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Federal Appropriation and the Reclamation Act of 1902

At the turn of the century, a burgeoning nation was in the midst of Western expansion. Hampering this expansion, however, was the simple geographical fact that great areas within the Western states and territories encompassed arid and semiarid land. By the enactment of the Reclamation Act of 1902 . . . Congress concluded that much of these arid and semiarid lands could be made habitable and fruitful by the construction of federally-funded irrigation works.¹

I. INTRODUCTION

The delicate area of state control over federal reclamation projects has been a disputed issue between the federal government and the arid Western states for a number of years. Recent litigation has renewed that dispute. The question involved in these decisions is whether a state may impose conditions on the exercise of a water right granted to the federal government for use on a reclamation project. The resolution of this issue is not easy since both the Western states and the federal government have legitimate interests in the operation of reclamation projects within the states.

The Western states follow the doctrine of prior appropriation in distributing water rights.² Under this doctrine the use of the water is conditioned on the requirement that the water be put to a beneficial use. State law defines what constitutes a beneficial use, and state water boards are generally given the power to impose conditions on the use of appropriated water in order to insure that the water is beneficially used. Although this system is used to control beneficial use for private appropriators, when the appropriator is the federal government a substantial question is raised as to whether the federal government is bound to comply with the conditions imposed by the state.


2. The doctrine of prior appropriation provides an appropriator a right to a specific quantity of water. A priority system is created whereby in times of shortage a senior appropriator's rights will be satisfied first.
In 1902 the federal government undertook a national program to assist the states in establishing irrigation projects. The Reclamation Act of 1902 was enacted for the purpose of controlling and using the unharnessed waters flowing in Western streams. It allowed the reclamation of arid lands in the Western states for the growing of crops. The answer to the question whether the federal government must comply with conditions on use imposed by states is arguably supplied by section 8 of the Act:

Nothing in [this Act] shall be construed as affecting or intended to affect or to in any way interfere with the laws of any State or Territory relating to the control, appropriation, use, or distribution of water used in irrigation, or any vested right acquired thereunder, and the Secretary of the Interior, in carrying out the provisions of such sections, shall proceed in conformity with such laws. . . .

The plain meaning of section 8 would appear to require the federal government, through the Bureau of Reclamation, to obtain rights to appropriate water from the states and follow all state laws relative to use and distribution. Section 8 arguably provides for dual control over reclamation projects. However, as recent litigation indicates, this interpretation of the effect of section 8 has been severely undermined. In fact, it is not unfair to say section 8 is no longer effective insofar as providing states with a veto power over reclamation projects. The interpretation of the language in section 8 as to the relative relationship between the states and the federal government has been the subject of articles by a number of commentators. The various interpretations of the effect of section 8 range from a theory giving the states a full veto power over all aspects of reclamation projects to the view that the only power the states possess is to identify property interests previously vested

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5. See United States v. California, 558 F.2d 1347 (9th Cir. 1977); United States v. California, 403 F. Supp. 874 (E.D. Cal. 1975).
under state law. Early interpretations of section 8 by the United States Supreme Court indicated that it was necessary for the federal government to comply with state laws governing the acquisition of water rights. However, later decisions appear to limit the federal government to complying only with its constitutional obligation to pay for property rights vested in individuals by state law. The following interpretation is endorsed by the majority of the commentators:

Obviously section 8 is not, and never was, a recognition of the supremacy of state law in water development, nor even of "the supremacy of state law in respect of the acquisition of water for the reclamation of public lands . . . ." The United States may acquire water rights in a manner which may be inconsistent with state law, e.g., inverse condemnation, and for purposes inconsistent with state law, e.g., distribution without preference to users within a watershed. Furthermore, it may distribute the water without regard to state law. Nor can section 8 and similar statutes be invoked to prevent construction of projects authorized by federal law and forbidden by state law. The practical effect of section 8 and its counterparts is to "leave to state law the definition of the property interests, if any, for which compensation must be made," provided, of course, that such interests are property within the meaning of the fifth amendment. The old argument of the United States seems to be correct: section 8 is directory, not mandatory. This is not necessarily because the Government owns all the unappropriated water, but rather because Congress has authorized federal conduct inconsistent with state law and thereby shown that section 8 refers to state law for a standard of compensation rather than of conduct.

The Bureau of Reclamation has consistently taken the position that it need not acquire its water rights under a state’s appropriation laws. The Bureau maintains that if it elects to acquire its water rights under state law, it is only as a matter of comity. The Bureau contends that the states must issue an appropriative permit if unappropriated water is available. As a corollary, the Bureau asserts that the states may not impose any conditions or uses in the permit. The justification for this position is that the approval of the federal reclamation project by Congress manifests sufficient evidence that the water will be beneficially used.

7. See 2 Waters and Water Rights, supra note 6, § 124, at 280.
12. Id. at 281.
As evidenced by recent cases, the Western states read section 8 to require the federal government to apply for and receive a state water permit in order to appropriate water within a state. The position of the states is that the Bureau of Reclamation is bound under section 8 by the terms and conditions which a state attaches to the water right. One commentator in 1960 wrote:

One thing is clear from Section 8: the water right for a Reclamation project is an appropriation depending for its existence on the law of the state of its location. Substantively, it is exactly like other water rights in that state, subject to the same definition and the same limitations as are rights held by individuals.

... It is an appropriation that can only be based on beneficial use.

California recently asserted that if the conditions in the permit do not impair the purposes of the federal reclamation project, then the Bureau should have to comply with the conditions set forth in the permits. The justification for this argument rests primarily on public policy reasons.

The United States Court of Appeals for the Ninth Circuit in United States v. California was recently confronted with the problem of state control over federal reclamation projects. The primary question addressed by the court was whether section 8 of the Reclamation Act of 1902 required the federal government, when seeking to acquire unappropriated water for a reclamation project, to comply with state procedures applicable to the appropriation of water. In answering this question, the court also addressed the question whether the Bureau of Reclamation can acquire water rights to state waters independent of state laws. Since the court held that section 8 does require the Bureau to at least comply with the "forms" of a state's appropriation laws, the next question addressed was whether a state may attach conditions to the use of the water. In holding that a state may not condition the use of the water right by the Bureau, the court ignored the question of whether the conditions imposed by California actually conflicted with a specific federal law or the purpose of the reclamation project. The court's answer to these questions necessarily turned on its interpretation of section 8.

In United States v. California the ninth circuit held that section 8 does require the Bureau to comply with the "forms" of state laws.

14. Id.
16. 558 F.2d 1347 (9th Cir.), cert. granted, 98 S. Ct. 608 (1977) (No. 77-285).
This holding rejects the proposition that the federal government can acquire water rights independent of state law. However, the court held that the state must grant the permit to the Bureau if there is unappropriated water available, and that the Bureau is not required to comply with the conditions imposed by state water boards. The court thus rejected the contention of California that it could condition the exercise of the Bureau's water right. The ninth circuit, in reaching this conclusion, relied heavily on the district court's finding:

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

Despite the fact that the ninth circuit's decision in United States v. California was predictable in light of recent Supreme Court cases, it still came as a shock to the Western states. These states have zealously guarded the precarious control they exercise over federal reclamation projects. This decision has effectively accomplished what the Western states have feared most—the substitution of federal administrative control for the appropriative system of water rights.

This comment will explore the various problems regarding the effect on the administration of state water systems created by the ninth circuit's opinion. The solution to the conflict raised by states imposing conditions on the use of water rights acquired by the Bureau is not an easy one. Neither the state veto theory nor the ninth circuit's complete displacement of state law seems to be the proper solution. The position advanced by the state veto theory is unrealistic in light of the valid interests of the federal government. The ninth circuit ignored the interests of the states in having some input into the use of water in their states.

A possible solution is the proposed legislation advanced by the National Water Commission in 1971. The National Water Commission recommended that the federal government, by legislation, adopt a policy of recognizing and following state water law as long

17. Id. at 1351.
18. Id.
19. 403 F. Supp. at 902.
as the state laws are consistent with and appropriate to federal purposes. This view is neither radical nor new. In fact, it finds ample support in the Supreme Court decisions in this area. The National Water Commission's proposal would not allow states to condition the exercise of water rights held by the Bureau if the condition is inconsistent with the operation of the reclamation project. Under this approach, these conflicts would be resolved by determining whether the conditions imposed by a state on the exercise of a water right are consistent with or impair the federal purposes of the Act. It would allow a state to impose reasonable conditions that do not impair the purposes of a particular project. Under this view there must be a determination as to whether the conditions impair the purposes of a project. It recognizes that states have a limited interest in controlling water rights granted to the federal government.

II. UNITED STATES V. CALIFORNIA

A. History

After the enactment of the Reclamation Act of 1902, Congress authorized several reclamation projects in the Western states. One such project was the Central Valley Project, a large project consisting of dams, reservoirs, and waterways in California. The purpose of the project was to regulate and distribute water for agricultural, industrial, and municipal uses in the Central Valley of California through a system of physical works. One of the units of the Central Valley Project was the New Melones Project. The New Melones Project provided for a dam on the Stanislaus River to create a reservoir for flood control, irrigation, municipal, indus-

22. Id.
24. The Reclamation Act of 1902 authorizes the construction and operation of federal reclamation projects in 16 Western states. Ch. 1093, 32 Stat. 388 (1902), provides that Arizona, California, Colorado, Idaho, Kansas, Montana, Nebraska, Nevada, New Mexico, North Dakota, Oklahoma, Oregon, South Dakota, Utah, Washington and Wyoming are subject to the Act.
28. The New Melones Project was originally authorized by the Flood Control Act of December 22, 1944, Pub. L. No. 78-534, 58 Stat. 887, and
The federal government, through the Bureau, applied to the California State Water Resources Control Board (State Board) for the right to appropriate unappropriated water from the Stanislaus River for development of the New Melones Project. The regular practice of the Bureau was to apply to the State Board in accordance with California law for permits to appropriate water.

In order to appropriate water in California, the appropriator must apply for and receive a permit issued by the State Board. The California permit system is similar to those of other Western states receiving water from reclamation projects. The State Board issues a permit if there is unappropriated water available and the proposed use is reasonable and beneficial. Under California law the State Board is also authorized to impose conditions which will insure that the proposed use is beneficial and in the public interest. The State Board has always contended that the Bureau, like any other appropriator, must apply for and receive a permit from the State Board in order to appropriate water.

The Bureau's application for water rights was divided into two requests. The Bureau applied directly to the State Board for its own permit to appropriate, and the Bureau sought to have approved the assignment to it of permit applications previously filed by the State Department of Finance. The relative advantage of obtaining the assigned rights was that the priority date would have been 1927, thus giving the Bureau seniority over many other appropriators.

30. 403 F. Supp. at 880.
31. Id.
33. See Attwater, supra note 11, at 283.
35. See Attwater, supra note 11, at 283-84.
36. United States v. California, 403 F. Supp. at 880. The State Department of Finance had agreed to the assignment of the permit application subject to the approval of the State Board. Under applicable California law, an applicant's priority date depends on the date of application for the permit and not the date the application is approved. See CAL. WATER CODE §§ 1450, 1455 (West 1971). The State Department of Finance submitted applications in 1927.
In April of 1973, in response to the water application filed by the Bureau, the State Board issued its decision. It granted the assignments sought by the Bureau and allowed permits to be issued for all the applications. However, the decision also imposed various terms and conditions in all the permits. Although the State Board authorized the Bureau to immediately impound water for some project purposes, the impoundment of water for agricultural, municipal, and industrial uses was deferred until the Bureau developed a plan for the use of the water that would show a definite need. Other conditions imposed by the State Board limited consumptive use to four named counties, prohibited off-season water collection and storage to offset seepage, prohibited the use of any water outside the counties of origin if necessary for development of those counties, prohibited additional impoundment for power or recreation, and limited the amount of water that could be impounded for fish and wildlife preservation.

The State Board, in subjecting the permits to the above conditions, was concerned with a number of items. Its primary concern was the belief that the limited unappropriated resources of California should not be committed to an applicant in the absence of a specific showing of actual need for the water, either at the present time or within a reasonable time in the future. The State Board also stated that the Bureau had not presented a specific plan for applying the water at any particular location, and that the Central Valley Project had substantial quantities of water available that were not being used. The State Board concluded:

The limited unappropriated water resource of the State should not be committed to an applicant in the absence of a showing of his actual need for the water within a reasonable time in the future. When the evidence indicates, as it does here, that an applicant already has a right to sufficient water to meet his needs for beneficial use within the foreseeable future, rights to additional water should be withheld and that water should be reserved for other beneficial uses. In this case, existing surplus supplies that are available to the Bureau should be utilized before storage is allowed in New Melones Reservoir to satisfy demand for more water in service areas outside of the four basin counties.

Under applicable state law the State Board was required to determine whether an intended water use is reasonable, beneficial, and in the public interest. This determination necessarily required a

37. 403 F. Supp. at 880.
38. Id. at 881-82.
39. Id.
40. Id.
41. Attwater, supra note 11, at 284-85.
balancing of competing demands and public policy considerations. The State Board found, pursuant to the statutory authority, that public interest considerations of preserving white water boating, water quality, downstream prior rights, stream fishing, and wildlife habitat on the Stanislaus River should be "protected to the extent that water is not needed for other beneficial uses." The State Board stated that until the Bureau could demonstrate the proposed use would be reasonable and beneficial, no water could be impounded for those purposes. The State Board reserved jurisdiction over the Bureau's application until the Bureau developed a plan for the use of the water.

Thus, the decision does not bar the impoundment of water for consumptive use; it only requires that, before any such water is impounded, the Bureau must show that a firm commitment exists to deliver the water and that the benefits of any specific use outweigh the damage to fish, wildlife and recreation.

B. Analysis of the Opinions

The ninth circuit, in arriving at its opinion in United States v. California, relied heavily on the analysis supplied by the district court. The district court opinion adopts the assumption that Congress, under the authority of the supremacy clause, and because of the national implications of reclamation projects, could allocate all the power and control over federal reclamation projects to the federal government without reserving any control to the states. The United States argued that Congress did in fact reserve all the power and control over this area in itself when it enacted the Reclamation Act of 1902. California, on the other hand, contended that the primary intent of the Reclamation Act of 1902 was to allow the federal government physical operational control over reclamation projects. Under California's interpretation of section 8, the federal government would be required to comply with state law in the appropriation of unappropriated water for project use.

42. 403 F. Supp. at 882.
43. Attwater, supra note 11, at 286.
44. 558 F.2d 1347 (9th Cir. 1977).
46. U.S. Const. art. VI, cl. 2.
47. 403 F. Supp. at 883. See also Ivanhoe Irr. Dist. v. McCracken, 357 U.S. 275, 294 (1958). California conceded that even if the states could impose terms and conditions on federal reclamation projects, this power would be subject to two limitations: (1) the state cannot infringe on specific grants of power to the federal government, and (2) the state can only control unappropriated water. 403 F. Supp. at 883 n.12.
Thus, the essential dispute as characterized by the district court was "not whether Congress could preempt the field, but whether the Congress has chosen to do so."\(^4\)

In an attempt to discern the intended role of section 8, the district court set forth several lengthy quotations from the legislative history of the Reclamation Act of 1902.\(^4\) The district court concluded that the legislative history of section 8 does not make the role of state law clear because of partisan statements of advocates on both sides. However, the district court stated that the legislative history revealed that state law has at least two functions under section 8 of the Act: (1) it requires the federal government to look to state law in order to define the property interests for which compensation must be paid under the eminent domain procedures set forth in section 7;\(^5\) and (2) it reaffirms the doctrine that states are free to apply their own rules of water law and the federal government cannot force any particular type of water system upon states.\(^5\)

The district court stated, "[s]ection 8 was not written upon a clean slate, but rather, on the overlay of prior federal law."\(^5\) As an example of the federal legislation upon which section 8 was modeled, the district court pointed to the Desert Land Act of 1877.\(^5\) The district court cited California Oregon Power Co. v. Beaver Portland Cement Co.,\(^5\) in which the Supreme Court stated that the Desert Land Act was fully consistent with the doctrine that states are free to apply their own water laws:

> The Desert Land Act does not bind or purport to bind the states to any policy. It simply recognizes and gives sanction, in so far as the United States and its future grantees are concerned, to the

\(^4\) 403 F. Supp. at 883.
\(^4\) Id. at 884-87.
\(^5\) Id. at 887. The district court quoted Congressman Martin:
> "[Section 7] should be read in connection with section 8, which is in the nature of a limitation upon this section. Section 8 provides that the Secretary of the Interior, when proceeding under this act, must proceed in conformity with the State laws. It therefore makes, taking the two sections together, simply an instruction to the Secretary of the Interior to invoke the aid of the State laws upon the subject of eminent domain where necessary."


\(^5\) 403 F. Supp. at 887. See also Kansas v. Colorado, 206 U.S. 46 (1907).
\(^5\) 403 F. Supp. at 887.
\(^5\) Desert Land Act, ch. 107, 19 Stat. 377 (1877).
\(^5\) 295 U.S. 142 (1935).
state and local doctrine of appropriations, and seeks to remove what might be an impediment to its full and successful operation.\textsuperscript{55}

The district court concluded that the apparent purpose of section 8 was to recognize and sanction state law doctrines of appropriative rights and to protect prior rights granted to individual water users by the states.\textsuperscript{56} Under this interpretation the federal government must at least comply with the procedural aspects of state law. The congressional history of the Act, according to the district court, evidenced a broad federal purpose in the operation and control of federal reclamation projects. However, this authority would not permit a total usurpation of state sovereignty:

\textit{[T]he federal government is required, when acquiring water for federal reclamation projects, to comply with the forms of state law, including application to state water boards where necessary, for two purposes: (1) to enable the state to determine, according to its law, whether there is sufficient unappropriated water available for the project; and (2) to give notice to the state of the scope of the project.}\textsuperscript{57}

The district court also reviewed several judicial decisions involving section 8 in an attempt to gain insight to the question presented in the case.\textsuperscript{58} After analyzing the effect of these decisions, it stated "that the cases cited and relied upon by both the United States and by California are more supportive of the position advanced by the United States, than of the position of California."\textsuperscript{59} None of the cases reviewed directly answered the question before the court, that is, whether the federal government must submit to state law in acquiring water for a reclamation project.

California also argued at the district court level that Congress, through a number of legislative acts passed subsequent to the 1902 Act, has consistently intended to provide the states with primary responsibility over water use.\textsuperscript{60} The court surmised that

\textsuperscript{55} Id. at 164.
\textsuperscript{56} Section 8 does not bind or purport to bind the states to any policy, but recognizes and gives sanction, as far as the United States and its grantees are concerned, to the state law doctrine of appropriative rights to water. In this regard, also, Section 8 guards prior rights granted by the individual states to individual water users.
\textsuperscript{403} F. Supp. at 888.
\textsuperscript{57} Id. at 889-90.
\textsuperscript{59} 403 F. Supp. at 893.
\textsuperscript{60} Id. at 893-94. The specific acts relied on by California were (1)
although the acts cited by California indicate a strong Congressional intention to include the States and state law in the planning process and to ensure federal-state cooperation in projects, it cannot be said that these acts indicate by analogy or otherwise, a Congressional intention to abdicate the federal government’s responsibility to develop and operate reclamation projects.61

In conclusion the district court held:

(1) The United States can appropriate unappropriated water necessary for use in any federal reclamation project within the State of California, but must first, in accordance with comity, apply to the California State Water Resources Control Board for a determination by that Board of the availability of unappropriated water;

(2) When the United States submits applications to the California State Water Resources Control Board, that Board must grant such applications if unappropriated waters are available;

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

(4) [The decision] is void in all respects where it attempts to impose terms and conditions of any kind upon the acquisition by the federal government of unappropriated waters as said terms and conditions may relate to the control, development or operation by the federal government of the New Melones Project.62

The ninth circuit affirmed the district court’s granting of summary judgment to the United States.63 The decision was affirmed substantially on the same grounds discussed by the district court. However, the ninth circuit decision noted that two recent decisions of the United States Supreme Court strengthened the position of the United States.64 The court cited Hancock v. Train65 and Environmental Protection Agency v. California ex rel. State Water Resources Control Board,66 as evidence of the Supreme

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61. 403 F. Supp. at 895-96.
62. Id. at 902-03.
63. United States v. California, 558 F.2d at 1349.
64. Id.
Court's reluctance to subject federal installations to state permit requirements.\(^6\)

In *Hancock* the issue was whether section 118 of the Clean Air Act\(^6\) permitted a state to require a federally owned or operated installation to obtain a permit to operate. The Supreme Court stated:

Kentucky, like the Court of Appeals for the Fifth Circuit in *Alabama v. Seeber...* finds in § 118 a sufficient congressional authorization to the States, not only to establish the amount of pollutants a federal installation may discharge, but also to condition operation of federal installations on serving a state permit. We disagree because we are not convinced that Congress intended to subject federal agencies to state permits. We are unable to find in § 118, on its face or in relation to the Clean Air Act as a whole, or to derive from the legislative history of the Amendments any clear and unambiguous declaration by the Congress that federal installations may not perform their activities unless a state official issues a permit.

... In view of the undoubted congressional awareness of the requirement of clear language to bind the United States, our conclusion is that with respect to subjecting federal installations to state permit requirements, the Clean Air Act does not satisfy the traditional requirement that such intention be evidenced with satisfactory clarity. Should this nevertheless be the desire of Congress, it need only amend the Act to make its intention manifest.\(^6\)

In *Environmental Protection Agency*, the Supreme Court came to a similar conclusion as to the effect of section 313\(^7\) of the Water Pollution Control Act Amendments of 1972\(^7\):

Our decision in this case is governed by the same fundamental principles applied today in *Hancock v. Train...* Federal installations are subject to state regulation only when and to the extent that congressional authorization is clear and unambiguous....

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67. 558 F.2d at 1349.
69. 426 U.S. at 180, 198 (footnotes omitted) (citations omitted).
70. Section 313 provides that federal installations must “comply with Federal, State, interstate, and local requirements respecting control and abatement of air pollution to the same extent that any person is subject to such requirements.”
Except for the reference to service charges, § 313 is virtually identical to § 118 of the Clean Air Act. . . . Taken alone, § 313, like § 118 of the Clean Air Act, states only to what extent—the same as any person—federal installations must comply with applicable state requirements. Section 313 does not expressly provide that federal dischargers must obtain state NPDES permits. Nor does § 313 or any other section of the Amendments expressly state that obtaining a state NPDES permit is a "requirement respecting control or abatement of pollution." 72

The ninth circuit compared section 8 to the statutes in Hancock and Environmental Protection Agency and concluded that it was no more specific in subjecting federal projects to state permit requirements than those statutes. 73 The court conceded it was arguable that when Congress enacted section 118 of the Clean Air Act and section 313 of the Water Pollution Control Act Amendments of 1972—because the use of state permits to enforce these laws was well known—Congress intended that the federal government submit to state law. However, the Court noted that this argument was rejected by the Supreme Court in Hancock and Environmental Protection Agency, where the sections were interpreted not to require compliance with state permit requirements. The ninth circuit pointed out that the above argument would not even be applicable in the situation, because when section 8 of the Reclamation Act was adopted in 1902, California's permit requirement did not exist. 74 In conclusion, the ninth circuit stated: "To read § 8 of the 1902 Act as requiring compliance with laws that did not then exist and procedures not made compulsory by California until 1923—over 20 years later—would fly in the face of the Hancock and Environmental Protection Agency decisions." 75

The ninth circuit did, however, disagree with one aspect of the district court's decision. The court stated that the phrase "in accordance with comity" 76 should be stricken from the order requiring the United States to apply to the State Board for a determination of the availability of unappropriated water. 77 The court said the application for determination of availability of water from the state is a legal requirement of section 8, not a matter of comity. The federal government must recognize and cannot nullify those water rights created and vested by state law. 78

72. 426 U.S. at 211-13 (footnotes omitted).
73. 558 F.2d at 1350.
74. Id.
75. Id. at 1350-51.
76. 403 F. Supp. at 902.
77. 558 F.2d at 1351.
78. Id.
The majority opinion was not unanimous. Judge Wallace, concurring and dissenting, stated that although he agreed that section 8 was neither clearer nor more equivocal than the sections rejected in the Supreme Court cases, he disagreed that those decisions foreclosed federal compliance with state imposed permits. He concluded that only legislative action will provide an adequate solution.\(^7\)

The ninth circuit foreclosed the state from attaching any conditions to a water permit granted to the Bureau. In fact the decision only required the Bureau to apply to the state for a determination of the availability of unappropriated water. In effect, there is no permit to which the conditions can be attached. The ninth circuit rejected the approach offered by California that a state can attach conditions to the use of water but only to the extent that the conditions are not inconsistent with congressional purposes underlying the particular reclamation project. Whether such a conflict existed in *United States v. California* was not addressed by the court. Congressional approval was viewed as sufficient evidence of beneficial use.

### III. SECTION 8 OF THE RECLAMATION ACT OF 1902

The decision of the ninth circuit in *United States v. California* is of historical significance in the checkered field of federal and state water relations. In the past, the Bureau of Reclamation has consistently complied with the appropriation laws of the Western states in acquiring rights to appropriate unappropriated water for

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79. Although recent Supreme Court decisions leave me with no clear concept of what Congress must say in order to require the federal government to comply with state law, I am persuaded that the language of the statute reviewed here is insufficient to validate California's permit procedure. While the "shall" in section 8 of the 1902 Reclamation Act appears to be mandatory, and while the Bureau of Reclamation's conduct over nearly three-quarters of a century indicates that it had no doubt of the necessity for compliance with state law, I cannot say that the language of the section is any clearer or less equivocal than that rejected as insufficient in *Hancock v. Train,* . . . and *E.P.A. v. California ex rel. State Water Resources Control Board.* . . . Thus, with reluctance I concur that the statute does not require the Bureau of Reclamation to secure, pursuant to state law, the permit in question.

However, unlike the majority, I would go no further. Nothing in *Hancock* or *EPA* necessarily forecloses federal compliance with state-imposed requirements not involving permits. Indeed, the more than 70 years of cooperative development of water resources in the West under the Reclama-
federal reclamation projects. However, at the same time the Bureau has maintained that it did so only as a matter of comity. The basic issue presented by United States v. California is not whether the Bureau should be required to apply to the state for a determination of the availability of unappropriated water, but whether a state can subject the right to appropriate available unappropriated water to a reasonable condition such as a demonstration of actual need, consistent with the public policy of the state. The decision effectively frees the Bureau from compliance with conditions imposed by the states even when its practice would be inconsistent with the public policy of the state. However, congressional approval demonstrates that the project is consistent with the public policy of the federal government. If the Bureau were allowed to appropriate water without ascertaining beforehand whether any unappropriated water was available, the effect would be to displace vested water rights granted by the state. One thing is clear and unambiguous about section 8—its primary purpose was to protect existing water rights granted under state law. The ninth circuit made it clear that the Bureau does not acquire its right independent of state law, and it must at least comply with the forms of state law. If the Bureau were allowed to circumvent the states' permit systems altogether, the states would be unable to administratively quantify the amount of water taken by the Bureau. Such information is needed in order to grant other water rights and to properly allocate state waters.

United States v. California raises several important questions, some answered and others unanswered. A majority of them turn directly on the interpretation attached to section 8: (1) whether the federal government can acquire its right to appropriate water independent of state law; (2) if not, whether section 8 requires the United States to comply with the forms or substance of state appropriation laws; (3) if federal compliance with state permit requirements is required, whether a state may impose conditions on the exercise of that right; (4) whether the imposition of conditions on a state issued water right is necessary in order to insure that the water is put to a beneficial use; (5) whether the determination Act attest to the wisdom in providing non-exclusive control over this limited asset.

Id. at 1351-52 (Wallace, J., concurring and dissenting) (footnote omitted).

80. In fact, the Bureau had acquired 41 conditionally approved appropriation permits from the State Board since 1938. 403 F. Supp. at 898-99.
of beneficial use lies exclusively within the provinces of the states; (6) whether the ninth circuit decision conflicts with the Supreme Court's analysis of section 8 in Nebraska v. Wyoming, Ivanhoe Irrigation District v. McCracken, City of Fresno v. California, and Arizona v. California; and (7) whether Hancock and Environmental Protection Agency render section 8 meaningless and foreclose the imposition of conditions on a water right.

A. Reservation Doctrine

An issue not addressed by the ninth circuit in United States v. California is whether the federal government can acquire its right to appropriate water independent of state law or whether it acquired such rights under the "implied reservation" doctrine at the time each federal reclamation project was authorized by Congress.81

In Winters v. United States82 the Court introduced the doctrine that the reservation of federal lands impliedly reserves the waters needed for the purposes of a reservation, independent of the laws of appropriation.83 The rationale of the Winters doctrine is that the federal government by reserving land also reserves the amount of water necessary to beneficially use the land. Any rights acquired after a reservation of land are junior to those of the federal government.84

Recently in Cappaert v. United States,85 the Supreme Court held that Congress has authority under the property clause86 to reserve unappropriated groundwater for use on federal lands that have been withdrawn from the public domain. The Court applied the rationale of the Winters doctrine—that Congress intended to exercise that authority at the time the lands were withdrawn from the public domain.87 An immediate question raised is whether the "implied reservation" doctrine is available to the federal government when the lands are acquired by purchase or condemnation as op-

81. See Goldberg, supra note 6, at 19; F. TRELEASE, supra note 20, at 104.
83. 207 U.S. at 577.
84. See F. TRELEASE, supra note 20, at 105.
86. U.S. CONST. art. IV, § 3, cl. 2.
posed to being withdrawn from the public domain as in Cappaert. The lands to be used for the New Melones Project which were the subject of the dispute in United States v. California were acquired by purchase and condemnation.

The initial inquiry is whether Congress intended this result. The following describes the operation of the reservation doctrine:

If the United States, by treaty, act of Congress or executive order reserves a portion of the public domain for a federal purpose which will ultimately require water, and if at the same time the government intends to reserve unappropriated water for that purpose, then sufficient water to fulfill that purpose is reserved from appropriation by private users. The effect of the doctrine is two-fold: (1) When the water is eventually put to use the right of the United States will be superior to private rights in the source of water acquired after the date of the reservation, hence such private rights may be impaired or destroyed without compensation by the exercise of the reserved right, and (2) the federal use is not subject to state laws regulating the appropriation and use of water.88

The reservation doctrine has been applied only when water is needed for use on reserved lands; it involves only the amount of water needed for reserved lands that state law cannot prevent from being taken.

Section 8, on its face, is evidence that Congress did not intend to reserve unappropriated water for use on reclamation projects. Section 8 requires the federal government to at least acquire its water rights for reclamation projects under the forms of state law. The "implied reservation" doctrine has been applied only to situations, such as in Winters and Cappaert, in which water is used on federal lands for federal purposes. It should not be extended to reclamation projects involving the use of water on private land by private users. The ninth circuit in United States v. California, by endorsing the opinion of the district court, apparently has adopted the same position. The district court stated that one of the functions of section 8 was to insure that prior appropriative rights granted by the states to individual water users would be protected.89 In that regard the federal government should, at the very least, be required to apply to the state for a determination of the availability of unappropriated water.90

B. Interpretations of the Effect of Section 8

Assuming that the federal government cannot obtain water for a reclamation project independent of state law, then the issue be-

88. F. TRELEASE, supra note 20, at 109.
89. 403 F. Supp. at 890.
90. Id.
comes to what extent section 8 requires the Bureau of Reclamation to comply with state law in the acquisition of water rights. The argument generally advanced by the states is that Congress, by the adoption of section 8, voluntarily subjected the federal government to state control over water development.\footnote{91} This means that the states could exercise a veto over the operation of federal reclamation projects. Another argument, advanced by the federal government and a majority of commentators, is that the language of section 8 is merely directory, not mandatory. Under this view, section 8 merely requires the federal government to refer to state law for a determination of vested property rights which are compensable.\footnote{92} Another view can be based on Supreme Court decisions in the area. The decisions interpreting section 8 have concluded that state law must defer at least to specific and mandatory federal laws.\footnote{93} These cases would seemingly leave section 8 some room to operate when state law is consistent with the federal policy underlying a particular reclamation project.

The federal government's basic position on the interpretation of section 8 has been termed the proprietary theory.\footnote{94} Under this theory, section 8 deals only with the definition of vested property interests and not with the administration of reclamation projects. The federal government would only defer to that portion of state law which decides whether a person has a property interest which must be compensated.\footnote{95} Under this interpretation, the federal government would be required to ascertain from the states whether any unappropriated water was available in order to determine if there are any prior property rights vested in individuals by state law.\footnote{96}

The proprietary theory is primarily based on First Iowa Hydro-Electric Cooperative v. Federal Power Commission.\footnote{97} In First Iowa the court was called upon to construe section 27 of the Federal Power Act,\footnote{98} which is nearly identical to the language of section 8 of the Reclamation Act.\footnote{99} The issue confronted by the Court was

\footnote{91. See notes 105-09 and accompanying text infra.}
\footnote{92. See notes 94-104 and accompanying text infra.}
\footnote{93. See notes 110-13 and accompanying text infra.}
\footnote{94. See Sax, supra note 6, at 57.}
\footnote{95. Id. See also City of Fresno v. California, 372 U.S. 627 (1963); Dugan v. Rank, 372 U.S. 609 (1963).}
\footnote{96. See F. TRELEASE, supra note 20, at 70 (discussion of state-created property rights).}
\footnote{97. 328 U.S. 152 (1946).}
\footnote{98. 16 U.S.C. § 821 (1964 & 1976).}
\footnote{99. Section 27 provides:}
whether federal power license applicants must comply with the licensing requirements of a state which directly conflict with federal requirements. *First Iowa* has often been cited for the proposition that state law governs only the acquisition and not the distribution or use of water:

The effect of § 27, in protecting state laws from superseded, is limited to laws as to the control, appropriation, use or distribution of water in irrigation or for municipal or other uses of the same nature. It therefore has primary, if not exclusive, reference to such proprietary rights. The phrase "any vested right acquired therein" further emphasizes the application of the section to property rights.100

The Court held that Iowa law was not compatible with the provision of the Federal Power Act and that dual regulatory control was not intended. Since state and federal law conflicted, the federal law was held to be paramount.101 In essence the Court held that applicants need comply only with the laws the Federal Power Commission deemed appropriate. A system of dual control was rejected as cumbersome and ineffective.

The federal government has contended that the reference to proprietary rights means that state law is to govern only the acquisition rather than the distribution and use of water. In other words, the states control questions of ownership but not questions of control. However, Professor Sax has stated that this interpretation of *First Iowa* is twisted. He believes the words appropriation, use, and distribution were intended to be grouped together under the term "proprietary rights," and were to be distinguished from the mere seeking of a license or a permit. In other words, basing a proprietary theory on *First Iowa* is misplaced.102 Professor Sax also states that there is no authority in the legislative history to support the federal government's proprietary theory.103 However, this theory has been upheld in later Supreme Court decisions,104 most recently in *Hancock* and *Environmental Protection Agency*.

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100. 328 U.S. at 175-76. See also *City of Tacoma v. Taxpayers of Tacoma*, 357 U.S. 320 (1958).
101. See Morreale, supra note 6, at 458.
102. See Sax, supra note 6, at 58-59.
103. Id. at 58-62.
104. See *Arizona v. California*, 373 U.S. 546 (1963); Federal Power Comm'n
The states' position on the interpretation of section 8 has been referred to as the veto theory. Under this theory section 8 subjects national reclamation policy to a state veto power. Dean Trelease, in 1960, stated:

One thing is clear from section 8: the water right for a Reclamation project is an appropriation depending for its existence on the law of the state of its location. Substantively, it is exactly like other water rights in that state, subject to the same definitions and the same limitations as are rights held by individuals...

A Reclamation water right is not a federal claim reserved or removed from state control. It is an appropriation that can only be based on beneficial use...

Section 8, viewed in the light of state appropriation procedures, deliberately subjects national policy to the possibility of state control and even state veto.

This theory is based upon decisions that proclaim the federal government is a mere physical carrier and distributor of water in the operation of reclamation projects. Dean Trelease has since reconsidered the state veto theory and acknowledged the fact that section 8 cannot realistically subject federal reclamation projects to a state veto indiscriminately.

Professor Sax has correctly stated that neither the proprietary theory nor the state veto theory are correct interpretations of section 8:

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

Professor Sax advocates that when there is a specific and mandatory federal rule, that federal rule must be implemented even when

105. See Sax, supra note 6, at 62.
106. Id.
108. See Sax, supra note 6, at 62-69. See also Nebraska v. Wyoming, 325 U.S. 599 (1945); Ickes v. Fox, 300 U.S. 82 (1937); Kansas v. Colorado, 206 U.S. 46 (1907).
109. See F. TRELEASE, supra note 20, at 56.
110. See Sax, supra note 6, at 68.
in derogation of state law. The problem arises when federal law is indefinite, and Professor Sax believes the "Secretary must look to federal law—to the statutes, to the legislative history and to the total fabric of national concerns and interests in administering federal reclamation projects" in order to determine whether the state law is consistent with federal policy.\textsuperscript{111} Under this view the only time state law would be inapplicable is when it is in direct conflict with federal law or incompatible with the federal policies, concerns and goals underlying reclamation projects.\textsuperscript{112} This analysis of the effect of section 8 and offering of a potential solution is essentially the same solution recommended by the National Water Commission for the resolution of conflicts between federal and state laws and water uses on federal reclamation projects.\textsuperscript{113}

C. Legislative History of Section 8

The legislative history of the Reclamation Act of 1902 can be interpreted to support the positions advanced by either the federal government or the Western states. Statements supporting both views are found throughout the legislative history. The relevant question is whether Congress in 1902 intended that the federal government must comply with state laws in acquiring water permits. An analysis of the ambiguous statements contained in the legislative history seems to be the proper focus of inquiry under the recent authority of \textit{Hancock} and \textit{Environmental Protection Agency}.\textsuperscript{114} In \textit{United States v. California} the district court concluded, after analyzing various provisions of the legislative history, that the Reclamation Act of 1902 was "an undertaking of national concern, transcending the often arbitrary geographical boundaries of individual states and territories."\textsuperscript{115} It also concluded that the intent of Congress was to merely require the federal government, when acquiring water, to comply with the forms of state law, in order to protect prior rights granted individual water users. However, California has alleged that the ninth circuit in \textit{United States v. California} ignored the plain mandate of the legislative history.\textsuperscript{116}

California argues that the legislative history reveals that during the 1902 congressional debates, the adoption of section 8 was op-

\textsuperscript{111} Id. at 83.
\textsuperscript{112} Id. at 84.
\textsuperscript{113} See \textit{NATIONAL WATER COMMISSION}, supra note 20, at 461-63; F. Trel|e|e|a|e, supra note 20, at 235.
\textsuperscript{114} See notes 65-72 and accompanying text supra.
\textsuperscript{115} 403 F. Supp. at 869.
\textsuperscript{116} Petitioner's Brief for Certiorari at 14, United States v. California, \textit{cert. granted}, 98 S. Ct. 608 (1977) (No. 77-285).
posed by those representatives who believed that the federal government should be able to control the appropriation, use, and distribution of project water.\(^{117}\) The state contended that section 8 was supported by those representatives who believed that the Western states would be vitally affected by the projects, and thus the states should control the appropriation, use, and distribution of water.\(^{118}\) Congressman Mondell in response to a question asking for a clarification of the relationship between the states and federal government under the 1902 Act stated that the federal government, after determining the need and feasibility of a reclamation project, must then defer to the state by "giving the notice and complying with the forms of law of the State . . . in which the works [are to be] located."\(^{119}\) California contends that since section 8 was ultimately included in the Reclamation Act, the view that the federal government must comply with state law in the acquisition of water rights prevailed.\(^{120}\)

The district court acknowledged that the legislative history could support California's position, but because of the broad federal purpose of operation and control evident in the legislative history, it must be read to require the federal government to comply only with the forms of state law, not necessarily the substance.\(^{121}\) Professor Sax does not believe the legislative history evidences an intent to subject congressional policy to a state veto power:

> We have already seen ample evidence that the framers of the Reclamation Act intended to leave the job of distribution and allocation of project water generally to state law. But this was not, as the states now suggest, because Congress was willing to subject national policies to a state veto. The explanation for section 8 was quite a different one. It was simply that as of 1902, with one im-

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\(^{117}\) Id. at 13. See also 35 Cong. Rec. 6696 (1902).

\(^{118}\) Petitioner's Brief for Certiorari, supra note 116, at 13. See also 35 Cong. Rec. 6677-6779 (1902).

\(^{119}\) 403 F. Supp. at 889. See also 35 Cong. Rec. 6678 (1902).

\(^{120}\) Petitioner's Brief for Certiorari, supra note 116, at 15. In the committee report to the House, Congressman Mondell made another statement which supports California's position:

> The American irrigator, beginning with the handicap of a woeful lack of knowledge of the subject and an inherited common-law rule fatal to its solution, has acquired a vast fund of theoretic knowledge and practical experience. He has been instrumental in the adoption of rules and regulations, and the establishment of customs relative to the use of water in irrigation in the arid region which, in some States, are well-nigh perfect, and in all are a distinct advance over former conditions. The bill recognizes the control of these local laws in matters regarding appropriations of water and in establishing and maintaining rights of users . . . .


\(^{121}\) 403 F. Supp. at 889. See also Goldberg supra note 6, at 25-26; Sax supra
portant exception, there were no federal reclamation policies. Thus, at that time there was no reason to displace state law. Indeed, the record clearly shows the view of the bill's proponents that state law was to prevail because, while not perfect, it was at that time thought adequate to safeguard the proposed federal investment in irrigation. It is important to see the significance of this attitude; state law was being adopted not because the Congress felt impelled to subordinate its goals to state goals, but because at the time state law was thought compatible with federal interests. And, of course, at the time there wasn't enough federal policy to make the problem a serious one. As we have seen, in general the federal government at that time did largely view itself as merely a financier and builder for the states, performing an economic function which the states were incapable of performing for themselves.122

The district court ignored the fact that the Bureau has consistently followed the administrative practice of complying with state permit systems. This in and of itself would seem to be some evidence of the intended purpose of section 8. If anything is clear about the legislative history of section 8, it is that Congress contemplated a partnership based on mutual interest.

The ninth circuit rested primarily on the recent Supreme Court decisions in Hancock and Environmental Protection Agency. These cases basically held that the states, which are authorized under the relevant federal acts to adopt permit programs for the control of air and water quality, cannot apply their permit programs to federal agencies. The primary reason for this is that the authority was not spelled out in clear and unambiguous terms. The ninth circuit merely extended the logic of these cases to hold that since section 8 does not specifically refer to state permit systems, the section does not require federal compliance with the state permit systems.123 This conclusion directly contradicts the portion of the decision that states section 8 requires federal compliance with the "forms" of state law. If the logic of Hancock and Environmental Protection Agency is extended, then the federal government under section 8 should not be compelled to comply with state permit laws.

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122. See Sax supra note 6, at 66-67 (footnotes omitted).

123. 558 F.2d at 1350-51.
It must be remembered that in Hancock and Environmental Protection Agency, as in First Iowa, there were direct conflicts between the federal and state requirements for permit licensing. However, it is definitely arguable in United States v. California that the imposition of conditions on the exercise of the appropriative right does not conflict with or impair the purpose of the Reclamation Act. California argues that the legislative history of section 8 demonstrates the intent of Congress that the federal government be bound by the plain language of section 8. In that event, following state law could not conflict with the purposes of the Reclamation Act.

D. Decisions Under Section 8

Although section 8 has been in force since 1902, there have been relatively few cases which have interpreted its effect and scope. They indicate that it is fairly well settled that section 8 does compel the federal government to at least comply with the forms of state law in the acquisition of a right to appropriate water. The primary question, which is apparently unanswered by prior cases, is whether a state has authority to condition the use of the water once appropriated by the federal government. If it does, the issue becomes to what extent the state can condition the use. It is uncertain whether the proper test for determining if a particular condition can be imposed on the Bureau’s exercise of the water right is whether the condition conflicts with a specific portion of federal law or violates the purpose of the particular reclamation project.

The starting point is an analysis of Kansas v. Colorado. The states have consistently relied on Kansas v. Colorado for the prop-


125. 206 U.S. 46 (1907).
osition that they have superior regulatory power over water within the state. This argument is primarily based on state sovereignty and state ownership of water. The Court held that the power of the federal government under the property clause was not without limits. Federal control of property in a state was limited to property owned by the federal government. The Court stated that the federal government

has power to dispose of and make all needful rules and regulations respecting its property. We do not mean that its legislation can override state laws in respect to the general subject of reclamation, . . . and it would be strange if, in the absence of a definite grant of power, the National Government could enter the territory of the States along the Atlantic and legislate in respect to improving by irrigation or otherwise the lands within their borders.

In other words, if a specific power was not granted to the federal government, it was precluded from exercising that power.

Although Kansas v. Colorado endorsed state sovereignty, it is no longer the correct interpretation of the scope of federal power. One commentator has written:

The "absence of a definite grant of [federal] power" to improve lands within the states has been corrected long since. The indifference to voids in governmental authority, the restriction of the powers under the property clause, the attribution of independent limiting force to the tenth amendment, the disposition to ignore the supremacy clause—all of these attitudes are now reversed.

Subsequent cases have limited the authority of Kansas v. Colorado.

126. Id. at 89.
127. Id. at 92.
128. See Goldberg, supra note 6, at 33. See also Ivanhoe Irr. Dist. v. McCracken, 357 U.S. 275 (1958) (power of federal government under property and supremacy clauses); United States v. Gerlach Livestock Co., 339 U.S. 725 (1950) (power of federal government under commerce and general welfare clauses); Utah Power & Light Co. v. United States, 243 U.S. 389 (1917). Goldberg has concluded that the combined effect of the property clause, commerce clause, and the general welfare clause is that the federal government could proceed to develop natural resources without regard to the desires of the states:

For example, the United States under the general welfare clause may engage in a public housing program and condemn land for the purpose. Similarly, it may acquire water rights for the reclamation program. Despite the tenth amendment, such acquisitions may be made over the objections of a state; and once the acquisition has been made, the property is to be treated as other national property, free of state taxation and control and subject only to Congress's unlimited power under the property clause.

Goldberg, supra note 6, at 35-36 (footnote omitted).

129. See Sax, supra note 6, at 62-63.
The decisions of the Supreme Court in *Nebraska v. Wyoming* have been relied on by advocates of both the state and federal views. In the first *Nebraska v. Wyoming*, which held that the federal government was not an indispensable party in an equitable apportionment of interstate water between States, the Supreme Court stated:

The bill alleges, and we know as a matter of law [citing Section 8 of the 1902 Act], that the Secretary and his agents, acting by authority of the Reclamation Act and supplementary legislation, must obtain permits and priorities for the use of water from the state of Wyoming in the same manner as a private appropriator or an irrigation district formed under the state law.

Although this language is supportive of the states' view, the district court in *United States v. California* viewed this language as mere dicta because of the subsequent holding of the Supreme Court in the second *Nebraska v. Wyoming*. The district court in *United States v. California* characterized the second *Nebraska v. Wyoming* as reserving the question whether the federal government is required to follow state law because the federal government did follow state law. The Supreme Court stated:

Nor, as we shall see, is it important to the decree to be entered in this case that there may be unappropriated water to which the United States may in the future assert rights through the machinery of state law or otherwise.

... We do not suggest that where Congress has provided a system of regulation for Federal projects it must give way before an inconsistent state system.

It is reasonably clear that *Nebraska v. Wyoming* cannot be realistically relied on to support the proposition that the administration of federal projects is entirely within state control under section 8.

The opinion of the Supreme Court in *United States v. Gerlach Livestock Co.* is often cited for the proposition that the Bureau has historically followed section 8 in acquiring water for reclamation projects:

"[T]he Bureau of Reclamation and the Secretary of the Interior have consistently, through the forty-two years since the 1902 act,

130. 325 U.S. 589 (1945); 295 U.S. 40 (1935).
131. See Sax, supra note 6, at 65.
132. 295 U.S. at 43.
133. 325 U.S. 589 (1945).
134. 403 F. Supp. at 891.
135. 325 U.S. at 612, 615.
136. See Sax, supra note 6, at 66.
been zealous in maintaining compliance with Section 8 of the 1902 act. They are proud of the historic fact that the reclamation program includes as one of its basic tenets that the irrigation development in the West by the Federal Government under the Federal Reclamation Laws is carried forward in conformity with the State water laws. Ample demonstration of the effect of this law and policy of administration, in action, has been given in connection with the Central Valley Project."

However, this phrase is probably limited to cases in which the federal government has respected state law definitions of property. Nonetheless, California has alleged that the Bureau has consistently complied with the conditions imposed in water permits it acquired from the state.

Two cases of primary importance dealt with the effect of section 8 on other specific provisions in the Reclamation Act of 1902. In Ivanhoe Irrigation District v. McCracken, the United States Supreme Court was faced with determining the effect of section 8 upon the 160-acre excess land rule of section 5 of the Act. In Ivanhoe the Court was faced with a California Supreme Court decision which had refused to confirm contracts entered into between two state irrigation districts and the federal government. The California Supreme Court had held that the language of section 8 requiring compliance with state law overrode the requirement of section 5 that no reclamation project water should be sold for use on land areas exceeding 160 acres in size. Section 5 was found to be contrary to state law because it would result in discrimination against owners of land over 160 acres, a limitation not found in state law. However, the United States Supreme Court reversed the state court, holding that under section 8, state law cannot override the "specific and mandatory" provisions of section 5:

As we read § 8, it merely required the United States to comply with state law when, in the operation of a reclamation project, it becomes necessary for it to acquire water rights or vested interests therein. But the acquisition of water rights must not be confused with the operation of federal projects. . . . We read nothing in § 8 that compels the United States to deliver water on conditions imposed by the State.

The primary significance of Ivanhoe is that it limits the operation of state law under section 8 to instances in which state laws conflict

138. Id. at 740-41, n.15 (quoting Regional Director, Bureau of Reclamation).
139. See Sax, supra note 6 at 66, n.69.
140. Petitioner's Brief for Certiorari, supra note 116, at 8.
143. Id.
144. 357 U.S. at 291-92.
with a specific provision of federal reclamation law. The Court also indicated that the analysis applied in *Ivanhoe* did not operate to generally limit state law: "Without passing generally on the coverage of § 8 in the delicate area of federal-state relations in the irrigation field, we do not believe that the Congress intended § 8 to override the repeatedly reaffirmed national policy of § 5."\(^{145}\)

In *City of Fresno v. California*\(^{146}\) the Court was faced with the effect of section 8 upon the irrigation priority system of section 7 of the Reclamation Act of 1902. Section 7 provides the Bureau with powers to acquire water rights by condemnation.\(^{147}\) The Court held that state law under section 8 cannot prevent the Bureau from exercising its section 7 right to acquire water by condemnation.\(^{148}\) The Court also stated:

Section 8 does not mean that state law may operate to prevent the United States from exercising the power of eminent domain to acquire the water rights of others. This was settled in *Ivanhoe Irrigation District v. McCracken* . . . . Rather, the effect of Section 8 in such a case is to leave to state law the definition of property interests, if any, for which compensation must be made.\(^{149}\)

*Fresno* stands for the proposition that section 8 requires compliance with California law when defining property interests for which compensation is required to be made under section 7, but section 8 cannot operate to prevent the federal government from exercising the power of eminent domain. The *Fresno* decision would seem to endorse the proprietary theory espoused by the federal government, that is, state law is limited to defining property interests and has no control over the use or distribution of project water. However, it has been pointed out that this broad generalization by the Court was dicta and not necessary to decide the issue presented in the case.\(^{150}\) The combined effect of *Ivanhoe* and *Fresno* is that state law, under section 8, is not available where it conflicts with a "specific and mandatory" federal reclamation law. A specific federal law governs the general state law approach provided by section 8.

In *Arizona v. California*\(^{151}\) one of the issues discussed by the Court was how water was to be distributed to users in a state under

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\(^{145}\) *Id.* at 292.


\(^{148}\) 372 U.S. at 630.

\(^{149}\) *Id.*

\(^{150}\) See *Sax*, supra note 6, at 53.

\(^{151}\) 373 U.S. 546 (1963).
the Boulder Canyon Project Act. Section 14 of the Boulder Canyon Project Act incorporated section 8 of the Reclamation Act of 1902. It was argued that section 14 of the Boulder Canyon Act took away the Secretary of Interior's power to make contracts for distribution of water in favor of the states and to determine with whom and on what terms the Secretary would make water contracts. However, the Supreme Court rejected this argument:

Section 14 provides that the reclamation law, to which the Act is made a supplement, shall govern the management of the works except as otherwise provided and § 8 of the Reclamation Act [of 1902], much like § 18 of the Project Act, provides that it is not to be construed as affecting or interfering with state laws "relating to the control, appropriation, use, or distribution of water used in irrigation. . . ." In our view, nothing in any of these provisions affects our decision, stated earlier, that it is the Act and the Secretary's contracts, not the law of prior appropriation, that control the apportionment of water among the States. Moreover . . . we hold that the Secretary in choosing between users within each State and in settling the terms of his contracts is not bound by these sections to follow state law.

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 this court in [Ivanhoe and Fresno] . . . . Since § 8 of the Reclamation Act did not subject the Secretary to state law in disposing of water 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.

Although this decision can be viewed as precedent for national control, it is clear the Supreme Court did not completely preclude the application of state law. In this case the primary reason state law was held not to apply was that it would have violated the expressed purpose of the Boulder Canyon Project Act. The Court stated that where Congress has

undertaken a comprehensive project for the improvement of a great river and for the orderly and beneficial distribution of water, there is no room for inconsistent state laws. . . . [W]here the Secretary's contracts, as here, carry out a congressional plan for the complete distribution of water to users, state law has no place.

. . . . It was only natural that the United States, which was to make the benefits available and which had accepted the responsibility for the project's operation, would want to make certain that the waters were effectively used. . . . Recognizing this, Congress

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153. Id. Section 14 provides that the 1902 Reclamation Act shall govern the management of the works, except as provided therein.
154. 373 U.S. at 585-87 (footnotes omitted).
put the Secretary of the Interior in charge of these works and entrusted him with sufficient power . . . to direct, manage, and coordinate their operation.\textsuperscript{155}

It has been noted that the decision in \textit{Arizona v. California} may be limited to the facts therein.\textsuperscript{156} Section 5 of the Boulder Canyon Act specifically authorized the Secretary of the Interior to contract for storage of water.\textsuperscript{157} The Court concluded that the power to make contracts normally includes the power to choose with whom and upon what terms the contracts will be made. Obviously, the power to contract evidenced the intent of Congress to allow the Secretary to control the distribution. Viewing \textit{Arizona v. California} in this light, it can be read consistently with the test applied in \textit{Ivanhoe} and \textit{Fresno} that when Congress proscribes a specific power or authority to the Secretary, state law under section 8 is displaced.

Although it is difficult to ascertain from these cases a precise test for when section 8 allows the operation of state law, two points are relatively clear. The first, under \textit{Ivanhoe} and \textit{Fresno}, is that when state law conflicts with a specific federal law or portion of the Reclamation Act, state law must yield to the conflicting federal law. The second, under \textit{Arizona v. California}, is that when the imposition of state law under section 8 impairs the purpose of a particular reclamation project, the state law will not be applied.

D. Public Policy

In \textit{United States v. California} the ninth circuit acknowledged that the federal government must recognize water rights created by state laws in administering reclamation projects, but only to the extent of inquiring as to the availability of unappropriated water.\textsuperscript{158} The state must approve the application if there is unappropriated water available. The state would not be permitted to subject the exercise of the rights granted by the permit to any conditions. The question left unanswered by both the district court and the ninth circuit is whether the imposition of its particular conditions in this case conflicted with any federal law or were incompatible with the purpose of the reclamation project. The courts tacitly assumed that any condition, regardless of its necessity or reasonableness, would be incompatible with the federal policy of leaving control of federal reclamation projects exclusively to the federal government.\textsuperscript{159} The

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\textsuperscript{155} Id. at 587-90 (footnotes omitted).
\textsuperscript{156} See Sax, supra note 6, at 56.
\textsuperscript{157} Ch. 42, § 5, 45 Stat. 1060 (1928) (codified at 43 U.S.C. § 617d (1970)).
\textsuperscript{158} See § II of text supra.
\textsuperscript{159} The district court stated:
\end{flushleft}
decisions adopted the position that if a project has been endorsed by Congress, that is sufficient evidence of a beneficial use and the state should not be able to interfere with the exercise of that use. The rationale is that the imposition of conditions in itself conflicts with purposes of federal reclamation projects.

The ninth circuit held that the Bureau must obtain a permit under state law, but it need not comply with any conditions in the permit. It is arguable that since the states are authorized by their laws to install conditions in permits to insure the beneficial use of the water, the permit cannot be distinguished from the conditions in the permit; the conditions are necessarily a component of the permits. If it is clear under section 8 that the Bureau must comply with the "forms" of state law, the question is raised whether it is equally clear under section 8 that the conditions are not part of those forms. Section 8 on its face makes no such distinction between a permit and its conditions, or the "forms" of state law and the substantive provisions of state law. Instead, as the dissent indicates, the ninth circuit has developed a new federal common law and rewritten the reclamation laws. Such a change should be made only by Congress.

Under California law, as in most states, the State Water Resources Control Board is required to evaluate the specific intended use of each proposed project before granting an application in order to determine if the use is reasonable, beneficial and in the public interest. The power of the states to impose conditions on use is extremely important. Although the water for a federal reclamation act is acquired by the federal government, the water is used on land owned by state residents. The use of reclamation water, therefore, directly ties into the growth and development of a state. Thus, it can be seen that the states have a direct and legitimate

It appears to this court, however, that the question of the effect of [the State Board's Decision] on the purposes of the New Melones Project is simply not material to the disposition of this case. As this opinion has previously noted, the "jurisdiction" of the Board in regard to the construction and operation of federal reclamation projects—once those projects have been approved—extends only so far as the determination of the availability of unappropriated water. Beyond that point, the Board has no jurisdiction. Therefore, any conditions or terms imposed by the Board must be considered ultra vires and 'in conflict' with the purposes of the federal reclamation project.

403 F. Supp. at 901.
160. 558 F.2d at 1352-53 (Wallace, J., concurring and dissenting).
161. See note 34 supra.
interest in the use and distribution of water by a federal reclamation project.

California contends it is vitally interested in whether the water from the Central Valley Project is used to promote urban growth or agricultural production. California does not assert that it can condition the exercise of the water right to impair the purposes of the reclamation projects, but only to make those decisions that were not made by Congress in approving the project. Moreover, California contends the ninth circuit effectively denied states the power to participate in decisions that directly affect the vitality and growth of the state. It argues it should have the power to subject reclamation projects to reasonable conditions. It is undisputed that the states have been eager to obtain reclamation projects in their states. In fact, many states have statutory schemes which favor Bureau projects; conditions are not lightly imposed.

The Western states have strong public policy interests in maintaining state control over the use of water. They have definite interests in determining what areas water will be diverted to for use in the interests of future growth and community development. Such decisions involve planning and balancing benefits and costs associated with competing uses and areas of uses. In fact, the states have administrative bodies which use the public process to resolve these decisions. It seems imperative that the states have some voice in the acquisition, use, and distribution of project water.

While the states have strong public policy interests, Congress also has an interest in the project water in a state. The Congress has supplied the money and effort to initiate the project. One commentator has stated:

The State's position is that the Bureau's reclamation function will not be unduly impeded if it is required to comply with California law. Such a requirement does not prevent the Bureau from acquiring water for reclamation purposes, since it is free to acquire water by purchase or condemnation under section 7 without regard to state law. On the other hand, if the Bureau chooses to acquire unappropriated water under state law, the Bureau can avoid the legal difficulties entailed in acquiring water by purchase or condemnation. The bureau, in acquiring water by purchase or condemnation, risks lengthy and costly litigation against those who assert rights superior to those acquired by the United States. These risks are largely avoided when the Bureau acquires appropriative permits under California law, since the State Board, in issuing permits, first determines that unappropriated water is available and

162. Petitioner's Brief for Certiorari, supra note 116, at 10.
163. Id. at 10-11.
hence that there is no conflict with the rights of others. Therefore, California's statutory procedures promote, rather than impede, the orderly fulfillment of the Bureau's reclamation function.\textsuperscript{165}

It is to the advantage of the federal government to apply to the states for a determination of availability of unappropriated water.\textsuperscript{166}

It is necessary to determine whether the conditions imposed by the State Board materially alter or impair the purposes of the New Melones Project. The obvious argument of California is that the State Board's decision does not prevent the fulfillment of the project's purposes, but instead merely temporarily denies a part of the water sought by the federal government until it can show a specific and identifiable need for the water. The federal government will be allowed to acquire additional water for the project once it can demonstrate a need for the additional water and once a specific plan for its use has been developed.

The main purpose of any reclamation project is to provide water for irrigation. Where there has been no showing that water is actually needed for irrigation at that time, a condition imposed by a state that denied the use of any water until such a showing is made would not impair the purpose of the project.

This conclusion is supported by strong public policy considerations. A state has a legitimate and necessary interest in having a voice in the future growth and development within the state. A state also has a legitimate interest in protecting its environment. Allowing a state to impose reasonable conditions which do not impair the purposes of a reclamation project would accomplish this result. A determination of whether the conditions imposed by the state impair the purposes of a reclamation project allows the legitimate interests of both the states and the federal government to be considered.

However, the argument of California must be viewed in light of all the conditions imposed. It can be argued that the combined effect of all the conditions imposed actually gave the state control over the project. In that case, the combined effect of the conditions would in fact frustrate the policy of the reclamation project. Such a conclusion is supported by the proposed legislation of the National Water Commission.\textsuperscript{167}

\textsuperscript{165} See Attwater, supra note 11, at 291-92 (footnotes omitted).
\textsuperscript{166} See notes 33-34 and accompanying text supra.
\textsuperscript{167} See National Water Commission, supra note 20, at 243-44.
E. Proposed Legislation

There have been numerous legislative solutions offered over the years. The National Water Commission has recommended that the conflicts and uncertainties between federal and state interests be resolved by congressional action.\textsuperscript{168} It recommends the adoption of a proposed National Water Rights Procedures Act. The purpose of the Act would be to integrate federal and state water rights administration and to provide a system that would accommodate the interests of both the Western states and the federal government. Two recommendations address the issues raised in \textit{United States v. California}:

Recommendation No. 13-1: The United States should adopt a policy of recognizing and utilizing the laws of the respective States relating to the creation, administration, and protection of water rights (1) by establishing, recording, and quantifying non-Indian Federal water uses in conformity with State laws . . . .

Recommendation No. 13-2: The United States in making any use of water and in constructing, administering, and operating any program or project involving or effecting the use of water, should proceed in conformity with State laws and procedures relating to (1) the appropriation, diversion and use of water and (2) the regulation, administration, and protection of water rights. This rule should be subject to two exceptions: (1) It should not apply to Indian water rights and (2) it should not apply where State law conflicts with the accomplishment of the purposes of a Federal program or project. In the second case the Federal official charged with administering the Act should be able to exercise his discretion in determining whether such inconsistency exists. If he concludes that there is a conflict or inconsistency he should be obliged to hold a hearing on the question and thereafter set forth his conclusions in writing, which should be subject to judicial review.\textsuperscript{169}

This National Water Rights Procedures Act recognizes that “the United States must be able to exercise all of its constitutional powers, carry out all national policies, purposes and programs, and construct and operate all federal projects free from state control.”\textsuperscript{170} The Act also acknowledges that the states have a legitimate interest in enforcing laws that protect the rights of individuals to the use of state created water rights.\textsuperscript{171} The proper sphere of state control is identified as recording water rights, policing withdrawals, regulating uses, and rationing in times of shortage.\textsuperscript{172} The Act recom-

\textsuperscript{168} See \textit{National Water Commission}, \textit{supra} note 20, at 471; \textit{F. Trelise}, \textit{supra} note 20, at 235.

\textsuperscript{169} \textit{National Water Commission}, \textit{supra} note 20, at 461–62.

\textsuperscript{170} \textit{F. Trelise}, \textit{supra} note 20, at 236.

\textsuperscript{171} \textit{Id.} at 237.

\textsuperscript{172} \textit{Id.}
mends a procedure by which federal-created water rights for federal purposes would co-exist with state-created rights for private and municipal purposes.173

Under “Recommendation Number 13-1” of the Act the federal government would have to comply with the form of state law. This proposal is substantially the same conclusion the ninth circuit reached in United States v. California. The Act “calls for a revitalization of the concept of conformity—not federal compliance with or submission to state law—but federal conformity of federal water rights to the form of state law, federal use of those substantive state laws that advance the federal purpose, federal observance of those state procedures which do not impair the substance of the federal rights.”174 Under this Act a state would not be permitted to veto a federal project or use, or dictate the purpose of the use. Under the contemplated procedure the federal water right would be recorded in conformity with state law and would be entitled to be protected as any state created water right.175

Under “Recommendation Number 13-2” of the Act, federal water rights would be identified and qualified under the state water law system. The states would have to give up any notions of control over federal uses of water.176 The Act distinguishes between “conformity” to and “compliance” with state laws. All that it requires is conformity:

The result of applying the policy of conformity would be federal rights owned by the federal government, created by federal law, but so procedurally conformed to private rights owned by individuals, created by state law, that both federal and private rights were interrelated and intermeshed into the same system of administration and enforcement.177

The provisions of the Act would support the decision of the ninth circuit in United States v. California, that states cannot condition the exercise of a water right held by the United States.

If the United States were to run into rejection of its applications, cancellations of its permits, declarations that its rights were abandoned or forfeited, it would only need to interpose its sovereignty and announce that it regarded the permit or right as in force and that the documents were to be treated by the state officials as evidence of the federal water right. Administrative precedents already exist for this practice. The California State Water Rights Board offered the Bureau of Reclamation permits for features of

173. Id. at 238.
174. Id. at 239 (emphasis added).
175. Id. at 240.
176. Id. at 244.
177. Id. at 245.
the Central Valley Project which contained conditions required by state law but inconsistent with the operations of the federal works. The Bureau accepted the permits with the notation that the conditions would be regarded as advisory only.\textsuperscript{178}

When state law is inconsistent with or inappropriate to federal objectives, then it would be superseded by federal law under the supremacy clause. Applying the Act to the situation in United States v. California, the state would not be able to condition the exercise of the permit if the condition was inconsistent with the operation of the reclamation project.

The contention is not necessarily with the conclusion arrived at by the proposed Act, but with the process that allows such a result to be reached by case law rather than by Congress through the legislative process. If states are not to be allowed to subject the Bureau's exercise of its water right to reasonable conditions that do not impair the purposes of a particular project, this result should be arrived at only after the legitimate interests of both sides are heard through the legislative process.

IV. CONCLUSION

It is clear the ninth circuit in United States v. California "has made the dream of the federal bureaucracy come true by granting it... the life-and-death power of dispensation of water rights long administered according to state law."\textsuperscript{179} What is not clear is whether this power is inappropriate at this time. Arguably the decision ignores the plain meaning of the legislative history of the Reclamation Act of 1902. The obvious intention of Congress, to at least one commentator, in enacting section 8 was to provide the states with a veto power over federal reclamation projects.\textsuperscript{180} Whether this intention is valid today, in light of the legitimate need for national policy setting and national management of reclamation projects, is another question. The proper solution to this conflict lies in legislative action. As Justice Wallace declared:

Concededly where two sovereigns acting independently, administer water rights in the same watershed, there is a great potential for uncertainty. But that is what our Hancock and EPA-inspired construction of section 8 means. The majority has failed to find a defensible legal basis to give effect to its desire to avoid this problem. Unfortunately, I can see no such basis either. Accordingly, we have, I believe, no alternative but to leave it to the legislative branch to devise a solution.\textsuperscript{181}

\textsuperscript{178} Id. at 245-46 (footnotes omitted).
\textsuperscript{181} 558 F.2d at 1352-53 (emphasis added).
This suggestion is not without precedent. Justice Douglas in Arizona v. California, in discussing the Supreme Court's rejection of the state veto theory in recent cases, stated that these decisions may "be marked as the baldest attempt by judges in modern times to spin their own philosophy into the fabric of the law, in derogation of the will of the legislature."[182]

As previously discussed, the state veto theory is clearly without justification today. State law simply cannot prevent the exercise by the federal government of its constitutionally based powers. However, this does not mean the proprietary theory is valid either. What is needed is certainty of rights and accommodation of the interests of both the states and the federal government.[183] This can be accomplished, by integrating federal rights into state procedure and by requiring compliance with the forms of state law. The legislation proposed by the National Water Commission would accomplish this result.

182. 373 U.S. at 628.
183. A proposed procedural scheme for cooperation between the states and the federal government has been suggested:

1. Preliminary investigations by federal agencies to determine possible feasibility of project.
2. Project feasibility studies undertaken after authorization by Congress.
3. Filing of water right applications when project plan has been selected, advertising applications and receiving protests.
4. Preparation and review of federal agency feasibility reports and draft EIS by federal agency.
5. Applicant obtains commitments from prospective users for purchase of water in a form acceptable to state agency.
6. Hearing of water rights applications and issuance of preliminary state decision relating to all issues, but reserving jurisdiction to consider effect of final EIS and any other specific issues that require additional information. Congress entitled to know conditions to be imposed on the project except possibly for well-defined areas of reserved jurisdiction.
7. Project plan and EIS revisions to reflect effect of State's decision.
8. Congressional authorization of proposed project.
9. Construction of project.
10. Reconsideration or review of matters on which Board has retained jurisdiction and issuance of final decisions and licenses and a review procedure if the project is not constructed within a reasonable time.

The above procedure would have the following advantages:

1. It would bring to light most water right claims and other streamflow requirements sometimes overlooked in the planning process.
2. It would highlight problems earlier in the process when they are usually easier to resolve and this would tend to reduce differences between the authorized project's plan and
The issue raised in *United States v. California* should be carefully considered in the drafting of any legislation. The question which must be answered is whether a state may impose a condition on the exercise of a water right granted to the federal government for the reason that a need for the water has not been shown. The fact that a state would disagree at all implies a lack of planning and cooperation between the state and the federal government. Whether a state should have this power is necessarily a question for resolution by Congress. It is clear that the states have legitimate interests which were not considered by the ninth circuit. The National Water Commission's proposed legislation would not allow states to impose conditions inconsistent with the purposes of reclamation projects.

It is probable that the complete resolution of this problem can only be arrived at through legislation which will clarify the situation. Until legislation is passed, it will be left to the courts to attempt to balance the competing interests of the states and the federal government. This can best be accomplished by adopting a position which would allow the states to impose reasonable conditions on the exercise of the Bureau’s water rights which do not conflict with the purposes or operation of a reclamation project. This would require an inquiry as to whether a particular condition conflicts with the purposes of a reclamation project. The benefit of this position is that it would allow the states to control the use of water within the state to the extent the control does not conflict with the operation of reclamation projects.

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terms and conditions in water right decisions and consequently reduce potential jurisdictional disputes.

3. The issuance of preliminary water right decisions and conformance of the plans thereto could significantly reduce the opposition to the projects and thereby improve authorization possibilities.

4. It would provide state assurances of the availability of project water supplies, thereby increasing the likelihood that the projects can be operated substantially as planned as far as the State is concerned.

Attwater, *supra* note 11, at 294-95.