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PROBLEMS OF FEDERALISM IN RECLAMATION LAW

JOSEPH L. SAX*

"The question is," said Humpty Dumpty, "which is to be master—that's all."

Through the Looking Glass, Chapter 6.

In the competition between the states and the United States over control of federal reclamation projects, the states have had the advantage of a very favorably worded statute. Section 8 of the Reclamation Act of 1902 provides:

That 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 in any vested right acquired thereunder, and the Secretary of the Interior, in carrying out the provisions of this act, shall proceed in conformity with such laws. . . .

The meaning of this provision, according to the states, is crystal clear: The federal government is to acquire water rights in accordance with state law, to finance and build reclamation projects, and to deliver the project water through the transmission system; at this point the state is to take over, determining under state law how, when and to whom the project water is to be distributed. This arrangement, it is said, is obviously mandated by the language of section 8 and would, if followed, provide a perfect example of fruitful cooperation between the states and the federal government.

For half a century after the passage of the Reclamation Act, this theory permeated thinking about the problems of state-federal relations in the reclamation field. But in recent years a series of cases arose which were permanently to shatter its comforting simplicity. In these cases

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1. 32 Stat. 390 (1902), 43 U.S.C. § 383 (1958). The 1902 Act is now classified at 43 U.S.C. §§ 372, 373, 381, 383, 391, 392, 411, 416, 419, 421, 431, 432, 434, 439, 461, 491, 498. As used herein the term "Reclamation Act" refers to this 1902 statute. The term "reclamation laws" includes the 1902 Act and all the subsequent acts which are supplementary thereto. The reclamation laws are quite extensive and are classified principally to title 43, U.S.C.

the courts were urged to recognize that while section 8, read literally and read in isolation, seemed to support the view of the states, it was quite unreasonable to read the section in this way. These cases pointed out that the federal reclamation laws contained other provisions which cast considerable doubt on the view that Congress wanted federal projects to be administered wholly in conformity with state law. Thus, in one case, a problem arose because while state law put no acreage limits on the right to acquire water, the Reclamation Act expressly prohibited the sale of project water to tracts in excess of 160 acres in single ownership. The question was naturally raised whether Congress, having enacted this excess land law in specific and mandatory terms, intended to have it subject to nullification by the state.

A few years later the same sort of problem was raised when an attempt was made to subordinate the explicit preference for irrigation in the federal law to a state law which preferred municipal to irrigation uses. And in the most recent litigation over the meaning of section 8, it was understandably urged that where Congress had provided that project water could be obtained only by contract with the Secretary "under such general regulations as he may prescribe," it did not mean to limit the Secretary to prescribing state law as his regulations.

These cases put the states' literal interpretation of section 8 in serious jeopardy for the first time. With section 8 on the one hand, and what seemed to be an important body of substantive federal policies on the other, the job of deciding what combination of state and federal control over federal projects Congress intended began to look considerably more complicated than had previously been thought. The Supreme Court's response to this challenge has been a great shock to traditional advocates of state control. For not only have the proponents of national power won on the issue of interpretation of section 8 in each case, but in its most recent decision the Court went so far as to say that it found in the reclamation project at issue "a congressional plan for the complete distribution of waters to users" and, therefore, it concluded, "state law has no place."

This apparent reversal in interpretation has been greeted with severe critical disapproval, particularly by Mr. Justice Douglas, who described the decision 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." Despite the strong convictions thus held by

3. Ivanhoe Irrigation Dist. v. McCracken, supra note 2.
6. Id. at 588. (Emphasis added.)
some authorities that they know the legislative will, the fact is that no adequate study of congressional attitudes toward federal control of reclamation projects has ever been done. In light of dramatic developments which have taken place and the inevitability of continued litigation, the time seems appropriate for such an inquiry. The following discussion is an attempted step in that direction.

PUTTING THE ISSUE IN FOCUS

During the past sixty years, the reclamation laws have given rise to a number of issues of state-federal relations. At one time it was seriously debated whether the Congress would have constitutional authority to distribute project water according to federal law, assuming that it wanted to do so. That question has now been authoritatively and unambiguously settled by the Supreme Court in favor of federal authority. The following discussion thus assumes that Congress has full constitutional authority to displace state law entirely in the management of federal projects.

Another common question is whether Congress has some form of proprietary rights in Western waters which exempt it from payment to prior users when it pre-empts them in acquiring water for its projects. This very complex problem also is not in issue here. In acquiring water rights for its reclamation projects the United States has traditionally respected state defined property rights, and we may assume that no problem of claims for compensation is in question.

The sole problem to be discussed here is one of statutory interpretation. The question is to what extent Congress chose, in enacting section 8, to defer to substantive state law in determining the distribution and use of project water. Thus, as has been indicated, the sort of cases that are under inquiry here are those that arise when, for example, the United States, in reliance upon some asserted conflicting federal policy, refuses to recognize state preference laws in distributing project water.

The goal here will be to suggest, after examining the legislative background, what relative roles Congress wishes state and federal law to play. But before beginning that examination, it is necessary to put the problem into perspective by a brief look at the present state of the law as fashioned by the Supreme Court.

10. See cases cited at note 2, supra.
12. Ivanhoe Irrigation Dist. v. McCracken, 357 U.S. 275, 290-91 (1958); Nebraska v. Wyoming, 325 U.S. 589, 614-15 (1945). The United States also complies with state procedures when it acquires water (see note 25, infra). This aspect of deference to state law is also not at issue here.
The Current Status of Section 8

Astonishing though it seems, since 1902, when the Reclamation Act was enacted, the Supreme Court has decided only three cases which actually presented questions of interpretation of section 8: Ivanhoe Irrigation Dist. v. McCracken,\textsuperscript{13} City of Fresno v. California\textsuperscript{14} and Arizona v. California.\textsuperscript{15} A closely related case, First Iowa Co-op v. Federal Power Comm'n,\textsuperscript{16} dealt with the meaning of a similar provision in the Federal Power Act, and will be discussed in the next section of this article.

As has already been indicated, Ivanhoe and City of Fresno dealt with the impact of section 8 upon the 160 acre rule (excess land law)\textsuperscript{17} and upon the irrigation priority provision\textsuperscript{18} of the reclamation laws. In both cases the state argued that under section 8 conflicting state law nullified the federal provisions and prevented the Secretary of the Interior from enforcing national reclamation policies.

In each case Mr. Justice Clark wrote the opinion for a unanimous Court, rejecting the position of the states. Both cases were capable of decision upon the quite narrow and traditional canon of statutory interpretation that the specific controls the general. And this is precisely the ground which the Court took. Where Congress has laid down "a specific and mandatory prerequisite . . . as binding in the operation of reclamation projects," the Court held in Ivanhoe, that specific mandate may not be ignored in favor of a general policy of deference to state law.\textsuperscript{19} This theory controlled exactly the relation between the excess land provision of section 5 and the general rule of section 8. The Court also supported its Ivanhoe opinion with a finding that the excess land law was "a repeatedly affirmed national policy," particularly to be respected because there had been a number of unsuccessful attempts to get it repealed.\textsuperscript{20} By the time City of Fresno was decided, the Court found the mere presence of a specific and mandatory federal rule—the irrigation preference in that case—sufficient to supercede conflicting state law.\textsuperscript{21}

Of course, the number of "specific and mandatory prerequisites" in

\textsuperscript{13} 357 U.S. 275 (1958).
\textsuperscript{14} 372 U.S. 627 (1963).
\textsuperscript{15} 373 U.S. 546 (1963).
\textsuperscript{16} 328 U.S. 152 (1946).
\textsuperscript{18} 53 Stat. 1195, as amended, 43 U.S.C. 485h(c) (1958).
\textsuperscript{19} 357 U.S. at 291-92.
\textsuperscript{20} The Court was also impressed by the well established congressional policy of expressly exempting a project from the requirements of the excess land law when it wanted to do so. 357 U.S. at 292-93. See Trelease, Reclamation Water Rights, 32 Rocky Mt. L. Rev. 464, 491 (1960).
\textsuperscript{21} After the statement of the specific federal standard, the Court, without further comment, said, "It therefore appears clear that Fresno has no preferential rights to contract for project water, but may receive it only if, in the Secretary's judgment, irrigation will not be adversely affected." 372 U.S. at 630-31.
the reclamation laws is rather limited, and if Ivanhoe and City of Fresno are kept to their narrow holding and narrow language, they would still leave very substantial room for the operation of state law in administering reclamation projects. In leaving this possibility open, the Court noted in Ivanhoe that it was not "passing generally on the coverage of section 8 in the delicate area of federal-state relations." 22

Despite this disclaimer, the Court in both cases proceeded to discuss the section generally in the broadest possible terms. "As we read section 8," the Court said in Ivanhoe without any explanation or citation of authority, "it merely requires the United States to comply with state law when, in the construction and operation of a reclamation project, it becomes necessary for it to acquire water rights or vested interests therein." 23 That this very sweeping limitation on the meaning of section 8 was not a mere casual aside was made clear in the City of Fresno case. There, after noting disapprovingly the city's claim that "section 8 . . . requires compliance with California statutes relating to . . . the priority of domestic over irrigation uses," Mr. Justice Clark said that "the effect of § 8 in such a case is to leave to state law the definition of the property interests, if any, for which compensation must be made." 24 This interpretation of section 8, apparently eliminating state law entirely from control over the distribution and use of project water, and reading it as merely affirming the federal government's constitutional obligation to compensate for the taking of property, 25 is a total repudiation of the traditional theory espoused by the states. It is, in fact, an almost verbatim adoption of the interpretation which the United States in its briefs had urged upon the Court. 26

With their very narrow holdings and their very broad dicta, Ivanhoe and City of Fresno leave the exact status of section 8 clouded in considerable uncertainty. In any event, it is useful to remember that the broad dicta of the cases, though very strongly worded, are nonetheless still dicta and were distinctly not necessary to decide the issues presented.

The Court's most recent explication of section 8 is found in the great Colorado River case decided in 1963. The issue in Arizona v. Cali-

22. 357 U.S. at 292.
23. Id. at 291.
24. 372 U.S. at 630.
25. Of course, as the Ivanhoe dictum indicates, section 8 does compel the United States to comply with state law in its initial appropriation of water. But that is not what we are concerned with here. The only question under consideration here is what authority state law exerts over use and distribution once the water is appropriated. In fact the United States does make application to state agencies for permits to appropriate, and does subject itself to state-law limitations on the amount of water it can acquire. See Decision D 1179, State of California, Water Rights Board 5-6, 23 (Adopted April 21, 1964). It is worth noting that in some non-reclamation situations the United States has been unwilling to comply with state permit procedures. Nevada v. United States, 165 F.Supp. 600 (D.Nev., 1958), aff'd on other grounds 279 F.2d 699 (9th Cir., 1960).
arose in a somewhat complicated context and requires a word of explanation. Of course the principal question in the case was a determination of how the river was to be apportioned among the lower basin states. But there was also injected into the case the issue with which we are concerned here; that is, how the waters apportioned to each state were then to be distributed to users within the state. The case arose under the Boulder Canyon Project Act, a separate reclamation law dealing with the waters of the lower Colorado. Section 14 of that Act incorporates by reference section 8 of the 1902 Act. Section 18 also has language saving certain rights to the states. These two sections assured that any state-federal conflicts arising in the administration of the Project Act would raise questions similar to those presented by *Ivanhoe* and *City of Fresno*.

But unlike those cases, this issue in *Arizona v. California* was not limited to a narrow conflict between state law and a particular federal policy expressed in the statute. Instead, the issue was the right of the Secretary in general to ignore state priorities in distributing project water intrastate in favor of some other scheme such as ratable proration. The problem was thus raised in the broadest possible form—the authority of the Secretary to contravene a fundamental principle of state water law in favor of a federal purpose not even articulated, let alone not “specific and mandatory,” in the Act. In upholding the authority of the Secretary so to act, the Court seems to have realized the worst fears of the states.

Moreover, the ground upon which the Court reached its decision is phrased in a most expansive way. After repeating the broad dictum of *Ivanhoe* and *City of Fresno* as if the limited scope of section 8 had been conclusively settled there, the Court proceeded to devise an affirmative theory to explain why federal law must be made controlling. In its view, the majority said, where the 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 waters to users, state law has no place.

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31. The Court's opinion does not set out the particulars of the conflict. For a discussion of the ratability vs. priority dispute see Reply Brief for the United States pp. 12-23 (October, 1961) and Answering Brief of the California Defendants to the Exceptions and Opening Briefs of the United States, Arizona and Nevada pp. 57-75 (August 14, 1961). For the dispute over whether deliveries to Boulder City, Nevada, must be subjected to state priorities, see 373 U.S. at 588 n. 94, Master's Report, pp. 303-04 (December 5, 1960), and the Proposed Findings and Conclusions of the United States, pp. 192-93 (1959).
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 put the Secretary of the Interior in charge of these works and entrusted him with sufficient power . . . to direct, manage, and coordinate their operation.32

That this decision represents a monumental victory for advocates of national control is perfectly obvious. But lest it be thought that the Court has conclusively pre-empted state law in administration of reclamation projects generally, it is important to note two very important potential limitations on the significance of the decision in Arizona v. California. Does the opinion apply only to the Boulder Canyon Project Act?—The key to this critical question is an understanding of the factors which induced the Court to decide that the Project Act implemented a “comprehensive . . . congressional plan for the complete distribution of water to users,” for it is the asserted existence of a comprehensive congressional scheme which persuades the majority that state law must be pre-empted.

The Court principally based that finding on the language of section 5 of the Project Act.33 In relevant part that section provides

That the Secretary of the Interior is hereby authorized, under such general regulations as he may prescribe, to contract for the storage of water. . . . No person shall have or be entitled to have the use for any purpose of the water stored as aforesaid except by contract made as herein stated.

The Court's understanding of section 5 was summed up in its statement that “the general authority to make contracts normally includes the power to choose with whom and upon what terms the contracts will be made. When Congress in an Act grants authority to contract, that authority is no less than the general authority, unless Congress has placed some limit on it.”34

Whether this is a satisfactory basis for discerning a congressional intent that there be a comprehensive scheme of federal, rather than state, regulation is a question that need not be considered at this point. For the moment the only concern is whether the holding as to a comprehensive plan necessarily encompasses all reclamation projects or appears to be limited to the peculiar provisions and background of the Project Act.

34. Arizona v. California, 373 U.S. 546, 580 (1963). The Court also seems to have relied on its finding that Congress had comprehensively planned a division of the River interstate to support its conclusion that there was a comprehensive congressional plan for distribution intrastate. Of course the two issues are quite independent.
Of course section 5 of the Project Act applies only to that Act and thus only to administration of part of the Colorado River. There is no precise counterpart to that section in the general reclamation laws,35 and insofar as the Court's holding rests on the view that it is the contract power of section 5 which displaces state law, it is safe to say at least that the case does not necessarily cover reclamation projects in general. Thus, until the Court may decide otherwise, the general scope of operation of section 8 of the Reclamation Act can be viewed as still an open question, firmly settled only to the quite limited extent of the holdings of Ivahoe and City of Fresno.

Does the opinion apply only to interstate projects?—In support of its finding of a comprehensive federal plan, the Court emphasized that the Boulder Canyon Project Act involved several states and that, therefore, leaving administration to state officials and state law might have the double detriment of inefficiency due to lack of unitary management and of "varying, possibly inconsistent, commands of the different state legislatures."36 Again, without passing on the soundness of this view, it is important to note that the difficulties foreseen if state law were applied under the Project Act, with its interstate implications, would be inapplicable to the nearly 85 per cent of all federal reclamation projects which serve users wholly within a single state.37 For this reason too, we may conclude that insofar as Arizona v. California rests on the interstate nature of the Boulder Canyon Project, it leaves open the question how far the federal pre-emption theory will be applied to intrastate reclamation projects.

As the foregoing discussion shows, the status of section 8 in reclamation projects generally may be considered as still in some doubt. Moreover, counsel on both sides in these cases have taken such extreme positions about the role of section 8 that it may well be questioned whether the Court has thus far been afforded an adequate perspective on the problem. Advocates for state control have unyieldingly urged the absolutist position that section 8 deliberately subjects national policy to the possibility of state veto.38 On the other side proponents of national power contend, and with much support from recent language of the Court, that federal administration according to federal policies is what

35. There are, of course, similar provisions which might be similarly interpreted. See, e.g., 72 Stat. 542 (1958), 43 U.S.C. § 485h(d) (1958), (though this contract power seems to have had a more restrictive purpose related to repayment arrangements); 76 Stat. 99 (1962), 43 U.S.C. § 615ss(a) (1958 Supp. V), (dealing only with the Navajo-San Juan-Chama Projects).
38. A perfect example of the attitude is found in Fresno's briefs where, studiously ignoring Ivahoe, the city blithely argues that the United States must conform to California preference law and ignore the preferences expressly set out in the reclamation laws. Brief for City of Fresno, pp. 54-57, City of Fresno v. California, 372 U.S. 627 (1963).
Congress wants, and that section 8 only demands reference to state law for definitions of compensable property.

These factors are sufficient to suggest that the time is appropriate for a careful look at section 8, unencumbered by speculation about what the Court has foreclosed. Enough may be revealed by such a new look to encourage some modification of theories presently accepted. Obviously the place to begin is with the views espoused by the contending parties, the federal government and the states.

THE POSITION OF THE UNITED STATES: THE PROPRIETARY THEORY

The notion advanced by the United States, that section 8 deals only with the definition of property and not with administration of reclamation projects, is an extremely attractive one. If adopted, it would permit enforcement of all federal policies in the reclamation acts and at the same time permit implementation of section 8. This result would be achieved by determining that the state law to which section 8 defers is not all state water law, but only that portion of state law which decides whether a person has, or does not have, a compensable property interest. Once we accept this view, we are spared the embarrassment of concluding that at one point or another in the statutes, Congress either did not mean what it said, or did not know what it was talking about.

This theory provides a very statesmanlike solution to a complex problem. Its only shortcoming is that it is a patent distortion of congressional intent which has no support whatever in the statute or the legislative history. In fact, the manner in which it developed and grew to its present prominence is a classic example of legal legerdemain. The authority for this "proprietary" theory is based almost entirely upon the opinion of Mr. Justice Burton in First Iowa Co-op. v. FPC,39 where the meaning of section 27 of the Water Power Act was in question.40 Section 27 is worded almost identically to section 8 of the Reclamation Act.41 The issue in the case was the extent to which federal power license applicants were to be subjected to licensing requirements of a state agency which dealt with the same issues as those covered by the Federal Power Commission. The facts showed that the state had standards which conflicted with those of the federal agency; thus the prospect was presented that Iowa would veto a project which met FPC standards and the FPC would have disapproved the project if state requirements had been met.

41. "Sec. 27. That nothing herein contained shall be construed as affecting or intending to affect or in any way to interfere with the laws of the respective States relating to the control, appropriation, use, or distribution of water used in irrigation or for municipal or other uses, or any vested right acquired therein." First Iowa Co-op. v. FPC, 328 U.S. 152, 175 (1946). The additional clause in section 8, directing the Secretary to proceed in conformity with state law, perhaps makes it a somewhat stronger authority for the states. Section 8 is quoted at p. 49 supra.
Justice Burton's opinion turned primarily upon an analysis of congressional intent which he found mandated primary federal control. But he still had to dispose of the broad language of section 27. This he did in the following way:

The effect of § 27, in protecting state laws from supersedure, 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.42

It is this excerpt from the Burton opinion—especially the phrase "proprietary rights"—which has been seized upon by the United States in subsequent cases to limit the meaning of section 8. What Burton meant, the government says, is that state law is to govern only the acquisition, rather than the distribution, of water. That is, the states are to control only "proprietary rights," meaning questions of ownership, rather than questions of control.

If the excerpt is read in context, however, it is clear that it means no such thing. All that the Court had to hold in First Iowa was that the Congress did not defer to the states in the field of power licensing; it was not necessary in that case to pass on the general role of state law in the administration of reclamation projects. And it is quite clear that this narrow ruling was all that Justice Burton intended. As Burton himself stated, he was simply applying the traditional canon of construction, ejusdem generis. The statute, he said, refers to irrigation of municipal or "other uses." Licensing is obviously neither an irrigation or a municipal use and, he held, under principles of ejusdem generis it is not an "other," necessarily meaning "similar," use. That this is all he meant to hold is demonstrated by the fact that the only case he cited in support of his interpretation was Alabama Power Co. v. Gulf Power Co.43 That case held merely that under the doctrine of ejusdem generis power licensing was not one of the uses contemplated in section 27 and was not, therefore, saved to state law.

Nor is his use of the term "proprietary rights" inconsistent with this analysis of his opinion. He undoubtedly meant to distinguish rights in the appropriation and use and distribution of water (property or proprietary rights) from the mere seeking of a license (an application for a privilege or business opportunity, as opposed to a property interest). That this is the only sense in which he used "proprietary" is confirmed by looking closely at the excerpt from the opinion quoted above. It will be noted that his characterization "such" proprietary rights refers back to the phrase "laws as to the control, appropriation, use or distribution of

42. First Iowa Co-op. v. FPC, 328 U.S. 152, 175-76 (1946).
It seems very clear that he meant to define as proprietary all “such” laws, that is, laws dealing with use and distribution as well as laws dealing with appropriation; it is only laws dealing with the licensing process that he excludes from this category.

Conversely, to adopt the government’s interpretation, we must twist Burton’s language, ignoring the fact that he grouped “appropriation, use or distribution” together, and read the opinion as saying that laws dealing with appropriation are to be distinguished from laws dealing with use and distribution, and that state control is to extend only to the former. This simply is not what the opinion says.

Certainly it would be difficult to imagine a less satisfactory authority to rely upon for the government’s proprietary theory than the opinion in *First Iowa*, which neither held what the government now uses it to mean, nor even said what the government claims it says. It hardly seems too harsh to say that the use of *First Iowa* as a precedent for the government’s proprietary theory is a total fabrication.

The only other authority upon which the United States has ever relied for its proprietary theory is a statement from the legislative history of section 27, in which Congressman Mondell had stated that inclusion of the section would assure respect for vested property rights. But nothing in that passage indicates in any way that Mondell believed section 27 was intended to limit the function of state law to the protection of vested property rights. Indeed, as we shall see when we go back to examine the original history of the Reclamation Act of 1902, Congressman Mondell had quite the opposite view. He was not only the principal spokesman for the Act in the House, but also a very firm advocate of broad state control over the use and distribution of project water. His views are wholly at odds with the theory which the government has posthumously tried to attribute to him.

It is from these dubious beginnings that the proprietary theory arose. The government, unembarrassed, has continued to press the theory in each subsequent case, but it has never cited any further support for it. And, even less forgivably, the Court has accepted the theory in each of these cases without any discussion or explanation. As we shall now see from a review of the legislative background and history of the Reclamation Act, there isn’t anywhere a scintilla of evidence to support the government’s proprietary theory.

In his major address in support of the Reclamation bill, Representative Mondell spoke at length about the issue of local versus national control over reclamation project water. The motto he proposed for the

44. 51 Cong. Rec. 13630-31 (1914). An examination of the briefs for the United States in the *First Iowa*, Ivanhoe, *City of Fresno* and *Arizona v. California* litigations confirms that they have advanced no other authority for the theory.
scheme which the bill employed was "National expenditure, local administration." And in order that the meaning of this phrase would be very clear, he quoted from President Roosevelt's message to Congress on the reclamation problem: "These irrigation works should be built by the National Government," the President had said, but, "the distribution of the water, the division of the streams among irrigators, should be left to the settlers themselves in conformity with State laws, and without interference with those laws or with vested rights." Mondell also quoted several times the Republican Platform of 1900 in support of his explanation of section 8. It recommended "adequate national legislation to reclaim the arid lands of the United States, reserving control of the distribution of water for irrigation to the respective States and Territories." During the presentation of this speech, Mondell was interrupted by an Indiana Congressman who expressly asked for clarification "upon the subject of national or state control." In response, Mondell said that section 8 merely followed traditional federal legislation "recogniz[ing] local laws and customs appertaining to the appropriation and distribution of water used in irrigation." In support he cited not only the well known laws of 1866, 1870 and 1877, in which Congress recognized rights vested under state law, but also federal practices which recognized that "the control of the flow and use of the water is therefore a matter under State or Territorial control," and federal decisions "leaving the disposition of the water to the State." Unless these phrasings were meant to have a most unconventional meaning, it would seem eminently clear that Mondell anticipated state law control both in defining rights for purposes of acquisition and in making rules for the distribution of water to project users.

Nor were Mondell's views confined merely to generalities. He was perfectly consistent in affirming the broad reach of state control in specific circumstances. His position on the federal condemnation authority under the Act is a particularly useful example. During the debates, a question was raised about the constitutionality of section 7 of the Act, giving the Secretary condemnation power. It had been urged that the federal government had no power to condemn for some of the proposed uses, which, it was argued, were private rather than public. Mondell's response to this is most enlightening, not for its constitutional learning, but for its view of the intended role of state law. No constitutional problems were raised by the condemnation power, he said, because only such authority to condemn was granted by the Act as was allowed to anyone under state law. "Where the State laws do not recognize the right to

45. 35 Cong. Rec. 6677 (1902).
46. Ibid.
47. Id. at 6676.
48. Id. at 6679.
49. Ibid.
50. Ibid.
condemn property for the purposes contemplated in the act, it will not be condemned, and there is the end of it."51 Surely this view is utterly inconsistent with the argument that state law was only to define property rights.

A parallel history is revealed by the debates in the Senate. Senator Clark of Wyoming, also a strong advocate for the bill, rose to speak at length in rebuttal to a claim that the bill would create "a great Government bureau which shall have control of all the lands and waters in our arid regions."52 His response is so revealing that it merits quotation at length:

The question of the conservation of waters is one of national importance; the question of reservoir sites and reservoir building is one that appeals to the Government as a matter of national import, but the question of State or Territorial control of waters after having been released from their bondage in the reservoirs which have been provided is a separate and distinct proposition. . . . It is right that the General Government should control, should conserve, and should reservoir the headwaters of these streams. In this it is a national and not a State proposition. But in the distribution of these waters . . . it is right and proper that the various States and Territories should control. . . . The conditions in each and every State and Territory are different. What would be applicable in one locality is totally and absolutely inapplicable in another. . . . Every one of these States and Territories has an accomplished and experienced corps of engineers who for years have devoted their energies and their learning to a solution of this problem of irrigation in their individual localities. . . . They are the men qualified to deal with the question, the laws are written upon their statute books and read of all men . . . .53

In addition to these extracts from the debates, both the House and Senate Reports upon the bill clearly supported the view that state law would govern administration and distribution of the water.54 Finally, for whatever little it may be worth we have also the view of Mr. Mondell's principal antagonist, Congressman Ray of New York, that state law would govern to the exclusion of federal control.55 In fact, in all the legislative history of this hotly debated Act, in which the meaning of section 8 was a much discussed issue, no one took the opposite view. The evidence that the states were intended to exercise control over the distribution and use of project water is overwhelming and incontrovert-

51. 35 CONG. REC. 6680, 6688 (1902). Interestingly, the courts have not been willing to give state law such broad scope. See United States v. O'Neill, 198 Fed. 677 (D. Colo. 1912); United States v. 277.97 Acres, 112 F. Supp. 159 (S.D. Calif. 1953).
52. 35 CONG. REC. 2222 (1902).
53. Ibid.
54. S. REP. No. 254, 57th Cong., 1st Sess. 2 (1902); H. R. REP. No. 1468, 57th Cong., 1st Sess. 6 (1902).
55. 35 CONG. REC. 6692 (1902).
ible. For the government's proprietary theory, which has apparently been adopted by the Supreme Court, there is not a single shred of support! As a reading of original congressional intent, the theory should be repudiated as utterly without basis.

THE POSITION OF THE STATES: THE VETO THEORY

The notion that section 8 deliberately subjected national reclamation policy to a state veto power has been strongly urged in each of the cases which has come to the Supreme Court. And each time it is argued that the veto theory is supported by a long established and well settled view in the Supreme Court that in reclamation projects the federal government was intended to be simply a physical "carrier and distributor" of water, and nothing more. In advancing this view heavy reliance has been placed upon three important decisions—Kansas v. Colorado, 56 Ickes v. Fox 57 and Nebraska v. Wyoming. 58

Of course the views in these cases, whatever they held, would not necessarily be controlling in present interpretation. But because they have been so strongly relied upon to evoke a misleading historical picture, it is important to make clear just what the Court in fact did in these cases.

Kansas v. Colorado, decided in 1907, was a dispute between the states over the waters of the Arkansas River. Kansas, claiming that it had a right to the full natural flow of the River as it had existed in the state of nature, objected to the diminution of the River by appropriations in Colorado. Colorado claimed a right to diminish the River under the doctrine of prior appropriation. All the case actually decided was how a controversy over division of the waters of an interstate stream should be settled, an issue quite unrelated to the problem here.

The opinion does, however, contain dicta which cast doubt on the authority of the federal government to regulate the use or distribution of waters within a state, and it is this language which has been cited time and again in cases raising questions of interpretation of section 8. In fact the language is quite beside the point for the reason that it is based on a constitutional theory rather than theory of statutory interpretation; what the Court said there was that Congress is without authority to regulate the use of irrigation water on private land and that state law must therefore, as a matter of constitutional necessity, be controlling. Whatever vitality this view might have had then 59 it has now been thoroughly

56. 206 U.S. 46 (1907).
57. 300 U.S. 82 (1937).
58. 325 U.S. 589 (1945).
59. Insofar as the opinion suggests that Congress' authority was constitutionally limited to reclamation of federally owned lands, it certainly deviated from both the theory and practice of the Congress which, of course, expressly made the Act applicable to privately owned lands. And insofar as the case suggests that it would be unconstitutional to apply federal law to distribution and use of project water on
repudiated, and it is well settled that Congress has ample constitutional authority to displace state law. As has already been noted, the only relevant question today is whether and to what extent Congress intended to displace the states as a matter of statutory construction. As a constitutional authority, *Kansas v. Colorado* is obsolete; as a guide to statutory interpretation, it is silent. For these reasons it should be discarded once and for all from discussions of the meaning of section 8.

The other two cases generally relied upon are somewhat closer to the mark, since they do deal directly with the Reclamation Act. Nonetheless, as we shall see, they are not significantly more useful as precedent. The citation of *Ickes v. Fox* by the states exemplifies the all too common situation where language used by a court for one purpose, and in one context, is subsequently perverted to a wholly different use in a wholly different context. The litigation arose out of an attempt by the Secretary of the Interior to withhold some reclamation project water from long time users unless they would agree to pay increased charges. The sole issue before the Court was whether the action must be dismissed as a suit against the United States barred by sovereign immunity. For purposes of deciding the immunity question, it apparently was necessary, under the rules then prevailing, to determine whether legal title to the water was in the United States or in the users. Why this was relevant is clear only to those steeped in the mystique of sovereign immunity, but at any event title was the issue.

It was in the context of deciding that issue that the Court made the statement that has been so much used by the states in subsequent litigation:

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private lands (assuming it would be constitutional to supply them project water ancillary to reclamation of public domain), it conflicts with the anti-monopoly provisions of the Act. While the Court has the final word on constitutionality, this note simply points out that the constitutional dicta of *Kansas v. Colorado* has never been followed; the reclamation laws have always embraced private lands and the federal standards governing use and distribution have been implemented in administration of federal projects.

It is possible to read the opinion more narrowly as merely prohibiting the federal government from enacting a national water law of general application intra-state, and thus from wholly pre-empting the states from control even over non-project water. If the opinion is read in this way, its constitutional position is much stronger but it is of even less relevance to problem under consideration here.


61. It seems that the controlling rule was this: If the water was owned by the United States, then the users' claim to it was only a claim based on their contract with the Secretary, and the suit was thus a suit against the United States for specific performance of its contract. Such a suit was barred by sovereign immunity. On the other hand, if title to the water was in the users, then the suit would be one against an officer for wrongful interference with a private property right and the defense of sovereign immunity would not be allowed. The Court held that title was in the users and that the suit would lie. 300 U.S. at 95.

The contention that ownership of the water became vested in the United States is not well founded. Appropriation was made not for the use of the government, but, under the Reclamation Act, for the use of the land owners; and the water-rights became the property of the land owners. The government was and remained simply a carrier and distributor of the water.

One might very well be willing to agree that ownership of the water is in the users for purposes of bringing suit, or for purposes of state taxation or for any of a miscellany of other legal purposes; and one might agree that for these purposes the United States was "simply" something other than titleholder of the water. Different characterizations of legal interests for different purposes is both common and valid.

An excellent example of this approach occurred recently. In a suit brought on an oil and gas lease, service by publication was made under a statute authorizing this procedure as to interests in land. The court held the service improper on the ground that the lease interest was not land, but was simply intangible personal property. But when, a few years later, the question arose whether this same lease interest was subject to state inheritance taxes on "tangible" personal property, the state, without in any way impugning the correctness of the service of process ruling, determined that for inheritance tax purposes the interest is "tangible personal property."

This is precisely the situation of Ickes v. Fox. To say that the United States, for purposes of sovereign immunity, is "simply a carrier," does not suggest in any way that the Court has barred the government from implementing national policies in the administration of federal reclamation projects. Indeed, it seems preposterous to suggest that Ickes stands for the proposition that the Congress did not care whether the excess land law (for example) was to be enforced. Yet that is the precise purpose for which the case is cited by the states.

62. 300 U.S. at 94-95. (Emphasis added.)
65. KAN. GEN. STAT. ANN. § 79-1501 (Supp. 1961). A similar situation occurred recently in New York. In considering the scope of the eminent domain power, the New York court held that condemnation could be for a public purpose even though the condemned property is leased to a private party. Courtesy Sandwich Shop, Inc. v. Port Authority, 12 N.Y.2d 379, 190 N.E.2d 402, 240 N.Y.S.2d 1 (1963), appeal dismissed, 375 U.S. 78. But in later considering the applicability of a tax which exempted property held for a public use, the Court determined that property leased to a private person could not be classified as "public." In sustaining this differential test of characterization the Court said:

The policy considerations which prompt or move the Legislature to authorize the acquisition and operation of a project, or to sanction condemnation to bring it into being, may be altogether different from those affecting its decision as to whether the property so acquired or operated shall be free from tax. Town of Harrison v. County of Westchester, 13 N.Y.2d 258, 265, 196 N.E.2d 240, 244, 246 N.Y.S.2d 593, 598 (1963).
In fact the Court in *Ickes* was far from any such holding. Not only
was no conflict between state and federal policy presented in that case;
on the contrary, it was clear that the challenged act of the Secretary vio-
lated both state law and the Reclamation Act. Thus in *Ickes* all the law
was uniform. A more inapt precedent for resolving the problems of
state-federal conflict under consideration here could hardly be imagined.

The last and most recent of the trinity of alleged precedents, *Ne-
braska v. Wyoming*, is one of those peculiar cases that is relied upon by
advocates on both sides of the federalism controversy. Though it con-
tains language very comforting both to partisans of state and of national
authority, its decision, like that in the preceding cases, has nothing to do
with the problem at issue here. *Nebraska v. Wyoming* was a suit for
equitable apportionment of the North Platte River. Like *Kansas v. Colo-
rado* it involved the division of water among the states involved; it did
not involve at all the issue with which we are concerned—the controlling
law as to distribution of project water within each state.

The much cited language of the case arose out of an apparent sug-
gestion by the United States that those waters of the River which were
appropriated for federal projects should be apportioned to the United
States, rather than to the states acting *parens patriae* for their citizens
who were users under the projects. This naturally raised the question to
whom the project water belonged. The Court held that it belonged to
the users and should therefore be apportioned through them to their re-
spective states. The United States understandably feared that such a
holding would imply that the water “belonged” to the various states in
the sense that they would be empowered to exercise full dominion over
the administration of federal projects within the state.

But the Court was very explicit in stating that its decision to ap-
portion the water to the states, rather than to the United States, did not in
any sense imply any such state control over the project. It could not
have made more clear that it was refraining from deciding that very im-
portant issue. It said, in response to the fears expressed by the United
States:

> It is argued that if the right of the United States to these waters
> is not recognized, its management of the federal projects will
> be jeopardized. It is pointed out, for example, that Wyoming
> and Nebraska have laws which regulate the charges which the
> owners of canals or reservoirs may make for the use of water.
> But our decision does not involve these matters. We do not
> suggest that where Congress has provided a system of regula-
> tion for federal projects it must give way before an inconsistent
> state system. We are dealing here only with an allocation,
> through the States, of water rights among appropriators.\(^6\)

\(^6\) *325 U.S. at 615.* (Emphasis added.)
This hardly sounds like a holding that administration of federal projects is entirely within state control under section 8, and that congressional policy must be subject to state veto power. Yet this is the case which is cited over and over for the proposition that state law governs the distribution of project water, and that the United States is "simply a carrier and distributor" of water. Read in context and in its entirety, Nebraska v. Wyoming supplies no support for the veto theory.

Thus we see that the much trumpeted historical precedents and attitudes, when closely examined, do not say at all what the states claim they say. Likewise, the often used cognate argument, that the federal government in administering projects has always in practice followed state law slavishly, is simply untrue. Thus the veto theory, if it has any legitimacy, must seek support in the original history of the Act. It is time again to look back to that history.

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 important 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 in-

67. Id. at 614.
68. This is equally true for the less prominently used precedents relied on by the states, such as United States v. Gerlach Live Stock Co., 339 U.S. 725, 734 (1950); Silas Mason Co. v. Tax Comm'n, 302 U.S. 186, 199 (1937); California Oregon Power Co. v. Beaver Portland Cement Co., 295 U.S. 142, 164 (1935); Nebraska v. Wyoming, 295 U.S. 40, 42-43 (1935). As with the decision just discussed, none of these cases actually deals with a section 8 question involving a conflict between state and federal law in the operation of a reclamation project. At best they contain casual and somewhat offhand remarks to the effect that Congress intended state law to be followed; at worst they are cited not for what the Court said, but for the allegations of a complaint which the Court merely quoted without in the least signifying its approval (295 U.S. at 42).
69. The authorities cited for this proposition turn out to be nothing more than cases where the United States has respected state law definitions of property by paying compensation when it acquires water rights; they are not cases where state distribution law was followed. E.g., United States v. Gerlach Live Stock Co., 339 U.S. at 740 n14; Nebraska v. Wyoming, 325 U.S. at 614-15. Of course the United States has always recognized its duty under section 8 to compensate state property rights which it acquires. But that is not the issue. The issue is whether the United States has followed state law in the administration of projects and the distribution of water. And the answer to this is that frequently it has not done so when it thought an important federal policy had to be implemented. *Ivanhoe, City of Fresno and Arizona v. California* are all cases where the Secretary contravened state law in administering federal projects. See also El Paso County Water Improvement Dist. v. City of El Paso, 133 F. Supp. 894 (W.D. Tex. 1955), modified, 243 F.2d 927 (5th Cir. 1957), cert. denied, 355 U.S. 820 (1957); Mower v. Bond, 8 F.2d 518 (D. Idaho 1925); Fayette-Boise Water Users' Ass'n v. Cole, 263 Fed. 734 (D. Idaho 1919); United States v. O'Neill, 198 Fed. 677 (D. Colo. 1912).
vestment 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.

But there was one important federal policy, even in 1902. This was the anti-monopoly policy, designed to insure that the benefits of federal irrigation programs went to, and stayed with, small family farmers, and that water did not fall into the hands of large speculators and corporations. This policy was reflected principally in three separate provisions of the Act—the excess land law, limiting the number of acres in single ownership for which water could be provided; the appurtenance provision, tying the water to the land and preventing speculation in water rights in gross; and the residency requirement, guaranteeing against absentee ownership. It is perfectly clear that Congress did not intend to submit to any state veto power in the enforcement of this policy. The characteristic attitude of the Congress was indicated by Senator Clark:

[W]hat we do not want is that large areas of public domain shall be taken from the settler and placed in the hands of the larger corporate interests; that is exactly what this bill guards with jealousy and is one of the ideas that the bill is designed to promote.

The official committee report is no less explicit. It states that the bill is "calculated to prevent the possibility of speculative landholdings," that it "carefully guards against the accumulation of large holdings of irrigated lands in single ownership . . . by limiting the area of lands the property of any one landowner for which a water right may be acquired to 160 acres and requiring residence or occupancy. . . No nonresident owner can secure a water right." The Report concludes with the statement that the bill is designed to "absolutely insure the user in his right and prevent the speculative use of water rights. . . . [Therefore] the character of the right which is contemplated under the act is clearly defined

70. 35 CONG. REC. 6679 (1902) (remarks of Rep. Mondell).
75. 35 CONG. REC. 2222-23 (1902); see also 35 CONG. REC. 6677 (remarks of Rep. Mondell), 6758 (remarks of Rep. Martin) and 1385 (remarks of Senator Hansbrough).
to be that of appurtenance or inseparability from the lands irrigated and founded on and limited by beneficial use."

This is hardly the sort of language one would use if the policy advanced was intended to be subject to state veto, particularly when the state laws did not have such anti-monopoly provisions. Moreover, there is express evidence suggesting that by these provisions Congress expected to displace inconsistent and inadequate state law. The President's message on irrigation in 1901, which served as a model for the Act, had specifically referred to the general "lax and uncertain" state laws which had permitted streams to pass into private ownership. As a remedy, he specifically recommended a law that would overcome this failing in state law by providing that the water "right should attach to the land reclaimed and be inseparable therefrom." 77

This suggestion was translated into the appurtenance rule of the Act. Congressman Mondell described this as one of the "most important provisions of the law" and said—significantly—"This is an advance over the water usages of most of the states." 78 Could there be any better indication that state law was to be superceded, as necessary, to carry out the federal policy?

This evidence casts quite a new light on section 8. While we can reaffirm the traditional view that Congress in 1902 intended to submit to state administration, we now see that this was not out of willingness to see federal policies vetoed by the states, but because in general Congress saw no threat to federal policies (since it hardly had any) in state administration. But Congress' attitude can only be fully understood by looking at the full picture, and that picture includes the attitude taken toward enforcement of the anti-monopoly provisions of the Act. Here we see not only a plain determination that this federal policy shall be enforced, but a clear recognition that it is to be enforced in spite of conflicting state law.

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.

If nothing had changed since 1902, we could end our inquiry here, advising that in general state law is to be followed in administering federal reclamation projects; that general practice would be subject to only

77. Quoted at 35 Cong. Rec. 6776 (1902).
78. 35 Cong. Rec. 6679 (1902).
one significant exception—that the express federal anti-monopoly policy is to be enforced even where it conflicts with state law.

But, as we shall see, things have changed a great deal since 1902. The brief act passed in that year has grown a hundred-fold and congressional attitudes toward reclamation have undergone a substantial evolution. Recalling that we are interested in ascertaining congressional intent, not as a matter of historical interest, but in order to determine how the problems of federalism are to be handled today in reclamation projects, the task which we must now undertake is to re-evaluate the meaning of section 8 in light of the developments of the last six decades.

**The Evolution of a Federal Reclamation Policy**

The first important amendment to the 1902 statute was the Warren Act of 1911, which authorized the Secretary to contract for the use of surplus waters and the construction of surplus capacity. The impetus for the statute arose out of two factual problems. First, project reservoirs sometimes had capacities in excess of that required for the irrigation of project lands, and it was unclear whether the Secretary of the Interior had congressional authorization to contract with private parties or ditch companies to utilize that excess capacity. Also, there was the related problem that sometimes the Secretary had acquired the only desirable reservoir site in an area, but all irrigable lands in the area were not within the project. Unless the Secretary could arrange to build a reservoir with joint capacity for project water and for water to be used on non-project lands, it was feared that great quantities of irrigable non-project land would needlessly remain barren. The Warren bill was designed to remedy both problems by making clear the authority of the Secretary to contract for the use of surplus waters and to arrange for cooperative construction of reservoirs and transmission facilities with excess capacity to be used for non-project purposes.

Somewhat surprisingly, the bill not only granted this authority, but contained language which seemed to invest the Secretary with very considerable general powers. In relevant part it provided that he could contract "upon such terms as he may determine to be just and equitable," and may fix charges to "be just and equitable"; when contracts were made with private carriers for distribution in turn to users outside the project, the bill prevented the carriers from charging more than they had paid the Secretary "except to such extent as may be reasonably necessary to cover cost[s]. . . ."

80. See the report of the Department of Interior quoted at 45 Cong. Rec. 4315-16 (1910).
82. Ibid.
83. Ibid.
Largely because of this language the bill drew severe opposition, particularly from Senator Heyburn of Idaho, who described it as a measure which "transferred the jurisdiction now exercised by the State under its laws . . . to the Interior Department." A similar fear was expressed by Congressman Taylor of Colorado who asked,

Does it not strike those on the committee who have had practical experience in irrigation operations of the West that this is rather an adroit entering wedge for the purposes of the Government controlling our waters in that country?

The response of the bill's proponents to these charges is indicative of the subtlety of reclamation law and politics. They did not say that such an entering wedge was precisely what they wanted. Indeed, they agreed with the opponents that state law was controlling. But to look merely at what was said is to see reclamation policy only on the most superficial level. It is what the bill's proponents did that really counts, and their actions diverged significantly from their words. They refused to adopt Senator Heyburn's theory that the bill was undesirable and unnecessary because waters, in or out of federal reservoirs, were subject to state law which was fully capable of deciding how they should be distributed. They also refused to remove from the bill the broad discretionary language to which Heyburn so steadfastly and so specifically objected. And the concession which they did make, in the form of a proviso, seems most relevant for what it did not concede. Rather than insert a proviso specifically stating that the distribution and use of water was to be solely a matter of state law, the sponsors of the bill provided instead

that nothing contained in this Act shall be held or construed as enlarging or attempting to enlarge the right of the United States, under existing law, to control the waters of any stream in any State.

That the importance of this proviso was in its restraint was clearly brought out in the debates. Mr. Taylor objected to the wording of the provision, asking "why should you put in anything that even indirectly assumes to give the United States control over our streams . . . . You say 'shall not be construed to have any enlarged authority.' Why do you tacitly recognize that it has any authority at all?" The proponents'
answer at first seems an unresponsive muttering about the relative interests of surplus users and landowners under the project and the principle of priority which controls under state law. But a careful reading of the passage indicates that they were thinking about imposing a federal rule providing that surplus waters be sold outside the project only on the condition that they be subject to return if and when they were needed for project purposes, a power that probably could not be exercised under state law control. The "tacit recognition" of federal power in the proviso was thus quite real and was explained by the fact that the bill's proponents had an interest in maintaining some congressional supervision over the distribution of project water.

That congressional deference to state control was more verbal than real is further confirmed by the discussion which took place over the provision in the bill prohibiting carriers from charging excessive rates. The sponsors of the bill were asked who would determine whether rates were excessive. From much of the talk which had taken place, one would think the answer an easy one: the states would determine the question under state law. Indeed it would not have been surprising to hear it urged that Congress had no business deciding how much a ditch company should charge a user for such water. But no such answers were forthcoming; instead, the questioner got a response full of the worst sort of evasion, circumlocution and plain doubletalk, though the question was persistently put and followed up. It is perfectly plain that the sponsors were unwilling to say that the Secretary would decide the question as a federal matter and equally unwilling to say that this congressional standard would be implemented as a matter of state law. Obviously even at this early date Congress was becoming more willing to talk about state control than it was to see it realized.

The next important event in this history took place in 1914, when Congress passed the Reclamation Extension Act. The principal purpose of that Act was to enlarge the time within which construction charges could be repaid to the reclamation fund by users of project water. The precise background leading to enactment of the extension law is not relevant here, and it need merely be noted that some of the extravagant claims that had been made for the original act in 1902—such as the assurance that the reclamation program would be wholly self-sustaining, and even profit making—were demonstrably erroneous. The simple fact was that more money and more time were needed. The extension bill was debated extensively, and representatives from other areas of the
country were less than delighted with the financial results of the first decade of federal reclamation policy. For our purposes, the significance of these events is that they signalled the first overt signs of the new congressional attitude; the view that the Congress had a large investment in reclamation and that it therefore had a correspondingly large responsibility to see that its investment was protected. Plainly the way to insure such protection was not merely to abdicate all control to the states, and the 1914 Act was a first open, albeit modest and quiet, step away from such abdication.

Two provisions designed to enlarge congressional control were inserted in the Extension Act, and the Western congressmen, in rather a poor bargaining position, accepted them meekly. Though they were thus accepted without noise or fanfare, their importance can hardly be overestimated. They first authorized

the Secretary of the Interior . . . to make general rules and regulations governing the use of water in the irrigation of the lands within any project, and [to] require the reclamation for agricultural purposes and the cultivation of one-fourth the irrigable area under each water-right application or entry within three full irrigation seasons . . . and the cultivation of one-half the irrigable area within five. . . .

With this provision the Secretary of the Interior was thrust into an area of water law that had traditionally been a matter of state concern—control over the laws dealing with due diligence, relation back and loss of water rights. And the Department of Interior lost no time in implementing this law with a quite specific set of rules and regulations.

The second provision required the Secretary to cease deliveries of water to any user more than one year in arrears in payment of his construction or maintenance charges; this, too, is an area ordinarily governed by state law, and the federal rule here enacted was one that conflicted with the law in some states. Thus unobtrusively did the Congress begin the development of a substantive federal law of reclamation projects and thus too did it begin operating on the unarticulated but nonetheless clear assumption that it must set some standards and assert some supervision in order to protect its investment and its policies.

The pattern begun in 1914 was continued in 1920 when Congress made the next important amendment to the reclamation laws. The impetus for change was the fact that, as interpreted, the law permitted project water to be used solely for irrigation. In response to considerable demand that water be made available for commercial purposes,

97. 44 I.D. 89 (1915).
100. See the report of the Secretary, quoted at 59 Cong. Rec. 2980 (1920).
an amendment was proposed to permit such uses. Again, to understand
the mood of Congress, it seems most important to look at what was done,
rather than what was said. To a Congress willing to leave the use of
water to the states the obvious form of amendment would have been a
mere authorizing bill, enabling the Secretary to make project water avail-
able for all uses which the law of the affected state permits; this would
have freed project water for commercial uses in all the Western states.
But the Congress was not content to do this. The bill instead authorized
the Secretary to contract for the use of project water “upon such condi-
tions of delivery, use, and payment as he may deem proper;”\textsuperscript{101}
and it added to this a series of substantive preference rules, limiting project
water for non-irrigation uses to situations where project users approved,
where there was no other practicable source and where such use would
not be detrimental to irrigation uses on the project.\textsuperscript{102}

An examination of the legislative history will show the usual asser-
tions by some Western congressmen that the Secretary was to follow
state law and that the reclamation laws are subject to state law, but it is
now obvious that these statements do not represent what the Congress as
a whole was doing in the reclamation laws. The statutes themselves show
a growing body of reclamation law built upon the exercise of federal
discretion and with a growing catalogue of substantive federal standards
and protections. Likewise the debate on the 1920 Act shows that con-
gressmen from other parts of the country were concerned about utilizing
federal standards to decide such questions as whether, under the bill pro-
posed, the irrigation preference in the bill was to permit displacement of
established commercial uses by subsequently developing irrigation de-
mands. They were not willing to have either the states or the water users
“dictate” reclamation policy to the Secretary or to the Congress.\textsuperscript{103}
And even on the verbal level, while the usual invocations of state supremacy
were generally read into the record without comment, the real situation
came to the surface occasionally, as when an Illinois representative in-
terrupted a statement to the effect that project water rights “are a matter

\textsuperscript{102} Again it is important to note that in devising a hierarchy of preferences
among competing uses, the Congress was infringing on a basic element of state
law; indeed preferences in some states are a matter of constitutional right. (E.g.,
Colo. Const. art. XVI, § 6; Idaho Const. art. XV, § 3; Neb. Const. art. XV,
§ 6.) Moreover, the federal preference for irrigation is inconsistent with much
state law. E.g., Cal. Water Code §§ 106, 1254 (1956) (1) domestic, (2) irri-
(2) manufacturing, (3) irrigation, (4) mining, (5) power, (6) navigation, (7) rec-
reation; Neb. Const. art. XV, § 6 and Colo. Const. art. XVI, § 6, (1) domestic,
(2) agricultural, (3) manufacturing. Several states give a special priority to mu-
nicipal uses, either by statute or judicial decision. See Cal. Water Code §§ 1460-
62 (1956); Tex. Rev. Civ. Stat. Ann. art. 7472 (1954); City and County of Den-
ver v. Sheriff, 103 Colo. 193, 96 P.2d 836 (1939), and Metropolitan Suburban
Water Users’ Ass’n v. Colorado River Water Conservation Dist., 148 Colo. 173,
\textsuperscript{103} 59 Cong. Rec. 2983 (1920).
of State grant and not a Federal grant” with the retort, “That is an old contention. I do not agree with that.”

With the Reclamation Project Act of 1939, we move into the modern era of legislation in the sense that the debates are considerably more open and candid about the degree and nature of congressional concern. The history of the debates on this Act is full of statements like these: “Since we are lending hundreds of millions of dollars . . . is there any reason on earth why we should not . . .”; or “The United States Government is investing vast sums of money . . .”, “This bill gives preference . . . and that should be done because the Government is furnishing the money for those projects.” In short, we begin now to see expressed in the Congress the attitude which Mr. Justice Clark stated in the Ivanhoe case when he noted that the United States obviously is entitled “to regulate that which it subsidizes.”

The history of the Reclamation Project Act, however, is relevant here not so much for its language indicating congressional concern—of which we have already seen an abundance—but for a much more important development which is central to an understanding of modern reclamation law. This development is the congressional interest in utilizing the reclamation laws as an instrumentality for the effectuation of a broad range of other important federal policies. In the Project Act, for example, a question was raised about how electric power produced from project facilities was to be distributed. While this issue is not technically covered by section 8, it is most instructive in demonstrating congressional attitudes toward the interrelation of various federal policies. Again the details are not relevant here, but the basic issue was whether a preference for project-produced power should be given to Rural Electrification Act projects. The Congress finally decided that such a preference should be given, and its attitude was summed up by Congressman Robinson of Utah, who said, in words that perfectly epitomize modern federal reclamation attitudes,

The bill simply says that any power that is produced on the project shall be first sold . . . to agencies in which the Government is now investing its money.

Everyone knows that today the Government is investing its money, for better or worse, in a great variety of activities and the debates over current reclamation laws are often little more than a determination how the Congress can assure that federal money spent on reclamation can be

104. Id. at 2981.
105. 84 Cong. Rec. 10222 (1939).
106. Id. at 10223.
107. Id. at 10224.
109. Technically section 8 saves state control only as to “water used in irrigation.”
110. 84 Cong. Rec. 10224 (1939).
used to promote these other federal policies. Perhaps the most common of these corollary national concerns are recreation and farm policy. The congressional concern for both these issues has been widely implemented in the reclamation laws;\textsuperscript{111} but rather than merely enumerate the statutes or set out the provisions, perhaps the most effective way of indicating the current congressional attitude toward the use of reclamation law to forward these policies, and toward the role of state law, is to look in some detail at a rather characteristic recent statute.

While no single act is truly representative, the recent Fryingpan-Arkansas Project law,\textsuperscript{112} enacted in 1962, seems typical of modern reclamation projects in its background, development and substantive provisions. Characteristically, the Fry.-Ark. project was strongly supported by the Colorado congressional delegation, was sharply and critically examined by midwestern representatives, and went through a process of refinement and change during a series of Congresses, with extensive hearing, debate and revisions before it was finally approved in the 87th Congress. The project was typical too in that it raised the pervasive question about using reclamation monies to support the growing of surplus agricultural commodities and because it incorporates a series of provisions relating to recreation. It thus seems an appropriate selection as a legislative case study in the current congressional approach toward reclamation policy. Since the recreation and surplus crop problems are of particular interest, they have been selected for detailed examination.

Recreation

The growth of independent federal policy, and its divergence from state standards, is perhaps nowhere better demonstrated than in the field of outdoor recreation. Increased interest in recreation in recent years has been widely demonstrated throughout the federal government. A variety of general recreation laws,\textsuperscript{113} along with important legislative\textsuperscript{114} and executive\textsuperscript{115} studies of the problems, and development

\begin{itemize}
  
  
  
  
  \item \textsuperscript{114}SENATE SELECT COMM. ON NAT' L WATER RESOURCES, 86TH CONG., 2ND SESS., WATER RESOURCES ACTIVITIES IN THE UNITED STATES (Comm. Print No. 17 1960).
  
  \item \textsuperscript{115}3 REPORT OF THE PRESIDENT'S WATER RESOURCES POLICY COMM'N, WATER RESOURCES LAW 331-34 (1950).
\end{itemize}
of the now standard practice of providing for recreation facilities in federal reclamation projects,\textsuperscript{116} make clear that recreation is an important element of federal reclamation policy which Congress is much interested in promoting. And federal concern for recreation is, despite this considerable activity, still in its infancy. That the future holds the prospect of substantially increased federal recreation activities is indicated by congressional authorization in the 88th Congress for the formulation of "a nationwide outdoor recreation plan."\textsuperscript{117}

On the other hand, in some reclamation states official interest in recreation is almost non-existent. In Colorado, for example, it is not even clear that recreation is a beneficial use under state law. It is nowhere mentioned in the statutes, though other uses are specifically discussed, and the status of recreation uses has never been before the Colorado Court. In fact, in the closest case, "scenic" and "artistic" uses were held non-beneficial, the federal court stating that in its view state law proceeded along more "material" lines.\textsuperscript{118} Thus recreation uses in Colorado are of doubtful status. And even in states where recreation uses are recognized as beneficial, the legislature sometimes puts them at the absolute bottom of the priority ladder.\textsuperscript{119} Clearly, then, even if the federal government and the states are not moving in opposite directions as to recreation, they are at best often moving at quite different paces.

In the Fry.-Ark. project in Colorado, for example, Congress strongly affirmed its substantial interest in promotion and protection of recreational uses. The statute specifically provides that such uses are beneficial uses;\textsuperscript{120} and in a statement of operating principles which the state was required to adopt, and which is incorporated into the law,\textsuperscript{121} not only is it expressly said that the "project contemplates . . . the preservation of recreational values," but in addition detailed numerical standards are set out relating to maintenance of streamflow in precise c.f.s. measurements for specific dates during each year, and for various areas

\textsuperscript{116} See statutes cited note 111 supra.
\textsuperscript{118} Empire Water & Power Co. v. Cascade Town Co., 205 Fed. 123 (8th Cir. 1913). But the Colorado Court has held that irrigating a city park is a beneficial use, on the narrow ground that irrigation includes the application of water for the purpose of nourishing plants. The court equivocated on the question of the use of water to fill artificial lakes in the city parks, City & County of Denver v. Brown, 56 Colo. 216, 230-31, 138 Pac. 44, 49 (1913).
\textsuperscript{119} TEX. REV. CIV. STAT. ANN. art. 7471 (1954). Of course some states list recreational use along with other beneficial uses, and do not relegate them to a subordinate position. ORE. REV. STAT. § 537.170(3)(a) (1963); see also CAL. WATER CODE §§ 233, 12880, 12885 (Supp. 1964). Some other states are at last beginning to think about recreational problems. See 7 KANSAS WATER NEWS # 4, June, 1957, Concept of Reasonable Beneficial Use in the Law of Surface Streams, 12 Wyo. L.J. 1, 11-12 (1957).
within the project collection system. Moreover, the statute directs the Secretary of the Interior to

investigate, plan, construct, operate and maintain public recreational facilities... provide for public use and enjoyment of the same and of the water areas created by this project by such means as are consistent with the purposes of said project...122

The Department of Interior, with apparent congressional approval, has indicated that it intends to play a quite active role both in policy planning and administration, in implementing this authorization.123

Surplus Crops

The determination of Congress to utilize the reclamation laws to promote federal recreation policies seems eminently clear. And quite the same sort of picture is presented by the attitude toward federal farm policy. Again, it is relevant to look at state law for purposes of contrast. It seems clear that the law of Colorado treats all appropriations of water for irrigation uses as of equal standing, without regard to the crop to be irrigated. There is nothing whatever in Colorado law to suggest, for example, that as between appropriators otherwise equal, any preference would be given to an appropriation intended to be applied to irrigation of non-surplus crops as defined in the federal Agricultural Act of 1949;124 indeed, any such discrimination might well be unconstitutional in Colorado. We may assume that if the Fry-Ark. project were administered according to Colorado law, such distinctions would play no part in the distribution of project water. Is this what Congress wants; is it what Congress meant to permit?

On the floor of the Senate, a principal question raised about the proposed project was whether federal funds would be used to increase the growing of surplus crops when at the same time federal taxes were being expended to take lands out of production. As Senator Proxmire put it,

It is my understanding that if the project is undertaken, the yield of alfalfa, feed grains, and other agricultural commodities will be substantially increased... [T]axpayers are being burdened by programs to take land out of production.... In Wisconsin we now have a serious problem... of having a limitation placed on our production of feed grains. What answer can I give to the farmers and taxpayers in Wisconsin when they wonder about having the federal government spend $170 million on a project which will increase agricultural pro-

duction; and when they will be confronted with a much greater
cost than that in the future in paying for the storage and the
cost of this additional agricultural production? 125

The principal spokesmen for the bill in the 87th Congress, Senators Car-
roll and Allott, had a ready and quite specific response to such inquiries.
They said, without qualification, and quite emphatically, that the prob-
lem would not arise in any significant way on this project. And they
made these promises: (1) No new lands would be irrigated, but all ir-
rigation water would go to presently irrigated lands merely as a rescue
operation to provide a firm water supply for existing crops. Senator Car-
roll flatly stated that "the surplus crop problem will not be aggravated.”
Senator Allott reiterated this commitment with great force and positive-
ness. 126 (2) They supported this with a further statement which is some-
between a promise and a prediction. “With a firm supply of water,”
Carroll said, "a greater percentage of garden and vegetable crops will be
grown, crops not in the surplus category.” 127 Senator Allott echoed the
statement precisely: “With assurances of adequate irrigation water sup-
plies... farmers will turn ever more to the high-value specialty crops,
and thus the project will help correct the problem of farm surpluses to
some extent rather than contribute to it.” 128 A pledge almost identical
in content and equally positive in form was given members of the House
by Representative Chenoweth. 129 And Congressman Aspinall, in a major
speech in support of the project, read into the Record the report of the
Department of Agriculture incorporating its specific understanding that
the project would be operated in accordance with the principles just
stated relating to surpluses, and giving its approval on the assumption
that those principles would be followed. 130

These assurances apparently were influential in obtaining needed
votes for the bill. Senator Douglas stated that he had, despite mis-
givings, decided to support the bill because Senator Carroll had “pointed
out that no new land is going to be brought under cultivation.” 131 He
then said, “perhaps that has been the decisive factor entering my mind.
We should not bring new land into cultivation... [Senator Carroll]
has been very persuasive in getting me to change my position.” 132 Surely
Senator Douglas would be surprised to hear it argued that the promises
solemnly made, upon which his vote was obtained, could be ignored
with impunity by a Colorado legislature uninterested in the farmers of
Wisconsin or Illinois.

125. 108 CONG. REC. 15665 (1962).
126. Id. at 15664 (remarks of Senator Carroll); 15669 (remarks of Senator
Allott).
127. Id. at 15664.
128. Id. at 15669.
129. Id. at 10153.
130. Id. at 10148.
131. Id. at 15679.
132. Ibid.
FEDERALISM IN RECLAMATION LAW

What is particularly enlightening about this interchange from the legislative history is its tone. Everyone involved in the debates, supporter or opponent of reclamation, seems to assume that congressional authorization necessarily depends upon assurances that the project will be used to advance federal programs and to protect federal policies. Everyone seems to agree implicitly that federal reclamation policy is obviously tied up with federal farm policy. No one acts as if the federal government is merely to be a banker and builder. No one intimates that promises about administering the project in conformity with surplus crop problems involves a reversal of established policy found in section 8 of the Act. No one suggests that section 8 is a bar to such assurances. Indeed, the significant thing is that debate on the reclamation laws is full of concern about substantive federal policies, whether it be power, farm policy, recreation or national defense.\(^{133}\)

Before any attempt is made to draw conclusions about the administration of the reclamation laws from these materials, it is important to remember that along with the development in congressional attitudes that we have been observing there has also been an unchanging element. With each new reclamation law, whatever its content or background, the Congress re-enacts or incorporates the extremely broad language of section 8 without change. The presence of section 8 may now seem anomalous, or even inconvenient, but it can hardly be ignored. The question must be asked, how is section 8 to be understood in the light of modern events?

Certainly the first step must be to stop thinking that effectuation of congressional intent requires us to read section 8 literally; we must, for a variety of reasons, begin to view the purpose of section 8 in a somewhat more sophisticated manner. First, as we have already seen, even in 1902 it was clear that Congress did not mean section 8 to be read literally, but rather intended it to be read as requiring federal deference to state law only insofar as state law was not inconsistent with federal policies. Thus, now as then, section 8 must be read not as permitting a state veto power, but merely as an invitation to the states to act where Congress has done nothing.

Second, if we look at the total text of the reclamation laws, we may become a bit sceptical about solemnly accepting at face value the applicability of every provision incorporated by reference into each modern statute. Anyone who doubts the need for scepticism might take a look at the Fryingpan-Arkansas law in its totality, as constituted through the magic of incorporation. The project is expressly made subject to the provisions of the Colorado River Compact, the Upper Colorado River Basin Compact, the Boulder Canyon Project Act, the

\(^{133}\) There was some discussion in the Fry.-Ark. debates about the need for the water in order to service the Air Force Academy and other defense establishments. See 108 CONG. REC. 15664 (1962).
Boulder Canyon Project Adjustment Act, the Colorado River Storage Project Act, the Mexican Water Treaty and the Arkansas River Compact. It must be administered in accordance with (1) the terms of any contracts made under any of the foregoing cited acts, (2) the laws of the state of Colorado, (3) the provisions of House Document 130 in the 87th Congress, (4) Senate Document No. 80 in the 75th Congress and (5) the Reclamation Act of 1902 and Acts amendatory thereto (the text alone of all the reclamation laws covers nearly one-hundred pages in the U. S. Code). Any attempt to enforce every provision incorporated, as written, would plainly end in utter chaos. Moreover, the problem is infinitely compounded by the fact that while federal reclamation law in section 8 defers to the states, the states also frequently have laws deferring in greater or lesser degree to federal law. And to complete the nightmare, it has sometimes been found that section 8's deference to state law is neutralized by state law appearing in an interstate compact which directs the application of federal policies. In short, if ever there was proof that the attempt to interpret statutes by literal reading of a single provision is, in Justice Frankfurter's words, a "pernicious oversimplification," the reclamation laws are it.

Finally, even a legal analysis ought to be permitted a modicum of realism. It is known to everyone that the inclusion of a provision stating respect for state law in federal reclamation legislation is a standard political ritual. This fact should never induce us merely to ignore such provisions. But it should lead to an understanding that the broad language in such provisions must be interpreted in light of the fact that they are in part rhetoric for the folks back home. Thus, for example, the typical approach in section 3 of the recent Water Resources Planning Bill—

—Nothing in this Act shall be construed to expand or diminish either Federal or State jurisdiction, responsibility, or rights in the field of water resources planning, development, or control—

though it is undoubtedly good politics, is hardly helpful as a congressional decision on the intricate problems of state-federal relations. For what may be good political reasons, the government seems generally unable to admit that federal law ever interferes, in even the smallest

degree, with state control over water, though this is manifestly false. 139
It is in light of these facts that the continuing re-enactment of section 8,
without modification, must be understood; and it is in this context that
its true meaning must be sought.

WHO, THEN, IS TO BE MASTER

Having now looked with some care at the background of modern
reclamation law, it becomes necessary to convert these interesting
observations into a conclusion about dealing with the problems of
federalism in reclamation projects. Of course the easy problems have
already been solved, and properly, by the Court. Where there is a
"specific and mandatory" federal rule in the law, it must be observed
even when in derogation of state law. But all the really difficult problems
lie ahead, for as we have now seen, the reclamation laws are full of
federal policies of varying specificity, of varying importance and of
varying clarity. The following random hypothetical problems suggest
the sort of difficulties which future litigation in this area will present:

—Could the Secretary, in administering the Fryingpan-
Arkansas Project, refuse to contract for the use of water
upon lands not in cultivation when the Act was passed; could
he prefer, among competing applicants, farmers who want to
grow non-surplus crops; might he adopt regulations which will
encourage users to shift to the high value specialty crops which
the Congress was assured would ultimately be principally
grown with project water.

—Could the Secretary, in contracting for the use of surplus
waters which the statute empowers him to dispose of on such
terms "as he may deem proper," prefer an application by a
user performing national defense work to an application by
a city, in a state which gives municipal uses the highest
priority.140

—Could the Secretary, in contracting with a municipal user,
make water available for dilution of sewage even though
such a use may be non-beneficial under state law; would his
position be affected if a federal pollution agency approved
such uses and was given continuing congressional support.141

—Could the Secretary, in contracting with irrigation users,
specify the maximum duty of water, in conflict with state law,
under his authority to contract "in a form satisfactory to the
Secretary" and his authority to "protect project lands against
deterioration due to improper use of water."142

140. Disposal of surplus waters is covered by 41 Stat. 451 (1920), 43 U.S.C.
§ 521 (1958).
141. The problem has arisen in a state context; see 7 COLORADO WATER
CONGRESS NEWSLETTER 5 (Jan. 27, 1964); cf. El Paso County Water Improvement
note 135.
These and like questions present the ultimate difficulty for problems of federalism because there is no readily ascertainable solution for them. To find an answer we must look to the rather indefinite "policy" of the law for guidance. But to the policy of state law, or of federal law? That is the question, for we will frequently get different results if we look at one source rather than the other.

The dilemma is presented by traditional congressional unwillingness to face up to the problem. It has never openly repudiated state law as the principal source for administration of reclamation projects, yet, as we have seen, it has made clear its desire to utilize the reclamation laws to implement all sorts of diverse federal policies. It talks about deference to state law and yet it invests the Secretary with the broadest kind of discretion to act "as he may determine to be just and equitable," or "as he may designate," "as he may deem proper," "as in his judgment [is] necessary and in the interest of the United States"; and with a variety of similar authorizations.

But while Congress has been unwilling to meet the problem directly, it has made the answer apparent enough through its actions. It is as simple as asking whether we can permit the congressional desire to administer projects such as Fry.-Ark. in conformity with federal farm policy to be ignored? Or whether the congressional interest in recreation could be vitiated by a state legislature subject to pressures from mining or farm lobbies? Or whether the Secretary, entrusted by Congress to decide whether an application for surplus water will interfere with irrigation, must have state officials decide that question for him?

Certainly Congress has made plain enough that it wants these national policies implemented. The debates we have examined were

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E.g., notes 99, 102 supra; see also note 69 supra.


It is quite insufficient to argue that if Congress wants a federal policy implemented, despite conflicting state law, it must (or would) put it in "specific and mandatory" terms in the statute. Obviously some policies cannot be reduced to such terms. The farm policy in the Fry.-Ark. project is a good example. Since it was clear that some water would be needed for surplus crops for at least some
not mere exercises in idleness, designed to be accepted or rejected at the caprice of state officials. 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. The old notion that Congress has abandoned the billions it has invested in reclamation to the vagaries of state law is a fiction that must, however reluctantly, be discarded. It is a luxury which history will not tolerate.

This, of course, does not mean that state law will have no place; where it is not incompatible with the federal policy state law may be resorted to.151 And, where it is possible to be specific, the states and the federal government can always work out a statement of operating principles which adopt particular state policies on particular issues as the law of the project.152 Nor does adoption of the view proposed here give the Secretary dictatorial power to give water to "the most worthy Democrat or Republican," as Mr. Justice Douglas cynically suggested in Arizona v. California.153 The Secretary's decisions, and his interpretation of federal policy, must be subject to attack as an erroneous determination of law in the same sense that an attempt to read the 160 acre provision as an 80 acre provision would be.154

Nor, finally, ought this view to be rejected as novel and unprecedented. By now some readers will have recognized that the theory

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152. The format of a Statement of Operating Principles as a statute containing the law of the project, worked out cooperatively between state and federal officials, has already been used. See, e.g., H. R. Doc. No. 130, 87th Cong., 1st Sess. (1962). (Fryingpan-Arkansas Project). Substantively, however, this particular effort was not very successful at working out a particular series of rules and policies, but succumbed by and large to repetition of generalities about respecting everybody's policies. See, e.g., the statement of purpose (c) at p. 1. The suggestion that such an attempt at working out particular rules and regulations be made is not original; in embryonic form it is suggested in Corker, Water Rights and Federalism, 1962 A.B.A. SECTION OF MINERAL AND NATURAL RESOURCES LAW 143, text at n. 11.

153. 373 U.S. 546, 630 (1963) (dissenting opinion).

154. Of course the difficulty in suing federal officials pervades all these problems. See Dugan v. Rank, 372 U.S. 609 (1963), and the Davis article cited supra at note 61. To the extent that the Dugan doctrine might give the Secretary dictatorial power by insulating him from suit, the solution would seem to be not in abandoning federal reclamation projects to the states, but in getting the Court to modify the Dugan doctrine. Of course, as cases like Ivanhoe, City of Fresno and Arizona v. California show, the immunity doctrine does not bar all litigation.
proposed here is little more than an application to federal reclamation law of the principle announced by the Supreme Court to govern the law of collective bargaining contracts. Indeed, the language used by the Court in the *Lincoln Mills* case is so appropriate to this situation that it may be paraphrased here as perfectly stating the proposed rule for reclamation projects:

We conclude that the substantive law to apply in [administering federal projects] is federal law, which the [Secretary] must fashion from the policy of our national [reclamation] laws. . . . The [Reclamation Act] expressly furnishes some substantive law. It points out what . . . may or may not [be done] in certain situations. Other problems will lie in the penumbra of express statutory mandates. Some will lack express statutory sanction but will be solved by looking at the policy of the legislation and fashioning a remedy that will effectuate that policy. The range of [the Secretary's] inventiveness will be determined by the nature of the problem. . . . Federal interpretation of the federal law will govern, not state law. . . . But state law, if compatible with the purpose of [the Act], [should] be resorted to in order to find the rule that will best effectuate the federal policy.155

If it be charged that this proposal gives too much federal authority in an area where local law ought to control, the remedy is not a manipulation of the statutes or the history, but a petition to the Congress. We must remember that this whole problem has been one of determining, through statutory analysis, "the kind of regime under which Congress has built . . . irrigation systems in the West."156 We have simply found that the regime is one full of federal concerns and national goals.157 If Congress were willing to appropriate reclamation monies to the West without such safeguards and leave administration wholly to the states, the problem of federal control would terminate automatically. But the Congress has demonstrably not chosen that course; let those who want a return to 1902 policies undertake the burden of getting Congress to repeal its preference policies, its recreation policies, its agricultural policies, and the like. Unless and until that has been done, we must recognize who really would ignore history and "spin their own philosophy into the fabric of the law, in derogation of the will of the legislature."

157. The overall trend toward employment of federal standards is exemplified in a recent development in pollution control, an area of considerable congressional activity and interest. In reporting out a bill amending the Federal Water Pollution Control Act, the Senate Public Works Committee approved (over strong opposition) a proposal "to establish a national policy for the prevention, control and abatement of water pollution." (Emphasis added.) S. REP. No. 556, 88th Cong., 1st Sess. (1963).
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