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UNITED STATES V. CALIFORNIA: WHO'S MINDING THE DAM?

A. INTRODUCTION

In *United States v. California*,[1] the Ninth Circuit held that conditions imposed by the State of California on the impoundment of water for the United States Government's New Melones Dam Project were valid, since those conditions had not been shown to be inconsistent with congressional directives contained in the dam's authorizing legislation.

The New Melones facility is a reclamation project on the Stanislaus River in California.[2] In 1973, the United States Bureau of Reclamation applied to the State Water Resources Control Board (State Board), as it does routinely pursuant to California law,[3] to appropriate the water needed for impoundment

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1. 694 F.2d 1171 (9th Cir. 1982) (per Kennedy, J; the other panel members were Pregerson and Reinhardt, JJ.).

2. *Id.* at 1173. The New Melones Project was designed to impound 2.4 million acre feet of water on California's Stanislaus River, for the multiple purposes of flood control, irrigation, power generation and recreation. *Id.* The project was authorized as part of the Central Valley Project, the largest water project yet approved under federal reclamation laws. *Id.* at 1172 n.1.

3. California v. United States, 438 U.S. 645, 652 (1978), *aff'd in part* and *rev'd in part*, 694 F.2d 1171 (9th Cir. 1982). In *California v. United States* the court noted:

> Under California law, any person who wishes to appropriate water must apply for a permit from the State Water Resources Control Board. Cal. Water Code Ann. §§ 1201 and 1225 (West 1971). The Board is to issue a permit only if it determines that unappropriated water is available and that the proposed use is both "reasonable" and "beneficial" and best services "the public interest." §§ 1240, 1255, and 1375, Cal. Const., Art. 10, § 2 (West 1971). In deciding whether to issue a permit, the Board is to consider not only the planned use of the water but also alternative uses, including enhancement of water quality, recreation, and the preservation of fish and wildlife. Cal. Water Code §§ 1242.5, 1243, 1257 (West 1971). The Board can also impose such conditions in the permit as are necessary to insure the "reasonable" and "beneficial" use of the water and to protect "the public interest." §§ 1253 and 1391 (West 1971).

in the dam. After lengthy hearings, the State Board approved the application,[4] but attached twenty-five terms and conditions to the appropriation permit.[5] The State Board based its decision on the failure of the United States to demonstrate a current need for the water, and on the projected destruction of recreational uses and environmental quality resulting from full impoundment.[6]

The most controversial state-imposed restriction provided that no water could be appropriated solely for the purpose of power generation,[7] effectively delaying additional diversions until needed for irrigation uses. The conditions also required that the New Melones project meet California's water quality standards, and mandated that the project abide by the county of

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Id. at 653 n.7.

4. Decision 1422, CAL. WATER RESOURCES CENTROL BOARD (Apr. 4, 1973).

5. The most important condition prohibited full impoundment of water until the U.S. Bureau of Reclamation was able to show firm commitments, or at least a specific plan, for the use of the water. Other conditions prohibited collection of water during periods of the year when unappropriated water is available; required that a preference be given to water users in the water basin in which the New Melones Project is located (referred to as the 'country of origin preference') required storage releases to be made so as to maintain maximum and minimum chemical concentrations in the San Joaquin River and protect fish and wildlife; required the United States to provide means for the release of excess waters and to clear vegetation and structures from the reservoir sites; required the filing of additional reports and studies; and provide for access to the project site by the State Board and the public. Additional conditions reserved jurisdiction to the Board to impose further conditions on the appropriations if necessary to protect the "beneficial use" of the water involved. *Id.* at 28-37.

6. The State Board found that white water rafting, stream fishing, and wildlife upstream from the dam would be harmed by the higher water levels. The State Board stated:

> The public interest requires that the use of Stanislaus River for whitewater boating, stream fishing and wildlife habitat be protected to the extent that water is not needed for other beneficial uses. Therefore, although there is a demonstrated need for the full yield of the project in the four basin counties at some time in the future, but for which no contracts have been negotiated, and in view of the adverse effect the proposed reservior will have upon these recreational uses, impoundment of water to satisfy that need should not be permitted at this time. Instead, the Board should retain jurisdiction over the permits for the purpose of approving incremental appropriations for consumptive use up to the quantities covered by the applications when the need for the water is substantiated.

Id. at 18-27.

7. *See supra* note 5.

origin preference[8] in California water law. In addition, the conditions provided for continuing State Board authority over the project.[9]

In 1973, the United States brought suit against the State of California, challenging the conditions attached to the permit for the New Melones project.[10] Seeking a declaratory judgment, the United States contended that California lacked authority to impose any condition on the acquisition and use of water, provided water was available for the facility.[11] The United States argued that all power and control over reclamation projects was given to the federal government under the Reclamation Act of 1902,[12] and that California's role was limited to determining whether sufficient water was available for the project.[13] The district court agreed with the United States and entered a declaratory judgment to that effect.[14]

The Ninth Circuit affirmed with modifications.[15] The United States Supreme Court granted certiorari and reversed, holding that the permit conditions were valid as long as they were not "inconsistent with congressional directives as to the New Melones Dam."[16] On remand, the district court determined that all of the conditions except for those prohibiting the appropriation of water for power operation[17] were consistent with the relevant congressional directives.[18] On appeal,[19] the United

8. *See supra* note 5.

9. *See supra* note 5.

10. United States v. California, 403 F. Supp. 874 (E.D. Cal. 1975).

11. *Id.* at 874.

12. Reclamation Act of June 17, 1902, Pub. L. No. 57-161, § 8, 32 Stat. 388, 390 (current version at 43 U.S.C. § 383 (1976)).

13. 403 F. Supp. at 883.

14. *Id.* at 902-03.

15. United States v. California, 558 F.2d 1347, 1352-54 (9th Cir. 1977) (Wallace, C.J., concurring and dissenting). The Ninth Circuit affirmed, but held that § 8 of the 1902 Reclamation Act, rather than providing for comity, requires the United States to apply for a permit.

16. 438 U.S. at 679.

17. *See supra* note 5.

18. 509 F. Supp. at 85-87. Relevant congressional directives were found to include the Flood Control Act of December 22, 1944, Pub. L. No. 78-534, § 10, 58 Stat. 887, 901, and the Flood Control Act of October 23, 1962, Pub. L. No. 87-874, § 203, 76 Stat. 1173, 1191.

19. Both the State of California and the United States appealed the district court decision. 694 F.2d at 1174.

States sought to invalidate all of the conditions, asserting they were inconsistent with congressional intent.[20] California contended that the condition prohibiting diversion for power generation purposes was consistent with "explicit" congressional directives.[21]

B. Background

Section 8 of the 1902 Reclamation Act provides that state law will govern in the appropriation, use or distribution of irrigation water for federal reclamation projects.[22] In early decisions interpreting section 8, the United States Supreme Court recognized broad state control over the water.[23] With the expansion of federal reclamation policies through subsequent legislation,[24] however, the Supreme Court departed from its earlier direction.[25] The legislation authorizing the New Melones facility expressly incorporated the 1902 Reclamation Act, including section 8.[26]

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20. *Id.*

21. *Id.* at 1175.

22. The Reclamation Act of 1902 § 8, *supra* note 12, 32 Stat. at 390, provides:

> [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 States 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 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.

Id. 32 Stat. at 390.

23. *See* Kansas v. Colorado, 206 U.S. 46 (1907); Nebraska v. Wyoming, 295 U.S. 40 (1935); Nebraska v. Wyoming, 325 U.S. 589 (1945).

24. *See, e.g.*, Act of February 21, 1911, Pub. L. No. 61-406, 36 Stat. 925 (extending the time period within which construction charges could be repaid to the reclamation fund by users of project water, and investing the Secretary with broad discretion to act "as he may designate" in administering the Act (current version at 43 U.S.C. § 418 (1976)); Act of February 25, 1920, Pub. L. No. 66-147, 41 Stat. 451 (amending the reclamation laws to authorize the Secretary to enter into contracts for non-irrigation purposes "upon such conditions of delivery, use and payment as he may deem proper") (current version at 43 U.S.C. § 521 (1976)). *See* Sax, *Problems of Federalism in Reclamation Law*, 37 U. Colo. L. Rev. 49, 82-83 (1964).

25. *See* Ivanhoe Irrigation District v. McCracken, 357 U.S. 275 (1958); City of Fresno v. California, 372 U.S. 627 (1963); Arizona v. California, 373 U.S. 546 (1963).

26. The New Melones Dam was authorized by the Flood Control Act of December 22, 1944, Pub. L. No. 78-534, § 10, 58 Stat. 887, 901, and the Flood Control Act of Octo-

Prior to *California v. United States*,[27] no decisions had addressed directly the validity of permit conditions imposed by a state pursuant to section 8, although seven Supreme Court cases had indirectly dealt with this issue.[28] In *Kansas v. Colorado*,[29] the United States Supreme Court suggested, in dicta, that the federal government may lack constitutional authority to acquire water for its reclamation projects without following state law.[30] In subsequent cases, however, the Supreme Court held that Congress does have authority to preempt state law in the management of federal reclamation projects.[31] Since the constitutionality of federal reclamation law has been firmly established, the degree of deference to state law required now becomes a matter of interpreting the federal reclamation statutes.[32]

Shortly after *Kansas*, the Supreme Court decided *Nebraska v. Wyoming*.[33] In the first *Nebraska*[34] opinion, issued in 1935, the Court stated, in dicta, that under section 8 the United States "must obtain permits and priorities for the use of the water" from the State of Wyoming in the same manner as any other private appropriator or irrigation district.[35] In a second *Ne-*

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ber 23, 1962, Pub. L. No. 87-874, § 203, 76 Stat. 1173, 1191. As in the case of all other reclamation projects, Congress specifically directed that the dam be operated and maintained "pursuant to the Federal reclamation laws." Flood Control Act of 1962 § 203, 76 Stat. at 1191.

27. 438 U.S. 645.

28. Only seven Supreme Court cases had even mentioned § 8. The cases were Kansas v. Colorado, 206 U.S. 46 (1907); Ide v. United States, 263 U.S. 497 (1924); Nebraska v. Wyoming, 295 U.S. 40 (1935); Nebraska v. Wyoming, 325 U.S. 589 (1945); United States v. Gerlach Livestock Co., 339 U.S. 725 (1950); Ivanhoe Irrigation District v. McCracken, 357 U.S. 275 (1958); City of Fresno v. California, 372 U.S. 627 (1963); Arizona v. California, 373 U.S. 546 (1963).

29. Kansas v. Colorado, 206 U.S. 46 (1907).

30. *Id.* at 85-94.

31. *Ivanhoe*, 357 U.S. at 291-92; *Fresno*, 372 U.S. at 630; *Arizona*, 373 U.S. at 586.

32. *See, e.g., Ivanhoe*, 357 U.S. at 277-300 (interpreting the Reclamation Act of 1902 §§ 5 & 8, Pub. L. No. 57-161, 32 Stat. at 389-90); *Fresno*, 372 U.S. at 629-632 (interpreting the Reclamation Act of 1902 § 8, 32 Stat. at 390, and the Reclamation Project Act of 1939 § 9(c), 43 U.S.C. § 485h (Supp. 1981)); *Arizona*, 373 U.S. at 586-88 (interpreting the Reclamation Act of 1902 § 8, 32 Stat. at 390, and the Boulder Canyon Project Act §§ 1-21, 43 U.S.C. §§ 617-617t (1928).

33. 295 U.S. 40 (1935); 325 U.S. 589 (1945).

34. 295 U.S. 40 (1935).

35. *Id.* at 42-43. The 1935 *Nebraska* opinion decided only a procedural issue. The United States Supreme Court determined that the United States was not an indispensable party to the suit brought by Nebraska against the State of Wyoming for equitable apportionment of the waters of the North Platte River. *Id.*

braska[36] opinion decided ten years later, the Court explained that its decision to apportion the water to the states, rather than the federal government, did *not* imply state control over federal projects.[37] The Court indicated that the United States had complied with the congressional directive in section 8 by acquiring its water pursuant to state law,[38] but cautioned, "[W]e do not suggest that where Congress has provided a system of regulation for federal projects," it must give way before an inconsistent state system.[39]

In *Ivanhoe Irrigation District v. McCracken*,[40] the Supreme Court ruled that section 8 did not authorize a state to override section 5 of the Reclamation Act.[41] Section 5 provides that distribution of water from federal projects is limited to holdings of 160 acres or less.[42] Earlier in the *Ivanhoe* litigation, the California Supreme Court found the section 5 acreage limitation contrary to state law.[43] The United States Supreme Court, in holding that California must adhere to the section 5 acreage limitation, stated that Congress did not intend the "specific and mandatory" provision of section 5, which "has represented national policy for over half a century," to be overriden by section 8.[44] The Court, in dictum, noted that section 8 requires compli-

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36. 325 U.S. 589 (1945).

37. *Id.* at 615-16.

38. *Id.* at 612.

39. *Id.* at 615.

40. 357 U.S. at 275.

41. *Id.* at 291-92. The Reclamation Act of 1902 § 5, Pub. L. No. 57-161, 32 Stat. 388, 389 (current version at 42 U.S.C. § 423e (1970)), provides in pertinent part:

> [N]o right to the use of water for land in private ownership shall be sold for 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 therefore are made.

Id. 32 Stat. at 389.

42. 357 U.S. at 291.

43. *Id.* at 289-90. The Supreme Court of California had found that § 5 would be contrary to the State's trust obligation as embodied in CAL. WATER CODE § 22250 because it would discriminate against owners of parcels exceeding 160 acres. Ivanhoe Irrigation District v. All Parties, 47 C.2d 597, 636; 306 P.2d 824, 847 (1957). *See* CAL. WATER CODE § 22250 (providing for ratable distribution of water among landowners).

44. 357 U.S. at 291-93. The Court stated:

> With respect to the Central Valley Project the Congress has again and again reaffirmed the specific requirements of § 5

ance with state law when the United States *acquires* water, but not when it *delivers* water.[45]

The United States Supreme Court reaffirmed the *Ivanhoe* dictum in *City of Fresno v. California*.[46] In *Fresno*, the Court held that the United States was authorized under the Reclamation Act to acquire private water rights through condemnation, notwithstanding state laws restricting condemnation of the rights.[47] The Court ruled that section 8 only required compliance with state law in defining the property interests for which compensation must be paid.[48] Accordingly, state law was held not to apply even in the acquisition of water, where such acquisition was through condemnation.[49]

In *Arizona v. California*,[50] California asked the Court to hold that state law would control in the distribution of water from the Boulder Canyon Project, a massive multistate reclamation facility on the Colorado River. The Court rejected the state's claim after reviewing the legislative history of the Boulder Canyon Project Act,[51] which incorporates section 8, and concluded that because of the unique size and multistate scope of the project, Congress did not intend for the states to interfere with the distribution of the water.[52] The Court indicated that the "varying, possibly inconsistent, commands of different state legislatures" could frustrate efficient operation of the project

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> and the action taken by the Secretary thereunder. As late as 1944 on consideration of the Omnibus Rivers and Harbors Bill the Senate refused, after vigorous debate, to concur in a conference report that would have exempted this project from the excess land requirements of § 5. 90 CONG. REC. 9493-9499.

Id. at 292-93.

45. 357 U.S. at 291-92. The *Ivanhoe* dictum has been critized as contrary to the extensive legislative history supporting state regulatory control over project water. *See* Walston, *Reborn Federalism in Western Water Law: The New Melones Dam Decision*, 30 HASTINGS L. J. 1645, 1668 (1979).

46. 372 U.S. at 632.

47. *Id.* at 630. The state laws provided for, first, a priority for water users in the county and watershed where the water originates. *Id.* at 628 (citing CAL. WATER CODE §§ 1460, 11460, 11463 (West 1971)); The Court noted that the first state law, providing for a priority of municipal over agricultural uses, is directly contrary to priorities contained in the federal reclamation laws. *Id.* at 630 (citing 43 U.S.C. § 485h(c) (1976)).

48. 372 U.S. at 630.

49. *Id.*

50. 373 U.S. 546.

51. Boulder Canyon Project Act §§ 1-21, 43 U.S.C. §§ 617-617t (1928).

52. 373 U.S. at 588.

and that a unitary system of management was necessary.[53] In *Arizona*, the United States Supreme Court left open, however, the question whether state control of a single-state project would be permissible.

More recent Supreme Court decisions, although not decided under the Reclamation Act, have failed to find expressions of legislative intent sufficient to bind federal facilities under state permitting systems governing air and water quality control.[54] In *Hancock v. Train*[55] and *United States Environmental Protection Agency v. California*,[56] the Supreme Court held that the states lack authority to require the federal government to seek permits for federal facilities. The Court ruled that the states cannot regulate federal activities in any way in the absence of "clear and unambiguous" congressional authorization.[57]

In *California v. United States*, the Supreme Court, following a thorough examination of the legislative history surrounding the 1902 Reclamation Act and the post-1902 federal administrative practice of following state laws, overruled the dicta in *Ivanhoe*, *Fresno* and *Arizona*. The Court held that section 8 requires the United States to comply with state laws governing the appropriation and distribution of water when such laws condition the use of water, provided the conditions are not inconsistent with congressional directives.[58] The decision, however, did not define what type of congressional directives would be sufficient to override state law, presumably intending that the lower courts would create a workable standard.[59]

C. Analysis: The Ninth Circuit Decision

In *United States v. California*, the Ninth Circuit determined that the state permit conditions were not shown to be

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53. *Id.* at 590.

54. In Hancock v. Train, 426 U.S. 167 (1976), the Court held that federal facilities were not required to comply with state permit programs under the Clean Air Act. *Id.* at 198. Similarly, in EPA v. California, 426 U.S. 200 (1976), the Court held that federal facilities need not apply for state permits pursuant to the Federal Water Pollution Control Act. *Id.* at 211.

55. 426 U.S. at 198.

56. 426 U.S. at 227.

57. 426 U.S. at 180; 426 U.S. at 214.

58. 438 U.S. at 674.

59. *Id.* at 653-70.

inconsistent with the "congressional directives" contained in the authorizing legislation for the New Melones Dam.[60] The Ninth Circuit concluded that the Supreme Court decision in *California v. United States* required the United States to comply with state water law absent a preempting federal statute.[61] The Court rejected California's contention that congressional intent to preempt state law must be explicit. California had argued that only provisions such as the federal 160-acre limitation at issue in *Ivanhoe*, and the preference for irrigation use over municipal use discussed in *Fresno* were sufficiently explicit to preempt inconsistent state laws.[62] Instead, the court adopted the position that the state permit conditions were valid unless shown to clash "with express or clearly implied congressional intent or to work at cross-purposes with an important federal interest served by the congressional scheme."[63]

In analyzing the specific permit conditions, the court conceded that the condition deferring the impoundment of water for irrigation and other consumptive uses was "capable of broad construction" and that California "might never" allow full use of the dam.[64] The court, however, was satisfied with California's narrow interpretation of the provision,[65] and concluded that the provision could be reconciled with congressional intent.[66] The panel noted that the beneficial use requirement contained in the provisions mirrored the beneficial use standard contained in section 8.[67] The court determined that California could require the United States to show it had customers who needed the water before sacrificing the upstream recreational, scenic and wildlife uses.[68]

The court rejected the United States' assertion that Congress had already determined the beneficial use issue, and that the failure to fill a federally funded project to capacity is inher-

60. 694 F.2d at 1182.
61. *Id.* at 1176.
62. *Id.*
63. *Id.* at 1177.
64. *Id.*
65. *Id.*
66. *Id.* at 1177-78.
67. *Id.*
68. *Id.*

ently inconsistent with congressional intent.[69] The court characterized the State Board's action on the permit application as deferring rather than prohibiting full impoundment.[70] Accordingly, the court expressly rejected the United States' argument that "the power to defer is the power to prevent."[71]

The court next stated that the precepts of federalism reflected in the congressional scheme and in the Supreme Court's earlier decision demonstrate a preference for negotiation rather than litigation.[72] The panel, in disapproving the United States' posture, stated that the United States' demands may not be justified as a "raw exercise of superior authority."[73] Citing the competing interests involved and the existence of alternative beneficial uses for the water,[74] the court emphasized that at a minimum, the United States has an obligation to make a full showing of the benefits anticipated from the operation of the dam at full capacity.[75]

The Ninth Circuit then turned to the power generation benefits of the project, which were deferred under the permit until the water was needed for irrigation or other consumptive uses.[76] The court concluded that the United States had failed to demonstrate a need to impound water for power purposes only.[77] Further, the court noted that in a prior case[78] challenging the adequacy of the environmental impact statement on the New Melones project the United States had argued that the impact of the permit conditions on the project was relatively slight and that only a deferral of full project benefits would result.[79] While

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69. *Id.*
70. *Id.*
71. *Id.*
72. *Id.*
73. *Id.*
74. *Id.*
75. *Id.*
76. *Id.* at 1179.
77. *Id.*
78. The prior case was Environmental Defense Fund v. Armstrong, 487 F.2d 814 (9th Cir. 1973), *cert. denied*, 416 U.S. 974 (1974).
79. 694 F.2d at 1179. The court stated:

> We note that in Environmental Defense Fund v. Armstrong, 487 F.2d 814 (9th Cir. 1973), *cert. denied*, 416 U.S. 974, 94 S.Ct. 2002, 40 L.Ed.2d 564 (1974), the United States advised the Supreme Court as follows:
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> [E]ven if the State Board's decision 1422 is found to be

the court did not find that the United States was estopped from asserting a contrary position in *United States v. California*, the court found the prior statement to be a significant admission.[80]

The Ninth Circuit next analyzed the permit conditions requiring adherence to both California water quality standards and to the county of origin allocation preference.[81] The court noted that the 1962 enabling legislation contained provisions almost identical to those two conditions,[82] indicating that the permit conditions could have been imposed by the federal agencies involved.[83] The court concluded that the permit conditions facilitate, rather than frustrate, congressional intent.[84]

The court rejected as inconsistent with the United States Supreme Court's earlier decision the United States' contention that the conditions were invalid because Congress intended federal agencies, rather than the state, to make permit decisions.[85] The court concluded that the conditions must be upheld, absent a showing that they would frustrate the attainment of federal goals.[86]

The court did not address the validity of many of the permit conditions on grounds that a decision on the issue would be premature.[87] The court stated that the parties' actions would determine the meaning of the conditions and their consistency

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> binding on the federal agencies, its only effect would be to defer slightly the full conservation yield of the project. Most of the project purposes were permitted by the Board's decision. The decision does not render the project useless or fundamently alter its value.
> Def. Exh. 7 at 9.

Id.

80. 694 F.2d at 1179.

81. *Id.* at 1180-81.

82. *Id.* The two key provisions give priority to water needs within the Stanislaus River Basin before water is exported for use outside the basin; the 1962 Flood Control Act also provides for the preservation and propagation of fish and wildlife, provides for the generation of electrical energy, and the maintenance of downstream water quality control. Act of October 23, 1962, Pub. L. No. 87-874, § 203, 76 Stat. 1173, 1191-92.

83. 694 F.2d at 1180-81.

84. *Id.* at 1181.

85. *Id.*

86. *Id.*

87. *Id.*

with the 1962 statute.[88] The panel noted that the conditions reserving State Board authority over the water permit, for example, could be exercised inconsistently with congressional intent.[89] The court, however, expressly declined to decide the validity of any "hypothetical action" to be taken by the state pursuant to the reserved power conditions, relying on "cooperative federalism" to prevent the issue from being presented for adjudication.[90]

D. SIGNIFICANCE

The Ninth Circuit relied on a preemption standard to determine that the conditions imposed by California on the distribution of water from the federal government's New Melones Dam Project were valid. In its analysis, the Ninth Circuit was purportedly applying the standard enunciated by the United States Supreme Court, prior to remand, that state conditions "not inconsistent with congressional directives" would stand. The court stated that, under *California v. United States*, a state condition is valid "unless it clashes with express or clearly implied congressional intent or works at cross-purposes with an important federal interest served by the congressional scheme."[91] While the result reached in the Ninth Circuit decision appears entirely consistent with the direction indicated by the Supreme Court, the Ninth Circuit's preemption approach does not comport with the standard enunciated by the Supreme Court upon remand to the lower federal courts.

In its groundbreaking *California v. United States* decision, the Supreme Court determined that, under section 8 of the 1902 Reclamation Act, state law controls in the distribution of project

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88. *Id.*

89. *Id.* at 1182. The court stated:

> The New Melones project is intended to be operated by federal officials in pursuance of certain declared goals. California cannot impose burdensome conditions which were not contemplated by Congress, or which would work against the achievement of the project's goals. For example, once the federal government has made binding contracts for delivery of water, California would be more restricted than it was when it originally regulated impoundment and distribution of water.

Id.

90. *Id.*

91. *Id.* at 1177.

water. In the decision, which overruled dicta threatening to erode the states' role in reclamation project management, the Supreme Court noted the long history of "purposeful and continued deference to state water law by Congress,"[92] and held that state law controls, absent more specific language to the contrary in subsequent legislation. The Supreme Court standard thus posed a question of statutory construction. By virtue of section 8, Congress has expressly deferred to state law, directing federal agencies to "proceed in conformity with"[93] state laws in the "control, appropriation, use or distribution"[94] of water from federal reclamation facilities. Where the issue before the court is one of determining the scope of state authority in an area expressly delegated to state control, rather than one of accommodation between conflicting state and federal regulations, the preemption doctrine has no application. In the present case, however, the distinction was without significance since the Ninth Circuit failed to find any congressional directives in conflict with state law.

While considerable uncertainty arises out of the Ninth Circuit's failure to articulate a standard for analyzing state permit conditions in future litigation, the lack of clarity is outweighed by considerations of fairness. The case by case approach exemplified in this decision will lead to a balanced accommodation between federal and state interests. Important federal interests expressed in legislation authorizing specific reclamation projects will still be protected. And state concerns, as reflected in the conditions attached to the project permit, will be upheld provided they do not conflict with the federal enabling legislation. However, the state of law as it relates to the validity of the remaining state water permit conditions may depend on political considerations and the zeal federal interests exhibit for litigating additional state-imposed permit restrictions.

The Ninth Circuit decision appears, at first blush, to be an endorsement of state control of reclamation project water. Yet, in alluding to a possible limit on state control, the court speaks in terms contrary to the strong language of deference articulated

92. 438 U.S. at 653.
93. *See supra* note 22.
94. *See supra* note 22.

by the Supreme Court in *California v. United States*. The Ninth Circuit suggests that once the federal government has contracted to sell the water, California would be constrained in its authority to regulate, notwithstanding state conditions reserving authority over the permit. However, there is nothing in *California v. United States* assigning any particular significance to the time of contracting or indicating that the state conditions would not be permitted to influence in some way the "operation" of the dam. Although dicta, the Ninth Circuit language limiting state control is disturbing to the extent that it may be relied on in subsequent challenges to state permit conditions. The court expressly declines to rule on the reserved power conditions, urging that "a spirit of cooperative federalism" on both sides aid the resulotion of future conflicts in the operation of the New Melones Dam. Thus, the Ninth Circuit decision succeeds only in clouding the question of the validity of the conditions reserving state authority over the permit, while ultimately refusing to decide the issue.

Nonetheless, despite its flawed application of the Supreme Court standard and some troublesome dicta, the result reached by the Ninth Circuit is correct. The decision, consistent with the Supreme Court's direction in *California v. United States*, properly achieves a restoration of the important policy of deference to state law reflected in the earlier case law interpretation of section 8. Section 8 is a product of the historic federal tradition that recognized the states as the source of water rights in the west.[95] Since 1902, Congress has continually reaffirmed its acknowledgment that water management appropriately rests with

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95. Senator Clark of Wyoming, one of the principal supporters of the original reclamation bill in the Senate, explained in the debate over the legislation:

> [I]t is right and proper that the various States and Territories should control in the distribution. The conditions in each and every State and Territory are different. What would be applicable in one locality is totally and absolutely inapplicable in another . . . . In each and every one of the States and Territories affected, after a long series of experiments, after a due consideration of conditions, there has arisen a set of men who are especially qualified to deal with local conditions.
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> Every one of these States and Territories has an accomplished and experienced corps of engineers who for years have devoted their energies and their learning to a solution of this problem of irrigation in their individual localities.

438 U.S. at 667 (citing 35 CONG. REC. 2222 (1902)).

state agencies.[96] California, like most western states,[97] has responded by developing a permit allocation system which promotes the maximum beneficial use of scarce water resources.[98] The western states' administrative programs routinely involved the imposition of permit conditions on water users. The permitting schemes employed by the states to manage their water resources represent an efficient implementation of the authority vested in them by virtue of section 8 and subsequent legislation.

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96. Recent legislation, in establishing a "national policy" to protect the environment, provides that the states shall bear the primary responsibility for implementing the policy. *See* National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. §§ 4321, 4332 (1976); Environmental Quality Improvement Act of 1970, 42 U.S.C. § 4371(b)(1976). *See* Walston, *supra* note 45 at 1678. Several other recent laws allow the states to exercise substantial authority in matters affecting national policy:

> For instance, the Clean Water Act of 1972 authorizes the states to adopt permit systems for the control of water pollution and to apply their permit systems to federal agencies. *See* 43 U.S.C. §§ 1251-1376, 1323 (West Supp. 1978). The Clean Air Act of 1977 similarly authorizes states to adopt implementation plans for the control of air pollution and to apply their plans to federal agencies. *See* 42 U.S.C. §§ 7401-7642, 7418 (West Supp. 1978). The Deepwater Ports Act of 1975, 33 U.S.C. §§ 1501-1524 (1976), gives the U.S. Department of Transportation authority to license deepwater ports, but gives the states a veto power over the licensing of such ports. *Id.* §§ 1503(c) (9) - (10), 1508. The Coastal Zone Managment Act of 1972, 16 U.S.C. §§ 1451-1464 (1976), encourages the states to develop management plans for the protection of their coastal areas, and provides that the plans must follow guidelines set forth in the Act and must be federally approved; federal agencies are required to comply with such plans "to the maximum extent practicable." *Id.* § 1456(c) (1) - (2).

Walston, *supra* note 45 at 1645 n.1.

97. Walston notes:

> Of the nineteen western states, all but three require an appropriator of surface water to obtain an appropriative permit from the state. 1 W. Hutchins, Water Rights Laws in the Nineteen Western States 302 (1974). The exceptions are Hawaii, Colorado and Montana. Hawaii, which is not an arid state, does not recognize the appropriation doctrine. Colorado and Montana have judicial rather than administrative systems for statutory adjudications of appropriative rights. Montana additionally provides that such rights can be acquired by posting of notice and filing of records.

Walston, *supra* note 45 at 1652 n.21.

98. *See supra* note 3.

These state water management systems should not be disturbed absent a strong showing of conflict with federal legislation.

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