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Link to publisher version (DOI)
http://dx.doi.org/https://doi.org/10.15779/Z38924J

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Allocation of Water from Federal Reclamation Projects: Can the States Decide?

Many environmental laws such as the Federal Water Pollution Control Act and the Clean Air Act rely heavily on state agencies for their enforcement. In California, the State Water Resources Control Board is currently involved in a dispute with the federal government over the proper allocation of California's water resources. In this dispute the federal Bureau of Reclamation contends that it has the sole right to determine how water from its projects is used. Its argument is grounded in interpretation of the legislative intent manifested in the various reclamation statutes. In this Comment the author discusses the history of California's reclamation projects and argues that the State Water Resources Control Board is the appropriate agency to control the water made available by these projects.

For the past four decades, the federal government has been engaged in large-scale water resource development in California. The major enterprise has been the Central Valley Project—a multi-unit, multi-purpose development conceived in the 1930's and still in the process of construction. While there have been legal conflicts with some local interests, this federal activity has been conducted in relative harmony with state authorities. Now, with two new units—the Auburn Folsom South Unit and the New Melones Project—about to be added to the Central Valley Project, this harmony has come to an end.

A dispute has arisen between a state and a federal agency over the proper allocation of water from the federal projects. The California agency is the State Water Resources Control Board which controls appropriations of surface water and is responsible for setting water quality throughout California. The federal agency is the U.S. Bureau of Reclamation which plans and operates the federal projects. The conflict concerns which agency will determine how water from the projects will be allocated.

Environmental quality is one of the major issues in the dispute. The Bureau of Reclamation's plans for the two new units and for the Central Valley Project in general contain allocations of water to consumptive uses such as irrigation and to in-place uses such as recreation and fish and wildlife enhancement. The State Water Resources Control Board has issued three major decisions which would require
changes in these allocations and which would place a greater emphasis on the preservation and enhancement of the environment.

The issue of which agency will make these allocation decisions is being litigated in several lawsuits pending in federal court. In Cal. ex rel. State Water Resources Control Board v. Morton,¹ the state asserts that federal law requires the Bureau of Reclamation to follow state dictated allocations in regard to all its projects. In Natural Resources Defense Council v. Stamm² the same contention is raised within the limited context of the Auburn-Folsom South Unit. In a counter-suit, U.S. v. California,³ the federal government asserts that the Bureau of Reclamation need not observe any state restrictions on its operation of reclamation projects.

Following a description of the projects and the natural environment in which they are being built this Comment will present a legal analysis of the issues involved in these cases. This will entail an examination of the Board decisions and the federal response they evoked. There will also be a discussion of the policy considerations which bear on the issue of which agency should allocate California's water.

I.

BACKGROUND

A. The Physical Environment

1. The Central Valley

The setting for the controversy, California's Central Valley, has water problems that are typical of most of California. The sources of water are distant from where the water is needed, and the supply is uneven throughout the year. Winter rains and spring runoffs often cause flood damage in areas which suffer from lack of water in the summer.⁴

The Valley is interlaced with rivers of varying size, all of which are tributaries of either the Sacramento River or the San Joaquin River. These two rivers themselves converge to form the Sacramento-San Joaquin Delta and then flow through the San Francisco Bay to the Pacific Ocean.⁵

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2. — F. Supp. —, 6 ERC 1525 (E.D. Cal. 1974). The plaintiffs also challenged the adequacy of the environmental impact statement for the Auburn-Folsom South Unit.
5. See Rogers & Nichols, supra note 4, at §§ 17-19, 27.
2. The Sacramento-San Joaquin Delta

In its natural state, the Delta was a vast, low-lying marshland. Now, as a result of a century of reclamation efforts, it is "a man-made ecosystem" and one of California's most important agricultural regions. However, the Delta still has a serious problem of salinity intrusion. In the summer months a low level of water outflow from the Delta will allow ocean waters, forced by tidal action from San Francisco and Suisun Bays, to move upstream. The high saline content of these waters damages fresh water uses within the Delta.7

The method used to prevent salinity intrusion has been to maintain a sufficient outflow of fresh water to repel the saline waters. To accomplish this, it is necessary to limit diversions of water elsewhere in the Central Valley and to store water for release during the dry season. Federal and state water development facilities have been used for this purpose.8

3. The American River

The American River is the second largest tributary of the Sacramento River. Its three principal forks rise in the upper reaches of the Sierra Nevada. The North and Middle Forks join near the town of Auburn; the South Fork enters about twenty miles downstream. From this point, the river flows another 23 miles to its confluence with the Sacramento River near the city of Sacramento.9

The Lower American, the stretch of the river just above its mouth, is a particularly valuable river resource. It offers a wide variety of recreational uses whose value is increased by the proximity to a metropolitan area.10 The river and its canyon are quite aesthetically pleasing. The Lower American, and the North Fork as well, have been included in the protected list of the California Wild and

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7. For a description of the Delta and its problems see D 1379, supra note 6, at 3; Note, The Delta Decision, supra note 4, at 736-38. The significance of the Delta to California can be seen in the fact that special legislation was passed to deal with its problems. The Delta Protection Act, CAL. WATER CODE §§ 12200-05 (West 1971), calls for a coordinated effort by all concerned parties, including federal agencies, to preserve water quality in the Delta.
8. This method of "salinity repulsion" is espoused by the Board. See generally D 1379, supra note 6. The Bureau of Reclamation has not always agreed, once expressing the view that such a use of fresh water was wasteful. Central Valley Documents, H.R. Doc. No. 416, 84th Cong., 2d Sess. 700 (1956) [hereinafter cited as C.V.P. Documents Part I].
10. Id. at 11.
Scenic Rivers System. The value of the Lower American inspired the county of Sacramento in 1962 to begin an ambitious recreational project called the American River Parkway, a "recreational and open space green belt along the American River flood plain from Folsom Dam to the Sacramento River." The county has expended a considerable amount of money and effort on this project.

The American River also has a history of floods which have caused damage to lives and property. While facilities now in existence on the American have averted disasters in the past, many now feel the need for increased flood protection.

4. The Stanislaus River

The Stanislaus River rises in the high Sierra and flows northwest to its confluence with the San Joaquin River at a point some sixty miles upstream from the Delta. It is an immensely beautiful river and provides a wide variety of experiences to a large number of visitors. Its most striking feature is a stretch of "whitewater" which provides opportunity for rafting and kayaking. The rapids are "very good without being unduly hazardous." The Stanislaus is estimated to be the most heavily used whitewater river in California.

The Stanislaus River Canyon has many unusual geological features including some rather beautiful limestone caves. Also, the area is a habitat for many forms of wildlife, including several endangered species. Another unique feature of the Canyon is the many relics of the Gold Rush era. Along the banks of the river can be found sluice boxes, remnants of dwellings, and other reminders of California's past. Like the American River, the Stanislaus presents

12. D 1400, supra note 9, at 10-11.
13. Sacramento County has invested about $5.2 million in the parkway development to date. About $7.9 million of a county bond issue passed in 1972 will be used for the parkway; some $4.5 million for land acquisition to complete the parkway, and $3.4 million for development of recreation facilities during the next 6 to 7 years. Bureau of Reclamation, Supplement to the Final Environmental Impact Statement, Auburn-Folsom South Unit, Central Valley Project, Calif. at 6 (1973).
14. See Rogers & Nichols, supra note 4, at § 19.
17. Id.
18. Id. at 26-27.
19. Id. at 22-24.
20. Id. at 24-25.
a flood hazard.21

B. The Developments

1. The Central Valley Project

The Central Valley Project (C.V.P.) began in the 1930's as a state endeavor to cope with California's water problems. However, the state soon realized that it could not finance so ambitious a project. As often happened during the Depression, the federal government assumed the task.22 Authorizing legislation was passed by Congress23 and the C.V.P. became subject to the already extant body of federal reclamation law.24 The purposes of the C.V.P. were spelled out:

... improving navigation, regulating the flow of the San Joaquin River and the Sacramento River, controlling floods, providing for storage and for delivery of the stored waters . . . .25

The original units of the C.V.P. were completed in the early 1950's and continue in operation today.26 Additional units have since been added,27 several are now under construction,28 and others are in various planning stages.29 Authorization and construction of

21. The Stanislaus River has a recorded history of destructive flooding dating back to March 1907, causing substantial crop, wildlife and property damage to citizens of the Stanislaus River Basin and the Sacramento-San Joaquin Delta. Environmental Defense Fund v. Armstrong, 352 F. Supp. 50, 54, 4 ERC 1760, 1761 (N.D. Cal. 1972); see also Rogers & Nichols, supra note 4, at § 28.

22. For a description of the genesis of the C.V.P. see Note, The Delta Decision, supra note 4, at 738-40. See also Ivanhoe v. McCracken, 357 U.S. 275, 280-84 (1957).

23. Act of Aug. 30, 1935, ch. 831, 49 Stat. 1028, 1038 (1935). This was the first congressional legislation relating to the C.V.P.; amendments and supplements were numerous.

24. See text accompanying notes 123-25 infra.

25. Rivers and Harbors Act of 1940, ch. 895, 54 Stat. 1198, 1199-2000, amending Rivers and Harbors Act of 1937, ch. 832, § 2, 50 Stat. 844, 850. Salinity repulsion in the Delta was not mentioned as a purpose in the authorizing legislation. Project documents do include this purpose but it was generally viewed as an "operational necessity" for the federal project rather than an effort to promote the welfare of Delta water users. The concern was that water supply contracts stipulated a limited saline content in the water delivered from the Delta. Central Valley Documents, H.R. Doc. No. 246, 85th Cong., 1st Sess. 466-67 (1956) [hereinafter cited as C.V.P. Documents Part II].

26. The original units included Shasta Dam, Keswick Dam, Friant Dam, Friant-Kern Canal, Madera Canal, Contra Costa Canal, Delta Cross Channel, Delta-Mendota Canal, and Tracy Pumping Plant. See Rogers & Nichols, supra note 4, at §§ 30-38, 52.

27. These include the American River Division, consisting of Folsom and Nimbus Dams (see text accompanying notes 34-35 infra) and Sly Park Dam, the Trinity River Division consisting of Trinity River Dam and related structures, and the Clear Creek and Spring Creek conduits. See Rogers & Nichols, supra note 4, at § 39.

28. The Auburn-Folsom South Unit (see text accompanying notes 34-41 infra), the New Melones Project (see text accompanying notes 45-54 infra), and the San Luis Unit which will be a joint federal-state development. See Rogers & Nichols, supra note 4, at §§ 50-51, 54.

29. The San Felipe Unit and the Chico Canal have been authorized, but no con-
new units always follows the same pattern: the Bureau studies the situation and prepares a feasibility study and a report based on that study. The report and proposed legislation are submitted to and are considered by Congress. If Congress approves, the project must then be approved by the President. Then the project is entrusted to the Bureau, and Congress enters the picture again only to make yearly appropriations.

2. The Auburn-Folsom South Unit

The Auburn-Folsom South Unit (A.F.S.) of the C.V.P. is the latest of a series of developments on the American River. Folsom and Nimbus Dams are currently in operation on the American. Folsom Dam provides storage capacity for water for irrigation and domestic use, flood control, hydroelectric power, and water quality control. Water from Folsom also serves to help control salinity in the Delta. Seven miles downstream from Folsom is Nimbus Dam, which creates Lake Natoma, an afterbay or reregulating reservoir for Folsom.

...
The main features of the A.F.S. are the Auburn Dam and the Folsom South Canal. The dam will be a 700 foot high concrete arch damming the American above Folsom and below the point where the North and Middle Forks converge. It will be a multipurpose dam, providing the same benefits as Folsom. The dam will be operated in coordination with Folsom and Nimbus Dams, and the chief point of diversion will be from Lake Natoma through the Folsom South Canal. The Canal is part of a number of coordinated facilities which will provide irrigation water to the area southeast of Sacramento. Some water from the Canal also is designated for municipal use.

The A.F.S. is a stepping stone to more development. The authorizing legislation gives the Bureau the power to build the Canal large enough to be used for another project now before Congress, the East Side Division. The Bureau is also studying the feasibility of the Hood-Clay Connection which will recapture water from the Sacramento River and divert it into the Folsom South Canal.

The A.F.S. has the potential to cause serious damage to the environment. Much of the North and Middle Forks will be inundated by the reservoir behind the Auburn Dam. Also, any water diverted through the Folsom South Canal will, of course, not be available for use in the Lower American. The reduced flows that are planned would lessen the value of the Lower American as a recreational resource and drastically reduce certain wildlife and fishery re-

38. The A.F.S. will add 250,000 acre-feet of flood control space to the American River System. Overall its reservoir will have a capacity of 2,300,000 acre-feet. NRDC v. Stamm, — F. Supp. —, 6 ERC 1525, 1527 (E.D. Cal. 1974).
41. See note 30 supra; see also D 1400, supra note 9, at 17-18. Hood-Clay would allow water to flow down the Lower American to the Sacramento River before it is diverted to the Folsom South Canal.
43. "Specifically, the flows could be reduced to a level of 250-500 c.f.s. from their present average flow of 2000-3000 c.f.s." NRDC v. Stamm, — F. Supp. —, 6 ERC 1525, 1528 (1974).
sources. Sacramento County’s American River Parkway will lose much of its value as a source of river recreation.\(^\text{44}\)

3. The New Melones Dam Project

The federal development under way on the Stanislaus River is the new Melones Dam Project. Originally, this project was designed solely for flood control,\(^\text{45}\) but it was later re-authorized as multipurpose.\(^\text{46}\) The proposed dam will be 625 feet of earth and rock fill, the second largest dam of this type in the country.\(^\text{47}\) Its reservoir will impound 2.4 million acre-feet of water and will inundate the old Melones Dam and most of the Stanislaus River Canyon.\(^\text{48}\)

The benefits of the project include flood control, storage for irrigation, hydroelectric power, and water quality control.\(^\text{49}\) The Bureau also considers the creation of New Melones Lake a project benefit since it will provide recreational opportunities such as water skiing and swimming.\(^\text{50}\)

The environmental damage caused by New Melones will be severe. The entire stretch of white-water will be destroyed by the reservoir.\(^\text{51}\) Habitat essential for certain fish and wildlife will be destroyed.\(^\text{52}\) The waters of New Melones Lake will cover the geologic formations throughout the Canyon\(^\text{53}\) and will destroy those historic features which cannot

\(^{44}\) . . . the possible minimum flow conditions in the Lower American River . . . would ultimately reduce the estimated salmon runs now occurring to about one-fourth of the present level and would decrease certain water-oriented recreation activities as well as reduce the size of the river. Auburn EIS, supra note 35, at 168d.

Also, ten thousand acres of wildlife habitat will be inundated by Auburn Reservoir “with partial mitigation.” Id. at 120, 124. However, even though there will be a degradation from present conditions in the Lower American, minimum and summer flows “would be well in excess of such historic flows under natural, unregulated conditions.” Id. at 168e.


\(^{47}\) EDF v. Armstrong, 352 F. Supp. 50, 52, 54 (N.D. Cal. 1972). Work has already begun on subsidiary facilities and 25 million dollars have been spent. Id. at 54. The contract for the main dam was awarded on Mar. 4, 1974. Letter from L.B. Christiansen, supra note 29.

\(^{48}\) See New Melones EIS, supra note 16, at 71.

\(^{49}\) D 1422, supra note 15, at 4.

\(^{50}\) New Melones EIS, supra note 16, at 5. The State Water Resources Control Board does not agree that this will be a benefit:

A study by the Water Resources Council indicates that the New Melones site does not lie within one of the regions which will require additional reservoir recreation areas by the year 2020 . . . . There are numerous other reservoirs already in the same region . . . .

D 1422, supra note 15, at 18.

\(^{51}\) New Melones EIS, supra note 16, at 71.

\(^{52}\) Id. at 71-72.

\(^{53}\) Id. at 71.
be removed.\textsuperscript{54} In short, the project will mean the death of the Stanislaus in the area above the dam.

4. \textit{The State Water Project}

To round out the picture of water development in the Central Valley, one must include the State Water Project (S.W.P.). California’s own system of water development began in 1957, and today it is operating on a large scale. The principal features of the S.W.P. are the Oroville Dam on the Feather River, the North and South Bay Aqueducts, the San Luis Division (jointly used with the C.V.P.) and the California Aqueduct.\textsuperscript{55} The S.W.P. through its impoundment

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\textsuperscript{54} \textit{Id.}

\textsuperscript{55} \textsc{Cal. Water Code} §§ 12930-42 (West 1971). For a description of the State Water Project (S.W.P.) see Note, \textit{The Delta Decision}, supra note 4, at 739-42. See map, supra.
and diversion of waters before they reach the Sacramento River has an effect on the water supply of the Delta.\footnote{Upon full project development, the S.W.P. is expected to supply 4,230,000 acre-feet annually to a total of 31 service areas.}  

5. Summary

This description defines the heart of the conflict—the interaction of the environment and water resource development. The development planned for the Central Valley offers several valuable benefits while threatening to cause severe environmental damage. How much damage will result and what benefits will be realized will depend on how the water from the projects is allocated. The next section will describe how California, through the State Water Resources Control Board, decided the allocations should be made.

II. THE CONFLICT

The current controversy began with the Bureau's applications to the State Water Resources Control Board for permits to appropriate the water needed for the projects. To grasp the significance of the decisions that resulted, it is necessary to understand the general structure of the California system of water regulation which was set into motion by these applications.

A. California Water Law

The touchstone of water law in California is Article XIV, section 3 of the state constitution.\footnote{Sec. 3. It is hereby declared that because of the conditions prevailing in this State the general welfare requires that the water resources of the State be put to beneficial use to the fullest extent of which they are capable, and that the waste or unreasonable use or unreasonable method of use of water be prevented, and that the conservation of such waters is to be exercised with a view to the reasonable and beneficial use thereof in the interest of the people and for the public welfare. The right to water or to the use or flow of water in or from any natural stream or water course in this State is and shall be limited to such water as shall be reasonably required for the beneficial use to be served, and such right does not and shall not extend to the waste or unreasonable use or unreasonable method of use or unreasonable method of diversion of water. Riparian rights in a stream or water course attach to, but to no more than so much of the flow thereof as may be required or used consistently with this section, for the purposes for which such lands are, or may be made adaptable, in view of such reasonable and beneficial uses; provided, however, that nothing herein contained shall be construed as depriving any riparian owner of the reasonable use of water of the stream to which his land is riparian under reasonable methods of diversion and use, or of depriving any appropriator of water to which he is lawfully entitled. This section shall be self-executing, and the Legislature may also enact laws in the furtherance of the policy in this section contained. CAL. CONST. art. XIV, § 3.}

This section calls for the "beneficial..."
use" of water resources "to the fullest extent of which they are capable." It also proscribes the use of water by "an unreasonable method." Judicial interpretation of section 3 shows that the concepts of beneficial use and unreasonable method are expansive. The range of "beneficial uses" has grown over the years, and what is a reasonable method of use has been determined in each case in the light of prevailing water conditions and current technology. This interpretation of section 3 has allowed California to remain flexible in its regulation of water.

A wide range of statutes implement section 3's policy. Some set priorities for the entire state. For example, California Water Code section 106 declares that domestic use of water is "the highest use" and irrigation is next in importance. Other statutes, such as the Delta Protection Act, are directed at more specific situations.

B. The State Water Resources Control Board

The role of the Board is to receive applications to appropriate surface water and to evaluate them in the light of section 3 and the various statutes. Under California law all water is subject to appropriation except water which is needed to fulfill pre-existing rights. Any person desiring to appropriate surface water must apply to the Board for a permit. When the Board evaluates an application, it makes three determinations: first, whether there is unappropriated water available for the applicant; second, whether the proposed use is beneficial; third, whether the proposed use is in "the public interest."


59. Although, as we have said, what is a reasonable use of water depends on the circumstances of each case, such an inquiry cannot be resolved in vacuo isolated from statewide considerations of transcendent importance. Paramount among these we see the ever increasing need for the conservation of water in this state, an inescapable reality of life quite apart from its express recognition in the 1928 amendment. Joslin v. Marin Municipal Water District, 67 Cal. 2d 132, 140, 68 Cal. Rptr. 377, 382 (1967).

60. CAL. WATER CODE § 106 (West 1971).

61. CAL. WATER CODE §§ 12200-05 (West 1971).


63. CAL. WATER CODE § 1201 (West 1971).

64. CAL. WATER CODE § 1225 (West 1971).


66. CAL. WATER CODE § 1240 (West 1971).

The concept of the public interest is "the primary statutory standard" for the Board. It is obviously open-ended, perhaps to allow for the flexibility prescribed by section 3. The California Water Code provides wide parameters and directs the Board to weigh the relative benefits of all beneficial uses. The Board also looks beyond the Water Code for measures of the public interest. One such measure is the California Environmental Quality Act, and that Act's message of environmental enhancement has been conspicuously present in recent Board decisions.

If the Board finds that a proposed use is not in the public interest, it may deny a permit or grant a permit subject to terms and conditions. Such conditions may be imposed at the time the permit is granted, or the Board may reserve jurisdiction to impose conditions at a later time.

Acting pursuant to its interpretation of California water law, the Board issued three major decisions which led to the current controversy.

C. The Board Decisions

1. Decision D 1379

The Bureau of Reclamation requested permits to appropriate water in the Delta for use in the C.V.P. in 1961. The Board granted the permits but reserved jurisdiction to impose conditions relating to salinity control, since insufficient information was available on the subject. This reserved jurisdiction was invoked years later in the landmark Decision D 1379. This decision set the "Delta Standards" which are designed to prevent salinity intrusion and protect water quality. The standards require minimum flows of fresh water through

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69. CAL. WATER CODE § 1257 (West 1971).
70. CAL. PUB. RES. CODE §§ 21000-21174 (West Supp. 1974).
71. D 1379 supra note 6, at 11-13; see Robie, supra note 62, at 701-710.
72. CAL. WATER CODE § 1255 (West 1971).
73. CAL. WATER CODE § 1253 (West 1971).
74. CAL. WATER CODE § 1394(a) (West 1971). Mechanisms are made available for an aggrieved party to obtain relief from a Board decision. A petition for a re-hearing may be filed within 30 days of a Board decision. CAL. WATER CODE § 1357 (West 1971). Also, judicial review may be sought within the same time limits. CAL. WATER CODE § 1360 (West 1971).
76. Id. at 64.
77. D 1379, supra note 6. Other decisions had intervened setting interim standards.
the Delta at prescribed levels during the year.\textsuperscript{78}

To enforce the standards, the Board imposed them as conditions on Bureau of Reclamation and State Water Project permits.\textsuperscript{79} To comply with D 1379, the Bureau must operate the C.V.P. in such a way as to insure the minimum flows. This will require taking water that is now being used elsewhere or would be used elsewhere in the future and releasing it into the Delta. The water will be put to economic use since Delta farmers take advantage of the strong flow of fresh water, but no system has yet been devised by the Bureau or by the state to require payment for water which is being released primarily to enhance water quality.\textsuperscript{80}

The Board emphasized that the Delta Standards were interim measures and would be revised when more information became available.\textsuperscript{81}

2. \textit{Decision D 1400}

As with the Delta, the Board granted permits to the Bureau of Reclamation for use of American River water for the A.F.S.,\textsuperscript{82} but reserved jurisdiction to impose water quality conditions.\textsuperscript{83} In decision D 1400 these conditions were imposed in the form of requirements for minimum flows in the Lower American at levels sufficient to insure the value of recreation uses and to protect fish and wildlife.\textsuperscript{84}

\begin{itemize}
  \item \textsuperscript{78} \textit{Id.} at 53-59. Monitoring stations were required at various points to assure the standards were being met. \textit{Id.} at 38-39.
  \item \textsuperscript{79} \textit{Id.} at 51-52.
  \item \textsuperscript{80} \textit{Id.} at 13-14. The Board recognized this problem, but did not deal with it. It confined its rulings to what it considered to be in the public interest and suggested that repayment problems be handled by the legislature or the courts if the agencies themselves could not resolve them. \textit{Id.}
  \item \textsuperscript{81} The standards will be reviewed no later than 1978. \textit{Id.} at 50. D 1379 is under attack in several lawsuits besides those being discussed herein. These include Central Valley East Side Project v. State Water Res. Control Bd., Civil No. S2582 (E.D. Cal., filed Sep. 29, 1972); Kern County Water Agency v. State Water Res. Control Bd., Civil No. S2583 (E.D. Cal., filed Sep. 29, 1972); San Joaquin Flood Control & Water Conservation Dist. v. State Water Res. Control Bd., Civil No. S2730 (E.D. Cal., filed Feb. 23, 1973). These suits challenge the decision under both federal and state law.
  \item \textsuperscript{82} Permits for the operation of Folsom Dam were approved without reservation of jurisdiction in State Water Rights Bd. Decision D 893, (March 18, 1958). The A.F.S. permits were granted in Cal. Water Res. Control Bd. Decision D 1356, (Feb. 5, 1970) [hereinafter cited as D 1356].
  \item \textsuperscript{83} D 1356, \textit{supra} note 82, at 5-6, 16.
  \item \textsuperscript{84} D 1400, \textit{supra} note 9, at 23. The flows required were as follows:
    \begin{enumerate}
      \item For fish and wildlife enhancement
        \begin{enumerate}
          \item from Oct. 15-July 14—1,250 c.f.s.
          \item from July 15-Oct. 14—800 c.f.s.
        \end{enumerate}
      \item For recreational purposes
        \begin{itemize}
          \item from May 15-Oct. 14—1,500 c.f.s.
        \end{itemize}
    \end{enumerate}
decision allowed elimination of the flows for recreation in times of low supply. During a dry year, the flows for fish and wildlife could be reduced to the same extent that diversions for irrigation were cut back.

The minimum flows required by D 1400 are considerably in excess of those planned by the Bureau of Reclamation. However, the Board disclaimed any interference with the federal plans because according to its calculations the Bureau could meet both the flow requirements and its irrigation supply contracts for at least the foreseeable future. The Board did not insist on any particular method of satisfying the conditions; instead, it left it to the Bureau to coordinate its project plans to meet the minimum flows.

3. Decision D 1422

The permits for the New Melones Project were granted in April 1973 in Decision D 1422, in which the Board strongly opposed the proposed use of the water. It found that the federal project would cause irreparable damage to the Stanislaus above the dam. The Board also found that the Bureau had not demonstrated a present need for all the water it wished to store. Therefore, in "the public interest," the Board limited storage to an amount which would satisfy only recreation, fish and wildlife enhancement, and water quality needs. The result of limiting storage will be to reduce the level of damage to the whitewater area and the surrounding canyon to a level which the Board considers "minimal."

85. Id. at 17.
86. Id.
87. Id. at 21. The Bureau of Reclamation has stated that it will comply with the conditions imposed in D 1400 "in the interest of comity" until such time as final decisions are made on possible alternatives. SUPPLEMENT TO THE FINAL ENVIRONMENTAL IMPACT STATEMENT, AUBURN-FOLSOM SOUTH UNIT, supra note 13, at 7 (1973).
88. Unlike D 1379 and D 1400, D 1422 was not in pursuance of reserved jurisdiction. The permits were the first for federal use on the Stanislaus. The applications had been filed in 1960, but the Bureau had requested delays in the hearings to allow it to negotiate with permit protestants. The court in E.D.F. v. Armstrong, 352 F. Supp. 50, 58-59, 4 E.R.C. 1760, 1765 (N.D. Cal. 1972) found that these delays hindered the implementation of NEPA, and it also found that "... the circumstances in this case do not justify a 12-year delay..." 89. D 1422 supra note 15, at 17-18.
90. Id. at 14:
Furthermore, the record shows that C.V.P. has substantial quantities of water that are not being used and are not under contract. The Bureau's own records indicate that without the yield of the New Melones Reservoir the Bureau can meet the estimated buildup of demands under present contracts for a long period of years.
91. Id. at 26-29.
92. Id. at 19-20.
D 1422 is perhaps the most significant decision for the federal-state conflict. There was unappropriated water available for the purposes the Bureau sought to implement, but the Board would not allow the appropriation. In so doing, the Board preserved the viability of the Stanislaus River Canyon and in the process mandated a change in the very nature of a federal project, for if D 1422 can be enforced, its conditions will not allow the realization of the irrigation and power purposes planned by the Bureau.93

The impact of D 1422 is diminished by the fact that it recognized that a need for irrigation water would arise in the future. The Board informed the Bureau that if it returned with information that indicated a need, it could have the water.94 In other words, the Board insisted that the river not be destroyed until it was necessary to do so. In this sense, D 1422 is only a stay of execution for the Stanislaus.

D. The Federal Response

The federal government responded to the Board decisions by stating that the Bureau did not have the authority to comply with the conditions imposed on the permits. A telegram to the federal district court hearing the case of Environmental Defense Fund v. Armstrong bespoke the federal position in regard to D 1379 and D 1400:

We have concluded that the United States of America cannot be made subject to any terms or conditions imposed by a state agency which would in any way interfere with or affect the operations of federal projects for the purposes for which such projects were authorized by Congress.

Both decisions 1379 and 1400 purport to require the release of federal water stored behind federally constructed dams for purposes other than those contained in the authorizing legislation.95

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93. "Until the need for water for consumptive purposes dictates approval of increased storage, the public interest requires that storage for power purposes also be kept at reduced levels." Id. at 24. The Board recognized that power production could aid in "the solution of the present power supply problems," but it felt that the Bureau had not shown a need for power that outweighed the need for "maintaining the present regimen of the stream . . . ." Id. at 22. The Board also noted that power production may eventually be an illusory benefit since power will be needed to deliver whatever water the Bureau does sell.

94. Id. at 14-16. The Board found that there was a lack of evidence that water would be needed for consumptive purposes outside of the counties in the Stanislaus River Basin. However, it found that within the basin the full conservation yield of the project will ultimately be needed. However, "... no facilities have been planned up to now to serve project water in those Stanislaus Basin counties and no contracts have been negotiated for such service." Id. at 16-17.

The reaction to D 1422 was manifested in the *U.S. v. California* declaratory action.\textsuperscript{96} The complaint alleged that “[the] conditions and limitations [of D 1422] interfere with and affect the operation of the Project as authorized by Congress.”\textsuperscript{97} The U.S. asked that the conditions be found void. The complaint went much further, however. It asserted that the Bureau had no duty even to apply to the Board for a permit, arguing that past applications were merely “in the interests of comity.”\textsuperscript{98}

This response appears to be motivated by the fear that implementation of the Board’s decisions would have two major consequences for the federal government. First, the benefits to be realized from the projects will be reduced, as water that is required to be released under D 1379 and D 1400 or that is refused for storage under D 1422 will not be available for the irrigation, municipal, and power uses envisioned by the Bureau. Secondly, the Board’s decisions would result in a financial loss to the federal government as no mechanism exists at present to reimburse the Bureau for water released for recreation, fish and wildlife enhancement, or water quality.\textsuperscript{99} This loss of revenue would threaten the financial viability of the project and would have the effect of forcing the federal government to subsidize the benefits to California’s environment.

These questions are thereby posed: 1) May the Board dictate changes in the Bureau’s plans for distribution of water and if so, 2) May it dictate changes which alter the financial integrity of a reclamation project. A related issue involved in both questions is at what stages of a development may the Board make these changes. May they be made only prior to construction or may they take place after a project is functioning?

### III.

#### A LEGAL ANALYSIS

These questions cannot be answered by deciding which sovereign has ultimate dominion over the waters in question. For good or ill, the federal government has the final say.\textsuperscript{100} What must be discovered is the extent to which Congress intended to exercise this power. This

\textsuperscript{96} U.S. v. California, Civil No. S 3014 (E.D. Cal., filed Oct. 15, 1973).

\textsuperscript{97} Complaint, U.S. v. California, Civil No. S 3014 (E.D. Cal., filed Oct. 15, 1973) at 7.

\textsuperscript{98} *Id.* at 4.

\textsuperscript{99} Project benefits are classified either as reimbursable or non-reimbursable. The former category includes irrigation and power. The latter category includes water quality control, and fish and wildlife enhancement. *See e.g.*, 43 U.S.C.A. §§ 616 ccc (a)-(b) (Supp. 1974).

issue can be aptly framed by a look at the constitutional provisions that have been asserted as authorizing federal reclamation activity and the reaction of the Supreme Court to these assertions.

The federal government has power to regulate activity on navigable waters by virtue of the Commerce Clause. This power has been used to authorize federal involvement in flood control and the production of hydroelectric energy. Pursuant to this power the federal government can and has displaced state law and has even taken certain state-created rights without compensation to the holder of the rights, the Fifth Amendment notwithstanding.

This navigation power was asserted in *United States v. Gerlach Livestock Co.* as allowing the taking without compensation of property rights in water for use in the C.V.P. The Supreme Court did not decide whether reclamation was an area in which such a power could be constitutionally exercised. Instead, the Court discovered the constitutional authority for the C.V.P. to be under the power to tax and spend for the general welfare. It also found that the Secretary of the Interior was directed to proceed under the Reclamation Act of 1902,

101. U.S. Const. art. I, § 8 cl. 3.

Navigation was found to be within the scope of the Commerce Clause in *Gibbons v. Ogden*, 22 U.S. 1 (1824). Since then the scope of the power has expanded considerably to include not only rivers navigable in fact, *The Daniel Ball*, 77 U.S. 557 (1870); but also those which could be made navigable with reasonable improvements, *United States v. Appalachian Electric Power Co.*, 311 U.S. 377 (1940); the non-navigable portions of a navigable waterway, *Oklahoma v. Guy F. Atkinson Co.*, 313 U.S. 508 (1940); and even non-navigable tributaries, *United States v. Grand River Dam Authority*, 363 U.S. 229 (1960). See Comment, *Problems in Interbasin Water Transfer*, 1 Calif. Western L. Rev. 136, 140 (1965). See also Smith, *Highlights of the Federal Water Pollution Control Act of 1972*, 77 Dick. L. Rev. 459, 461-67 (1973) [hereinafter cited as Smith], discussing the complete extension of federal authority to all waters through the Federal Water Pollution Control Act.


103. Our cases hold that . . . when the United States asserts its superior authority under the Commerce Clause to utilize or regulate the flow of the water of a navigable stream there is no "taking" of "property" in the sense of the Fifth Amendment because the United States has a superior navigation easement which precludes private ownership of the water or its flow. *United States v. Grand River Dam Authority*, 363 U.S. 229, 231-32 (1960). Thus a riparian owner was not compensated for the loss of water power in *United States v. Chandler-Dunbar Co.*, 229 U.S. 53 (1913); in *Lewis Blue Point Oyster Co. v. Briggs*, 229 U.S. 82 (1913), compensation was disallowed for the destruction of an oyster bed. The Supreme Court has not passed on the question of whether a state-created consumptive right from a navigable stream—a right to diversion for beneficial uses by a riparian or appropriator—would be subject to the navigation easement. It has been suggested that, absent a statute to the contrary, interference with these rights would also not be a compensable taking. See Sato, *Water Resources—Comments Upon the Federal-State Relationship*, 48 Calif. L. Rev. 43, 46 (1960).


105. Id. at 737-38. Citing U.S. Const. art. I, § 8, cl. 1.
and that Act's provisions required that compensation be paid for any water rights that were taken.\textsuperscript{106}

Another possible source of federal power is the proprietary clause of the Constitution.\textsuperscript{107} The United States, as owner of the public domain, has the power to regulate the water on the public domain, although there is dispute as to whether this power has been delegated to the states.\textsuperscript{108} The proprietary power was asserted in \textit{Nebraska v. Wyoming}\textsuperscript{109} as allowing the United States to apportion the natural flow of the North Platte River free from state control. The Supreme Court brushed aside the issue of ownership and looked instead to the federal statutes which pertained to the regulation of water. It found a congressional intent to provide “a system of regulation for Federal projects” which, while it need not “give way to an inconsistent state system,”\textsuperscript{110} did include the concurrent operation of some state laws.\textsuperscript{111}

While \textit{Gerlach} and \textit{Nebraska v. Wyoming} are not controlling precedent for the controversy at hand, they do convey a message which frames the issues involved. Although it possesses ultimate power over state waters, the federal government has generally not exercised this power fully but rather has incorporated some state law into its reclamation schemes. \textit{Gerlach} shows that Congress intended that conflicts between the federal government and private holders of water rights are to be resolved by the payment of compensation. The Supreme Court did not decide in \textit{Nebraska v. Wyoming} how Congress intended to resolve or avoid conflicts between the federal government and state regulatory mechanisms. Therefore, the court that hears the current controversy will have to decide this issue. It will have to try to discover what system of regulation Congress intended for its reclamation projects and what role a state agency is to play within that system.\textsuperscript{112}

\textsuperscript{106} 339 U.S. at 739.
\textsuperscript{107} U.S. Const., art. I, \S\ 8, cl. 2:
The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other property belonging to the United States . . .
\textsuperscript{108} The regulatory power of the United States pursuant to its ownership of the public domain and the history of the exercise of this power is discussed in the text accompanying notes 116-22, infra.
\textsuperscript{109} 325 U.S. 589 (1945).
\textsuperscript{110} Id. at 615.
\textsuperscript{111} “We have then a direction by Congress to the Secretary of the Interior to proceed in conformity with state laws in appropriating water for irrigation purposes. We have a compliance with that direction.” 325 U.S. 589 at 614-15.
\textsuperscript{112} Efforts were made in the past to obtain federal legislation that would settle this issue. After the case of Federal Power Commission v. Oregon, 349 U.S. 435 (1955) (see text accompanying notes 121-22 infra), had aroused fears that federal activity would eradicate state regulation of water, a number of bills were proposed that
A. 19th Century Legislation

Federal interest in California water began, obviously enough, with the Mexican Cession.\textsuperscript{113} At this time, all the lands of the Pacific Southwest became part of the public domain and, pursuant to the common law doctrine of riparianism, the United States “owned” the waters thereon.\textsuperscript{114} When California was admitted to the Union, it claimed dominion over the navigable waters,\textsuperscript{116} the U.S. retained control of the non-navigable waters on the public domain.

As California moved into the Gold Rush, the custom arose of acquiring water by appropriation.\textsuperscript{116} Some water was appropriated from public domain for use in different areas. To forestall conflicts over the use of water, Congress gave its approval to appropriative rights in the Mining Act of 1866.\textsuperscript{117} It re-affirmed this recognition in an 1870 act which provided that grants of public domain lands came subject to water rights that had accrued under state law.\textsuperscript{118}

As the mining era waned, Congress moved to encourage the settlement of the arid lands of the West. In the Desert Land Act of 1877 Congress provided for the sale of the public domain separately from any water rights.\textsuperscript{119} As interpreted by the Supreme Court, this meant

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  \item would have spelled out the extent of state authority. \textit{See} Sato, \textit{supra} note 103, at 53-57. The fact that these bills were never passed perhaps creates an inference that Congress did not intend to allow any significant state regulation. On the other hand, it may be that the bills failed because the F.P.C. case did not cause the “evils that have been conjured from” its language. \textit{See} id. at 51.
  \item Treaty of Peace, Friendship, Limits, and Settlement with the Republic of Mexico, 9 Stat. 922 (1848).
  \item According to the classical theory of water law, one does not own water, but rather has a right to its use. However, as owner and sovereign in the acquired territories, the United States had every element of proprietorship possible in the land and the water, as long as they remained as territories. \textit{See} JOSEPH L. SAX, WATER LAW, CASES AND COMMENTARY 349 (prelim. ed. 1965).
  \item \textit{See} Lux v. Hagggin, 69 Cal. 255, 335-36, 10 P. 674, 719-20 (1886).
  \item \textit{See} Jennison v. Kirk, 98 U.S. 453 (1878).
  \item Whenever, by priority of possession, rights to the use of water for mining, agricultural, manufacturing, or other purposes have vested or accrued, and the same are recognized and acknowledged by the local customs, laws and the decisions of the courts, the possessors and owners of such vested rights shall be maintained and protected in the same.
  \item All patents granted, or homesteads allowed, shall be subject to any vested and accrued water rights, or rights to ditches and reservoirs used in connection with such water rights, as may have been acquired under or recognized by the Mining Act of 1866.
  \item The relevant section of this act is as follows:
  \item \textit{Provided}, however, that the right to the use of water by the person so conducting the same, on or to any tract of desert land of six hundred and forty acres shall depend upon bona fide prior appropriation; and such right shall not exceed the amount of water actually appropriated, and necessarily
\end{itemize}
that water rights were to be obtained in the fashion prescribed by state law. Later cases have established that this delegation of authority was not complete, and exceptions have been carved out to assure the protection of federal interests. For example, in *Federal Power Commission v. Oregon*, the Supreme Court found that the delegation did not apply to waters on lands "reserved" by the United States, and compliance with state law was not a prerequisite to the issuance of a license by the F.P.C. for the construction of a water power project on those reserved lands.

These legislative enactments are an indication that Congress felt there were substantial reasons for local control of water. One such reason would be that local water law grew in response to and reflected the conditions and needs of the area in which it worked. If Congress had insisted on asserting the riparian right to continuous flow on the public domain, there would have been conflicts between federal patentees and early miner or settler appropriators. The result would have been the frustration of the primary federal interest in California—that of promoting growth and development.

Of course, this federal interest in the West was not all that sophisticated in the 19th century, and the federal government had little control in any event. Cases like *F.P.C. v. Oregon* show that increased federal activity required carving out exceptions in the general rule of favoring local control. However, the statutes delegating the control of non-navigable waters to the states have never been repealed, and there is evidence that the policy they represent still prevails.

Against this backdrop, the federal government began its reclamation activity and thereby introduced a new national purpose which would affect the regulation of water.

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used for the purpose of irrigation and reclamation; and all surplus water over and above such actual appropriation and use, together with the water of all lakes, rivers, and other sources of water supply upon the public lands and not navigable, shall remain and be held free for the appropriation and use of the public for irrigation, mining, and manufacturing purposes subject to existing rights.


120. What we hold is that following the Act of 1877, if not before, all non-navigable waters then a part of the public domain became publici juris, subject to the plenary control of the designated states, including those since created out of the territories named, with the right in each to determine for itself to what extent the rule of appropriation or the common-law rule in respect of riparian rights should obtain.


122. See the discussion of the Federal Water Pollution Control Act at text accompanying notes 199-201 infra.
B. The Reclamation Act of 1902

The federal government entered the reclamation scene when Congress passed the Reclamation Act of 1902. The most significant section of this Act for purposes of this discussion is section 8:

[N]othing in this Act shall be construed as affecting or intended to affect or to in any way interfere with the laws of any State or Territory relating to the control, appropriation, use, or distribution of water used in irrigation, or any vested rights acquired thereunder, and the Secretary of the Interior, in carrying out the provisions of this Act, shall proceed in conformity with such laws, and nothing herein shall in any way affect any right of any State or of the Federal Government or of any landowner, appropriator, or user of water in, to, or from any interstate stream or the waters thereof: Provided, That the right to the use of water acquired under the provisions of this Act shall be appurtenant to the land irrigated, and beneficial use shall be the basis, the measure, and the limit of the right.123

Other sections define the powers and duties of the Secretary of the Interior and spell out the various federal policies that were intended to be implemented.124 A problem of statutory interpretation is presented since some of these sections mandate certain preferences and limitations which are inconsistent with the laws of some states.125 Thus, there is an internal conflict in the Act of 1902 between section 8 and these other sections.

This conflict did not precipitate a major law suit for some fifty years after the passage of the Act of 1902, perhaps because federal reclamation activity did not reach large-scale proportions until the early 1950's. Also, the Bureau of Reclamation as a rule followed the state procedures for the appropriation of water,126 and California never felt the need to challenge the federal plans.

Two cases — Ivanhoe Irrigation District v. McCracken127 and City of Fresno v. California128—required the U.S. Supreme Court to

126. It has been Bureau policy to apply to the Board for permits, as shown by the very existence of the decisions discussed herein. The only instance of a federal reclamation project proceeding without a state permit is documented in Turner v. Kings River Conservation Dist., 360 F.2d 184 (9th Cir. 1966), discussed at text accompanying notes 153-55 infra.
interpret section 8. Both cases involved local interests that were adversely affected by the operation or construction of the C.V.P. In both, California was not opposed to any facet of the federal development involved, and in *Ivanhoe*, the state attorney general filed a brief supporting the federal position.  

In *Ivanhoe*, the question presented involved section 5, the so-called “excess lands” provision. The Bureau had contracted for the sale of water with local water districts, and by the terms of the contracts the districts had to enforce the limitations of section 5. A land owner challenged one such contract in state court and asserted that under state law he had a right to water for more of his lands. The California Supreme Court had taken section 8 at its word and had invalidated the contract. The federal position was that section 8 did not require the Bureau of Reclamation to ignore another specific provision of the Act of 1902.

The U.S. Supreme Court agreed with the federal position, holding that “... it cannot be said that Congress intended that § 8 would ... make inapplicable the excess lands provision of § 5 ... .” Commentators and later cases agree that this was the extent of *Ivanhoe’s* holding. However, the opinion also contains *dicta* which strongly favor the federal position in the present controversy. For example, “... we read nothing in § 8 that requires the U.S. to deliver wa-

129. On the brief was Edmund G. Brown, later to be governor of California. The Court took note of the federal-state cooperation:

... there is no clash here between the United States and the state of California. Quite the contrary, the United States and the various state agencies, with commendable faith and steadfastness to one another, have embarked upon and nearly completed a most complicated joint venture known as the Central Valley Project.


130. In relevant part:

No right to the use of water for land in private ownership shall be sold for a tract exceeding one hundred and sixty acres to any one landowner, and no such sale shall be made to any landowner unless he be an actual bona fide resident on such land, or occupant thereof residing in the neighborhood of said land, and no such right shall permanently attach until all payments therefor are made.


132. 357 U.S. at 293.

133. See *Arizona v. California*, 373 U.S. 546, 586 (1963): In *Ivanhoe*, we held that even though § 8 of the Reclamation Act preserved state law, that general provision could not override a specific provision of the same Act prohibiting a single landowner from getting water for more than 160 acres.

ter on terms imposed by the state."\textsuperscript{134} What then does section 8 mean?

As we read § 8, 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 rights therein. But the acquisition of water rights must not be confused with the operation of federal projects.\textsuperscript{135}

No authority was cited for this interpretation and no Rosetta Stone was provided to decode its cryptic message. One commentator called it a "very sweeping limitation" on state authority,\textsuperscript{136} but it was not taken that way in Congress. Two days after the \textit{Ivanhoe} decision, "one of the chief students of the 160-acre limitation . . . " thought the case stood for state control of water:

Mr. Barrett: "[A]lso, I was very much pleased that the Court quite clearly pointed out the distinction between the rule on the 160-acre limitation and the question of the right of the States to control and dispose of the waters. Certainly nothing was said in the opinion which would indicate in the least that the States were not acting wholly within their rights in controlling the disposition of the waters. As Justice Clark pointed out in the decision, the Bureau of Reclamation should go to the states to acquire any water rights it may desire or need for the project in question.\textsuperscript{137}

A court seeking guidance from the \textit{Ivanhoe} opinion must contend with this ambiguity. As precedent, the case stands for the proposition that the Bureau of Reclamation is to follow a specific mandate from Congress before it defers to state law. It also may stand for a federal inclination to protect federal investments. However, \textit{Ivanhoe} does not adequately explain the general relationship of the federal and state governments as regulators of water.

The case of \textit{City of Fresno v. California}\textsuperscript{138} presented a question similar to that in \textit{Ivanhoe}. The plaintiff city claimed that certain water rights it held under state law prohibited the diversions planned for the Friant Dam, another part of the C.V.P. Two sets of California statutes were involved, one that gave a higher priority to domestic uses than to irrigation uses,\textsuperscript{139} and another known as the county or watershed of origin law which reserved a preference to water users within a watershed over those who exported water from the watershed.\textsuperscript{140}

The Supreme Court decided against the application of these stat-

\textsuperscript{134} 357 U.S. at 292.
\textsuperscript{135} \textit{id.} at 291.
\textsuperscript{136} Sax, \textit{supra} note 133, at 53.
\textsuperscript{137} 104 CONG. REC. 12162 (1958).
\textsuperscript{138} 372 U.S. 627 (1963).
\textsuperscript{139} CAL. WATER CODE § 106 (West 1971).
\textsuperscript{140} CAL. WATER CODE §§ 11460-63 (West 1971).
utes and in doing so offered alternative rationales. The first was a reference to the federal power of eminent domain:

... However, § 8 does not mean that state law may operate to prevent the United States from exercising the power of eminent domain to acquire the water rights of others. This was settled in *Ivanhoe Irrigation District v. McCracken*, 357 U.S. 275 (1958). Rather, 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.141

In an alternative holding, the Court analyzed the state statutes. It found that the plaintiffs had misconstrued the watershed of origin law, and it did not give them the preference they claimed. It then found that the state priority for domestic uses was in direct conflict with a specific federal reclamation policy favoring irrigation uses.142

It requires considerable unraveling to get a coherent message from the *Fresno* opinion. The second rationale was the more appropriate one to decide the questions presented, yet the Court chose to present the eminent domain point first, as if it settled the issues. Eminent domain concepts could conceivably handle the watershed of origin claims. Under California law, the preference did not create a water right until it was exercised, but once it was exercised, a right vested and this could be condemned.143 However, eminent domain and compensation concepts are entirely irrelevant to the other issue in the case. Since no right rests in anyone as a result of the setting of priorities, there is nothing which can be condemned.

The *Fresno* opinion unfortunately blurs a distinction crucial to the present controversy. The Court appears to say that the eminent domain concepts discussed in *Gerlach* are applicable to the entire federal-state reclamation law controversy. But the question considered in *Gerlach* was how the Congress intended to deal with cases where the federal government was damaging private appropriated water rights. There compensation is paid so that the private property owner does not bear the cost of the public benefit. However, when the federal government takes water that is unappropriated, it is not damaging private property but rather is asserting a power also claimed by a state agency. The answer given in *Gerlach* is thus not sufficient to decide how Congress had intended to resolve the federal-state conflict, a point apparently missed by the *Fresno* court.

One commentator has suggested that the eminent domain language in *Fresno* does speak to the issue of unappropriated water as well as

141. 372 U.S. at 630.
142. Id.
144. See text accompanying notes 104-06 supra.
to vested property rights.\textsuperscript{145} The argument is made that since state law does not define a compensable right in unappropriated waters, the Bureau of Reclamation may merely take such waters. This argument does bridge the gap between the concepts of property and regulation, but it flies in the face of the history of somewhat delicate federal intrusion into state regulation of water. It is also totally foreign to the traditional view of water rights in which only subjecting water to a beneficial use creates a right.\textsuperscript{146} Furthermore, if the state could create a compensable right in its unappropriated waters, who would be paid for a taking and how much? Would the Bureau ever be able to build New Melones if it had to pay California for the value of the Stanislaus as a recreational resource?\textsuperscript{147}

Realistically viewed, \textit{Fresno} can offer little more than a restatement of the \textit{Ivanhoe} holding that a federal statute is supreme over a conflicting state statute, a proposition questioned by no one. The case fails as a guide to what the federal statutes in fact mean.

Only one existing Supreme Court case interprets section 8 in its relation to state regulation of water. This is \textit{Arizona v. California},\textsuperscript{148} which involved the apportionment of water from the Boulder Canyon Project. The Court found that the Boulder Canyon Project Act (B.C.P.A.)\textsuperscript{149} gave the Secretary of the Interior the authority to apportion the water between the states. The Court also found that, despite the incorporation of section 8 into the B.C.P.A., the Secretary had the authority to determine distribution \textit{within} the state as well.\textsuperscript{150}

It is not clear whether \textit{Arizona v. California} is applicable to the C.V.P. The Court in \textit{Arizona} was concerned that the Boulder Canyon Project was an interstate endeavor. It felt that "the varying, possibly inconsistent, commands of the different state legislatures could frustrate efficient operation of the project . . . ," and that only "unitary management" could insure efficient operation.\textsuperscript{151} This might imply that control by one state legislature would be permissible.

Another factor that may distinguish \textit{Arizona} from the instant controversy lies in the fact that the B.C.P.A. gave the Secretary greater

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\begin{enumerate}
\item[145.] Note, \textit{The Delta Decision}, supra note 4, at 757-58.
\item[146.] See note 114 supra.
\item[147.] Estimates of the annual economic benefit of recreational uses of the Stanislaus to Tuolumne and Calaveras counties range from one-half to one-and-a-half million dollars. Telephone interview with David Kay, American River Touring Ass'n, Oakland, Cal., Sept. 4, 1974.
\item[148.] 373 U.S. 546 (1962).
\item[150.] \textit{Id.} at 589-90.
\item[151.] \textit{Id.} at 589-90.
\end{enumerate}
\end{footnotesize}
contractual powers than he had under the general reclamation law. Therefore, the question is left open as to whether the general reclamation law, or the specific authorization for the projects involved here, authorizes the Bureau to control intrastate distribution of water without conforming to state regulation.

*Arizona* is thus too clearly distinguishable to be of much use in interpreting section 8 for purposes of the present controversy. Thus, the net result of the Supreme Court decisions regarding reclamation law is the narrow *Ivanhoe* holding.

There is one circuit court opinion that interprets section 8. In *Turner v. Kings River Conservation District*, private landowners sought to halt the construction of the Pine Flat Dam in California. One ground asserted was that no state permit had been obtained for the storage of water behind the dam. The Ninth Circuit found that no permit was required:

> We must agree with the government "that reason precludes an interpretation of the general provisions of Section 8 of the Reclamation Act [of 1902] and Sections 1 and 8 of the Flood Control Act [of 1944] which would impute to Congress an intention to frustrate its plans for this project by subjecting it to the risk that it might never be used for some of the authorized purposes, should a State permit not be forthcoming."

*Turner* is not adequate as precedent for the issues here since it rested its conclusion on the Flood Control Act of 1944 as well as on section 8. Furthermore, the court made no attempt to explore congressional intent to find out exactly what “reason would preclude” in the estimation of Congress. However, its observation is relevant to the instant controversy and it may add another dimension to the *Ivanhoe-Fresno* holdings. The ultimate question is whether Congress could have authorized the reclamation projects and yet have left room for them to be changed to comply with the Board’s decisions. There is obviously some point beyond which changes in the operation of the projects will render the original authorization meaningless.

This is the context in which the courts must now apply section 8 to the federal-state controversy. The next section will examine the relationship of this body of law to the authorization statutes for the A.F.S. and for New Melones.

152. 43 U.S.C. § 617(d) (1964). The significance of this factor in the Court’s decision is discussed in Sax, *supra* note 133, at 55-56.

153. 360 F.2d 184 (9th Cir. 1966).

154. *Id.* at 198.

C. The Auburn-Folsom South Unit Authorization

The act authorizing the A.F.S. was passed in 1965 and was incorporated into the federal reclamation law. Thus, all the provisions of the Act of 1902, including section 8, apply to the operation of the A.F.S. The directions to the Bureau were to build the A.F.S. and to integrate it "from both a financial and operational standpoint" with present and future components of the C.V.P. The goal set was to "effectuate the fullest, most beneficial, and most economic utilization of the water resources hereby made available."157

One section of the Act specifically mentions state law, but its proper interpretation is difficult to discover. This is section 5 of the Act which reads as follows:

Nothing contained in this Act shall be construed by implication or otherwise as an allocation of water, and in the studies for the purposes of developing plans for disposal of water as herein authorized the Secretary shall make recommendations for the use of water in accord with State water laws, including but not limited to such laws giving priority to the counties and areas of origin for present and future needs.158

The proponents of the state position have asserted that this section requires that the Secretary follow the directives contained in D 1400. However, the language of the section does not completely bear out this assertion. The only duty imposed upon the Secretary is to recommend that state law be followed and this duty seems to extend to "studies" which will be used for developing "plans." Furthermore, since section 8 of the Act of 1902 applies here as well, section 5 would be superfluous if given the meaning that is also attributed to section 8.159

The most likely explanation for the inclusion of section 5 within the A.F.S. statute is that it refers to studies for future developments that may grow out of the completed project. This conclusion is based on

159. The legislative history adds little to help the state position. The Act came before the Senate Committee on Interior and Insular Affairs in two sessions of Congress. During the first session, the Committee resisted efforts by the Secretary of the Interior to delete section 5 and found that because "the Auburn-Folsom South project is a wholly intrastate project, . . . the laws of the State of California with respect to allocation of water should be followed by the Secretary. . . ." S. REP. No. 1289, 88th Cong., 2d Sess. 3-4 (1964). The bill was not passed following this report, but was reintroduced during the next session of Congress. The same Senate committee changed its position on section 5 and recommended its deletion since the reports for the project made "adequate allowances for future water uses in the upstream foothill areas. . . ." S. REP. No. 312, 89th Cong., 1st Sess. 2 (1965). The bill was passed after the corresponding House committee reinserted the provision without significant explanation. H.R. REP. No. 295, 89th Cong., 1st Sess. 12 (1965).
the fact that language identical to that in section 5 appeared in the statute authorizing the Folsom development in 1949. This latter statute is accompanied by legislative history that indicates that more development was envisioned and studies were to be made for this purpose. It was in these studies that the "recommendations" were to be made. If section 5 serves the same purpose as did the same language in the Folsom act, then it applies to studies that may be made for the proposed East Side Project. If this analysis is correct, section 5 is not a mandate to follow state law but rather a less potent direction to consider state law as studies are carried forward. The holdings of Ivanhoe, Fresno, and Turner therefore provide the only guides for analysis.

Ivanhoe and Fresno both involved specific directives in the authorization statute. In A.F.S. the only specific directives in regard to allocation are "to allocate water and reservoir capacity to recreation and fish and wildlife enhancement." This could be an indication that final allocation decisions are to be made by the Secretary, but this is not clear. In contrast to the statutes involved in Ivanhoe and Fresno, these directives can be reconciled with state decision-making powers and can even be read together with section 8 to direct the Secretary to allocate water to these purposes when the state finds it necessary. According to this reading, D 1400 would be in furtherance of the federal objectives.

This interpretation would also reconcile any inconsistency between D 1400's allocation of water and the preferences found in federal law for irrigation uses. D 1400 does not subordinate the irrigation pur-

161. The developments thus authorized will utilize but a part of the potentialities of the American River Basin's waters. Accordingly, the bill provides for studies by the Bureau of Reclamation of means of making full use of the remaining water and of the need therefor, and for report thereon. Among the investigations which are to be made and reported on are studies of the feasibility of diversion canals leading north and south from Folsom Reservoir to serve lands in El Dorado, Sacramento, and Placer Counties, of canals and appurtenant works to serve lands in Contra Costa, Alameda, Santa Clara, and San Benito Counties, and of supplemental works and equipment needed to furnish and maintain a firm supply of electric energy. The studies are to take full account of the water laws of the State of California, including such laws as give priority to present and future uses of water in the areas in which it originates.
162. The East Side Project is a possible outgrowth of the A.F.S. project. See text accompanying note 40 supra.
pose to any of the other purposes but merely balances the various uses in such a way as to realize the most beneficial allocation. This balancing would have to be done anyway under the language in the A.F.S. authorizing statute, and it is irrelevant to the federal objectives whether state or federal agencies do the balancing.

The *Turner* rationale poses a problem that requires more serious attention. The A.F.S. act specifically authorizes a dam and reservoir of certain dimensions. There is also a provision authorizing a hydroelectric power plant that will generate up to a specified capacity. If D 1400's required minimum flows prevent the accumulation of water needed to provide power, then *Turner's* dilemma will be presented. One of the purposes for which the project was authorized will not be realized, or at least it will be diminished. Of course, if there is less water for power, there will also be less water for irrigation. The money-making capacity of the unit will then be reduced.

It is quite likely that this issue will not have to be faced in regard to the A.F.S. In D 1400, the Board indicated that there would be no interference with project objectives.\(^\text{165}\) That the Bureau agrees may be implied by the Bureau's declaration that it would comply with D 1400's conditions until the matter is resolved either in court or in Congress.\(^\text{166}\) Also, there is reason to believe that the conditions of D 1400 can be met without incurring a financial loss. The decision allows for elimination of the flows for recreation in a dry year.\(^\text{167}\) The Board did not preclude any contracts for the delivery of water, allowing one contract to stand even though the Board thought it was an unwise diversion.\(^\text{168}\) Finally, the coordinated operation of Auburn, Folsom, and Nimbus dams may allow for meeting the flows required without a substantial loss in power production.

The question then is whether the Bureau may vary from the plans that have been developed for the project. The Bureau's position seems to be that its congressional authorization does not allow it to accede to Board-imposed conditions which will "interfere with or affect the operation of" a federal project,\(^\text{169}\) but it is far from clear what is meant by "the project." Congressional mandates regarding construction and operation are quite general; nowhere in the statute or in the feasibility report is there a mandate to sell to a particular customer or to deliver water from a certain point.\(^\text{170}\)

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166. *Supplement to the Final Environmental Statement, Auburn-Folsom South Unit, supra* note 13, at 7.
167. D 1400, *supra* note 9, at 23.
168. *Id.* at 19. See note 39 *supra*.
169. See text accompanying notes 95-98 *supra*.
170. The flexibility allowed in a federal project can be appreciated by comparison
Despite the Bureau's position, there is evidence that certain facets of the A.F.S. could be changed to provide additional water to meet D 1400's required flows without going beyond existing authority. During the hearing on the E.I.S. count in N.R.D.C. v. Stamm, a representative of the Bureau of Reclamation indicated that the Bureau would not object if the East Bay Municipal Utility District, a customer for water from the Folsom South Canal, requested a change of the diversion point to a spot near the mouth of the American River. This change would mean more water for the Lower American. It is far from certain that the utility district will request this change, and the Bureau may be bound by the contract if it does not. However, the possibility of the change shows that congressional authorization does not entirely define "the project." Rather, the Bureau proceeds from the congressional authorization and determines what is to be the project within the rather wide parameters of that authorization. If the Bureau were to be true to all of its congressional authorizations, it would be forced to change what has turned out to be inconsistent with state law. The reclamation law authorizes the Secretary of the Interior to do all things necessary and proper to accomplish the reclamation goals. The section that bestows this authority specifically mentions section 8 as one of the goals the Secretary is to accomplish.

Therefore, in regard to the A.F.S., the Bureau should be required under federal law to comply with the conditions of D 1400.

D. The New Melones Authorization

The flood control bill under which the New Melones project was originally authorized recognized that states have "interests and rights in water utilization and control." These policy declarations were incorporated into the bill modifying the project to its present specifications. The new bill sets off against this policy several specified pow-

with the requirement under California law that 75% of the contracts for delivery of water be signed prior to construction of facilities. See DEPT. OF WATER RES., STATE RES. AGENCY, BULL. NO. 132, THE CALIFORNIA STATE WATER PROJECT IN 1963, at 155 (1963).

174. 33 U.S.C. § 701-1 (1970). The text also reads: "... it is hereby declared to be the Policy of the Congress to recognize the interests and rights of the States in determining the development of the watersheds within their borders. . . ."
ers of the Secretary of the Army. He is to adopt measures to protect fish and wildlife\(^{178}\) and must give “consideration” to the need for storage of water to release for water quality.\(^{177}\) Also, after determining the quantity of water which will satisfy needs within the Stanislaus River Basin, the Secretary of the Interior must take care of those needs before diverting water for use elsewhere.\(^{178}\)

The same issues arise in regard to this authorization as were discussed in regard to the A.F.S. act. The directives to the Secretaries may constitute specific directives in the sense of the *Ivanhoe* holding. On the other hand, they could be read together with section 8 and the New Melones policy declaration as creating the authority for the Bureau to allocate water in accordance with state decisions.

However, if the *Turner* rationale is applied to New Melones and D 1422, then a more serious problem must be confronted. If congressional authorization requires that the New Melones Dam be built as planned, then D 1422 cannot be enforced without destroying the economic feasibility of the project. There is no way that the irrigation and power purposes of New Melones can be achieved if the conditions of D 1422 remain unchanged.

Faced with this situation, a court has two choices. The first is simple—it can follow the reasoning in *Turner* and conclude that D 1422 must fall. The second choice would be to attempt to discover what the congressional intent would be in this specific situation. There is one specific provision in the original authorization which pertains to the situation where there is a conflict between state and federal authorities. Like most reclamation law it is ambiguous, but it may provide some clue as to the general congressional intent.

This provision requires the Secretary of the Interior to obtain input from an “affected state” when an irrigation project is planned:

In the event a submission of views and recommendations made by an affected state . . . sets forth objections to the plans or proposals covered by the Secretary of the Interior, the proposed works shall not be deemed authorized except upon approval by an Act of Congress; and subsection 9(a) of the Reclamation Project Act of 1939 (53 Stat. 1187) and subsection 3(a) of the Act of August 11, 1939 (53 Stat. 1418) as amended, are hereby amended accordingly.\(^{179}\)

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177. Pub. L. No. 87-874, 76 Stat. 1192 (1962). The Secretary of the Army controls the Army Corps of Engineers which builds the projects. The Bureau of Reclamation takes over the operation of multi-purpose projects once they are built. See note 32 supra.
The statutes that this provision amends required findings of economic and engineering feasibility before the Secretary could proceed with projects, but it is unclear whether this pertains to projects already authorized or to new projects for which the Secretary sought authorization. The former interpretation is more likely since congressional authorization is a prerequisite to the initiation of a project. Perhaps the provisions call for findings of feasibility prior to the actual construction of major units of a project, even if they have already been authorized.

In any case, there seems to be an indication that Congress wished to maintain control of three categories of decisions rather than to delegate these decisions to the Bureau. One category includes the decision to go ahead with a project that turns out to be a financial loss; another includes the decision to go ahead with a project that may not have been adequately designed from an engineering standpoint. The third category includes the decision to go forward with a project that is objected to by the state within which it will operate.

California has not objected to the construction of New Melones. However, through the State Water Resources Control Board, it has objected to the proposed use of the water made available by New Melones. It is not at all clear that the Bureau has the authority to ignore this objection and to proceed with construction and operation as planned. Moreover, an initiative measure stating California’s opposition to the project as currently designed will be on the November ballot. Although construction of the dam will probably continue until then, even spokesmen for the Corps feel that Congress will abandon the project if the referendum passes.

The courts will thus be faced with a difficult situation in regard to New Melones and D 1422. The provision discussed above is too vague to support a decision; at best it can provide an indication of congressional intent in an area otherwise devoid of guideposts. Congress has just not resolved the issue of what is to be done when a federal reclamation project turns out to be in complete opposition to state regulation of its water. Thus, from the analysis of legislation and precedent it is not clear how a court should decide with respect to New Melones. Any decision will have to be heavily dependent on policy considerations.

Even if state law is somehow reconciled with the federal development now, there will arise in the future another situation in which the

181. To the contrary, the California legislature has officially endorsed the project as designed. Cal. Water Code § 12648.5 (West 1971).
operation of the projects may require alterations to reflect changed conditions, and the regulatory agencies of the two sovereigns may once again be at odds. As the next section will illustrate, D 1379 now presents a preview of the problem.

E. The Effect of D 1379 on the C.V.P.

D 1379 presents two problems which, while not clearly distinct from those presented in D 1400 and D 1422, require separate consideration. These are: 1) what happens when state allocation decisions require releases for a purpose not contained in any authorizing statute and 2) what happens when the Board, through the exercise of reserved jurisdiction, disturbs a project which is already functioning under executed contracts for the delivery of water?

The first problem, in its hypothetical form at least, may be answered simply. If there is no congressional grant of authority for a given purpose, then the Bureau cannot devote project resources to that purpose. Recreation, fish and wildlife enhancement, and water quality control are specific purposes of the C.V.P. However, as was mentioned earlier, the control of salinity intrusion is not contained in the C.V.P. authorization.\(^\text{183}\)

This may not settle the issue, however. Control of salinity intrusion is of paramount importance to the Delta environment. Thus, authority to implement such control may be found in environmental statutes such as the National Environmental Policy Act\(^\text{184}\) or the Environmental Quality Improvement Act.\(^\text{185}\) Also, there is evidence that salinity intrusion is a form of pollution sought to be prevented under the Federal Water Pollution Control Act (FWPCA),\(^\text{186}\) thus arguably solving the unauthorized purpose problem in the current controversy. It must also be noted that NEPA requires federal agencies to seek changes

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183. See note 25 supra.
186. 33 U.S.C. § 1252(b)(2) (1970) directs the Bureau of Reclamation and other agencies to consider "[t]he need for and value of storage for regulation of streamflow . . . including . . . salt water intrusion. . . ." With regard to projects previously authorized, see Cape Henry Bird Club v. Laird, 359 F. Supp. 404, 5 ERC 1283 (D.C. Va.), aff'd, 484 F.2d 453, 6 ERC 1336 (4th Cir. 1973). However, there is an indication in the legislative history that Congress intended that salinity intrusion be dealt with:

    Sen. Muskie: . . . it is the intent of the conferees and of the bill that such salt water intrusion is pollution as defined in Section 502 (33 U.S.C. § 1362 (6) (West Supp. 1974)) of the bill.

118 Cong. Rec. 16894 (1972). It is not clear exactly how the FWPCA, which focuses on effluent limitations, will function in regard to salinity intrusion which until now has been controlled by releases of stored water.
in their authorization where necessary to preserve the environment. 187 This provision may be applicable here.

The real difficulty lies with the second problem—that of requiring changes in a functioning project. This problem exists in regard to all previous Board decisions and will persist since the Board always reserves jurisdiction. D 1379 merely presents in sharpest focus the two major aspects of the problem—money and planning.

The Bureau will lose money in supplying water to repel salinity because it will be forced to forego diversions upstream from the Delta. However, this does not mean that no one benefits economically from water used for salinity control. Users in the Delta receive better quality water in greater quantity than would otherwise exist. 188 They divert and use such water, but they make no payments therefor. 189

Thus, issues of financial feasibility and equity arise: Water is taken from paying customers and dedicated to uses and users who pay nothing. California, of course, receives a great benefit in the improvement of its environment, but the cost is borne by the national treasury.

Congress probably did not intend to provide these local benefits at national expense. Projects are often approved with some expenditures which will not be repaid by project benefactors, but this does not allow a dramatic shift in cost allocation from that originally mandated by Congress.

There is no way to resolve this problem within the repayment scheme of current reclamation law, but several legislative solutions are possible. To pay for the environmental benefits to California, a fund could be established from the general revenues of the state to reimburse federal projects for the loss of irrigation revenues. California already has such a fund to reimburse the State Water Project for water devoted to fish and wildlife enhancement. 190 Also, the users of the additional Delta water could be required to pay an amount based on the water they receive beyond their current rights. 191

188. D 1379 supra note 6, at 8:
... the rights of users of water on riparian lands and appropriators in the Delta extend only to water quality and quantity which would have existed in the absence of the projects, taking into consideration current upstream uses under vested rights.

A related problem lies in the fact that these upstream users cause depletion in the Delta but do not share in the cost of maintaining water quality. Id. at 15.
189. See text accompanying note 80 supra.
190. CAL. WATER CODE §§ 11900-25 (West 1971). See especially CAL. WATER CODE § 11914 (West 1971) which authorizes a revision in allocation of costs of water project works for fish and wildlife enhancement purposes.
191. The Board noted that California law did not give Delta users a right to water
Of course, courts are not free to resolve issues by speculation as to what the law should be or what it could be if Congress were to act in the future. No provision is made in federal law for changes in reclamation project financing to favor environmental values. Such lack of flexibility could indicate that Congress did not intend these values to be implemented to the derogation of other national policies such as irrigation. This then might mark the limits of state authority in the reclamation field: When a state allocates water in such a fashion that the financial viability of a project is destroyed, the state allocations may not stand.

In application, this standard may result in no state regulation at all. The Board's differences with the Bureau's plans have been in the direction of environmental enhancement and away from economically productive consumptive uses. Therefore, the enforceability of any state allocation would depend on the willingness of the Bureau to adapt its operations to compensate for the financial loss. Furthermore, since changes in allocations may be necessary in any event, this resolution will leave the Bureau to decide the nature and extent of the changes. As will be discussed below, the Bureau may not be the most desirable decisionmaker in this situation.

The second argument against allowing state-imposed changes in on-going projects is that it would inhibit planning: the Bureau could never be sure of the feasibility of its projects and Congress would never know exactly what it was authorizing. This is not a valid argument in the field of water resource development. Water is a capricious resource, and its management must adapt to changing supply and demand. When development is accomplished by means of large-scale structures such as the C.V.P. units, capital costs may hinder adaptation but should not prevent it.198

No reasonable construction would impute to Congress an intent in excess of their vested rights without payment. D 1379 supra note 6, at 15. Therefore, the extent and value of the right should be susceptible of judicial determination; however, a preferable resolution would be by agreement between the Bureau, the State Water Project, and the Delta users.

192. The Bureau has recognized in regard to the A.F.S. for example, that "the greater emphasis which the public has since placed on the fishery and recreational uses of the river below Nimbus . . . has created a strong demand for release about four times as great [as that originally planned]." Supplement to the Final Environmental Statement: Auburn-Folsom South Unit, supra note 13, at 4.

193. An observation regarding the effect of public interest litigation on long-range projects is pertinent here: Only if we could be persuaded that every large project—whether governmental or private—was perfectly conceived at the outset, impregnable to new facts or new public concerns, and perfectly executed, could we view litigation as an infringement of planning and large-scale social policy activities.

to authorize projects which are financially unsound. But it is equally unreasonable to assume that Congress intended to authorize projects which result in unsound management of water resources. Changes in conditions surrounding the project must be accounted for by changes in project operation. Again, the basic question is which agency should be given the power to make these decisions.

F. State Water Resources Control Board/Bureau of Reclamation: Policy Considerations

The foregoing discussion has shown that the reclamation statutes and related judicial precedent do not provide an answer to the problem of how much state regulation may take place in a federal reclamation project. Whether it is admitted or not, the courts will have to extend the law. In doing so, various policy considerations will have to be examined. This section will explore what this author believes are the relevant policy questions.

The policy factors break down along three lines: the first concerns locating the level of government at which decisions will be most efficiently made; the second relates to finding which agency is best suited to make these kinds of decisions; and the third is the effect of the choice of decisionmaker on future options.

Any governmental decision is most efficiently made at a certain level. Where environmental decisions are concerned, there are two levels to consider: the decisionmaking jurisdiction can correspond to the area of immediate environmental impact, or the decision can be made by a larger governmental unit. The choice will depend on the nature of the environmental decision involved.

The factors which favor locating the decisionmaking in the area of impact include:

1. Those who must bear the non-economic costs of an environmental decision in their daily lives are likely to make it responsibly. It is in the interest of those who feel the effects of an action to minimize the environmental discomfort they experience.194

2. Those closest to the area of impact will be more likely to react quickly to rectify outmoded or faulty operations. If conditions

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194. The steady deterioration of our environment proves that no level of government has responsibly dealt with decisions affecting the environment. As the U.S. now moves to reverse this pattern, it will be necessary to locate the correct level of government for decisionmaking and to provide mechanisms and incentives to ensure that this decisionmaking will be knowledgeable and responsible. Hopefully, statutes such as NEPA and the California Environmental Quality Act, Cal. Pub. Res. Code §§ 21000 et seq. (West Supp. 1974), by requiring that the effects of environmental decisions be considered in advance, will provide a step in this direction.
change sufficiently to make a formerly correct decision incorrect, local
decisionmakers will be able to sense this quickly and take action.

3. The legal systems of the area of impact will be likely to have
mechanisms appropriate to deal with the vagaries of natural resources
in that area. It was shown above how water law in the western states
grew in response to the scarcity of the resource and the needs of the
society.195

4. Within the area of impact, those affected by an environmental
decision will be represented in the legislative body corresponding to
that area. Thus, all interests will have an opportunity to have a voice
in the decisionmaking process.

Conversely, there are several factors which, if present, will point
toward locating the decision in a jurisdiction larger than that which
feels the immediate impact. These factors include:

1. A larger governmental unit may have an interest in the realiza-
tion of a goal that transcends the interests of those in the area of
immediate impact.

2. A larger unit will have representation for those who have
an interest in the larger goal mentioned above but who are not di-
rectly represented within the area of impact. At the same time the
larger unit may be free of the pressures, such as political machines or
the domination of one industry, which often distort the decisionmaking
process at the lower levels of government.

3. A larger governmental unit will usually have greater re-
sources, at least in terms of money, to bring to bear on the problem.

4. A larger unit will not be likely to act rashly in the face of
sudden changes in the environment. Thus, it is more likely that a
higher level of government will persevere in the effort to realize long-
range goals.

Applying these principles to the present controversy, it can be
seen that the impacts of the decisions concerning the construction and
operation of the projects will be felt at various levels.196

The flood control decisions will obviously impact the immediate
area surrounding the rivers. However, there are several factors present

195. See text accompanying notes 113-22 supra.
196. No great precision is possible in translating these broad concepts to real life
situations. For example, is the area of impact of a flood control decision the farmlands
that are deluged or is it the market that as a result receives less food? Perhaps precise
definition would include the farmlands in the area of immediate impact while consumers
in the market would be among those interested in the secondary consequences of that
impact. In many cases protecting the welfare of those within the area of impact will
also protect those who feel the secondary effect, but this will not always be true. For
example, in some cases the loss of farmland to inundation upstream may result in in-
creased land being made arable in the area to which the water is sent.
which point to a larger jurisdiction as the appropriate decisionmaker. Primarily, the rivers and the lands adjacent to them are just too important to the welfare of the state to leave them to local interests on the city or county level. The major political forces on these levels are economic ones for whom development is important as a short-range goal, and long-range environmental goals are often forgotten. Furthermore, local interests will, understandably, tend to over-react to a flood and impose measures which are unwise in the long run.

It is evident that the most significant effects of the A.F.S. and New Melones projects will be those felt throughout California. The distribution of water will affect the growth and movement of population and will influence the development of agriculture and industry. Recreation areas will have to be relocated or redesigned in response to these consequences. The California legislature will have to deal with these secondary effects; it would also provide the best forum to debate how the initial decision, the one which precipitates the effects, should be made.

Despite the concentration of the effects of the projects within California, however, there are federal interests involved which point toward national control. First is the interest of consumers throughout the nation in the irrigation provided by the projects and the resultant production of agricultural goods. Since these consumers are represented directly only at the national level, national control might be necessary to protect their interests. Another factor which points toward national control concerns the source of the funds used to build the projects. The entry of the federal government into California water development was due to the state's financial inadequacy. Once federal money on such a large scale is invested, federal officials may well feel that it is their responsibility to ensure that it is properly used.

This last point is contradicted by the general policy statements regarding state responsibility that accompany all federal environmental activities. The President's 1973 Environmental Program provides an illustration:

... because there are no local or State boundaries to the problems of our environment, the Federal Government must play an active, positive role. We can and will set standards and exercise leadership.

197. It is possible that this national interest will be sufficiently protected on the state level. Agricultural interests are vital to California's economy and their spokesmen are rarely silent in the Legislature when water development is being discussed. For example, several bills have been introduced in the state legislature which would alter the power of the Board. One bill, AB 3070 (introduced by Assemblyman MacDonald, Republican-Ventura) would reverse D 1379 and D 1400. See 2 CALIFORNIA TODAY, No. 3, at 4 (1974).

198. See text accompanying note 22 supra.
We are providing necessary funding support. . . . But Washington must not displace state and local initiative, and we shall expect the state and local governments—along with the private sector—to play the central role in making the difficult, particular decisions which lie ahead.  

Similar statements of policy are found in the FWPCA and in the Environmental Quality Act. The courts in the instant controversy will have to decide whether these sentiments are to be given substance or if they are to be treated as mere political boilerplates as some have called similar statements in past water resources legislation.

Summarizing the preceding discussion, it would seem that the decisions concerning these reclamation projects would be best located at the state level if assurances could be made that the national irrigation purpose would be protected.

The second major policy question concerns the institutional structure of the two agencies involved. The Board has two institutional characteristics which favor it as the decisionmaker. First, it is a neutral agency in that it merely regulates the water resource and has no interest in the completion of reclamation projects. The Bureau, on the other hand, is the initiator and operator of these projects and is thus self-interested in decisions that affect them. The good faith of the Bureau is above question, but it is always wise to ensure that environmental decisions are made free of "the bias of determinedly mission-oriented agencies" where it is possible to do so.

Secondly, the Board has mechanisms that make it responsive to changing circumstances. Any interested party may move to re-open the reserved jurisdiction for any of the decisions involved here. The Board then holds hearings in which interested parties may present evidence and cross-examine witnesses. A record is made and its decisions contain written findings that are judicially reviewable within the statutory scheme. Those dissatisfied with a final decision by the Board have an avenue for quick relief in the state legislature. The


200. It is the policy of the Congress to recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution, and to plan the development and use of land and water resources... 33 U.S.C.A. § 1251(b) (Supp. 1974).


202. See Sax, supra note 133, at 80.


205. See note 74 supra.
Board's procedures thus provide an updating mechanism for projects which by their very nature must be planned far in advance of their operation.

The Bureau is not as easily accessible to local groups, and Congress is too large and distant to provide speedy relief. However, it must be realized that this can cut both ways. The Bureau will be more likely to keep long-range goals in mind and will not be open to pressures arising from a significant but short term problem such as a dry year or a freak flood.

The final policy consideration is the preservation of future options. Decisions made by the Board which favor environmental enhancement leave room for adjustment in the direction of future development. On the other hand, decisions to develop water resources by means of large structural devices such as dams have a definite finality about them. If the Bureau does not follow the requirements of the Board decisions discussed herein, the damage to the Delta, the American River, and the Stanislaus River will most likely be irreversible.

Either Congress or the state legislature may act to change a Board decision if it should prove unwise. The Bureau is in the best position to reach Congress, since it is essentially the eyes and ears of Congress in the reclamation field. If the Bureau is forced by a state to follow policies it considers unwise, it can present this issue forcefully at the appropriation hearings. Congress can then determine the proper federal-state relation and can evaluate the need to displace state law in order to further a national purpose. The state, in attempting to prevent the construction of a dam, is not in a position to evoke such a definite response from Congress. There is an inevitable momentum in reclamation projects that is difficult to stop by political means, and there is no way to restore a river once it has become a reservoir.

Finally, as noted above, the federal government has struggled to foster responsible decisionmaking at the state level where natural resources are concerned. California, through the Board, has developed a sound system of water management. It would not be in the national interest to create a disincentive to such responsible state action.

IV.

CONCLUSION AND A SUGGESTION

Section 8 of the Reclamation Act of 1902 provides that state law in regard to the distribution of water remain intact within the federal

206. See text accompanying notes 199-201 supra.
207. California was the first state to receive permanent approval for its permit program under the National Pollutant Discharge System created by FWPCA. ENVIRONMENTAL QUALITY: THE FOURTH ANNUAL REPORT OF THE COUNCIL ON ENVIRONMENTAL QUALITY 175 (1973).
reclamation scheme. Supreme Court interpretation of this section has not yet determined the reach of this provision or its relationship to various other provisions of the federal statutes. The Court, in resolving the issue presented in the current controversy, should take cognizance of the many policy factors that support regulation by the California State Water Resources Control Board and should require the Bureau of Reclamation to follow the conditions set in D 1379, D 1400 and D 1422.

However, this would leave unsolved the problem of what should be done if these decisions conflict irreconcilably with the plans formulated by the Bureau within its congressional authorization. An analogous situation arose in 1925 when the Secretary of the Interior decided that a project he was authorized to build was no longer feasible. The Secretary was uncertain whether he was legally required to build the project notwithstanding. The U.S. Attorney General furnished this opinion:

\[\ldots\] I am of the opinion that if you "come to the conclusion that the Baker project is not a feasible project," existing law does not "make it (your) mandatory duty to begin the construction of the project, notwithstanding the conclusion on (your) part that it is not feasible." On the contrary, I believe it is your duty to withhold the beginning of construction and to lay the matter before Congress for such action as it may deem proper.\[208\]

The facts of that situation do not correspond exactly to those in the instant controversy, but it is submitted that the same procedure is called for here. By enjoining further construction on the A.F.S. and New Melones projects, a court can employ what has been called a legislative remand.\[209\]

The Board decisions have cast doubt on the worth of the projects as they are now designed. At the same time they have raised a question of the adequacy of the current reclamation scheme to deal with modern needs in water resource development.\[210\]

The authority for such an injunction can be found in section 8. Enjoining construction will force the Bureau to present Congress with definite problems for solution. Three questions are now unresolved:

1. The exact nature of the congressionally intended federal-state relation in reclamation.

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210. "... the Nation has not kept its water policies and programs up to date." National Water Comm'n, Water Policies for the Future, Final Report to the President and to the Congress of the United States 112 (1973).
2. The desirability of the A.F.S. and New Melones projects in the light of environmental values that were recognized only after the projects were authorized.

3. The adequacy of repayment procedures to deal with project alterations for environmental enhancement.

These are questions that Congress will have to face at some point in the future. The courts can act as “a catalyst in the legislative process”\(^{211}\) by a properly framed injunction.

The suggestion here advanced is that Congress should consider turning the entire C.V.P. over to state authorities. The procedures could be much the same as are found in the Federal Water Pollution Control Act (FWPCA). The federal government can set standards and determine how repayment should be made. California has shown that it is capable of shouldering responsibility for large-scale water resource development. Also, this change would make it possible to achieve a coordinated system of planning for water needs within California, a goal that is of paramount importance in FWPCA.\(^ {212}\)

Whether or not this suggestion is adopted, California’s water problems will not disappear overnight. The struggle to preserve the environment cannot be won on the national level alone. The cooperation of the states is necessary. It is in the national interest that California be allowed to decide how its crucially important water is to be used. If this occurs, other states may follow its example of responsible decisionmaking.

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