further order of the Board following a showing that the benefits that will accrue from a specific proposed use will outweigh any damage that would result to fish, wildlife and recreation in the watershed above the New Melones Dam and that the permitee has firm commitments to deliver water for such purpose.

Decision 1422, at 18 (1973). The Board was also concerned about the effect of the Project on the Stanislaus River salmon fishing industry. In addition to further study on the matter, the Board ordered that up to 98,000 acre-feet annually be released at a rate and timing specified by the Department of Fish and Game. The Board felt that it should retain jurisdiction to revise this requirement after further studies were completed. Decision 1422, at 20-21 (1973).
damming the river for hydroelectric purposes.\textsuperscript{52}

Because of these concerns, the Board imposed rather demanding conditions on the New Melones permits. It deferred full impoundment of waters until the Bureau demonstrated a plan for their use.\textsuperscript{53} It also required the Bureau to study further the ecological effects of the Project,\textsuperscript{54} imposed deadlines for construction and for application of the waters to beneficial uses,\textsuperscript{55} demanded access to the Project,\textsuperscript{56} mandated specific construction procedures,\textsuperscript{57} and reserved jurisdiction to impose further conditions to ensure beneficial use of Project water.\textsuperscript{58}

The Bureau vigorously objected to the conditions in the permits and sought a declaratory judgment in the Eastern District of California that it could appropriate water without applying to the Board.\textsuperscript{59} Alternatively, the Bureau contended that when it did apply to the Board as a matter of comity, the Board could not attach conditions to the permit.\textsuperscript{60} After a lengthy review of the legislative history of section 8 and the Supreme Court cases construing it, the district court identified two limited effects of the section. First, the court said, section 8 "requires the federal government to look at state law to define the property interests for which compensation must be made pursuant to . . . eminent domain proceedings [under section 7 of the Reclamation Act]."\textsuperscript{61} Second, it viewed section 8 as reaffirming the doctrine that "states are free to [choose] their own rules of water law"\textsuperscript{62} and that the federal government cannot impose either a riparian or an appropriation system. The court concluded that comity required the Bureau, when acquiring water for projects, to comply with the "forms" of state law, but not the "substance."\textsuperscript{63}

\textsuperscript{52} Decision 1422, at 21-24 (1973). The Board felt that the value of maintaining the river's existing water flow outweighed the value of water storage for hydroelectric production. As a result, the permit issued greatly reduced the Bureau's planned water storage behind the New Melones Dam. Decision 1422, at 24 (1973).

\textsuperscript{53} Conditions 1 and 2, Decision 1422, at 29-30 (1973).

\textsuperscript{54} Conditions 3, 7, 8, 12, and 21, Decision 1422, at 30-35 (1973).

\textsuperscript{55} Conditions 10 and 11, Decision 1422, at 32 (1973).

\textsuperscript{56} Conditions 15 and 16, Decision 1322, at 33 (1973).

\textsuperscript{57} For example, condition 18 required the Bureau to clear the reservoir site of vegetation, and condition 17 required an outlet pipe of adequate size in the stream bed to allow release of water entering the reservoir above the amount authorized for impoundment. Decision 1422, at 34 (1973).

\textsuperscript{58} Conditions 6, 9, 13, 20, and 22, Decision 1422, at 31-35 (1973).


\textsuperscript{60} 403 F. Supp. at 877.

\textsuperscript{61} 403 F. Supp. at 887. This interpretation of § 8 is what is commonly referred to as the "proprietary theory," as opposed to the "veto theory." See note 24 supra. Section 7 of the Reclamation Act, containing the eminent domain provisions, is codified at 43 U.S.C. § 421 (1976).

\textsuperscript{62} 403 F. Supp. at 887-88.

\textsuperscript{63} 403 F. Supp. at 889-90.
Accordingly, the court granted the declaratory judgment for the United States, limited only by a requirement that the Bureau apply to the Board as a matter of comity. The Ninth Circuit affirmed this judgment, but indicated that the Bureau must apply to the Board for a permit as a matter of law rather than of comity.

The Supreme Court reversed the lower courts, explaining that the legislative history of the Reclamation Act of 1902 — particularly that of section 8 — made it "clear that state law was expected to control in two important respects." First, the "Secretary [of the Interior] must appropriate, purchase, or condemn necessary water rights in strict conformity with state law." Second, the "distribution [of waters] to individual landowners would be controlled by state law." The Court expressly disapproved the distinction created by the lower courts between the form and the substance of state law, holding that the legislative history of the Reclamation Act of 1902 made it "abundantly clear that Congress intended to defer to the substance, as well as the form, of state water law." Thus, section 8 allows states to "impose any condition on the control, appropriation, use or distribution of water" by a federal reclamation project that is not inconsistent with clear congressional directives respecting the project.

To reach this conclusion, the Court had to distinguish *Ivanhoe*, *Fresno*, and *Arizona*. It began by restricting *Ivanhoe* and *Fresno* to their facts:

> [W]e disavow the dictum to the extent that it would prevent [states] from imposing conditions on . . . permit[s] granted to the United States which are not inconsistent with congressional provisions authorizing the project in question. Section 8 cannot be read to require the Secretary to comply with state law only when it becomes necessary to purchase or condemn vested water rights. . . . [I]t also requires the Secretary to comply with state law in the "control, appropriation, use or distribution of water."

The majority then distinguished *Arizona*. It explained that the *Arizona* Court had decided that "because of the unique size and multistate scope of the [Boulder Canyon] 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.\textsuperscript{73} Therefore, the \textit{California} Court reasoned, the \textit{Arizona} Court had not needed to reaffirm the dicta of \textit{Ivanhoe} and \textit{Fresno} "except as it related to the singular legislative history of the Boulder Canyon Project Act."\textsuperscript{74} Beyond that particular Act, \textit{Ivanhoe} and \textit{Fresno} stood only for the proposition that "state water law does not control in the distribution of reclamation water if [it is] inconsistent with . . . congressional directives."\textsuperscript{75}

\section{II. INTERPRETING \textit{CALIFORNIA}}

In \textit{California}, the Court construed section 8 to require the Bureau to comply with state law unless it is inconsistent with a clear congressional directive.\textsuperscript{76} Beyond its own facts, \textit{California}'s language offers

\begin{itemize}
\item \textsuperscript{73} 438 U.S. at 674.
\item \textsuperscript{74} 438 U.S. at 674.
\item \textsuperscript{75} 438 U.S. at 668 n.21.
\item \textsuperscript{76} An interesting side issue concerns the meaning of the phrase "congressional directive." This Note assumes that it encompasses the provisions of the reclamation acts and the statutes authorizing specific reclamation projects, but there are problems even with this generalization. "Reclamation law" is customarily defined as "the Act of June 17, 1902 [32 Stat. 388], and all Acts amendatory thereof or supplementary thereto." 43 U.S.C. § 371(b) (1976). But while some laws relating to reclamation state that they are to be deemed a supplement to the reclamation law, a number of important laws that affect reclamation neither describe themselves as such, nor expressly amend existing reclamation law. \textit{See Sax, supra note 17, at 123-25. Professor Sax also notes that reclamation laws are further complicated by the unfortunate circumstances that, because of congressional reluctance to repeal obsolete laws and because of the lack of modern codification, the United States Code continues to carry a number of provisions that are obviously made obsolete by subsequent enactments, and thus in practical effect repealed. \textit{Id.} at 124. Another problem arises when state law conflicts not with a "reclamation law," but with a federal statute outside of the "reclamation law" that in some manner affects the project. Since § 8 specifies that "nothing in this Act" shall affect state law, ch. 1093, 32 Stat. 390 (codified at 43 U.S.C. § 383 (1976)), it is limited to saving state law from preemption by reclamation laws. Presumably, in such situations, an analysis of the legislative history of the federal statute in question would have to be undertaken to see if Congress intended either to occupy the field or in some other manner preempt state law. Section 8 would be irrelevant, and standard preemption doctrines would prevail. \textit{See generally Note, The Preemption Doctrine: Shifting Perspectives on Federalism and the Burger Court, 75 COLUM. L. REV. 623 (1975). A final difficulty involves the administrative rulings and decisions made pursuant to one of the several sections of the reclamation laws that grant the Secretary discretion to enact regulations and establish procedures to implement the legislation. \textit{See, e.g., 43 U.S.C. §§ 373, 440, 485 (1976). Discussing the effect of regulations made by the Secretary, one court explained, "If the rule amounts to nothing more than a regulation, the purport and tendency of which is to carry into full force and effect the provisions of the act to which it refers, it is valid and has the same binding force as the law itself." Clyde v. Cummings, 35 Utah 461, 465, 101 P. 106, 108 (1909). If, on the other hand, the Secretary goes beyond merely implementing the statutes, his regulations and rulings are invalid. In analyzing this situation, one must remember that the Secretary is directed not only by the statute he is implementing, but also by the federalism concerns of § 8. If a conflict arises between state law and the Bureau's regulation or ruling, preemption analysis should center on the underlying statutes which the Secretary is claiming to implement by his regulation. If the statute, under \textit{California}, is a "clear congressional directive" that overrides § 8, and the Secre-
little guidance for resolving future federal-state water disputes. To understand the case's implications, one must place it alongside *Ivanhoe, Fresno,* and *Arizona* in the framework of preemption doctrine, the analysis traditionally used by courts to resolve federal-state disputes. Preemption doctrine dictates that when Congress can legislate constitutionally in a given area, determining whether a state law in that area is preempted is no more than an analysis of congressional intent. If the state law directly conflicts with a federal statute, the state law must yield to the clear congressional desire. If, on the other hand, there is no direct conflict with a federal statute, the validity of the state law hinges on whether Congress intended 1) to "occupy the field" and thereby preclude all state legislation in the area, whether conflicting or not, or 2) to have nonconflicting state laws complement federal laws in the area. The remainder of this Section interprets *California* and its predecessors in light of these standard principles of preemption, scrutinizing the decision's implications for future reclamation controversies.

A. Occupying the Field

The more interesting question in most preemption fights is whether Congress has occupied the field. In the area of reclamation law, however, the language of section 8 seems to indicate clearly that Congress did not intend to occupy the field. Nevertheless, in *California* the Bureau of Reclamation offered an "occupying the field" argument. The Bureau contended that even if Congress in 1902 had intended the Secretary to comply with state law, the array of legislative enactments since that time had resulted in "such a comprehensive set of reclamation laws and policies that [Congress] has left no room for imposition of mandatory state controls or conditions." The Court blandly turned aside that argument, noting that even in

77. When Congress has unequivocally and expressly declared that its action is meant to be exclusive, the state cannot regulate. For example, in *Napier v. Atlantic Coast Line R.R.,* 272 U.S. 605, 613 (1926), the Court found that Congress, by passing the Boiler Inspection Act and vesting the Interstate Commerce Commission with the responsibility to enforce it, precluded a state requirement of safety equipment not required by the Commission. The Court held that "[t]he broad scope of the authority conferred upon the Commission" indicates that Congress "intended to occupy the field." *See also Campbell v. Hussey,* 368 U.S. 297, 302 (1961); *Rice v. Santa Fe Elevator Corp.,* 331 U.S. 218, 229-30 (1947). The courts have usually required a strong showing of congressional intent before declaring that the federal law was intended to exclude state regulation, because any such conclusion "must rest on congressional intent to regulate exclusively — to occupy totally — the field in question." *Wallach, Whose Interest: A Study of Administrative Preemption,* 25 CASE W. RES. L. REV. 258, 263 (1975). *See California v. Zook,* 336 U.S. 725, 733 (1949) ("Congressional purpose to displace local laws must be clearly manifested.").

1902 the Reclamation Act was "not devoid of such directives." To the Court, the presence of mandatory directives together with section 8 in the 1902 Act was sufficient evidence that Congress did not intend by subsequent directives alone to occupy the entire reclamation field. In general, more explicit action would be needed to override section 8's language.

Nonetheless, the Supreme Court seems to have concluded that Congress intended to occupy one corner of the reclamation field, section 8 notwithstanding. The Court in Arizona v. California, impressed by the vast size and multistate character of the Boulder Canyon Project, decided that Congress had intended to preempt completely any state law affecting the Project. In California, the Court distinguished Arizona, reaffirming the unique scope of the Boulder Project. At least in theory, the Court also left open the possibility that other Bureau projects could be classified as "comprehensive."

The general tenor of the California opinion, however, suggests little desire to expand the Arizona exception in the future. Moreover, the Boulder Canyon Project is easily distinguished from most Bureau projects. First, the Boulder Canyon Project touches many states: project water from an interstate stream is distributed to users in Nevada, California, and Arizona. Most of the Bureau's projects, such as the Central Valley Project, distribute water in only one state. And among those projects using water from interstate streams, the Boulder Canyon Project was unusual in that, at the time the project was established, the concerned states had not agreed on a means of assessing their relative rights to water. Therefore, the Act had to apportion water among the states, relying on the Secretary's contracts with water users within the several states. Second, the statutes authorizing the Boulder Canyon Project are far more comprehensive than the authorizing legislation for the rest of the Bureau's projects. Finally, section 5 of the Boulder Canyon Project

79. 438 U.S. at 678 n.31.
80. 438 U.S. at 668 n.21.
82. See generally Corker, Water Rights in Interstate Streams in 2 WATERS AND WATER RIGHTS 293-372. (R. Clark ed. 1967). Three methods exist for states to establish an apportionment of interstate streams: an interstate compact with approval of Congress; an equitable apportionment action within the original jurisdiction of the Supreme Court; and an act of Congress. The last technique was recognized by the Supreme Court in Arizona v. California, 373 U.S. 546, 564-65 (1963), where it approved the apportionment of waters of the lower Colorado River by the Boulder Canyon Project Act.
84. To obtain water from the Project, users had to contract with the Secretary, who was guided in his contracts by the congressional apportionment.
Act is unique in that it authorizes the Secretary to enter into contracts with individual waters users, giving him greater discretion than he possesses under the 1902 Act or any other legislation authorizing a reclamation project.

California and Arizona thus suggest that Congress has occupied the field of reclamation law only where a project distributes water to users in several states, and state laws or compacts do not provide adequate coordination for distributing that water. Furthermore, California hints that the Court will find the necessary intent to occupy the field only where Congress drafts unusually complex and explicit authorizing legislation. California may thus be said to hold that outside the narrow scope of the Arizona exception, state laws regulating federal reclamation projects are presumptively valid unless they directly conflict with a specific federal statute.

B. Preemption by Conflict

Preemption by conflict requires a direct and obvious clash between the state and federal law. Such a clash is clearest when compliance with the terms of both the federal and state directives is impossible. In such cases, the supremacy clause renders the strength of the state interest irrelevant. Courts, however, usually demand a convincing showing of conflict before they will invalidate a state law: "[T]he repugnance or conflict should be direct and positive, so that the two acts could not be reconciled or consistently stand together." 90

Ivanhoe offers an excellent example of a "direct" conflict. California law prohibited restrictions on the acreage a project user could

87. A court might conclude that the Colorado River Storage Project, which provides for development of the Upper Colorado River Basin, is "comprehensive" enough to warrant a finding that Congress intended to occupy the field. The project involves massive development of the water resources in a multistate area faced with some of the same problems as the Boulder Canyon Project. Act of Apr. 11, 1956, ch. 203, 70 Stat. 105, as amended, 76 Stat. 102 (1962), 78 Stat. 852 (1964), 82 Stat. 896 (1968) (codified at 43 U.S.C. §§ 620-620a (1976)).
88. See, e.g., Morgan v. Virginia, 328 U.S. 373, 377-80 (1946); Clover Leaf Butter Co. v. Patterson, 315 U.S. 148, 156 (1942); Union Bridge Co. v. United States, 204 U.S. 364, 399-401 (1907).
90. See also California v. Zook, 336 U.S. 725, 733 (1949); Hines v. Davidowitz, 312 U.S. 52, 67 (1941).
irrigate, while Congress explicitly required a restriction. Similarly, *Fresno* presented a situation where the California priority system of water uses flatly contradicted the priority system set forth in the federal reclamation act. In these cases, the conflicting statutes clearly required a finding of preemption. Since the general respect for state laws expressed in section 8 was not intended to override specific congressional intent expressed elsewhere in the reclamation laws, clearly incompatible state water law cannot survive.

In the more difficult cases, such as *California*, one could comply with both federal and state law, although the state provision may impede attainment of the federal goal. The State Board in California did not absolutely bar completion of the New Melones Dam. It approved the Bureau's application for a permit but required several measures to protect wildlife and ensure "beneficial use" of the appropriated waters. The Bureau never argued that it could not meet the conditions; it argued simply that it did not have to meet them. As a result, the Supreme Court did not decide whether the conditions imposed by the Board were incompatible with the project. The Court held only that if the conditions were not incompatible, the Bureau had to comply with them. It then remanded the case for "additional factfinding."

Under standard preemption theory, where the state law and federal law are not explicitly contradictory, but are potentially inconsistent, the test is "whether, under the circumstances of the particular case, . . . [state] law stands as an obstacle to the accomplishment and execution of the full purpose and objectives of Congress." The Supreme Court has cautioned against preempting state laws due to

92. See text at notes 31-34 supra.
94. See text at notes 59-60 supra.
95. 438 U.S. at 679.
96. Hines v. Davidowitz, 312 U.S. 52, 67 (1941). The Supreme Court applied this principle most clearly in *Sears*, Roebeck & Co. v. Stiffel Co., 376 U.S. 225 (1964), and *Perez* v. Campbell, 402 U.S. 637 (1971). In *Sears*, a state attempted to protect a lamp design that did not qualify for a federal patent. Invalidating the state protection, the Court explained, "Just as a State cannot encroach upon the federal patent laws directly, it cannot, under some other law, . . . give protection of a kind that clashes with the objectives of the federal patent laws." 376 U.S. at 231. *Perez* involved a conflict between § 17 of the Bankruptcy Act, 11 U.S.C. § 35 (1976), and the Arizona Motor Vehicle Responsibility Act, Ariz. Rev. Stat. Ann. §§ 28-1101 to -1225 (1956). The Bankruptcy Act allows the discharge of tort claims, but the Arizona Act provided that an uninsured motorist against whom a judgment had been rendered concerning an automobile accident would have his license and vehicle registration suspended until the judgment was satisfied. The Act specified that a discharge in bankruptcy would not "relieve the judgment debtor from any requirements of the article," Ariz. Rev. Stat. Ann. § 28-1163(B) (1956). The Court invalidated the Arizona law on the grounds that it frustrated the purpose of the Bankruptcy Act, which was to give the debtor a new opportunity in life and a clear field for the future, unhampered by any preexisting debt.
minor potential conflicts with federal law, for to do so would “ignore . . . this Court’s decisions which enjoin seeking out conflicts between state and federal regulation where none clearly exists.”

The Court has been particularly reluctant to preempt state law where the potentially conflicting federal legislation contemplates cooperation between state and federal officials. In *New York State Department of Social Services v. Dublino*, the Court stated, “Where coordinate state and federal efforts exist within a complementary administrative framework, and in pursuit of common purposes, the case for federal preemption becomes a less persuasive one.” In *Dublino*, the New York Department of Social Services required certain employable individuals to receive education and job training if they were to continue to receive AFDC payments. Dublino claimed that the state program conflicted with a similar federal program. Because both the state and federal governments contributed to the AFDC program, the Court hesitated to strike down the state program unless the conflict was significant. It noted that preemption is a “sweeping step that strikes at the core of state prerogative under the . . . program — a program which this court has been careful to describe as a ‘scheme of cooperative federalism.’”

Thus, where a party seeks to preempt a state law related to a program involving “cooperative federalism,” a stronger showing of conflict is necessary to invalidate the state statute. Significantly, the Court in *California* described the Reclamation Act of 1902 as an early example of cooperative federalism.

97. *Huron Portland Cement Co. v. City of Detroit*, 362 U.S. 440, 446 (1960). In *Huron*, Detroit’s smoke abatement ordinance prohibited conduct that federal ship licensing requirements allowed. See also *De Canas v. Bica*, 424 U.S. 351, (1976), where the Court reaffirmed its preference for reconciling the operation of both state and federal statutory schemes with one another rather than holding one completely ousted.

Unfortunately, the line between those cases where the Court upheld the challenged state law and those where it has held the state law preempted is anything but bright. In *Franklin Natl. Bank v. New York*, 347 U.S. 373 (1954), for example, the Court struck down a state statute prohibiting national banks from using the words “savings” or “saving” in their advertisements and business. The Court found that the statute conflicted with §24 of the Federal Reserve Act, 12 U.S.C. § 371 (1952). The Reserve Act authorized national banks to “continue hereafter to receive time and savings deposits.” The Court held that the state prohibition on advertising impaired the power implicitly granted national banks by the Federal Reserve Act.

98. 413 U.S. 405 (1973).
99. 413 U.S. at 421.
102. 413 U.S. at 413.
103. “If the term ‘cooperative federalism’ had been in vogue in 1902, the Reclamation Act of that year would surely have qualified as a leading example of it . . . . Reflective of the ‘cooperative federalism’ which the Act embodied is § 8.” *California v. United States*, 438 U.S. 645, 650 (1978).
Against this doctrinal background, the Court will probably not find many state water law provisions preempted by conflicts with federal reclamation statutes. Most reclamation projects serve several purposes,104 which often conflict with each other. For example, the New Melones Dam had, according to the Court, "the multiple purposes of flood control, irrigation, municipal use, industrial use, power, recreation, water quality control, and the protection of fish and wildlife."105 Yet it is impossible to maximize all of these purposes simultaneously. To control floods best, a reservoir should be emptied immediately after a flood, to be ready for the next one; yet irrigation is best served by filling the reservoir in the spring and gradually drawing the level down during the dry summer months; and for best recreational use, the reservoir should be nearly full at all times.106

State water law will rarely be wholly inconsistent with such multiple purposes. Typically, a state water law will impair one purpose but promote another.107 Thus, instead of clearly frustrating federal purposes, state law will usually establish priorities among the project's conflicting purposes. Section 8 thus gives the states significant latitude to protect and promote the beneficial use of their waters. Of course, Congress may limit or eliminate that latitude by enunciating its own priority of purposes in legislation authorizing a reclamation project. Where Congress has done so, contrary state purposes and priorities must fall. However, under the resuscitated section 8, Congress must express its wish to preempt state law in explicit terms. Since most reclamation projects espouse multiple purposes, some of which are compatible with state water law,108 state rules will control most of the projects to which they apply.


105. 438 U.S. at 651.


107. For example, the State Board in California was particularly concerned that the Project not interfere with in-stream uses for wildlife and recreation. 438 U.S. at 652 n.8.

108. Few of the Bureau's major projects have only a single purpose, and these few generally involve wells and pumping stations, not reservoirs. For instance, the Spokane Valley Project, Washington and Idaho, Pub. L. No. 87-630, § 1a, 76 Stat. 431 (1962) (codified at 43 U.S.C. § 615s (1976)), provides water for irrigation and municipal use, two relatively compatible purposes. (The uses are compatible as both require a gradual use of stored supply during the dry period, with replenishment during the wet period.) If a state impairs the purpose of a single-purpose project (or a project with compatible purposes), it is not merely shifting the priorities among multiple purposes, but is obstructing a clear directive of Congress. In such a case, preemption is indisputable.
III. APPLYING CALIFORNIA

In California, the Supreme Court departed from its restricted construction of section 8 in Ivanhoe, Fresno, and Arizona. But California left unanswered a few specific questions about the scope of section 8's applicability. This Section offers tentative responses to two of these questions.

Does California allow state law to alter existing projects?

California involved state restrictions on a project that the Bureau had not yet built. However, since the Court's opinion mandated that the Secretary conform with state law relating to the “control, appropriation, use or distribution of water,” state water law could also affect existing Bureau projects. Such an application of a new state law is not improbable. A similar problem would arise if state officials had not attempted to apply existing law to a project because of mistaken assumptions about the proper construction of section 8. California suggests that standard preemption doctrine should still govern a retroactive application of the state law. However, the application would have to survive a two-pronged test: The law would have to satisfy the California preemption standard, and it would then have to undergo scrutiny for unconstitutional retroactivity.

While the constitutional implications of retroactive legislation are beyond the scope of this Note, it should be observed that there are several obstacles to applying subsequently adopted state laws to an existing project if the application would threaten the project's

109. 438 U.S. at 674. Although it is conceivable that a future Court might deem this language improvident dicta and limit California to the issue of state appropriation regulations, such a prospect is unlikely.

110. For example, a state safety law relating to dams could require changes in Bureau operating procedures, a new state water quality law might require water releases to meet quality standards, or a state might alter its statutory definition of beneficial use to exclude a use currently made by an individual receiving project water.

111. “A retroactive statute is one which gives to preenactment conduct a different legal effect from that which it would have had without the passage of the statute.” Hochman, The Supreme Court and the Constitutionality of Retroactive Legislation, 73 Harv. L. Rev. 692 (1960).

112. Professor Hochman suggests that courts should weigh three factors to determine the validity of retroactive legislation: (1) the nature and strength of the public interest served by the legislation, (2) the extent of abrogation of the asserted preenactment right, and (3) the degree to which the right has been asserted and enforced prior to the enactment of the statute. Furthermore, he notes that the “Court has consistently held that not all [retroactive] statutes are unconstitutional, but only those which, upon a balancing of the considerations on both sides, are felt to be unreasonable.” Id. at 694-95. See also Slavson, Constitutional and Legislative Considerations in Retroactive Lawmaking, 48 Calif. L. Rev. 216 (1960).

113. State retroactive legislation is often attacked on the ground that it impairs the obligation of contracts. U.S. Const. art. 1, § 10. See, e.g., Veix v. Sixth Ward Bldg. & Loan Assn., 310 U.S. 32 (1940); Home Bldg. & Loan Assn. v. Blaisdell, 290 U.S. 398 (1934). It can also be stricken for depriving persons of property without just compensation or due process. U.S.
economic feasibility. When projects are initiated, the Bureau conducts studies to ascertain whether the project is economically feasible. In this analysis, the Bureau allocates project costs between "reimbursable uses," such as irrigation, industrial uses, and the municipal water supply, all of which return money to the Bureau, and "nonreimbursable uses," such as fish and wildlife management, recreation, and flood control. The Bureau only undertakes projects approaching economic self-sufficiency.\footnote{In reality, Bureau projects have never paid for themselves. Nevertheless, the Bureau does not initiate projects unless it decides that the return of money from reimbursable uses, coupled with public benefits from the nonreimbursable aspects of a project, justify the expenditure required. See A. Gotze, \textit{supra} note 106, at 218-28.} Thus, new state regulations could alter facts about state law that the Bureau had justifiably relied on when it initiated the project. If, for example, a state law required the release of impounded water to enhance stream values, it would reduce the amount available for reimbursable uses. As a result, the federal government would lose funds and be forced to subsidize improvement of the local environment. Of course, the state might compensate the Bureau for the diversion, but compensation might not save government contracts with water users, some of which could not be performed because of the reduced amount of water available to the Bureau. Moreover, by obtaining valid permits and completing construction of a project, the Bureau may acquire vested property rights, just like an individual appropriator. The state would have to compensate the Bureau for taking these property rights in the same manner as it would compensate individual property owners. Thus, any state law that would alter the operation of an existing project should be subject to close examination.\footnote{Presumably, the challenge to most retroactive state laws reducing the capacity of a project would be based either on the contract clause or the due process clause. As Professor Hochman indicates, the Court's decision will be heavily influenced by the public interests served on both sides. Hochman, \textit{supra} note 111, at 694. A typical case might balance the Bureau's interest in having a dependable water supply against a growing public interest in an in-stream use.}

\textit{Does California allow state law to prevent construction of a project completely?}

While the lower courts in \textit{California} ruled that the state must issue the Bureau a permit if unappropriated water exists,\footnote{See text at notes 64-65 \textit{supra}.} the Supreme Court did not specifically address this issue. Several states have provisions authorizing the state board to refuse any appropriation permit if the board determines that it would not be in the public interest.\footnote{See note 14 \textit{supra}.} Thus, unless prevented by clear congressional directives,
these states could theoretically thwart the initiation of a project within their boundaries.

Under the Reclamation Act of 1902, the Secretary was "authorized in his discretion to locate and construct reclamation projects." The California Court believed that the history of section 8 demonstrated that if "state law did not allow for the appropriation . . . of the necessary water, Congress did not intend the Secretary . . . to initiate the project." However subsequent legislation authorizing a project may evince a specific congressional intent that the Secretary be allowed to appropriate or condemn the required water, and thus override the general intent to honor state law embodied in section 8.

As a practical matter, this problem is unlikely to arise. Because reclamation programs almost invariably entail federal-state cooperation, the Bureau will probably not initiate a project unless the states involved have indicated their support. Nevertheless, the Court in California left open the possibility that states might deny the Bureau permits because of their own public interest assessments. California should require the Bureau to respect such assessments, absent a clear contrary signal from Congress.

IV. Conclusion

As a result of California, the states have regained control over their waters, control that earlier decisions construing section 8 had apparently removed. This victory may hold more academic than practical significance, as disputes between the states and the Bureau should seldom reach the courts. All the Western states participate in the planning of new reclamation projects within their borders. Furthermore, since the enactment of the Flood Control Act of 1944, they also review reports of projects proposed by the Bureau. State participation in the planning stages should resolve most state objections before the Bureau undertakes a project.

118. See 438 U.S. at 669 n.21.
119. See 438 U.S. at 669 n.21.
120. No such legislation was before the Court in California, and hence this issue was left unanswered. 438 U.S. at 669 n.21.
121. 58 Stat. 887 (1944) (codified at 33 U.S.C. § 701-1(c) (1976)): "In the event a submission of views and recommendations, made by an affected State . . . sets forth objections to the plans or proposals covered by the report of the Secretary of the Interior, the proposed works shall not be deemed authorized except upon approval by an Act of Congress."
122. A. Golzé, supra note 106, at 111-12.
123. Most state-federal conflicts in reclamation will probably arise either when state law is changed after the initiation of a project, or when there is a significant time lapse between the
However, for those federal-state conflicts over reclamation projects that persist, \textit{California} offers courts new guidelines for interpreting the ubiquitous section 8. It acknowledges congressional occupancy of a narrow field of reclamation law — the law governing the Boulder Canyon Project. It also calls for preemption where it is physically impossible to comply with both state and federal mandates, and where state law is clearly inconsistent with an express congressional purpose. On the other hand, where state law enhances certain federal objectives and incidentally impedes — but does not bar — attainment of others, \textit{California} requires the state provision to control.

Because its holding was limited,\textsuperscript{125} the Court in \textit{California} left many gaps for the lower courts to fill. Most notably, the decision planning stage and the time for requesting an appropriation permit, during which conditions have changed to make the project less attractive to the state. Disputes may also arise as a result of the necessarily vague plans the Bureau has at the project-initiation stage regarding exactly who will receive water and on what terms. This was one of the difficulties in \textit{California}. The California State Water Resources Board was concerned that, at the time of application, the Bureau did not have firm commitments for the use of project water. \textit{See note 52 supra}. However, as a practical matter, the Bureau usually does not enter into contracts with ultimate users until it is assured that it will receive water for its projects.

Where the Bureau’s plans are vague, a state may not realize that the intended use is contrary to state law until after the appropriation permit is granted, and the Bureau enters into contracts with water users. \textit{See, e.g., Environmental Defense Fund v. East Bay Mun. Util. Dist.}, 125 Cal. Rptr. 601 (1978), aff’d., 20 Cal. 3d 327, 572 P.2d 1128, 142 Cal. Rptr. 904, \textit{vacated}, 439 U.S. 811 (1978).


Some states statutorily define beneficial use by excluding certain uses that are deemed not beneficial. \textit{See, e.g., Mont. Rev. Codes Ann.} § 89-2911(4) (1977 Supp.) (use of water to export coal slurry from the state is not a beneficial use). Problems may arise when, after the state has appropriated water to the Bureau, the Secretary in his discretion contracts with a user whose use would not be beneficial. \textit{See note 123 supra}.

A few states specifically limit the amount of water per acre that may be appropriated for irrigation. \textit{See, e.g., Okla. Stat. Ann. tit. 82, § 33 (West 1970). If a Bureau contract exceeded the statutory limit, courts and administrative agencies would face a \textit{California} problem. Finally, many states place dams and reservoirs under the jurisdiction of state administrative officials. Arizona, for example, provides that all dams in the state are under the jurisdiction of the state engineer, and virtually nothing affecting a dam can be done without his approval. \textit{Ariz. Rev. Stat. Ann.} § 45-702(A) (1956). If the state engineer in performing his job decided that some aspect of the dam was unsatisfactory a conflict could arise with officials in the Bureau who believed present operations or structures were satisfactory.

None of these statutory provisions, however, necessarily conflicts with federal reclamation projects. By working together in the planning process, state and federal officials could avoid much litigation and develop projects that better meet the needs of state citizens as well as citizens across the nation.

125. \textit{See text at notes 93-95 supra}.
does not clarify satisfactorily the distinction between intrastate and comprehensive interstate projects such as the Boulder Canyon Project in Arizona. But whatever its shortcomings, the opinion supplies a sound legal framework for supervising the continuing cooperation between states and the Bureau in planning, constructing, and operating reclamation projects.