

Chapter 15

Federal Interests

Scope of Chapter

Water supplied to the federal government may be obtained through the assertion of a federal reserved right without compliance with state administrative permit procedures. In those cases where a reserved right is not available to serve a specific federal purpose, the federal government may assert a claim to water under state law.

The Bureau of Reclamation (Bureau) acquires water rights under the state water rights system. Generally, the Bureau is required to comply with state laws concerning the control, distribution, and use of water.

Specific federal interests in power, water quality, and in the protection of endangered species are reflected in the Federal Power, Clean Water, and Endangered Species Acts. From time to time, these federal acts may result in a preemption of state laws related to water.

Although the federal government has deferred to the states for the development of laws allocating water, Congress possesses paramount authority to preempt these state laws under the Supremacy, Property, and Commerce Clauses. This chapter examines the sensitive area of state and federal relations that results from the history of Congress' decisions to defer to the states in some contexts, while choosing to reserve and later exercise its authority in others.

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PART A. FEDERAL RESERVED RIGHTS

Part A is dedicated to one area in which Congress is deemed to have retained its sovereign prerogative: federal reserved water rights. The federal reserved water rights are appurtenant to federal lands. The early cases recognizing federal reserved rights did so in the course of providing water to Indian lands created by withdrawing federal land from the public domain.

Although the first cases dealt with the reserved rights claims in the context of Indian lands, subsequent cases expanded the reserved-rights

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doctrine to encompass a broad range of federal purposes. This part explores the general considerations applicable to all reserved rights and accords separate treatment to the Indian reserved rights.

Finally, this part reviews the federal government's rights and obligations in acquiring water rights arising under the California water allocation system for use in those instances where federal reserved rights may not be called on to satisfy the water requirements of the federal government.

§ 15.01 BACKGROUND

The origin and development of federal reserved rights coincides with the progression of the doctrine of prior appropriation in the west. Like the doctrine of appropriative rights, the genesis of the federal reserved water rights cannot be traced to any specific statutory creation.

As construed by the courts, the federal reserved right represents an exception to the general federal deference to state water laws.¹ The United States Supreme Court has held that state ownership of lands underlying navigable waters is traditionally characterized as an essential attribute of state sovereignty.^{1a} A state's title to these sovereign lands arises from the equal footing doctrine and is conferred upon the state by the Constitution, and not by any specific act of Congress.^{1b} Pursuant to the equal footing doctrine, the United States is presumed to have held navigable waters in acquired territory in trust for the benefit of future states; therefore, Congressional action disposing of such lands are not to be lightly inferred absent a plain, contrary intention.^{1c} While Congress was deemed to have delegated authority for the allocation of water supplies to the states, it did not acquiesce to the states in all matters relating to water. Powers related to the federal interest in navigability or in pursuing its proprietary interests were still reserved to the federal government.² Moreover, the equal footing

¹ *United States v. New Mexico* (1978) 438 U.S. 696, 715 [98 S.Ct. 3012]; *In re Waters of Hallett Creek Stream System* (1988) 44 Cal.3d 448 [243 Cal.Rptr. 887], *cert. denied*, 488 U.S. 824.

^{1a} *Idaho v. Coeur d'Alene Tribe of Idaho* (1997) 521 U.S. 261 [117 S.Ct. 2028, 2041, 138 L.Ed.2d 438].

^{1b} *Idaho v. Coeur d'Alene Tribe of Idaho* (1997) 521 U.S. 261 [117 S.Ct. 2028, 2041, 138 L.Ed.2d 438].

^{1c} *Idaho v. Coeur d'Alene Tribe of Idaho* (1997) 521 U.S. 261 [117 S.Ct. 2028, 2041, 138 L.Ed.2d 438].

² *United States v. Rio Grande Dam & Irrigation* (1899) 174 U.S. 690, 703 [19 S.Ct. 770]; *see United States v. Gardner* (9th Cir. 1997) 107 F.3d 1314, 1318.

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doctrine does not divest the federal government of its authority to administer public lands within the states.^{2a} The power over federally owned public land is entrusted to Congress, generally without limitations.^{2b}

Through the Supreme Court's recognition of the reserved water right, the federal interest in maintaining an adequate water supply, first for Indian lands and subsequently for a broader class of federal lands, was preserved. As interpreted and applied by the courts, the reserved-rights doctrine prohibits the states from exercising their water allocation powers in a manner that deprives federal reserved lands of the water supply necessary to achieve a beneficial use of the federal property.³ Accordingly, the courts have consistently held that when the federal government reserves public lands for federal reservation purposes, the federal government implicitly reserves unappropriated waters to satisfy the primary or principal purposes of the reservation.⁴

In theory, this reserved water is not "surplus" water available for appropriation under the state allocation system.⁵ Rather, the reserved right is derived from federal action that has withdrawn the water from the public domain and the state allocation system. The magnitude of the federal right in any given instance is determined by the federal purpose to be served by the reservation.⁶

The Indian reserved rights represent a commonly asserted federal purpose to support a "reservation" of water.⁷ Modernly, however, the reserved-rights doctrine is potentially applicable to all reserved federal lands and a multitude of federal purposes.⁸

^{2a} *United States v. Gardner* (9th Cir. 1997) 107 F.3d 1314, 1319; *United States v. Medenbach* (9th Cir. 1997) 11 F.3d 487.

^{2b} *Kleppe v. New Mexico* (1976) 426 U.S. 529, 539 [49 L.Ed.2d 34, 96 S.Ct. 2285, 2291]; *United States v. Gardner* (9th Cir. 1997) 107 F.3d 1314, 1318.

³ *United States v. Rio Grande Dam & Irrigation* (1899) 174 U.S. 690, 703 [19 S.Ct. 770]; *see Winters v. United States* (1908) 207 U.S. 564 [28 S.Ct. 207]; *Federal Power Commission v. Oregon* (1955) 349 U.S. 435 [75 S.Ct. 435].

⁴ *Arizona v. California* (1963) 373 U.S. 546, 601 [83 S.Ct. 1468]; *see generally* Trelease, *Federal Reserved Water Rights Since PLLRC* (1977) 54 *Denver L.J.* 473.

⁵ *Arizona v. California* (1963) 373 U.S. 546, 601 [83 S.Ct. 1468].

⁶ *United States v. New Mexico* (1978) 438 U.S. 696, 698 [98 S.Ct. 3012]; *but see* Comment, *Federal Nonreserved Water Rights* (1980) 48 *Univ. Chi. L.R.* 758, 763, n.34.

⁷ *See Winters v. United States* (1908) 207 U.S. 564 [28 S.Ct. 207].

⁸ *See Arizona v. California* (1963) 373 U.S. 546, 601 [83 S.Ct. 1468]; Trelease, *Federal Reserved Water Rights Since PLLRC* (1977) 54 *Denver L.J.* 473, 475.

Although the reserved right does not originate under state law, it shares many of the same characteristics with the overlying and riparian right. For example, it is not dependent upon continuous use to acquire or maintain the right. Like riparian and overlying rights, the reserved right is not subject to forfeiture for nonuse, nor is it subject to quantification, absent an adjudication.

§ 15.02 MATTER OF FEDERAL LAW

In the late nineteenth century, congressional legislation clearly deferred to state water allocation laws in virtually all respects.⁹ However, early federal court decisions cautioned that the federal interest in water matters had not been forfeited. The federal interest retains sufficient water for the primary purposes of reserved lands.¹⁰ Lands underlying navigable waters have historically been considered “sovereign lands” and state ownership is deemed to be an essential attribute of state sovereignty.^{10a}

The existence of the reserved water right that attaches to designated reserved lands is determined as a matter of federal rather than state law.¹¹ In accordance with its powers under the Commerce, Property, and Supremacy Clauses, the federal government may even reserve water after a state is admitted to the Union.¹² Consequently, although a state asserts complete ownership interest in the waters within the state, the federal government retains the ability to reserve water rights beyond the state’s allocation authority.¹³

One commentator has suggested that the reserved right theory rests on “twin pillars,” one constitutional and one statutory.¹⁴ The constitutional pillar of the Commerce, Property, or Supremacy Clauses provides the basis for the federal entry into the area of water allocation. The second pillar of the reserved-rights doctrine rests upon the specific statutory action to

⁹ See 43 U.S.C. §§ 321, 661.

¹⁰ See *United States v. New Mexico* (1978) 438 U.S. 696, 715 [98 S.Ct. 3012].

^{10a} *Idaho v. Coeur d’Alene Tribe of Idaho* (1997) 521 U.S. 261 [117 S.Ct. 2028, 2041].

¹¹ *Arizona v. San Carlos Apache Tribe of Arizona* (1983) 463 U.S. 545, 550 [103 S.Ct. 3201].

¹² *Arizona v. California* (1963) 373 U.S. 546, 597–598 [83 S.Ct. 1468].

¹³ *United States v. Winans* (1905) 198 U.S. 371, 382–384 [25 S.Ct. 662]; *Winters v. United States* (1908) 207 U.S. 564, 577 [28 S.Ct. 207].

¹⁴ See Walston, *Reborn Federalism in Western Water Law: The New Melones Dam Decision* (1979) 30 *Hastings L.J.* 1645, 1658.

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reserve or withdraw the federal lands.¹⁵

Perhaps the most significant aspect of the reserved right is that the federal government is not required to comply with state permitting laws or procedures as a precondition to exercising or perfecting a federal reserved water right.¹⁶ The characterization of the water supply as navigable or nonnavigable is irrelevant.¹⁷

On the other hand, while the state common law and procedures concerning water use and allocation do not determine the existence of the federal reserved right, the federal courts may resort to state law for guidance on issues to resolve disputes between conflicting claimants.¹⁸ Moreover, the assertion of the federal reserved right claim is always likely to have some impact on the state water allocation system. Not only does the federal government own a substantial percentage of the land in California, it has been estimated that more than 50 percent of the available water supply in the west either originates in or flows through national forests.¹⁹

§ 15.03 PUBLIC DOMAIN VS. RESERVED LANDS

In 1877, Congress adopted the Desert Land Act to authorize and encourage the sale of arid land to homesteaders so long as the land was irrigated.²⁰ Patents were issued to settlers who reclaimed the desert land and their water rights were generally governed by the law of prior appropriation. Water not put to beneficial use by the patent holders was available for appropriation for irrigation, mining, and manufacturing purposes, subject to those preexisting rights.²¹

The term “reserved lands” is used to characterize that class of lands that

¹⁵ See Walston, *Reborn Federalism in Western Water Law: The New Melones Dam Decision* (1979) 30 *Hastings L.J.* 1645, 1658.

¹⁶ *Cappaert v. United States* (1976) 426 U.S. 128, 143–145 [96 S.Ct. 2602].

¹⁷ *Cappaert v. United States* (1976) 426 U.S. 128, 143–145 [96 S.Ct. 2602].

¹⁸ *Colville Confederated Tribes v. Walton* (9th Cir. 1985) 752 F.2d 397, 400.

¹⁹ *United States v. New Mexico* (1978) 438 U.S. 696, 699, 705 [98 S.Ct. 3012]; *In re Waters of Hallett Creek Stream System* (1988) 44 Cal.3d 448 [243 Cal.Rptr. 887, 891], *cert. denied*, 488 U.S. 824; see Attwater & Markle, *Overview of California Water Rights and Water Quality Law* (1988) 19 *Pac.L.J.* 957, 968, n.36; see also *State of Alaska v. Babbitt* (9th Cir. 1995) 54 F.3d 549, *cert. dismissed*, 516 U.S. 1036 (1996), and *Native Village of Quinagak v. United States* (9th Cir. 1994) 35 F.3d 388 for discussion of federal government power over state management of fish and wildlife.

²⁰ 43 U.S.C. § 321.

²¹ 43 U.S.C. § 321.

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have been withdrawn from the public domain by statute, executive order, or treaty for a specific public purpose.²² Land not so reserved comprises the “public domain.” There is no comparable federal right to provide water to lands held in the public domain.

Private rights on federal lands or reserved lands usually depend on the character of the underlying claim. State granted easements and rights of way are subject to federal regulation. Even if a person has rights to the water on federal land, those rights are limited in nature by the grant or circumstances that give rise to the claim. For example, the Ninth Circuit has held that state granted easements and rights of way are still subject to reasonable regulation by the Forest Service.^{22a}

§ 15.04 ELEMENTS**1. Reserved Land**

To successfully assert a federal reserved water right claim, the federal government must own federal lands that can benefit from the water use underlying or traversing the federal property.²³ Whatever power states acquired over the use and distribution of water by acts of Congress, the federal government has not relinquished its authority to set aside water for use on appurtenant lands for specific federal purposes.²⁴

2. Intent to Reserve a Water Supply

A federal reserved water right exists in any given case because the federal government, by statute, treaty, or executive order has deemed that it should.²⁵ The existence of the right and the quantity so reserved is dependent upon the “express or implied intent,” not the power of the federal government.²⁶ The Commerce Clause and the Supremacy Clause

²² *In re Waters of Hallett Creek Stream System* (1988) 44 Cal.3d 448 [243 Cal.Rptr. 887, 890, n.5], *cert. denied*, 488 U.S. 824.

^{22a} *See Adams v. United States* (9th Cir. 1993) 3 F.3d 1254, 1260.

²³ *See, e.g., Arizona v. California* (1963) 373 U.S. 546, 598 [83 S.Ct. 1468]; *Cappaert v. United States* (1976) 426 U.S. 128, 138, 139 [96 S.Ct. 2602]; *United States v. New Mexico* (1978) 438 U.S. 696, 698 [98 S.Ct. 3012].

²⁴ *United States v. New Mexico* (1978) 438 U.S. 696, 698 [98 S.Ct. 3012].

²⁵ *Arizona v. California* (1963) 373 U.S. 546, 598 [83 S.Ct. 1468].

²⁶ *United States v. New Mexico* (1978) 438 U.S. 696, 698 [98 S.Ct. 3012]; *see also State of Alaska v. Babbitt* (9th Cir. 1995) 54 F.3d 549 (property clause), *cert. dismissed*, 516 U.S. 1036 (1996).

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are the most frequently cited constitutional provisions for the proposition that the federal power is plenary if the federal government chooses to exercise it.²⁷

The intent of the federal government is generally inferred from the language of circumstances surrounding the federal decision to reserve the land. Consequently, intent is inferred if the previously unappropriated waters are necessary to accomplish the purposes for which the reservation was created.²⁸

The scope of the intent and the breadth of the reservation is a question for the trier of fact upon an examination of the documents reserving the land from the public domain, a review of the underlying legislation authorizing the reservation, consideration of whether water is essential for that purpose, and a calculation of the quantity of water necessary to serve the purpose.²⁹

3. Primary Purpose of the Reservation

The federal government must establish that, without the reserved water, the primary purpose of the federal reservation would be defeated.³⁰ Only the primary purpose of the reservation is accorded water under the federal reserved right. Water use for secondary purposes must be asserted in accordance with state law and procedures.³¹

§ 15.05 WATER RESERVED

The federal reserved water right includes water found in navigable and

²⁷ See *Cappaert v. United States* (1976) 426 U.S. 128, 138 [96 S.Ct. 2602]; *In re Waters of Hallett Creek Stream System* (1988) 44 Cal.3d 448 [243 Cal.Rptr. 887, 889, n.3], *cert. denied*, 488 U.S. 824; *see also* *United States v. Gardner* (9th Cir. 1997) 107 F.3d 1314 for a discussion of the property clause; *State of Alaska v. Babbitt* (9th Cir. 1995) 54 F.3d 549 (property clause), *cert. dismissed*, 516 U.S. 1036 (1996).

²⁸ *United States v. New Mexico* (1978) 438 U.S. 696, 698 [98 S.Ct. 3012]; *Cappaert v. United States* (1976) 426 U.S. 128, 138, 139 [96 S.Ct. 2602].

²⁹ *See* *United States v. City and County of Denver* (Colo. 1982) [656 P.2d 1, 20]; *see further* *United States v. New Mexico* (1978) 438 U.S. 696, 698 [98 S.Ct. 3012]; *Cappaert v. United States* (1976) 426 U.S. 128, 138 [96 S.Ct. 2602].

³⁰ *United States v. New Mexico* (1978) 438 U.S. 696, 705 [98 S.Ct. 3012].

³¹ *See* *In re Waters of Hallett Creek Stream System* (1988) 44 Cal.3d 448 [243 Cal.Rptr. 887], *cert denied* 109 S.Ct. 71 (1989); *see also* Boles & Elliott, *United States v. New Mexico and the Course of Federal Reserved Water Rights* (1980) 51 Univ. of Colo. L.R. 209, 230 for a discussion of the impact of the *United States v. New Mexico* decision on the threat of the reserved right claim to western water users.

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nonnavigable streams.³² The specific quantity of water potentially subject to the reservation includes all water that is “surplus” or unappropriated water on the date of the federal reservation.³³ As such, there are only nominal federal takings issues raised by the assertion of a federal reserved rights claim. Any subsequent appropriation of water within the state system is held junior in priority and subordinate to the federal reserved right. The United States acquires a water right to unappropriated water that vests on the date of the reservation and it is superior to the rights of future appropriators.³⁴

The question of whether the federal government may reserve waters for the benefit of lands that are not appurtenant is presently unresolved. In one case, the United States Supreme Court has enjoined water use off the boundaries of the federally reserved land where the off-reservation use was resulting in injury to reservation uses.³⁵ In another instance, the federal government has argued that the reserved water right should not be limited to waters “on, under, or touching reserved lands.”³⁶ However, the territorial and distance limitations on the use of water under a reserved rights claim have not been clearly resolved and await further direction from the courts.

It is also not entirely clear whether the Supreme Court has held that the reserved right extends to percolating ground water.³⁷ There appears to be a split of authority among the lower courts.³⁸ The Supreme Courts of

³² Cappaert v. United States (1976) 426 U.S. 128, 138 [96 S.Ct. 2602].

³³ Cappaert v. United States (1976) 426 U.S. 128, 138 [96 S.Ct. 2602].

³⁴ Cappaert v. United States (1976) 426 U.S. 128, 138 [96 S.Ct. 2602].

³⁵ Cappaert v. United States (1976) 426 U.S. 128, 138 [96 S.Ct. 2602].

³⁶ United States v. City and County of Denver (Colo. 1982) 656 P.2d 1, 35.

³⁷ See Cappaert v. United States (1976) 426 U.S. 128, 143 [96 S.Ct. 2602]; see further Leshy, *The Federal Role in Managing the Nation's Groundwater* (2004) 11 *Hastings W.N.W.J. Envtl.L & Pol'y* 1, 3; Tarlock, *Law of Water Rights and Resources*, Section 9.41, at 9.80–9.80.1 (5th ed. 2002); compare *In re General Adjudication of Gila River System* (Az. 1999) *cert. denied sub no.*, *Phelps v. United States* (2000) 530 U.S. 1250; *Confederated Salish and Kootenai Tribes of the Flathead Reservation v. Stults* (2002) 312 Mont. 420 [59 P.3d 1093, 1099]; *In re General Adjudication of All Rights to Use Water in the Big Horn System* (Wyo. 1988) 753 P.2d 76, 99–J;100 affirmed w.o. opinion, *Wyoming v. United States* (1989) 492 U.S. 406 [109 S.Ct. 2994].

³⁸ See *In re the General Adjudication of All Rights to the Use of Water in the Gila River System and Source, Maricopa County W-1 through W-4* (Ariz. Sup.Ct. Affirmed 989 P.2d 739) (1999); *Park Center Water District v. United States* (Colo. 1989) 781 P.2d 90, 95; *Tweedy v. Texas Co.* (D.Mont. 1968) 286 F.Supp. 383; *Nevada ex rel. Shamberger v. United States* (D.Nev. 1958) 165 F.Supp. 600; but see *In re General Adjudication of All Rights to Use Water in Big Horn* (Wyo. 1988) 753 P.2d 76, 99 reserved right as not

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Arizona^{38a} and Montana^{38b} have concluded that federal reserved rights pertain to groundwater to the extent necessary to accomplish the purpose of the reservation. As such the holders of the federal reserved rights enjoy greater protection from groundwater pumping than do holders of state law rights.^{38c} Conversely, the State of Wyoming concluded that the reserved rights doctrine would not support a claim to groundwater.^{38d}

§ 15.06 RIGHT NOT DEPENDENT ON CONTINUOUS BENEFICIAL USE

Neither the creation nor the maintenance of a federal reserved right is dependent on continuous beneficial use. In this regard, the reserved right shares many of the same attributes and characteristics of riparian, overlying, and pueblo water rights arising under California law.³⁹ For example, the reserved right is not subject to loss or forfeiture for nonuse.⁴⁰ However, the failure to assert a reserved right claim after being joined in a state adjudication proceeding may adversely impact the federal government's assertion of the reserved rights claim.⁴¹

§ 15.07 PRIORITY

The priority of the federal reserved water right arises from federal rather

applicable to groundwater; see further Glennon & Maddock, *In Search of Subflow: Arizona's Futile Effort to Separate Groundwater from Surfacewater* (1994) 36 *Ariz. L.Rev.* 567 at pp. 607-609 arguing against; Leshy, *The Federal Role in Managing the Nation's Groundwater* (2004) 11 *Hastings W.N.W.J. Envtl.L & Pol'y* 1, 3 noting that "the Arizona and Montana Supreme Courts, using more persuasive reasoning have disagreed with Wyoming."

^{38a} *In re General Adjudication of Gila River System* (Az. 1999) *cert. denied sub no.*, *Phelps v. United States* (2000) 530 U.S. 1250.

^{38b} *Confederated Salish and Kootenai Tribes of the Flathead Reservation v. Stults* (2002) 312 Mont. 420 [59 P.3d 1093, 1099].

^{38c} See *In re the General Adjudication of All Rights to the Use of Water in the Gila River System and Source, Maricopa County W-1 through W-4* (Ariz. Sup.Ct. Affirmed 989 P.2d 739 (1999)).

^{38d} *In re General Adjudication of All Rights to Use Water in Big Horn* (Wyo. 1988) 753 P.2d 76, 99.

³⁹ See generally *Winters v. United States* (1908) 207 U.S. 564, 569 [28 S.Ct. 207]; *United States v. New Mexico* (1978) 438 U.S. 696 [98 S.Ct. 3012]; *United States v. City and County of Denver* (Colo. 1982) 656 P.2d 1, 34.

⁴⁰ *United States v. New Mexico* (1978) 438 U.S. 696 [98 S.Ct. 3012].

⁴¹ *United States v. Bell* (Colo. 1986) 724 P.2d 631, 643.

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than state law. The priority of the right is determined by the date the federal reservation was established to

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reserve the land.⁴² All appropriative water uses that are initiated after the date the federal reservation is established remain subordinate to the reserved right.⁴³

§ 15.08 QUANTIFICATION

The quantity of water available under the reserved right turns on the specific purposes of the reservation for which the land was reserved. A determination of how much water is needed to ensure that the purpose of the reservation will not be entirely defeated establishes the extent of the right.⁴⁴ When quantified, the primary purposes of the reservation are accorded the “necessary amount” of water.⁴⁵ Conversely, the secondary purposes of the reservation require the federal government to acquire water “in the same manner as any other public or private appropriator” under the applicable state law.⁴⁶

§ 15.09 RECORDATION

There is no requirement that the federal reserved right be recorded to perfect the right.⁴⁷

§ 15.10 TRANSFER

By definition, the federal reserved water right is appurtenant to benefitted federal lands. As such the right is not susceptible to transfer for use on nonreserved lands. However, as is the case with state dormant water rights, a well-positioned appropriator may execute an agreement with the owner of federal reserved rights to reduce or reconfigure its water use so that surplus water will be created for the benefit of the junior users. In addition, the government may transfer (more appropriately called an

⁴² *Arizona v. California* (1963) 373 U.S. 546, 595–596 [83 S.Ct. 1468]; *Cappaert v. United States* (1976) 426 U.S. 128, 138 [96 S.Ct. 2602].

⁴³ *Id.*

⁴⁴ *United States v. New Mexico* (1978) 438 U.S. 696, 700, 705 [98 S.Ct. 3012].

⁴⁵ *Id.*

⁴⁶ *Id.* at p. 700; see *In re Waters of Hallett Creek Stream System* (1988) 44 Cal.3d 448 [243 Cal.Rptr. 887], cert. denied 109 S.Ct. 71 (1989).

⁴⁷ *Winters v. United States* (1908) 207 U.S. 564, 568–569 [28 S.Ct. 207].

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assignment) the benefits of its reserved rights by agreement for its licensees and agents to use the water on federal lands.⁴⁸

§ 15.11 FEDERAL PURPOSES**1. In General: Preservation of Natural Resources for the Public Benefit**

The general purpose underlying all federal reservations is the need to protect natural resources for the benefit of the public and future generations.⁴⁹ However, it is the specific primary purposes for each discrete reservation that determine the existence, measure, and scope of each reserved right. To date, courts have recognized a wide variety of federal interests and purposes as sufficient to support a reserved rights claim.⁵⁰ The following sections provide a few examples.

2. National Forests

In response to perceived forestry abuses, Congress adopted the Organic Administration Act in 1897.⁵¹ The legislation was designed to improve and protect the forest within the reservation, to improve water flows, and to furnish a continuous supply of timber.⁵² Congress subsequently identified supplemental purposes in complementary legislation passed in 1960.⁵³ Nevertheless, the Supreme Court has limited the assertion of the reserved right to those primary purposes initially identified in the initial 1897 Organic Administration Act, essentially watershed and timber protection.⁵⁴ In so doing, the Court has rejected claims

⁴⁸ *United States v. City and County of Denver* (Colo. 1982) 656 P.2d 1, 34.

⁴⁹ See Note, *Forcing the Federal Hand: Reserved Water Rights v. States' Rights for Instream Protection* (1990) 41 *Hastings L.J.* 1271, 1300.

⁵⁰ See, e.g., *Arizona v. California* (1963) 373 U.S. 546, 601 [83 S.Ct. 1468] wildlife refuge; *United States v. Alaska* (9th Cir. 1970) 423 F.2d 764, 767 wildlife; see also *State of Alaska v. Babbitt* (9th Cir. 1995) 54 F.3d 549 "the subsistence priority applies to navigable waters in which the United States has reserved water rights."

⁵¹ 16 U.S.C. §§ 475-482.

⁵² *Id.*

⁵³ See 16 U.S.C. §§ 528-531.

⁵⁴ *United States v. New Mexico* (1978) 438 U.S. 696, 705 [98 S.Ct. 3012].

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for reserved instream flows where the water would only benefit the secondary purposes of the reservation.⁵⁵

3. National Defense

Military installations continue to advocate for the recognition of a reserved right.^{55a} Independent research has not disclosed a case in which such a right has been expressly recognized. However, the matter appears ripe for resolution.^{55b}

4. National Parks and Monuments

The Organic Act for the national park system includes parks and monuments and expressly references water in its definition.⁵⁶ The courts have interpreted the act as fostering the public purpose of conserving scenery and natural and historic objects and wildlife therein.⁵⁷

§ 15.12 INDIAN RESERVED WATER RIGHTS

1. Creation

Like other forms of federally reserved water rights, the reserved right that is exercised in favor of Indian lands is created by actions of the federal government: a treaty between two sovereign nations, executive order, or statute. In construing the treaties, courts have generally relied upon the rules of

⁵⁵ *Id.* at pp. 705–707.

^{55a} See Cianci, Williams, and Binkley, *The New National Defense Water Right: An Alternative to Federal Reserved Water Rights for Military Installations* (2000) 48 A.F. L.Rev. 159; Compare Glennon & Maddock, *In Search of Subflow: Arizona's Futile Effort to Separate Groundwater from Surfacewater* (1994) 36 Ariz. L.Rev. 567 at pp. 607–609 arguing against application of reserved right to groundwater and military installations.

^{55b} See Cianci, Williams, and Binkley, *The New National Defense Water Right: An Alternative to Federal Reserved Water Rights for Military Installations* (2000) 48 A.F. L.Rev. 159, 172–175 arguing for an alternative right to the federal reserved right, the national defense water right; see further *State of Nevada ex rel. Shamberger v. United States* (1958) 165 F.Supp. 600 (D.C. Nev) 609–611 no need to get a state permit to use water on federal land.

⁵⁶ See 16 U.S.C. § 1c(a).

⁵⁷ Compare *Cappaert v. United States* (1976) 426 U.S. 128, 138 [96 S.Ct. 2602] and *United States v. City and County of Denver* (Colo. 1982) 656 P.2d. 1, 27.

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construction applicable to contracts. The primary directive is to give meaning to the intention of the parties.

Exercise of the Indian reserved right is not dependent upon precise language in the specific treaty which reserved the federal reservation.^{57a} For example, in *United States v. Winans*, the Supreme Court held that an Indian treaty encompassed the right to take fish.⁵⁸ This right was accorded a status superior to the rights of homestead patents or state licensees.⁵⁹

In a subsequent case, *Winters v. United States*, the Supreme Court expanded the extent to which Indian reserved rights could be asserted to encompass uses which antedated the establishment of the reservation.⁶⁰ By way of contrast to the *Winans* form of Indian reserved water right, the *Winters* form of the Indian reserved right was deemed to be created and determined by the stated purposes for creating the federal reservation.⁶¹ However, the *Winans* right has been appropriately characterized as aboriginal rights, having been derived from express recognition in treaties.^{61a} In its *Winters* form, the Indian reserved water right operates in a method substantially similar to other federally reserved rights. Accordingly, the method of conveyance has important implications on the breadth and scope of the right.^{61b} Moreover, a single treaty may be the source of both *Winters'* and *Winans'* rights.^{61c}

^{57a} A rule of liberal construction in favor of the Indian reserved right is employed. See *Waters and Water Rights*, Vol. IV, Federal and Indian Rights (1991) § 37.02 at p. 217.

⁵⁸ *United States v. Winans* (1905) 198 U.S. 371 [25 S.Ct. 662]; see *Waters and Water Rights*, Vol. 4, Federal and Indian Rights (1991) § 37.02 at p. 217.

⁵⁹ *Id.* at p. 381; see also *State of Alaska v. Babbitt* (9th Cir. 1995) 54 F.3d 549 holding that the subsistence priority applies to navigable waters in which the United States has reserved water rights; *Shurts, VII. Legal History: The Unsettling of the West: How Indians Got the Best Water Rights, Indian Reserved Water Rights: the Winters Doctrine in its Social and Legal Context* (2001) 99 Mich. L.Rev. 1473.

⁶⁰ *Winters v. United States* (1908) 207 U.S. 564, 577 [28 S.Ct. 207].

⁶¹ *Id.*; see *Waters and Water Rights*, Vol. 4, Federal and Indian Rights (1991) § 37.02 at p. 217.

^{61a} *Waters and Water Rights*, Vol. 4, Federal and Indian Rights (1991) § 37.02 at p. 217.

^{61b} *Id.*

^{61c} *Id.*

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2. Purpose

The purpose of the *Winans* Indian reserved right is linked to the intention of the parties to maintain subsistence activities that existed prior to the reservation, such as hunting and fishing.⁶² Thus, the extent of the right is determined by the previous exercise of the right to meet the subsistence and commercial needs of the reservation.⁶³ Conversely, the purpose associated with the *Winters* brand of Indian reserved right is predominantly agriculture.⁶⁴ However, some ancillary uses are also permissible.⁶⁵

3. Priority Date

If the reservation is based upon tribal activities predating the creation of the reservation, the priority date is time immemorial. Unless the treaty clearly cedes the water rights, the reserved rights to the water reserved remain effective.⁶⁶ The *Winters* form of the Indian reserved right is based upon the priority date the reservation is established in the same way as other forms of the federal reserved right referenced above.

4. Waters Reserved

The waters reserved under an Indian reserved right include all water sources necessary to satisfy the purpose of the Indian reservation. Contrary to some state laws, such as California's that do not allow for the appropriation of water right for instream purposes, the Indian reserved water right does encompass

⁶² United States v. *Winans* (1905) 198 U.S. 371, 384 [25 S.Ct. 662].

⁶³ *Washington v. Washington State Commercial Passenger Fishing Vessel Assoc.* (1979) 443 U.S. 658, 678-679 [99 S.Ct. 3055].

⁶⁴ *Arizona v. California* (1963) 373 U.S. 546, 600 [83 S.Ct. 1468].

⁶⁵ See *United States v. Anderson* (9th Cir. 1984) 736 F.2d 1358, 1365 irrigation water may be used for instream purposes; *Colville Confederated Tribes v. Walton* (9th Cir. 1985) 752 F.2d 397, 405 water may be used to support the replacement of a fishery destroyed by government dams. See also *Fort Mojave Indian Tribe v. United States* (9th Cir. 1995) 64 F.3d 677 action seeking damages for breach of fiduciary duty in representing tribe; *State of Alaska v. Babbitt* (9th Cir. 1995) 54 F.3d 549; *Shoshone-Bamock Tribe v. Reno* (D.C. 1995) 56 F.3d 1476 seeking to compel the filing of a claim.

⁶⁶ United States v. *Winans* (1905) 198 U.S. 371, 384 [25 S.Ct. 662].

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nonconsumptive uses such as fishing and the instream flows necessary to support the use.⁶⁷ The federal reserve right may also require the release of water from a dam or reservoir to preserve fishery resources.⁶⁸ Accordingly, the right can provide substantial assistance to those parties interested in benefitting instream uses. At least one case has held that the Indian reserved right extends to the use of ground water.⁶⁹

The extent to which a congressional reservation included submerged lands for the benefit of a tribe was addressed in *Idaho v. United States*.^{69a} The Supreme Court acknowledged the strong presumption against defeat of a State's title to land under navigable waters and the identity of the title beneath these waters.^{69b} To determine whether there was congressional intent to override this presumption, the Court applied to a two-step test. When the land under navigable water within a federal reservation is created by an executive reservation clearly including submerged lands and Congress recognizes the reservation in a way that demonstrates an intent to defeat state title, the reservation will be sustained.^{69c} As both elements were satisfied in *Idaho v. United States*, the reservation was deemed to include the submerged lands despite the traditional strong interest of the state.

5. Quantification or Measure of Right

a. In General

The general measure of the *Winans* Indian reserved right is determined by the amount of water necessary to provide the

⁶⁷ *United States v. Adair* (9th Cir. 1983) 723 F.2d 1394, 1410-1412, cert. denied 467 U.S. 1252 (1984).

⁶⁸ *Kittitas Reclamation Dist. v. Sunnyside Valley Irrigation Dist.* (9th Cir. 1985) 763 F.2d 1032.

⁶⁹ Compare *In re the General Adjudication of All Rights to the Use of Water in the Gila River System and Source, Maricopa County W-1 through W-4* (Ariz. Sup.Ct.) affirmed 989 P.2d 739 (1999); *In re General Adjudication of All Rights to Use Water in Big Horn* (Wyo. 1988) 753 P.2d 76, 99; see *Tweedy v. Texas Co.* (D.Mont. 1968) 286 F.Supp. 383; see also *Cappaert v. United States* (1976) 426 U.S. 128, 138 [96 S.Ct. 3012].

^{69a} *Idaho v. United States* (2001) 533 U.S. 262 [121 S.Ct. 2135].

^{69b} *Idaho v. United States* (2001) 533 U.S. 262, 336 [121 S.Ct. 2135].

^{69c} *Idaho v. United States* (2001) 533 U.S. 262, 336 [121 S.Ct. 2135].

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Indians on the reservation with a moderate living. The quantification of the water right may fluctuate considerably, depending on the facts and circumstances of each case.⁷⁰ The *Winters* doctrine focuses on agricultural use and the Practicable Irrigable Acreage Standard.

b. Practicable Irrigable Acreage Standard

The extent of existing and potential water requirements for water under a *Winters* reserved right claim is determined by applying the “practicable irrigable acreage” (PIA) standard.⁷¹ Under the PIA standard, the water requirements of the reserved lands are based on a calculation of total irrigable land, and how much water the irrigable land would require at a reasonable cost.⁷²

c. Adjustments in Quantity

Once the *Winters* Indian reserved right has been quantified in litigation, the amount of the right becomes fixed.⁷³ However, if it should become clear that the water requirements of the reserved lands can be met with less water, the parties may seek an adjustment in the quantity of the right.⁷⁴

Procedurally, the federal government is required to assert all aspects of its reserved rights claims in the same proceeding. In other words, the federal government may not have its reserved right determined in a piecemeal fashion. Judicial considerations such as *res judicata* will preclude the federal government from requesting an allocation of water for a new purpose after already having adjudicated its reserved right for agricultural purposes in earlier litigation.⁷⁵

⁷⁰ *Washington v. Washington State Commercial Passenger Fishing Vessel Assoc.* (1979) 443 U.S. 658, 686 [99 S.Ct. 3055].

⁷¹ *Arizona v. California* (1963) 373 U.S. 546, 596, 600–601 [83 S.Ct. 1468].

⁷² *Id.*; *In re General Adjudication of All Rights to Use Water in the Big Horn System* (Wyo. 1988) 753 P.2d 76, 93 affirmed w.o. opinion, *Wyoming v. United States* (1989) 492 U.S. 406 [109 S.Ct. 2994]; see 43 C.F.R. § 417.5 for PIA regulations.

⁷³ *Arizona v. California* (1983) 460 U.S. 605, 615–617, 625–626 [83 S.Ct. 1068]; *Nevada v. United States* (1983) 463 U.S. 110, 121 [103 S.Ct. 2906].

⁷⁴ See *Washington v. Washington State Commercial Passenger Fishing Vessel Assoc.* (1979) 443 U.S. 658, 686 [99 S.Ct. 3055].

⁷⁵ *Nevada v. United States* (1983) 463 U.S. 110, 121 [103 S.Ct. 2906].

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Winans Indian reserved rights have rarely been quantified and fixed through litigation.

6. Transfer

Indian water rights are property rights appurtenant to the reserved lands. They may not be alienated by conveyance from Indians to non-Indians without the consent of the federal government.⁷⁶ Typically the consent takes the form of statutory authorization to effectuate the transfer.⁷⁷

Where a transfer has been authorized, a non-Indian may acquire a portion of the reserved right.⁷⁸ Upon acquisition, the non-Indian successor acquires the allotted reserved right, including the reserved priority date.⁷⁹ However, the non-Indian may find that, upon receipt of the paper title, they are held to strict state standards that are not applicable to the reserved rights while they are retained by Indians.⁸⁰

§ 15.13 THE FEDERAL NONRESERVED RIGHTS

At the turn of the century the federal government had argued that the states lacked the power to divest the federal government of its federal riparian rights.⁸¹ Approximately 45 years later, the federal government claimed an interest in the waters necessary for irrigation projects under theories related to the cession of territories from foreign governments.⁸²

It has been argued that nonreserved rights were not pursued by the federal government, in large part due to the availability

⁷⁶ *United States v. Adair* (9th Cir. 1983) 723 F.2d 1394, 1418 cert. denied, 467 U.S. 1252 (1984); 25 U.S.C. § 177; see *Waters and Water Rights*, Vol. 4, *Federal and Indian Rights* (1991) § 37.02 at p. 235.

⁷⁷ *United States v. Powers* (1939) 305 U.S. 527, 533 [59 S.Ct. 344]; see *Waters and Water Rights*, Vol. 4, *Federal and Indian Rights* (1991) § 37.02 at p. 235.

⁷⁸ *Id.*; *Colville Confederated Tribes v. Walton* (9th Cir. 1985) 647 F.2d 42, 401; *United States v. Anderson* (9th Cir. 1984) 726 F.2d 1358.

⁷⁹ *Colville Confederated Tribes v. Walton* (9th Cir. 1984) 736 F.2d 1358.

⁸⁰ See *Colville Confederated Tribes v. Walton* (9th Cir. 1981) 647 F.2d 42, 51 non-Indian is subject to state law requirements of diligence.

⁸¹ See *United States v. Rio Grande Dam & Irrigation* (1899) 174 U.S. 690 [703 19 S.Ct. 770].

⁸² See, e.g., *Nebraska v. Wyoming* (1945) 325 U.S. 589, 611-612 [65 S.Ct. 1332].

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of reserved rights to satisfy the federal water requirements. The federal interest in nonreserved rights was increased after the Supreme Court decision in *United States v. New Mexico*, in which the Court limited the application of the reserved right to the primary purposes of the reservation. The Solicitor for the United States Department of the Interior attempted to breathe new life into a relatively dormant concept of the federal nonreserved right.⁸³

In theory, the nonreserved water right was based upon the “actual use of unappropriated water by the United States to carry-out congressionally-authorized management objectives on federal lands.”⁸⁴ As expected, the legitimacy of the nonreserved rights doctrine was hotly contested by the commentators.⁸⁵

The conflict was brought to a head in 1980, when the federal government incorporated a claim for nonreserved waters in the Big Horn adjudication.⁸⁶ Although the claim was rejected by the district court, political pressure continued to mount and the federal government ultimately reversed its position on the nonreserved right claim and made the decision to abandon its nonreserved rights theory.⁸⁷ For the time being, the existence of the nonreserved right claim remains a purely academic issue.

PART B. SATISFYING FEDERAL WATER REQUIREMENTS: THE FEDERAL GOVERNMENT AS A PROPRIETOR IN THE STATE ALLOCATION SYSTEM

Part B examines the rights and obligations of the federal government in obtaining water rights in the state allocation system when reserved water rights are not available for the federal purpose which requires water. (Specific laws governing federal reclamation projects are reviewed in Part C of this chapter.)

⁸³ See Comment, *Federal Nonreserved Water Rights* (1981) 48 Univ.Chi.L.R. 758, 761.

⁸⁴ Comment, *Federal Nonreserved Water Rights* (1981) 48 Univ.Chi.L.R. 758, 761; see Trelease, *Uneasy Federalism—State Water Laws and National Water Uses* (1980) 55 Wash.L.Rev. 751, 763.

⁸⁵ Compare Trelease, *Uneasy Federalism—State Water Laws and National Water Uses* (1980) 55 Wash.L.Rev. 751, 766; Note, *Federal Acquisition of Nonreserved Water Rights After New Mexico* (1979) 31 Stanf.L.Rev. 885.

⁸⁶ See *Colville Confederated Tribes v. Walton* (E.D. Wash 1978) 460 F.Supp. 1320.

⁸⁷ Supplement (1981) 88 I.D. 253; *Nonreserved Water Rights—United States Compliance with State Law* (1981) M-36914 (Supp.I) 88 I.D. 105.

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§ 15.14 FEDERAL PROPRIETARY RIGHTS: IN GENERAL

Given the Supreme Court's holding in the *New Mexico* decision that the federal reserve water right could only be used to supply the primary purposes of a federal reservation, federal attention turned to other methods to satisfy the water requirements of federal lands.⁸⁸ Although Congress deferred to the states to adopt and implement water allocation laws, it has never been seriously argued that the United States Constitution would not support the federal government's ability to carry out projects and indirectly affect water rights. The Property Clause will support federal action which affects water rights,⁸⁹ as will the Commerce Clause⁹⁰ and the Supremacy Clause.

§ 15.15 THE FEDERAL GOVERNMENT AS AN APPROPRIATOR

While Congress had previously deferred to the states for the development of laws to control and allocate water, the federal government has maintained supremacy in the area of navigable waters and federal reserved rights.⁹¹ Whatever the extent of the state's proprietary interest in water, for several decades it was believed that when the federal government appropriated water, it was not subject to the state control and regulation of water through its police power because Congress had preempted the field.⁹²

In the western states and particularly in California, the federal government most frequently sought to appropriate water for reclamation purposes. Under the *Arizona v. California* decision, federal reclamation projects were believed to be immune from SWRCB police power based regulation of federal appropriations of water under the 1902 Reclamation Act.⁹³ The state's power to regulate federal projects was deemed preempted by

⁸⁸ See *United States v. New Mexico* (1978) 438 U.S. 696, 702 [98 S.Ct. 3012].

⁸⁹ U.S. Const., art. III, § 3; *Kleppe v. New Mexico* (1976) 426 U.S. 529, 539, n.9 [96 S.Ct. 2285].

⁹⁰ *California v. United States* (1978) 438 U.S. 645 [98 S.Ct. 2895]; *Federal Power Commission v. Oregon* (1955) 349 U.S. 435, 443; U.S. Const., art. I, § 8.

⁹¹ See *California v. F.E.R.C.* (1990) 495 U.S. 490 [110 S.Ct. 2024]; *Oklahoma ex rel. Phillips v. Guy F. Atkinson Con.* (1941) 313 U.S. 508, 534-535 [61 S.Ct. 1050]; *California Oregon Power Co. v. Beaver Portland Cement Co.* (1935) 295 U.S. 142, 159 [55 S.Ct. 725].

⁹² See *Arizona v. California* (1931) 283 U.S. 423, 451 [51 S.Ct. 522]; *Arizona v. California* (1963) 373 U.S. 546, 597-598 [83 S.Ct. 1468]; *Ivanhoe Irr. Dist. v. McCracken* (1958) 357 U.S. 275 [78 S.Ct. 1174].

⁹³ See *Arizona v. California* (1963) 373 U.S. 546, 597-598 [83 S.Ct. 1468].

Congressional authorization of the projects.⁹⁴ However, in its 1978 decision in *California v. United States* the United States Supreme Court reversed its prior direction, and concluded that the federal government was obligated to operate its reclamation projects in accordance with state laws.⁹⁵

In reaching its decision that the federal government would be required to comply with state water laws, the Supreme Court focused heavily on the meaning of Section 8 of the 1902 Reclamation Act. The Court interpreted Section 8 as a “savings clause” and concluded that the state water law governs the use of water by a federal reclamation project, unless the state law is inconsistent with express Congressional directives.⁹⁶

Congress has already deferred to the states to adopt water allocation laws. Unless there are express Congressional directives to the contrary, the federal government typically must comply with the state appropriative rights permit process, including permit conditions.⁹⁷

Likewise, when acting as a proprietor in the state system, the federal government is subject to the ongoing regulatory authority of the SWRCB.⁹⁸ However, federal projects that are not subject to the Section 8 “savings clause” or which are authorized through express Congressional directives may not be required to comply with state water allocation laws.⁹⁹

The combined effect of the *New Mexico* and the *California v. United States* decisions was substantial. First, in the *New Mexico* decision the Court limited the application of the reserved rights claims to the primary purposes of the reservation, leaving it to the federal government to acquire

⁹⁴ See Kelley, *Staging a Comeback—Section 8 of the Reclamation Act* (1984) 18 U.C.Davis L.Rev. 97, 122–123, 163.

⁹⁵ *California v. United States* (1978) 438 U.S. 645 [98 S.Ct. 2895]; see Kelley, *Staging a Comeback—Section 8 of the Reclamation Act* (1984) 18 U.C.Davis L.Rev. 97, 163; Walston, *Reborn Federalism in Western Water Law: The New Melones Dam Decision* (1979) 30 Hastings L.J. 1645, 1655–1656.

⁹⁶ See Kelley, *Staging a Comeback—Section 8 of the Reclamation Act* (1984) 18 U.C.Davis L.Rev. 97, 122–123, 163; Walston, *Reborn Federalism in Western Water Law: The New Melones Dam Decision* (1979) 30 Hastings L.J. 1645, 1655–1656.

⁹⁷ *California v. United States* (1978) 438 U.S. 645 [98 S.Ct. 2895]; *United States v. California* (SWRCB) (1986) 182 Cal.App.3d 82 [227 Cal.Rptr. 161].

⁹⁸ See *California v. United States* (1978) 438 U.S. 645 [98 S.Ct. 2895]; *United States v. California* (SWRCB) (1986) 182 Cal.App.3d 82 [227 Cal.Rptr. 161].

⁹⁹ See *California v. F.E.R.C.* (1990) 495 U.S. 490 [110 S.Ct. 2024]; *Phillips v. Guy F. Atkinson Con.* (1941) 313 U.S. 508, 534–535 [61 S.Ct. 1050].

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any additional water required for a federal project from the state “in the same manner as any other public or private appropriator.”¹⁰⁰ The *California v. United States* decision then clarified that the federal government operation of reclamation projects would be subject to the ongoing regulatory authority of the SWRCB.¹⁰¹

§ 15.16 THE FEDERAL GOVERNMENT AS AN OVERLYING OR RIPARIAN LAND-OWNER

Perhaps as a result of the federal government’s setbacks in the *New Mexico* and *California v. United States* decisions, the federal government began to place increased emphasis on alternative rationales to satisfy federal water requirements.¹⁰² One basis given increased attention was the existence of riparian and overlying rights that might be available under state water allocation laws.

The early federal decisions holding that a federal reserved water right existed for the benefit of reserved lands found it unnecessary to reach the question of whether the federal government could assert a separate and independent claim for a riparian right for the benefit of the same federal lands.¹⁰³ There was earlier precedent that federal lands may qualify as “riparian.”^{103a} When the California Supreme Court was asked in 1988 for the first time, it clearly answered “yes” (*see below*).

In the case of *In re Waters of Hallett Creek Stream System*, the federal government sought to assert a claim of riparian rights to support the secondary or incidental federal uses on federally reserved lands. The SWRCB advanced the argument that the federal government was not a private proprietor and thus not entitled to claim the benefit of riparian rights for its federal lands which would otherwise satisfy the traditional test for

¹⁰⁰ *United States v. New Mexico* (1978) 438 U.S. 696, 702 [98 S.Ct. 3012].

¹⁰¹ *California v. United States* (1978) 438 U.S. 645, [98 S.Ct. 2895].

¹⁰² *See Dunn, Acquisition of Water Rights: A Federal Practitioner’s Point of View* (1988) 19 Pac.L.J. 1325.

¹⁰³ *See Winters v. United States* (1908) 207 U.S. 564, 567, 578 [28 S.Ct. 207].

^{103a} *United States v. Fallbrook Public Utility District* (S.D.Cal 1952) 108 F.Supp. 72 where the use of water for domestic purposes in a military camp was held a proper and reasonable riparian use; *see further United States v. Fallbrook Utility District* (S.D. Cal. 1952) 109 F.Supp. 28 the amount of water is limited to the maximum allowable for agricultural use on the ranch which had been purchased for the camp.

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determining whether land was riparian.¹⁰⁴ In addition, the SWRCB argued that the Congressional Mining Acts of 1866 and 1877 as well as the Desert Land Act of 1877 resulted in a federal relinquishment of all proprietary water rights in federally reserved lands.¹⁰⁵

The California Supreme Court did not agree and held that the federal government possessed the same rights held by any other proprietor under the state allocation system.¹⁰⁶ The Court also held that the Mining and Desert Land Acts did not relinquish the federal government's interest in waters in the public domain.¹⁰⁷

To the extent that appropriative rights may have been perfected on the public domain, under the Desert Land Act, the federal government's riparian rights are junior to the rights of prior appropriators.¹⁰⁸ However, the Desert Land Act is not applicable to federally reserved lands, and consequently, the subordination rule does not come into play.¹⁰⁹

Of course, like any other proprietor using water under a state-based water right claim, the federal government is subject to traditional limitations and restrictions applicable to the right under the state system. Thus, the SWRCB is entitled to review and scrutinize the water use practices of the federal government and to hold those practices to the same standards it employs when reviewing other proprietors.¹¹⁰

¹⁰⁴ In re Waters of Hallett Creek Stream System (1988) 44 Cal.3d 448 [243 Cal.Rptr. 887, 893-894].

¹⁰⁵ In re Waters of Hallett Creek Stream System (1988) 44 Cal.3d 448 [243 Cal.Rptr. 887, 893-894].

¹⁰⁶ In re Waters of Hallett Creek Stream System (1988) 44 Cal.3d 448 [243 Cal.Rptr. 887, 893-894]; *see also* California v. United States (9th Cir. 1956) 235 F.2d 647, 656 holding that federal government may possess riparian rights when property is acquired by the federal government; United States v. Fallbrook Public Utility District (S.D.Cal. 1952) 108 F.Supp. 72 federal government has riparian right for military installation at Camp Pendleton.

¹⁰⁷ In re Waters of Hallett Creek Stream System (1988) 44 Cal.3d 448 [243 Cal.Rptr. 887, 899].

¹⁰⁸ In re Waters of Hallett Creek Stream System (1988) 44 Cal.3d 448 [243 Cal.Rptr. 887, 899].

¹⁰⁹ In re Waters of Hallett Creek Stream System (1988) 44 Cal.3d 448 [243 Cal.Rptr. 887, 899].

¹¹⁰ In re Waters of Hallett Creek Stream System (1988) 44 Cal.3d 448 [243 Cal.Rptr. 887, 899]; *see, e.g.,* In re Waters of Long Valley Creek Stream System (1979) 25 Cal.3d 339, 358-359 [158 Cal.Rptr. 350] for an example of how the dormant riparian rights can be subordinated to existing uses.

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The *Hallett Creek* decision allows the federal government to rely on riparian rights to satisfy those water requirements of federally reserved lands that cannot be met by the traditional reserved water rights. However, the SWRCB retains significant authority to condition, regulate, and all but extinguish the federal government's exercise of its riparian right.

Although the *Hallett Creek* decision involved riparian rights and not overlying rights to percolating ground water, there is nothing in the decision to suggest the result would be any different for ground water. California courts have already concluded that the state and its subdivisions may assert an overlying right on behalf of their overlying land.¹¹¹ There appears to be no good reason to conclude that the federal government would occupy a different status. At least one federal court case supports the view that the federal government will be treated as any other overlying owner in the state allocation system for percolating ground water.¹¹²

PART C. A SURVEY OF FEDERAL WATER RECLAMATION LAWS

The laws governing the acquisition, use, and distribution of water made available by federal reclamation laws are expansive. Part C provides a general overview of the federal water reclamation laws. In addition, the rights and obligations of the federal government and its contractors are reviewed. This part is designed only as a survey of general laws and recent developments in case law. It is not intended to provide comprehensive evaluation of federal reclamation law.

§ 15.17 IN GENERAL

Congress sought to encourage the settlement of the western frontier by passing several pieces of legislation addressing water use.¹¹³ The Reclamation Act of 1902 was adopted, in part, as a reform measure that was designed to discourage monopolization by strengthening qualification for settlement on the public domain.

¹¹¹ See, e.g., *Wright v. Goleta Water District* (1985) 174 Cal.App.3d 74 [219 Cal.Rptr. 740]; *Tehachapi-Cummings County Water Dist. v. Armstrong* (1975) 49 Cal.App.3d 992 [122 Cal.Rptr. 918].

¹¹² *United States v. Fallbrook Public Utility District* (S.D.Cal. 1952) 108 F.Supp. 72; see *Leshy, The Federal Role in Managing the Nation's Groundwater* (2004) 11 *Hastings W.N.W.J. Env'tl.L. & Pol'y* 1, 3-6.

¹¹³ See, e.g., the Homestead Act of 1862, 43 U.S.C. § 161 et seq., the Mining Act of 1866, and the Desert Land Act of 1877, 43 U.S.C. § 321 et seq.

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Water was to be supplied to the previously arid land by a massive program of dams, reservoirs, and canals.¹¹⁴ Under the 1902 Reclamation Act, water was to be provided to public and private lands under conditions requiring the irrigator to repay maintenance costs annually and to repay the cost of construction on an interest-free basis. To prevent large farming monopolies, water sold to private individuals was to be limited to 160 acres. Over time, the program evolved into a federal subsidy of western water projects.

§ 15.18 USES OF RECLAMATION WATER

The Reclamation Act of 1902 was designed to provide water for the irrigation of lands. Subsequent reclamation laws expanded the permissible uses to power, municipal, commercial, industrial, and most recently, instream uses.¹¹⁵

§ 15.19 AUTHORIZATION FOR THE RECLAMATION ACT

The federal government has the constitutional authority to operate reclamation projects under the General Welfare Clause.¹¹⁶ Although the Commerce Clause is sufficiently broad to authorize federal projects for the purpose of controlling navigation, it does not permit the deprivation of state water rights without compensation.¹¹⁷

§ 15.20 FEDERAL DEFERENCE TO STATE WATER LAW

Section 8 of the 1902 Reclamation Act provides that the Bureau's actions were not to interfere with state water laws. The relevant part of Section 8 states as follows:

Nothing in this Act shall be construed as affecting or intended to affect or to in any way interfere with the laws of any State or Territory relating to the control, appropriation, use or distribution of water used in irrigation, or any vested right acquired thereunder, and the Secretary

¹¹⁴ California v. United States (1978) 438 U.S. 645, 650 [98 S.Ct. 2895].

¹¹⁵ 43 U.S.C. § 485(c); Environmental Defense Fund, Inc. v. Morton (D.Mont. 1976) 420 F.Supp. 1037, 1042, affirmed (9th Cir. 1979) 596 F.2d 848, 850.

¹¹⁶ U.S. Const., art. I, § 8; United States v. Gerlach Live Stock Co. (1950) 339 U.S. 725, 738 [70 S.Ct. 955].

¹¹⁷ United States v. Gerlach Live Stock Co. (1950) 339 U.S. 725, 734, n.7 [70 S.Ct. 955].

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of the Interior, in carrying out the provisions of this Act, shall proceed in conformity with such laws, and nothing herein contained shall in any way affect any right of any State or the Federal Government or any landowner, appropriator, or user of water in, to, or from any interstate stream or the waters thereof . . .

For approximately 50 years, the states and federal government operated water projects in the spirit of cooperative federalism.¹¹⁸ As the 1950s came to a close, the era of cooperation was beginning to give way to several decades of measured conflict.

For example, in 1958 a direct conflict arose between state and federal law when California held that acreage limitation in Section 5 of the 1902 Reclamation Act conflicted with state law, and was thus invalid under Section 8 of the same Act. The Supreme Court held that state law was preempted, and that the policy of deference to state law was limited to the areas of acquiring water rights.¹¹⁹ The federal government was not required to defer to state law in the operation of the federal project.¹²⁰

At least two subsequent Supreme Court decisions continued to give Section 8 a limited reading and thus severely circumscribed the state's authority in addressing impacts created by federal projects. In 1963, the Supreme Court issued two decisions that were representative of the narrow reading given to Section 8. First, the Court held that state law could not limit the federal government's right of eminent domain.¹²¹ In its second decision concerning Section 8 that year, in an opinion written by Justice White, the Court also decided that the federal government was not required to comply with state water right priorities when operating a federal project, holding that inconsistent state laws could not impede federal projects.¹²²

Just 15 years later, the Supreme Court revisited the meaning of Section 8 in *California v. United States*.¹²³ At issue in the case were conditions the SWRCB sought to impose on the state water rights permit that had been previously issued to the federal government. In reviewing the conflict

¹¹⁸ *California v. United States* (1978) 438 U.S. 645, 651 [98 S.Ct. 2985].

¹¹⁹ *Ivanhoe Irr. Dist. v. McCracken* (1958) 357 U.S. 275, 291–292 [78 S.Ct. 1174], overruled as stated in *CA ex rel. SWRCB v. FERC* (9th Cir. 1989) 877 F.2d 743.

¹²⁰ *Ivanhoe Irr. Dist. v. McCracken* (1958) 358 U.S. 275, 291–292 [78 S.Ct. 1174].

¹²¹ *City of Fresno v. California* (1963) 372 U.S. 627, 630 [83 S.Ct. 996], overruled as stated in *CA ex rel. SWRCB v. FERC* (9th Cir. 1989) 877 F.2d 743.

¹²² *Arizona v. California* (1963) 373 U.S. 546, 585–588 [83 S.Ct. 1468].

¹²³ *California v. United States* (1978) 438 U.S. 645 [98 S.Ct. 2985].

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between the conditions that the state sought to impose on the federal government's operation of the Central Valley Project, the Supreme Court concluded that prior pronouncements in other Supreme Court decisions were merely "dictum."¹²⁴ The Court concluded that the state water allocation laws were indeed controlling and that Section 8 required the federal government to comply with state water allocation laws and procedures, including the ongoing regulatory authority of the SWRCB, unless express congressional directives provided otherwise.¹²⁵

§ 15.21 CONGRESSIONAL DIRECTIVES

The rights of the federal government (acting through the Bureau of Reclamation), parties with whom it contracts ("contractors"), and the state depend to a large degree on whether state or federal law is applicable in any given factual situation. Under the Supreme Court's decision in *United States v. California*, California water law will govern federal projects unless express or clearly implied congressional intent declares otherwise.¹²⁶ Several areas in which clear congressional directives are binding on the state follow.

1. Appurtenance

Section 8 of the 1902 Reclamation Act provides that the right to the water use acquired under the Act "shall" be appurtenant to the land irrigated.¹²⁷ This requirement has been construed to mean that the right to use water is held by the person who has title to the real property on which the water is used.¹²⁸

¹²⁴ *California v. United States* (1978) 438 U.S. 645, 671, n.24, 672-677 [98 S.Ct. 2985].

¹²⁵ *California v. United States* (1978) 438 U.S. 645, 672-677 [98 S.Ct. 2985]; see *United States v. State of Nevada* (D.Nev. 2000) 123 F.Supp.2d 1209, 1214 indicating that today it is generally acknowledged that Congress and the courts have historically deferred to states' water law procedures and courts, when dealing with applications for appropriation of water.

¹²⁶ *California v. United States* (1978) 438 U.S. 645, 672 [98 S.Ct. 2985]; see *United States v. California* (9th Cir. 1982) 694 F.2d 1171, 1177.

¹²⁷ 43 U.S.C. §§ 372, 383; see *California v. United States* (1978) 438 U.S. 645, 668, n.21 [98 S.Ct. 2985].

¹²⁸ See Trelease, *Reclamation Water Rights* (1960) 32 Rocky Mtn.Min.L.Rev. 464, 466.

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2. Beneficial Use

Section 8 provides that “beneficial use shall be the basis and the measure, and the limit of the right.”¹²⁹ Although the beneficial use requirement constitutes a congressional directive,¹³⁰ the directive is interpreted in accordance with substantive state standards. In other words, there is no separate federal standard for beneficial use.¹³¹

One Ninth Circuit Appellate Court decision concluded that the meaning of “beneficial use” is determined by reference to the common principles generally applicable in the western states.¹³² However, the concept of what uses are beneficial use may vary considerably between the states. One area that seems ripe for discrepancies in future decisions lies in the area of instream and future municipal uses because of the differences between how these interests are treated in each of the western states.¹³³

3. Excess Lands Limitation

Section 5 of the 1902 Reclamation Act restricted the benefits accruing under the legislation to small farms of less than 160 acres.¹³⁴ The limitation against excess lands is a congressional directive preempting inconsistent state law.¹³⁵ The limitation precludes any complementary state legislation or regulation.

4. Irrigation Preference

A contractor for irrigation uses has preference over a contractor for municipal and power purposes.¹³⁶ However, Congress may exempt specific

¹²⁹ 43 U.S.C. §§ 372, 383.

¹³⁰ *California v. United States* (1978) 438 U.S. 645, 668, n.21, 672, n.25 [98 S.Ct. 2985].

¹³¹ *United States v. Alpine Land & Reservoir Co.* (9th Cir. 1983) 697 F.2d 851.

¹³² *United States v. Alpine Land & Reservoir Co.* (9th Cir. 1983) 697 F.2d 851, 854.

¹³³ *United States v. Alpine Land & Reservoir Co.* (9th Cir. 1983) 697 F.2d 851, 859–860; *compare Jicarilla Apache Tribe v. United States* (10th Cir. 1980) 657 F.2d 1126 and Wat. Code, §§ 1462–1463.

¹³⁴ 43 U.S.C. § 431.

¹³⁵ *Ivanhoe Irr. Dist. v. McCracken* (1958) 357 U.S. 275, 291–292 [78 S.Ct. 1174], overruled as stated in *CA ex rel. SWRCB v. FERC* (9th Cir. 1989) 877 F.2d 743; *California v. United States* (1978) 438 U.S. 645, 668, n.21, 675, n.25 [98 S.Ct. 2985].

¹³⁶ 43 U.S.C. § 485(c); *see City of Fresno v. California* (1963) 372 U.S. 627 [83 S.Ct. 996].

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reclamation projects from the irrigation preference.¹³⁷

5. Distribution of Waters

The distribution of waters by the Bureau is governed by federal law. Section 8 of the Reclamation Act does not require the federal government to comply with state law in priorities or the disposition of water.¹³⁸

§ 15.22 ACQUIRING WATER FOR FEDERAL RECLAMATION PROJECTS

In the vast majority of cases the federal government has complied with the state permitting system.¹³⁹ To the extent private water rights are taken, the federal government must provide compensation.¹⁴⁰

§ 15.23 CHANGE IN POINT OF DIVERSION

Although the actual construction of a dam is a matter of federal law, the state law may influence the point of diversion.¹⁴¹ The question of whether the point of diversion may be relocated is determined by state law. Thus, the point may be relocated if no injury would result.¹⁴²

§ 15.24 WATERSHED OF ORIGIN PREFERENCE

The watershed in which water originates is extended a priority to water

¹³⁷ *Central Arizona Irrigation and Drainage District v. Lujan* (Ariz. 1991) 764 F.Supp. 582, 589.

¹³⁸ *California v. United States* (1978) 438 U.S. 645, 674 [98 S.Ct. 2985]; *Arizona v. California* (1963) 373 U.S. 546, 585-588 [83 S.Ct. 1468].

¹³⁹ Trelease, *Reclamation Water Rights* (1960) 32 Rocky Mtn.Min.L.Rev. 464, 486.

¹⁴⁰ *United States v. Gerlach Live Stock Co.* (1950) 339 U.S. 725, 742, 743, 754 [70 S.Ct. 955].

¹⁴¹ *Environmental Defense Fund Inc. v. East Bay Municipal Utility Dist.* (1980) 26 Cal.3d 183 [161 Cal.Rptr. 466, 470]; *United States v. Alpine Land & Reservoir Co.* (D.Nev. 1980) 503 F.Supp. 877, 884 affirmed as modified, 697 F.2d 851, 858 requiring compliance with state change of diversion provisions; see *United States v. Alpine Land & Reservoir Co.* (9th Cir. 1989) 878 F.2d 1217, 1223 state law governs the process and substance of the transfer of water rights; but see *United States v. California* (E.D.Cal. 1981) 509 F.Supp. 867, 888-902 holding SWRCB condition on manner of diversion preempted by federal interest in project construction, remanded by *United States v. SWRCB* (9th Cir. 1982) 694 F.2d 1171.

¹⁴² See *Environmental Defense Fund Inc. v. East Bay Municipal Utility Dist.* (1980) 26 Cal.3d 183 [161 Cal.Rptr. 466] applying benchmark of reasonable use.

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exported by the Central Valley Project.¹⁴³ There are no express congressional directives that void the application of the watershed of origin statutes.¹⁴⁴ As such, the statutes will support SWRCB conditions on federal permits for the benefit of the watershed of origin.¹⁴⁵

§ 15.25 WATER QUALITY STANDARDS

There are no congressional directives precluding the SWRCB from applying conditions designed to protect water quality on federal projects.¹⁴⁶ This condition may be applied even where it will result in a reduction in the amount of water available for distribution by the federal government.¹⁴⁷

§ 15.26 CONTINUING JURISDICTION OF THE SWRCB

The SWRCB may maintain its continuing jurisdiction over federal permits in the same manner as it does all other permits in the state system.¹⁴⁸ Moreover, even if the SWRCB does not reserve jurisdiction, the SWRCB is authorized to modify the permit terms under its power to prevent waste and unreasonable use.¹⁴⁹

§ 15.27 TRANSFERS

State law governs the process and substance of the transfer of acquired water rights.¹⁵⁰ Thus, a party attempting to engage in an intra-project transfer must comply with state conditions related to the transfer of water rights.¹⁵¹

¹⁴³ Wat. Code, §§ 11460–11465.

¹⁴⁴ *South Delta Water Agency v. United States* (9th Cir. 1985) 767 F.2d 531, 538.

¹⁴⁵ *United States v. California* (9th Cir. 1982) 694 F.2d 1171, 1180–1181; *see also* *United States v. California* (E.D.Cal. 1981) 509 F.Supp. 867, 888, remanded by *United States v. SWRCB* (9th Cir. 1982) 694 F.2d 1171.

¹⁴⁶ *United States v. SWRCB* (9th Cir. 1982) 694 F.2d 1171, 1179–1180.

¹⁴⁷ *United States v. SWRCB* (1986) 182 Cal.App.3d 82 [227 Cal.Rptr. 161], on remand from *United States v. SWRCB* (9th Cir. 1982) 694 F.2d 1171.

¹⁴⁸ *United States v. California* (E.D. Cal. 1981) 509 F.Supp. 867, 888–902.

¹⁴⁹ *United States v. SWRCB* (1986) 182 Cal.App.3d 82 [227 Cal.Rptr. 161, 187], on remand from *United States v. SWRCB* (9th Cir. 1982) 694 F.2d 1171.

¹⁵⁰ *United States v. Alpine Land & Reservoir Co.* (9th Cir. 1989) 878 F.2d 1217, 1223.

¹⁵¹ *United States v. Alpine Land & Reservoir Co.* (9th Cir. 1992) 965 F.2d 731.

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§ 15.28 FISH AND GAME CODE SECTION 5937

Fish and Game Code Section 5937 relates to the release of water from dams and affects the impoundment and distribution of water.¹⁵² Consequently, Section 5937 is a state water law within the meaning of Section 8 and a law that the Bureau can be required to satisfy in the operation of its projects.¹⁵³

Although Section 5937 is clearly a state law relating to the operation of water projects, it is generally not directly applied in California in the absence of a decision to do so by the SWRCB. This method and procedure under which Section 5937 is applied in California is as much a matter of state law as the statute itself. Pursuant to the SWRCB's own administrative regulations, the SWRCB must determine whether the particular dam or reservoir is a candidate for a release or by-pass and then move to a consideration of relevant facts before ordering a release.

In *Natural Resources Defense Council v. Patterson*, Judge Karlton returned to his earlier decision in which the court concluded that the federal government was subject to the provisions of Water Code Section 5937.^{153a} However, the new decision went substantially further in two areas.

First, the court reviewed California precedent and concluded that the holding of *Cal-Trout II*^{153b} requires that the owner of a dam maintain fish in good condition.^{153c} The *Cal-Trout* decision had expressly reserved the question of whether Section 5937 had an independent vitality in the context of the appropriation of water.^{153d} However, rather than reading the

¹⁵² *Natural Resources Defense Council v. Patterson* (E.D.Cal. 1992) 791 F.Supp. 1425, on remand from *NRDC v. Houston* (9th Cir. 1998) 146 F.3d 1118, *cert. denied*, *Chowchilla Water District v. NRDC* (1999) 526 U.S. 1111; *Natural Resources Defense Council v. Patterson* (E.D. Cal. 2004) 333 F.Supp.2d 906.

¹⁵³ *Natural Resources Defense Council v. Patterson* (E.D.Cal. 1992) 791 F.Supp. 1425, on remand from *NRDC v. Houston* (9th Cir. 1998) 146 F.3d 1118, *cert. denied*, *Chowchilla Water District v. NRDC* (1999) 526 U.S. 1111; *Natural Resources Defense Council v. Patterson* (E.D. Cal. 2004) 333 F.Supp.2d 906.

^{153a} *Natural Resources Defense Council v. Patterson* (E.D. Cal. 2004) 333 F.Supp.2d 906, 916-917.

^{153b} *California Trout, Inc. v. Superior Court* (1990) 218 Cal.App.3d 187 [266 Cal.Rptr. 788].

^{153c} *Natural Resources Defense Council v. Patterson* (E.D. Cal. 2004) 333 F.Supp.2d 906, 920.

^{153d} *Natural Resources Defense Council v. Patterson* (E.D. Cal. 2004) 333 F.Supp.2d 906, 920.

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Cal-Trout II decision as turning on the existence of Water Code Section 5946, which expressly made Section 5937 applicable to Mono County, the court characterizes the *Cal-Trout II* decision as holding that Section 5937 has an independent application regardless of the water rights application process. In other words, under *NRDC v. Patterson*, Section 5937 requires a dam owner to maintain fish in good condition regardless of the Sections application and importance in water rights determinations.^{153e}

In a further order issued in 2005, Judge Karlton moved still further in implementation of his earlier orders regarding the application of Fish and Game Code Section 5937 to federal projects.^{153g}

§ 15.29 RELATIONSHIP BETWEEN THE BUREAU AND ITS CONTRACTORS

1. Background

In the early years of implementing the 1902 Reclamation Act, the bureau contracted directly with individual irrigators.¹⁵⁴ After 1926, the Bureau was limited to executing contracts with irrigation districts organized under state law.¹⁵⁵ In 1933, the number of permissible contracting parties was expanded to include conservation districts, irrigation districts, water users' associations, and any other "organization, which is organized under State law and which has capacity to enter into contracts with the United States pursuant to the Federal reclamation laws."¹⁵⁶

Modernly, the Central Valley Project (CVP) comprises nine distinct geographic areas, known as "divisions." These divisions are the (1) Trinity; (2) Shasta; (3) Sacramento; (4) American River; (5) Delta; (6) Eastside; (7) San Felipe; (8) West San Joaquin; and (9) Friant.^{156a} Generally, the Bureau executes repayment contracts with districts to construct and operate a water supply project to deliver water to the contracting parties in exchange for the

^{153e} *Natural Resources Defense Council v. Patterson* (E.D. Cal. 2004) 333 F.Supp.2d 906, 914.

^{153g} *Natural Resources Defense Council v. Rodgers* (E.D. Cal. 2005) 381 F.Supp.2d 1212.

¹⁵⁴ 43 U.S.C. §§ 419, 461.

¹⁵⁵ 43 U.S.C. § 423e.

¹⁵⁶ 43 U.S.C. § 485a(g).

^{156a} *Westlands Water Dist. v. United States* (2001) 153 F.Supp.2d 1133, 1142, *affirmed*, *Westlands Water Dist. v. United States* (9th Cir. 2003) 337 F.3d 1092.

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agreement to repay project costs. The Bureau may also execute water service contracts with districts to supply water for specified rates.¹⁵⁷

The initial CVP plan contemplated that the United States would acquire, by purchase or otherwise, riparian and appropriative rights in specified areas to facilitate the distribution of water and ensure a reliable water supply.^{157a} However, not all water rights were directly purchased. Instead, Interior sought and obtained water rights through legal exchanges.^{157b} Without the arrangements with the Exchange or Settlement Contractors, it would not be possible for the CVP to operate within its historical framework.^{157c}

Those contractors that execute water service contracts with the Bureau are distinguished from “Exchange Contractors.”¹⁵⁸ Exchange Contractors are generally those parties that transferred their preexisting water rights to the Bureau in exchange for an agreement by the Bureau to provide a substitute water supply.¹⁵⁹ Because the Exchange is conditional, the Bureau’s rights are coterminous with its offer of substitute supply.^{159a}

Contracts authorized by federal reclamation laws are to be interpreted against the legislative scheme that authorized them.^{159b} When the United

¹⁵⁷ See 43 U.S.C. § 485a(e).

^{157a} *Westlands Water Dist. v. United States* (2001) 153 F.Supp.2d 1133, *affirmed*, *Westlands Water Dist. v. United States* (9th Cir. 2003) 337 F.3d 1092.

^{157b} *Westlands Water Dist. v. United States* (2001) 153 F.Supp.2d 1133, *affirmed*, *Westlands Water Dist. v. United States* (9th Cir. 2003) 337 F.3d 1092; *c.f.* *Westlands Water Dist. v. U.S. Department of Interior* (Cal. 1992) 805 F.Supp. 1503, 1504.

^{157c} *Westlands Water Dist. v. United States* (2001) 153 F.Supp.2d 1133, *affirmed*, *Westlands Water Dist. v. United States* (9th Cir. 2003) 337 F.3d 1092.

¹⁵⁸ See *Westlands Water Dist. v. Firebaugh Canal* (9th Cir. 1993) 10 F.3d 667, injunction denied, and *Westlands v. Patterson* (E.D.Cal. 1994) 864 F.Supp. 1536, reversed, remanded (9th Cir. 1996) 100 F.3d 94, for a general discussion of the rights of exchange contractors. Exchange Contract is used here to represent both Exchange and Settlement Contractors. They possess similar rights, but the names vary depending on from which portion of the CVP the initial right holders took water.

¹⁵⁹ See *Westlands Water Dist. v. Firebaugh Canal* (9th Cir. 1993) 10 F.3d 667, injunction denied, and *Westlands v. Patterson* (E.D.Cal. 1994) 864 F.Supp. 1536, reversed, remanded (9th Cir. 1996) 100 F.3d 94; *Westlands Water Dist. v. United States* (2001) 153 F.Supp.2d 1133, *affirmed*, *Westlands Water Dist. v. United States* (9th Cir. 2003) 337 F.3d 1092.

^{159a} *Westlands Water Dist. v. United States* (2001) 153 F.Supp.2d 1133, *affirmed*, *Westlands Water Dist. v. United States* (9th Cir. 2003) 337 F.3d 1092.

^{159b} *Westlands Water Dist. v. United States* (9th Cir. 2003) 337 F.3d 1092, 1100.

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States is party to a reclamation contract, federal common law controls.^{159c}

The Uniform Commercial Code (“UCC”) is a source of common law and it may be relied upon in interpreting a contract when the United States is party to the agreement.^{159d} Consequently, the UCC rules of interpreting, such as the use of extrinsic evidence to prove contract ambiguity, are available.^{159e}

The rights of Exchange Contractors are superior in some ways to those of the service contractors in that their water right is predicated on a claim or entitlement that preexisted the Bureau projects.¹⁶⁰ In many respects, the Exchange Contracts merely reflect a physical solution whereby the Bureau acted to keep a preexisting water right holder whole in the process of developing its water supply that was ultimately allocated to its service contractors. The specific type of reclamation contract determines the rights and obligations of the contractor. For example, the contractor may be a Warren Act contractor, a repayment contractor, or a utility contractor.¹⁶¹

2. Legal Title and Equitable Ownership of Water Rights

The federal government may obtain legal title to water appropriated under the state system.¹⁶² In addition, the federal government has sufficient standing to maintain an action to protect the appropriative rights acquired under the state system.¹⁶³ However, when the federal government appropriates water for the benefit of landowners, the landowners, not the federal

^{159c} *Westlands Water Dist. v. United States* (9th Cir. 2003) 337 F.3d 1092, 1100; *Smith v. Central Arizona Water Conservation District* (9th Cir. 2005) 418 F.3d 1028, 1034; *Orff v. United States* (9th Cir. 2004) 358 F.3d 1137, 1142–1143, *affirmed on other grounds*, *Orff v. United States* (2005) —U.S.—, 125 S.Ct. 2606, 2610; *see O’Neill v. United States* (9th Cir. 1995) 50 F.3d 677, 682.

^{159d} *Westlands Water Dist. v. United States* (9th Cir. 2003) 337 F.3d 1092, 1100.

^{159e} *Westlands Water Dist. v. United States* (9th Cir. 2003) 337 F.3d 1092, 1101.

¹⁶⁰ *See Westlands Water Dist. v. Firebaugh Canal* (9th Cir. 1993) 10 F.3d 667; *Westlands v. Patterson* (E.D. Cal. 1994) 864 F.Supp. 1536, *reversed, remanded*, (9th Cir. 1996) 100 F.3d 94.

¹⁶¹ 43 U.S.C. §§ 485, 523; *see generally Ivanhoe Irr. Dist. v. McCracken* (1958) 357 U.S. 275 [78 S.Ct. 1174], *overruled as stated in CA ex rel. SWRCB v. FERC* (9th Cir. 1989) 877 F.2d 743.

¹⁶² *United States v. Humbolt Lovelock Irrigation Light & Power Co.* (9th Cir. 1938) 97 F.2d 38.

¹⁶³ *United States v. Alpine Land & Reservoir Co.* (D.Nev. 1980) 503 F.Supp. 877, 881, *affirmed as modified*, 697 F.2d 851.

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government, hold equitable or beneficial title to the water appropriated.¹⁶⁴

The right to use water acquired under the provisions of reclamation law is appurtenant to the land irrigated.¹⁶⁵ The obligations of the federal government are analogous to a trustee, acting as the carrier and distributor of the water to landowners.¹⁶⁶ The Bureau holds the legal title for the water and it has operational control and responsibility for flood control, water supply, power generation, and fish and wildlife mitigation.^{166a} The federal government maintains a lien-holder's interest to secure repayment of the project construction costs.^{166b}

Federal law controls the interpretation of contracts entered into under federal reclamation law to which the government is a party.¹⁶⁷ A different rule may apply where the United States is not a party or the direct interests of the United States are not in question.^{167a}

Although the Government may have the legal right to make decisions regarding the operations, the authorizing acts may create obligations that give rise to breach of contract claims for failure to discharge the duty. For example, federal contractors contended that the San Luis Act requires the Bureau of Reclamation to build the interceptor drain to the Contra Costa

¹⁶⁴ See *Nevada v. United States* (1983) 463 U.S. 110, 126–127 [103 S.Ct. 2906]; *Nebraska v. Wyoming* (1945) 325 U.S. 589, 613–616 [65 S.Ct. 1332]; *Ickes v. Fox* (1937) 300 U.S. 82 [57 S.Ct. 412], *rehearing denied*, 300 U.S. 686.

¹⁶⁵ *Ickes v. Fox* (1937) 300 U.S. 82, 94–95 [57 S.Ct. 412], *rehearing denied*, 300 U.S. 686.

¹⁶⁶ *Ickes v. Fox* (1937) 300 U.S. 82, 94–95 [57 S.Ct. 412], *rehearing denied*, 300 U.S. 686.

^{166a} See *County of San Joaquin v. SWRCB* (1997) 54 Cal.App.4th 1144, 1156 n.12 [63 Cal.Rptr.2d 277] “[A]ppellants assert the Bureau ‘holds only legal title to the water’ and ‘has no substantial interest in the water,’ emphasizing the Bureau ‘uses no water.’ The argument is highly misleading: the fact the Bureau does not consume water is not synonymous with having no substantial interest in the water. The Bureau has appropriate water rights in the Central Valley Project.” See further *United States v. State Water Resources Control Bd.* (1986) 182 Cal.App.3d 82, 106 [227 Cal.Rptr. 161]. The Bureau owns the CVP facilities, has operational control and responsibilities relating to flood control, water supply, power generation, and fish and wildlife mitigation.

^{166b} *United States v. Alpine Land & Reservoir Co.* (D.Nev. 1980) 503 F.Supp. 877, 879, *affirmed as modified*, 697 F.2d 851.

¹⁶⁷ *Smith v. Central Arizona Water Conservation District* (9th Cir. 2005) 418 F.3d 1028, 1034.

^{167a} *Smith v. Central Arizona Water Conservation District* (9th Cir. 2005) 418 F.3d 1028, 1034.

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Delta. The federal government defended on the basis that the San Luis Act is an authorizing statute, and does not require the construction of the interceptor drain to the Contra Costa Delta. However, the Ninth Circuit found the plain language of the San Luis Act in direct conflict with the Government's argument.

Although it is true that the San Luis Act "authorized," but did not require, the Secretary to "construct, operate, and maintain the San Luis unit,"^{167b} the discretion contained in this authorization is limited to the decision whether to construct the *unit*. The very next sentence of the statute specifically defines which "principal engineering features" are to be included in the "unit" (if the unit is constructed), and it thus denies the Secretary discretion as to what constitutes the San Luis "unit." Therefore, while the Department of the Interior was only authorized (and not required) to construct the *unit*, once it decided to construct the unit, it was *required* to construct "necessary . . . drains" as part of the unit. Accordingly, once its discretion was exercised by the Department, Congress controlled the limits of that discretion.^{167c}

3. Exception: Warren Act Contract Rights

Contracts executed under the Warren Act are an exception to the rule that the landowner/user has a property right to the water applied to his or her land. Warren Act contractors are considered to be nonproject users whose rights depend on the four corners of their contracts with the federal government.¹⁶⁸

4. Operation and Management of the Project and Facilities

The Bureau holds title to the reservoir and facilities of the reclamation project. The Bureau has exclusive control over the allocation and preferences accorded project water.¹⁶⁹ Thus, the Bureau may establish the terms

^{167b} Pub. L. No. 86-488, 74 Stat. 156 (emphasis added).

^{167c} *Firebaugh Canal Co. v. U.S.* (9th Cir. 2000) 203 F.3d 568, 574.

¹⁶⁸ See *Nebraska v. Wyoming* (1945) 325 U.S. 589, 595 [65 S.Ct. 1332]; *United States v. Imperial Irrigation Dist.* (9th Cir. 1977) 559 F.2d 509, 531-534; Trelease, *Reclamation Water Rights* (1960) 32 Rocky Mtn.Min.L.Rev. 464, 478; see also *Nebraska v. Wyoming* (1995) 515 U.S. 1 [115 S.Ct. 1933]; *El Paso County Water Improvement Dist. No. 1 v. City of El Paso* (1955) 133 F.Supp. 894.

¹⁶⁹ *Central Arizona Irrigation and Drainage District v. Lujan* (Az. 1991) 764 F.Supp. 582, 591; *Israel v. Morton* (9th Cir. 1977) 549 F.2d 128, 132-133.

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and conditions under which landowners may obtain water appropriated by the Bureau. Landowners are not third-party beneficiaries of federal reclamation contracts in which the federal government is a party.^{169a}

5. Recapture

Return flows often result from project water used for irrigation. The right to recapture this return flow generally lies with the federal government.¹⁷⁰ The Bureau may expressly reserve the right to return flows in its contracts with its users.¹⁷¹

6. Right to Water Service at Contractual Rate

If the contractor applies the water received from the Bureau to beneficial use, the contractor obtains a vested right to water.¹⁷² Although the contractor may have a vested property right to perpetual water service by the Bureau, this does not mean that the Bureau is precluded from modifying or conditioning the extension or renewal on the payment of outstanding operation and maintenance costs.¹⁷³

7. Shortages

The Bureau has authority to exercise discretion in the management of project water.¹⁷⁴ The rights of the Exchange Contractors must be satisfied first. Although it is unclear whether the Exchange Contractors may assert a priority against distant or unrelated water supply sources,¹⁷⁵ there is a prohibition against the Bureau's satisfaction of Exchange Contract entitle-

^{169a} Smith v. Central Arizona Water Conservation District (9th Cir. 2005) 418 F.3d 1028, 1034; Orff v. United States (9th Cir. 2004) 358 F.3d 1137, 1142–1143, *affirmed on other grounds*, Orff v. United States (2005) —U.S.—, 125 S.Ct. 2606, 2610.

¹⁷⁰ Ide v. United States (1924) 263 U.S. 497, 499–500 [44 S.Ct. 182]; Flint v. United States (9th Cir. 1990) 906 F.2d 471; Washington Department of Ecology v. Bureau of Reclamation (Wash. 1992) 827 P.2d 275.

¹⁷¹ Washington Department of Ecology v. Bureau of Reclamation (Wash. 1992) 827 P.2d 275, 277.

¹⁷² Ickes v. Fox (1937) 300 U.S. 82, 95–96 [57 S.Ct. 412], *rehearing denied*, 300 U.S. 686; Madera Irr. Dist. v. Hancock (9th Cir. 1993) 985 F.2d 1397.

¹⁷³ Madera Irr. Dist. v. Hancock (9th Cir. 1993) 985 F.2d 1397.

¹⁷⁴ Westlands Water Dist. v. U.S. Department of Interior (Cal. 1992) 805 F.Supp. 1503, 1507, injunction denied.

¹⁷⁵ Westlands Water Dist. v. San Benito Water Dist. (9th Cir. 1993) 10 F.3d 667, 674–676, injunction denied.

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ments from other sources.¹⁷⁶ However, the Exchange Contractors, by virtue of their preexisting rights and the terms of the contracts, may not be subjected to a permanent reduction in their water supply.¹⁷⁷

8. Standing

Article III, Section 2 of the United States Constitution authorizes the federal courts to adjudicate cases and controversies. The Supreme Court has referred to this requirement as the “irreducible constitutional minimum of standing.”^{177a} Satisfaction of the following three requirements establishes a plaintiff’s standing:

- Plaintiff must have suffered an injury in fact;
- There must be a causal connection between the injury and conduct; and
- The injury must be capable of redress by a successful judicial challenge.^{177b}

In *Central Delta Water Agency v. United States*,^{177c} the Ninth Circuit Court of Appeal applied these factors against a claim by farmers that the disposal of CVP water by the Bureau of Reclamation would increase the salinity of the rivers which they used to irrigate their crops.^{177d} The primary issue facing the court was whether the fact that the injury had not yet occurred was nevertheless injury in fact in satisfaction of the standing requirement. Applying prior precedent, the court concluded that plaintiffs faced the “threat of injury” to be sufficient.^{177e}

9. Sovereign Immunity

Even if a plaintiff can satisfy constitutional standing requirements, the federal government may nevertheless be immune from suit. The Reclama-

¹⁷⁶ *Westlands Water Dist. v. San Benito Water Dist.* (9th Cir. 1993) 10 F.3d 667, 674–676, injunction denied; *Westlands Water Dist. v. Patterson* (E.D. Cal 1994) 864 F.Supp. 1536.

¹⁷⁷ *Westlands Water Dist. v. San Benito Water Dist.* (9th Cir. 1993) 10 F.3d 667, 674–676, injunction denied.

^{177a} *Lujan v. Defenders of Wildlife* (1992) 504 U.S. 555, 560 [112 S.Ct. 2130].

^{177b} *Lujan v. Defenders of Wildlife* (1992) 504 U.S. 555, 560 [112 S.Ct. 2130].

^{177c} *Central Delta Water Agency v. United States* (9th Cir. 2002) 306 F.3d 938.

^{177d} *Central Delta Water Agency v. United States* (9th Cir. 2002) 306 F.3d 938.

^{177e} *Central Delta Water Agency v. United States* (9th Cir. 2002) 306 F.3d 938.

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tion Reform Act, 43 U.S.C. Section 390uu, included a partial waiver of sovereign immunity.^{177f} Section 390uu grants consent “to join the United States as a necessary party defendant in any suit to adjudicate” certain rights under a federal reclamation contract.^{177g}

This language is best interpreted as granting consent to join the United States in an action between other parties—for example, two water districts, or a water district and its members—when the action requires construction of a reclamation contract and joinder of the United States is necessary. It does not permit a plaintiff to sue the United States alone.^{177h}

For a further discussion of sovereign immunity, see Part E.

§ 15.30 TRANSFERS

This section provides a brief outline of federal guidelines and policies concerning the transfer of water controlled by the Department of the Interior and the Bureau of Reclamation. (The subject of water transfers is addressed extensively in Ch. 10.)

In 1988, the Department of the Interior adopted a statement of general principles to govern the voluntary reallocation of water.¹⁷⁸ These principles should be consulted when evaluating a proposed transfer of project water:

1. Primacy in water allocation decisions rests principally with the states.
2. There must be no diminution in service to other contractors.
3. Any adverse third-party impacts must be subject to suitable mitigation measures.
4. The Department of the Interior will generally not suggest transfers but will only act as a facilitator of transfers.
5. The fact that the water has been developed by the federal government through reclamation projects shall not be used as a

^{177f} Orff v. United States (2005) —U.S.—, 125 S.Ct. 2606, 2610.

^{177g} Orff v. United States (2005) —U.S.—, 125 S.Ct. 2606, 2610.

^{177h} Orff v. United States (2005) —U.S.—, 125 S.Ct. 2606, 2610.

¹⁷⁸ “Principles Governing Voluntary Water Transactions that Involve or Affect Facilities Owned or Operated by the Department of the Interior,” (December 16, 1988); see Bureau of Reclamation, *Voluntary Water Transactions: Criteria and Guidance* (1989) guidelines were established in 1989 to assist in implementation of the principles.

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consideration in evaluating the transfer by the Department of the Interior.

6. The Department of the Interior will refrain from burdening the transaction by imposing additional costs, fees, or charges, except those actually incurred as a result of the transaction.
7. The Department of the Interior will consider appropriate environmental mitigation measures to mitigate adverse impacts.

§ 15.31 CENTRAL VALLEY PROJECT IMPROVEMENT ACT

The Central Valley Project Improvement Act (CVPIA) is subject to implementation through federal regulations and guidelines developed by the Department of the Interior and the Bureau of Reclamation. The prudent practitioner faced with issues or questions arising under reclamation law, or in particular the CVPIA, would be well advised to review the Act and these guidelines. Some of the more important provisions follow.

1. Background

In response to perceived historic abuses, Congress adopted the CVPIA in 1992. The avowed purpose of the legislation was to facilitate voluntary water transfers and the development of extensive fish, wildlife, and habitat restoration programs.¹⁷⁹ In addition, the Secretary of the Interior is required to develop water conservation standards for project contractors and new revenues based upon increased repayment rates as well as mitigation and restoration payments.¹⁸⁰

2. Limitation on Water Supply Contracts

The CVPIA prohibits the execution of new short-term, temporary, or long-term contracts for water supply from the Central Valley Project (CVP) for any purpose other than fish or wildlife until specified fish, wildlife, and habitat restoration measures, including instream flows, have been satisfied.¹⁸¹ The prohibition does not extend to contracts to deliver surplus flood

¹⁷⁹ CVPIA § 3405(d).

¹⁸⁰ CVPIA § 3405(e), (f).

¹⁸¹ CVPIA § 3404; *see Westlands Water Dist. v. San Benito Water Dist.* (E.D. Cal. 1994) 850 F.Supp. 1388.

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flows or to contracts under two years for delivery of Class II water held in the Friant Unit.¹⁸²

3. Fish and Wildlife Restoration Program

The Secretary of the Interior is obliged to operate the CVP to meet all obligations under state and federal law, including the Endangered Species Act and the applicable decisions of the SWRCB.¹⁸³ Second, the secretary must develop a fish, wildlife, and habitat restoration program.¹⁸⁴ The program must accord first priority to restoration measures of the natural channel and riparian habitat values, modifications to CVP operations, and implementation of supporting measures. In addition, the CVP operations must be modified to protect anadromous fish. Finally, the secretary must dedicate and manage approximately 800,000 acre-feet of water for the primary purpose of implementing the fish, wildlife, and habitat restoration program.¹⁸⁵ The mandate is not subject to environmental review.¹⁸⁶

4. Contract Renewals

On request by the contractor, the Secretary must renew any existing long-term repayment or water service contract for the delivery of water from the CVP. The period of contract renewal is 25 years and for successive renewals of a similar period. A condition precedent to contract renewals is the preparation of an environmental impact statement.¹⁸⁷ In addition, the contracts must contain specific provisions related to water conservation, pricing, and quality.¹⁸⁸

5. Water Transfers

One of the primary purposes of the CVPIA was to promote voluntary water transfers. Under the new legislation, all individuals or districts who receive CVP water may transfer their water to any California water

¹⁸² CVPIA § 3404(b).

¹⁸³ *Id.*

¹⁸⁴ CVPIA § 3403(a).

¹⁸⁵ CVPIA § 3406(b)(2).

¹⁸⁶ *Westlands Water Dist. v. Natural Resources Defense Council* (9th Cir. 1994) 43 F.3d 457; *Westlands Water Dist. v. San Benito Water Dist.* (E.D. Cal. 1994) 850 F.Supp. 1388, overruled.

¹⁸⁷ CVPIA § 3404(c).

¹⁸⁸ *See* CVPIA § 3406(b), (c), (d).

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users.¹⁸⁹ However, the water subject to transfer is limited to water that would be consumptively used or irretrievably lost to beneficial use during the year of the proposed transfer.¹⁹⁰

Except for statutorily mandated conditions, the terms of the transfer are determined by mutual agreement of the parties. Where the transfer is executed by willing buyer and willing seller, the secretary must review and approve the proposed water transfer.¹⁹¹ The secretary may not approve the transfer unless he or she can determine that the transfer will not violate the CVPIA, federal law, or the secretary's ability to comply with existing contractual or fish and wildlife obligations.¹⁹² A decrease in the quantity or quality of water available for fish, wildlife,¹⁹³ ground-water supplies,¹⁹⁴ or an unreasonable impact on the water supply operations of the transferor et al.¹⁹⁵ must also be avoided.

If the transfer involves more than 20 percent of CVPIA water subject to a long-term contract with any contracting district or agency, the district or agency must review and approve the transfer as well.¹⁹⁶ In addition, the cumulative amount of the water transferred in any year cannot exceed the average annual quantity of water under contract actually delivered to the contracting district or agency during the preceding three years of water delivery prior to the enactment of the CVPIA.¹⁹⁷ Transfers outside the historic CVP service area are subject to a right of first refusal by entities within the CVP service area.¹⁹⁸ The right must be exercised within 90 days after receiving notice of the proposed transfer.¹⁹⁹ Finally, the transfer must also be consistent with state law, including the California Environmental Quality Act.²⁰⁰

¹⁸⁹ CVPIA § 3405(a).

¹⁹⁰ CVPIA § 3405(a)(1)(I).

¹⁹¹ CVPIA § 3405(a)(1).

¹⁹² CVPIA § 3405(a)(1)(H).

¹⁹³ CVPIA § 3405(a)(1)(L).

¹⁹⁴ CVPIA § 3405(a)(1)(J).

¹⁹⁵ CVPIA § 3405(a)(1)(K).

¹⁹⁶ CVPIA § 3405(a)(1).

¹⁹⁷ CVPIA § 3405(a)(1)(A).

¹⁹⁸ CVPIA § 3405(e).

¹⁹⁹ CVPIA § 3405(a)(1)(F).

²⁰⁰ CVPIA § 3405(a)(1)(D).

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Part D consists of a brief overview of three of the more common federal bases which serve to preempt state water allocation laws: the Federal Power, Clean Water, and Endangered Species Acts.

§ 15.32 THE FEDERAL POWER ACT**1. Background**

The Federal Power Act (FPA), formerly the Federal Water Power Act, was first enacted in 1920 to develop water power as a source of electric energy. In 1935, Congress authorized the Federal Energy Commission (FERC) to “regulate the transmission and sale at wholesale of electric energy in interstate commerce . . .”²⁰¹ To develop and utilize the nation’s water resources, Congress exercised its constitutional authority under the Commerce Clause and navigable waters to regulate and develop hydroelectric power.²⁰² In short, the FPA authorizes FERC to issue licenses to construct and operate a water power project in the navigable waters of the United States or upon federal lands.²⁰³

2. Preemption of State Laws

Section 27 of the FPA contains a provision similar to Section 8 of the 1902 Reclamation Act and suggests that the Act should not be construed as abridging state laws relating to the appropriation and use of water.²⁰⁴ Following the Supreme Court decision in *California v. United States*, which held that Section 8 of the Reclamation Act required the federal government’s operation of the Central Valley Project to comply with state permit conditions, a question arose concerning the extent of the state’s authority on matters impacting federal licensees.²⁰⁵

In *California v. F.E.R.C.*, the Supreme Court concluded that power and

²⁰¹ *New England Power Co. v. New Hampshire* (1982) 455 U.S. 331, 340 [102 S.Ct. 1096].

²⁰² *New England Power Co. v. New Hampshire* (1982) 455 U.S. 331, 340 [102 S.Ct. 1096].

²⁰³ *California Save Our Stream Council, Inc. v. Yeutter* (9th Cir. 1989) 887 F.2d 908, 910.

²⁰⁴ See 16 U.S.C § 821.

²⁰⁵ *California v. United States* (1978) 438 U.S. 645, 670, 671, 677–678 [98 S.Ct. 2985].

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reclamation projects are different.²⁰⁶ Deferring to substantial precedent, the Court concluded that the FPA envisioned a “considerably broader and more active federal oversight role in hydropower development” than the Reclamation Act.²⁰⁷ Accordingly, the state laws restricting or conditioning the operation of a federal power facility are preempted.²⁰⁸

Although state laws restricting the operation or conditioning of a federal power facility are preempted, the SWRCB’s authority to approve the appropriation of water for consumptive use is not preempted by federal law.^{208a} Accordingly, there is a critical distinction between the SWRCB’s authority to regulate the use of water exclusively for the purpose of power generation that has been held to be preempted and the SWRCB’s authority to regulate the use of water for domestic, municipal, and irrigation purposes.^{208b}

§ 15.33 THE CLEAN WATER ACT**1. Background**

In 1948, Congress enacted the Federal Water Pollution Control Act.²⁰⁹ The legislation encouraged states to adopt uniform water pollution laws.²¹⁰ Until 1972 the primary reliance for water pollution control remained with the states. The dominant portion of water quality regulation focused on the quality of water being received rather than the nature of effluent discharges.²¹¹ Dischargers were required to reduce the nature of the pollutant only where the discharge would impair the quality of water received by others.²¹²

This approach proved to be ineffective and difficult to enforce against

²⁰⁶ *California v. F.E.R.C.* (1990) 495 U.S. 490 [110 S.Ct. 2024, 2034].

²⁰⁷ *California v. F.E.R.C.* (1990) 495 U.S. 490 [110 S.Ct. 2024, 2034].

²⁰⁸ *See Sayles Hydro Association v. Maughan* (9th Cir. 1993) 985 F.2d 451.

^{208a} *In the Matter of Applications 29919, 29929, 22921 and 29922 (El Dorado County)* (2001) WR 2001-22.

^{208b} *In the Matter of Applications 29919, 29929, 22921 and 29922 (El Dorado County)* (2001) WR 2001-22.

²⁰⁹ 33 U.S.C. § 46.

²¹⁰ *Middlesex County Sewage Authority v. National Sea Clammers Ass’n* (1981) 453 U.S. 1, 11 [101 S.Ct. 2615].

²¹¹ *See EPA v. California ex rel. State Water Resources Control Board* (1976) 426 U.S. 200, 202 [96 S.Ct. 2022].

²¹² *Shanty Town Associates Limited Partnership v. Environmental Protection Agency* (4th Cir. 1988) 843 F.2d 782.

individual polluters because it required tracing the degradation to a specific discharger.²¹³ However, in 1972 amendments to the Clean Water Act (CWA) eliminated this problem by placing restrictions of effluent discharges from point sources and thus facilitating enforcement.²¹⁴

Under the 1972 amendments, EPA was required to formulate effluent limitations which measure the permissible discharges and by implementing a permit system whereby discharge of pollutants is prohibited absent a permit.²¹⁵ The CWA was amended again in 1977 and 1987 for the purpose of establishing a comprehensive water quality program designed to restore and maintain the chemical, physical, and biological integrity of the waters of the United States.²¹⁶

2. Preemption Considerations

Prior to 1972, responsibility for the abatement of water pollution was essentially left to the states. With the amendments to the CWA in 1972, 1977, and 1987, Congress sought to preserve the rights of the states to address pollution through regulatory measures. However, the federal government was obliged to adopt mandated minimum standards for the protection of navigable waters and wetlands.

Under the present form of the CWA, the state may impose water quality standards more stringent than those required by the CWA.²¹⁷ The state's standards may supplement the federal standards so that sources of pollution may be further regulated.²¹⁸

Nevertheless, to the extent the federal government sets standards pursuant to the CWA, its power is plenary. The federal government's

²¹³ *Shanty Town Associates Limited Partnership v. Environmental Protection Agency* (4th Cir. 1988) 843 F.2d 782, 784.

²¹⁴ *EPA v. California ex rel. State Water Resources Control Board* (1976) 426 U.S. 200, 204 [96 S.Ct. 2022]; *United States v. California (SWRCB)* (1986) 182 Cal.App.3d 82 [227 Cal.Rptr. 161, 172].

²¹⁵ *EPA v. California ex rel. State Water Resources Control Board* (1976) 426 U.S. 200, 204 [96 S.Ct. 2022]; *United States v. California (SWRCB)* (1986) 182 Cal.App.3d 82 [227 Cal.Rptr. 161, 172].

²¹⁶ 33 U.S.C. § 1251.

²¹⁷ 33 U.S.C. § 1313(d).

²¹⁸ *EPA v. California ex rel. State Water Resources Control Board* (1976) 426 U.S. 200, 205 [96 S.Ct. 2022]; *United States v. California (SWRCB)* (1986) 182 Cal.App.3d 82 [227 Cal.Rptr. 161, 173].

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authority to regulate water quality is based upon the Commerce Clause.²¹⁹ Consequently, the authority of the federal government under the CWA extends to any water source which in any way may affect interstate commerce.²²⁰

Percolating ground water that does not migrate to surface water may be beyond the regulatory authority of the CWA.²²¹ Conversely, ground water that does migrate and potentially contaminate surface water supplies may come within the CWA regulatory system.²²²

3. Conflict with State Water Allocation Laws

Although Section 101(g) of the CWA includes a declaration of federal policy that the state authority to allocate water quantities shall not be impaired by the CWA, the actual implementation of the CWA may serve to conflict and preempt state water allocation laws.²²³ For example, Section 404 of the CWA requires a permit from the Corps of Engineers for the discharge of dredged or fill material into the waters of the United States, including wetlands.²²⁴ The Corps' denial of a permit or the conditions placed upon a permit may conflict with conditions imposed by the SWRCB. In such cases, the effectiveness of the state water rights decisions can be thwarted.²²⁵

§ 15.34 THE FEDERAL ENDANGERED SPECIES ACT**1. Background**

The major purposes of the Endangered Species Act of 1973 (ESA) are to

²¹⁹ *United States v. Holland* (Fla. 1974) 373 F.Supp. 665, 676; *Leslie Salt Co. v. Froehlke* (Cal. 1974) 403 F.Supp. 1292.

²²⁰ *United States v. Earth Sciences, Inc.* (10th Cir. 1979) 599 F.2d 368, 374-375; 40 C.F.R. § 122.2.

²²¹ *See Exxon Corporation v. Train* (5th Cir. 1977) 554 F.2d 1310, 1312, n.1.

²²² *Compare Kelley, People of State of Michigan v. United States* (Mich. 1985) 618 F.Supp. 1103, 1105-1107 and *McClellan Ecological Seepage Situation v. Cheney* (Cal. 1989) 763 F.Supp. 431, 436, 437.

²²³ *See Tarlock, The Endangered Species Act and Western Water Rights* (1985) 20 *Land and Water L.Rev.* 1, 2; *Jefferson County PUD v. Ecology Dept. of Wash.* (1994) 511 U.S. 700 [114 S.Ct. 1900].

²²⁴ *United States v. Riverside Bayview Homes, Inc.* (1985) 474 U.S. 121 [106 S.Ct. 455]; 33 U.S.C. § 1311(a).

²²⁵ *See United States v. Glenn-Colusa Irrigation District* (Cal. 1992) 788 F.Supp. 1126, 1134 involving an application of the Endangered Species Act.

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designate species and their critical habitat and the actual protection of threatened and endangered species.²²⁶ Subject to limited exceptions,²²⁷ the ESA generally prohibits both public and private actions that would result in a taking of an endangered species.²²⁸ Congress has decided that under the ESA, the balance of hardships always tips sharply in favor of the endangered or threatened species.^{228a}

To ensure that endangered or threatened species are not jeopardized by federal projects either approved or carried out by the federal government, there must be a prior consultation with the United States Fish and Wildlife Service.²²⁹ Therefore, for any federal action that may affect a threatened or endangered species or its habitat, the federal agency contemplating the action must consult with the appropriate consulting agency, usually United States Fish and Wildlife, for the purpose of ensuring that the federal action is *not* likely to: (1) jeopardize the continued existence of an endangered or threatened species; and (2) that the federal action will not result in the destruction or adverse modification of the designated critical habitat of the listed species.^{229a}

A biological assessment may be required to determine whether the species identified may be affected by the proposed action.²³⁰ Usually the agency transmits a written request to the consulting agency.^{230a} If the biological assessment concludes that endangered or threatened species are likely to be affected by the proposed action, the agency is required to engage in formal consultation.²³¹ After formal consultation with the agency, the process concludes with the consulting agency issuing a

²²⁶ 16 U.S.C. §§ 1531–1543.

²²⁷ 16 U.S.C. §§ 1539(a)(1)(B), 1539(a)(2)(A).

²²⁸ 16 U.S.C. § 1538; 50 C.F.R. § 17.3; *Natural Resources Defense Council v. Rodgers* (E.D. Cal. 2005) 381 F.Supp.2d 1212, 1223.

^{228a} *Pacific Coast Federation of Fishermen's Association v. U.S. Bureau of Reclamation* (9th Cir. 2005) 426 F.3d 1082, *see Wash. Toxics Coalition v. EPA* (9th Cir. 2005) 413 F.3d. 1024, 1035.

²²⁹ 16 U.S.C. § 1536(a)(2); 16 U.S.C. § 1537(a)(2); *see Natural Resources Defense Council v. Rodgers* (E.D. Cal. 2005) 381 F.Supp.2d 1212, 1223.

^{229a} 16 U.S.C. § 1536(a)(2); 16 U.S.C. § 1537(a)(2); *see Natural Resources Defense Council v. Rodgers* (E.D. Cal. 2005) 381 F.Supp.2d 1212, 1223.

²³⁰ *Thomas v. Peterson* (9th Cir. 1985) 753 F.2d 754, 763–764.

^{230a} 50 C.F.R. § 402.14(c).

²³¹ *Thomas v. Peterson* (9th Cir. 1985) 753 F.2d 754, 763–764.

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biological opinion.^{231a}

A biological opinion issued by the consulting agency must determine whether the jeopardy and critical habitat elements of Section 7 have been met by considering the current status of the species, the environmental baseline, the effects of the proposed action, and the cumulative effects of the proposed action.^{231b}

An agency must consult with the secretary when an action will “jeopardize the continued existence” of a species. However, if critical habitat for the species has been designated, ESA imposes an additional consultation requirement when an action will result in the “destruction or adverse modification” of the critical habitat.^{231c} In those cases where the biological opinion determines that the agency’s action is likely to jeopardize a protected species, the agency must modify its proposal according to the service’s recommendations or face the prospect of violating the ESA.^{231d}

In addition to the consulting agency’s evaluation of “direct effects,” the consulting agency is also required to analyze indirect effects caused or induced by the action that are reasonably certain to occur to determine whether there will be jeopardy to the continued existence of the species.^{231e} “Jeopardize” means an action that reasonably would be expected to reduce appreciably the likelihood of both the survival and recovery of a listed species in the wild by reducing the reproduction, number, or distribution of that species.^{231f}

Section 7(a)(2) of the ESA^{231f.1} requires that the federal agency action is

^{231a} *Natural Resources Defense Council v. Rodgers* (E.D. Cal. 2005) 381 F.Supp.2d 1212, 1223.

^{231b} 50 C.F.R. § 402.14(g)(2)–(3); *Natural Resources Defense Council v. Rodgers* (E.D. Cal. 2005) 381 F.Supp.2d 1212, 1224; *see Gifford Pinchot Task Force v. United States Fish & Wildlife Serv.* (9th Cir. 2004) 378 F.3d, 1059, 1063–1065.

^{231c} 16 U.S.C. § 1536(a).

^{231d} 16 U.S.C. § 1536(b)(3)(a); *see Tribal Village of Akutan v. Hodel* (9th Cir. 1988) 869 F.2d 1185, 1193; *Natural Resources Defense Council v. Rodgers* (E.D. Cal. 2005) 381 F.Supp.2d 1212, 1224.

^{231e} 50 C.F.R. § 402.2; *Natural Resources Defense Council v. Rodgers* (E.D. Cal. 2005) 381 F.Supp.2d 1212, 1227.

^{231f} Interagency cooperation — Endangered Species Act of 1973, *see* 50 C.F.R. § 402.02; *Natural Resources Defense Council v. Rodgers* (E.D. Cal. 2005) 381 F.Supp.2d 1212, 1227.

^{231f.1} 16 U.S.C. § 1546(a)(2).

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not likely to jeopardize the continued existence of any threatened or endangered species. If the biological opinion concludes that the proposed action is likely to jeopardize a protected species, the agency must modify its proposal.^{231g} In summary, the ESA requires that the biological opinion detail how the agency action affects the species or its critical habitat.^{231h}

The consultation obligation may be satisfied even when an agency relies on an “admittedly weak” biological opinion.²³¹ⁱ Although a weak opinion may satisfy its obligation, the agency cannot rely on inconsistent legal positions to defend the opinion^{231j} or avoid the likelihood of a jeopardy determination by disregarding the actual life cycle of the species in crafting the mitigation measure that is designed to protect the species.^{231k} Likewise, the agency does not discharge its responsibility when it provides only partial protection for a species for several generations without any analysis of how doing so will affect the species.^{231l}

A fair summary of how the ESA interacts with a federal water project and the issuance of water supply contracts by the Bureau of Reclamation is found in *Natural Resources Defense Council v. Rodgers*.^{231m} In its opinion, the court reviewed the history of the Bureau’s operations and its impact on the surrounding fisheries²³¹ⁿ and then turned to the Bureau’s water supply deliveries under long-term water contracts for the diversion, impoundment, and delivery of up to 2.14 million acre-feet to its contractors.^{231o}

^{231g} *Natural Resources Defense Council v. Rodgers* (E.D. Cal. 2005) 381 F.Supp.2d 1212, 1234.

^{231h} *Natural Resources Defense Council v. Rodgers* (E.D. Cal. 2005) 381 F.Supp.2d 1212, 1236.

²³¹ⁱ *Defenders of Wildlife v. United States Environmental Protection Agency* (9th Cir. 2005) 420 F.3d 946, 959.

^{231j} *Defenders of Wildlife v. United States Environmental Protection Agency* (9th Cir. 2005) 420 F.3d 946, 959.

^{231k} *Pacific Coast Federation of Fishermen’s Associations v. United States Bureau of Reclamation* (9th Cir. 2005) 426 F.3d 1082, 1094.

^{231l} *Pacific Coast Federation of Fishermen’s Associations v. United States Bureau of Reclamation* (9th Cir. 2005) 426 F.3d 1082, 1094.

^{231m} *Natural Resources Defense Council v. Rodgers* (E.D. Cal. 2005) 381 F.Supp.2d 1212.

²³¹ⁿ *Natural Resources Defense Council v. Rodgers* (E.D. Cal. 2005) 381 F.Supp.2d 1212, 1216.

^{231o} *Natural Resources Defense Council v. Rodgers* (E.D. Cal. 2005) 381 F.Supp.2d 1212, 1216–1217.

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With reference to the inter-agency consultation responsibility under the ESA, the court concluded that the consulting agency must consider the “entire agency action.”^{231p} This included the effects of the federal action along with the impact of “interrelated and interdependent” actions.^{231q} The test for interrelated or interdependent effects is “but for” causation, i.e., but for the proposed action, would the other action occur.^{231r}

Accordingly, because the delivery of water under contracts cannot be accomplished without the use of canals, operations and maintenance activities are “interrelated action” or actions which are part of a larger action and depend on the larger action, not their justification.^{231s} The consulting agency must also consider the full contract delivery amounts rather than limit its analysis based on its judgment that the actual delivery of the identified amounts might be highly unrealistic, if not impossible.^{231t} If a jeopardy determination is forthcoming, the federal government may not approve or carry out the project.

In the new millennium, the ESA has an enormous reach and influence in water allocation and the cost of the distribution and use of water.^{231u} It has been the subject of intense rhetoric and debate.^{231v}

^{231p} *Natural Resources Defense Council v. Rodgers* (E.D. Cal. 2005) 381 F.Supp.2d 1212, 1216–1217; *see Conner v. Burford* (9th Cir. 1988) 848 F.2d 1441, 1453.

^{231q} 50 C.F.R. § 402.02(d).

^{231r} *Natural Resources Defense Council v. Rodgers* (E.D. Cal. 2005) 381 F.Supp.2d 1212, 1234–1235; *see Sierra Club v. Marsh* (9th Cir. 1987) 816 F.2d 1376.

^{231s} *Natural Resources Defense Council v. Rodgers* (E.D. Cal. 2005) 381 F.Supp.2d 1212, 1239; 50 C.F.R. § 402.02.

^{231t} *Natural Resources Defense Council v. Rodgers* (E.D. Cal. 2005) 381 F.Supp.2d 1212, 1239.

^{231u} *See, e.g., Sax, Environmental Law at the Turn of the Century: A Reportorial Fragment of Contemporary History* (2000) 88 Cal.L.Rev. 2375; Getches, *The Metamorphosis of Western Water Policy: Have Federal Laws and Local Decisions Eclipsed the State’s Role* (2001) 20 Stan.Envtl.L.J. 3, 51–54.

^{231v} *See, e.g., Sax, Environmental Law at the Turn of the Century: A Reportorial Fragment of Contemporary History* (2000) 88 Cal.L.Rev. 2375; Getches, *The Metamorphosis of Western Water Policy: Have Federal Laws and Local Decisions Eclipsed the State’s Role* (2001) 20 Stan.Envtl.L.J. 3, 51–54; Doremus, *Water, Population Growth and Endangered Species in the West* (2001) 72 Colo.L.Rev. 361; Eaton, *Note: Of Salmon, Salamander, and Lizards: Can State and Local Conservation Plans “Preempt” the Endangered Species Act?* (2001) 87 Cornell L.Rev. 185; B. Kauffman, *Case Note: What Remains of the Endangered Species Act and Western Water Rights After Tulare Lake Basin Water Storage District v. United States?* (2003) 74 Colo.L.Rev. 837; *see further* C. Parobek, *Note: Of Farmers’ Takes and Fishes’ Takings: Fifth Amendment Compensation Claims*

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Given that virtually every major water supply project, modification of facility, or transfer of water requires a federal permit of one form or another, the ESA has emerged as the key consideration in water resource planning and allocation.^{231w} Even assuming that no federal permit is required, the Section 9 prohibition against “taking” an endangered species applies to the non-federal action.

2. Preemption of State Water Allocation Laws

Water diversions that modify habitat, even without direct physical harm to the endangered species, may constitute a taking under the ESA.²³² In some cases, the implementation of the ESA may affect or limit the quantities of water that may have been historically enjoyed by a water right holder.²³³ A water right holder that seeks to benefit from the application of the ESA must satisfy the zone of interest standing requirements before a suit can be maintained to enforce action under the ESA.^{233a}

3. Takings

The potential clash of the ESA and private water rights continues to be the subject of considerable legal commentary of the past several years.^{233b} As a practical matter, whenever the government acts pursuant to its

When the Endangered Species Act and Western Water Rights Collide (2003) 27 Harv. Envtl.L.Rev. 177 “Although often treated as real property, . . . a water right is really an incorporeal hereditament;” J. Barton, *Note: Tulare Lake Basin Water Storage District v. United States: Why it Was Correctly Decided and What This Means for Water Rights* (2002) 25 Cal. Environ. Envtl. L. & Pol. J. 109.

^{231w} See Sax, *Environmental Law at the Turn of the Century: A Reportorial Fragment of Contemporary History* (2000) 88 Cal.L.Rev. 2375; Getches, *The Metamorphosis of Western Water Policy: Have Federal Laws and Local Decisions Eclipsed the State’s Role* (2001) 20 Stan.Envtl.L.J. 3, 51–54.

²³² See *Pyramid Lake Paiute Tribe v. United States Department of the Navy* (9th Cir. 1990) 898 F.2d 1410, 1419.

²³³ See *United States v. Glenn-Colusa Irrigation District* (Cal. 1992) 788 F.Supp. 1126, 1133; see also *Department of Fish & Game v. Anderson Cottonwood Irrigation Dist.* (1992) 8 Cal.App.4th 1554 [11 Cal.Rptr.2d 222].

^{233a} *Bennett v. Plenert* (9th Cir. 1995) 63 F.3d 915.

^{233b} See generally Sax, *Symposium on Law in the Twentieth Century: Environmental Law at the Turn of the Century: A Reportorial Fragment of Contemporary History* (2000) 88 Calif. L. Rev. 2375; Doremus, *Water, Population Growth and Endangered Species in the West* (2001) 72 U.Colo.L.Rev. 361; Local, *Braving the Waters of the Supreme Court Takings Jurisprudence: Will the Fifth Amendment Protect Western Water Rights From Federal Environmental Regulation?* (2000) 4 U. Denv. Water L. Rev. 76; see also Sax,

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regulatory power to restrict the use of private property rights, takings considerations are raised. This is certainly true with regard to water rights and the ESA.

The degree of protection accorded private water rights against *regulatory takings* under the United States Supreme Court decision in *Lucas v. South Carolina Coastal Council* remains unresolved.^{233c} However, one federal decision has found that there is some basis for sustaining a takings claim against federal action under the ESA without regard to the regulatory character of the ESA.^{233d}

In *Tulare Lake Basin Water Storage District v. United States*, the federal court of claims was presented with a situation in which the National Marine Fisheries Service and the Fish and Wildlife Service had issued a biological opinion restricting the operation of the Central Valley Project and the State Water Project so as to avoid taking winter-run chinook salmon and delta smelt. Bureau of Reclamation and Department of Water Resources compliance with the opinion and the subsequent federal directives under the ESA led to pumping restrictions and the absence of available water under existing contracts. Three State Water Project contractors and four of their customers brought suit against the federal government claiming NMFS and FWS had violated the takings clause of the United States Constitution.

The court engaged in a three-prong analysis:^{233e}

- (1) Was the taking regulatory or physical?
- (2) Did the action go further than state law in restricting the exercise of the private water rights?
- (3) Was there merely a frustration of purpose under the water supply contracts through the application of the ESA such that there was no compensable taking?

In an interesting departure from some of the commentary suggesting how a court might analyze the takings problems under the ESA, the court in *Tulare* concluded that the requirement that a water user turn off their

Rights That "Inhere in the Title Itself": The Impact of the Lucas Case on Western Waterlaw (1993) 26 Loy. L.A. Law Rev. 943.

^{233c} *Lucas v. South Carolina Coastal Council* (1992) 505 U.S. 1003 [112 S.Ct. 2886].

^{233d} *Tulare Lake Basin Water Storage District v. United States* (2001) 49 Fed.Ct. 313.

^{233e} *Tulare Lake Basin Water Storage District v. United States* (2001) 49 Fed.Ct. 313, 316-317.

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pumps and redistribute water to another use was in fact a “physical taking.”^{233f} Because the impairment was so complete, it effectuated a “complete extinction of all value.”^{233g} Accordingly, the court opined that the “exclusive possession of plaintiff’s water-use rights for preservation of the fish” constituted a physical taking.^{233h}

As for whether the ESA restrictions would limit the plaintiffs’ rights more than state law would anyway, the court found the absence of a SWRCB or state court decision applying Article X, Section 2 of the public trust doctrine to be material.²³³ⁱ Unless there had been an affirmative restriction resulting from a state proceeding engaging in the complex balancing under state law, the federal court was reluctant to consider what such restrictions *might* be applicable.^{233j}

Finally, the federal government argued that it may not be held liable for takings when its lawful actions frustrate contract performance.^{233k} On the facts of the *Tulare* case, the federal government argued that the imposition of the pumping restrictions under the ESA was simply a lawful exercise of federal authority.^{233l} However, the Claims Court did not agree. When the contract and the property are inextricably intertwined, the contract is not a mere expectancy that is beyond protection under the takings clause.^{233m}

The *Tulare* decision was not appealed. However, the convergence of state water rights law and ESA regulation will likely continue to be a subject of further takings litigation and refinement by the courts.²³³ⁿ As

^{233f} *Tulare Lake Basin Water Storage District v. United States* (2001) 49 Fed.Ct. 313, 319.

^{233g} *Tulare Lake Basin Water Storage District v. United States* (2001) 49 Fed.Ct. 313, 319.

^{233h} *Tulare Lake Basin Water Storage District v. United States* (2001) 49 Fed.Ct. 313, 319.

²³³ⁱ *Tulare Lake Basin Water Storage District v. United States* (2001) 49 Fed.Ct. 313, 324.

^{233j} *Tulare Lake Basin Water Storage District v. United States* (2001) 49 Fed.Ct. 313, 324.

^{233k} *Tulare Lake Basin Water Storage District v. United States* (2001) 49 Fed.Ct. 313, 318–319.

^{233l} *Tulare Lake Basin Water Storage District v. United States* (2001) 49 Fed.Ct. 313, 318–319.

^{233m} *Tulare Lake Basin Water Storage District v. United States* (2001) 49 Fed.Ct. 313, 318–319.

²³³ⁿ See Robinson, *Claims Court Rules that Giving Farmers’ Water to Fish Requires Just Compensation*, California Real Property Journal, Volume 19, Number 3/4 at p. 29.

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2003 came to a close, the federal court of claims issued its decision on the damage phase of the *Tulare* case. The court considered arguments that some of the damages suffered by plaintiffs were in fact caused by state water law and not by application of the Endangered Species Act.^{233o} After finding a smaller portion of the losses to be caused by the application of state law, the court found the ESA to be the cause in fact of the plaintiff's damages.^{233p} Damages were awarded to the plaintiffs based on a cost of cure theory based on the value of water during the relevant shortage period.^{233q} See Ch. 9, §§ 9.06, 9.07.

PART E. SOVEREIGN IMMUNITY AND THE MCCARRAN AMENDMENT

Part E briefly summarizes the federal government's immunity from suit and the partial waiver of that immunity under the McCarran Amendment.

§ 15.35 FEDERAL SOVEREIGN IMMUNITY

The federal government is immune from suit unless its immunity is expressly and unequivocally waived. There is no implied waiver of immunity.²³⁴ When there is a waiver, it is strictly construed.²³⁵

§ 15.36 THE McCARRAN AMENDMENT

Because of the federal government's immunity to suit in a state court proceeding, the state water-allocation systems could not be applied to the adjudication of federal water rights. However, the McCarran Amendment waives the federal government's sovereign immunity defense in general stream adjudications or for the administration of water rights after a general stream adjudication.²³⁶ Congress consented to the state jurisdiction to

^{233o} *Tulare Lake Basin Water Storage Dist. v. United States* (2003) 59 Fed.Ct. 246.

^{233p} *Tulare Lake Basin Water Storage Dist. v. United States* (2003) 59 Fed.Ct. 246, 252.

^{233q} *Tulare Lake Basin Water Storage Dist. v. United States* (2003) 59 Fed.Ct. 246, 252.

²³⁴ *Metropolitan Water Dist. v. United States* (9th Cir. 1987) 830 F.2d 139, 142.

²³⁵ *Metropolitan Water Dist. v. United States* (9th Cir. 1987) 830 F.2d 139, 143; *Orff v. United States* (2005) —U.S.—, 125 S.Ct. 2606, 2610.

²³⁶ *South Delta Water Agency v. United States* (9th Cir. 1985) 767 F.2d 531, 540–541; 43 U.S.C. § 666; see *United States v. Oregon Klamath Allottees Water Users Assn.* (9th Cir. 1994) 44 F.3d 758, holding that a state administrative determination is a comprehensive civil suit within the meaning of the McCarran Amendment.

avoid piecemeal adjudications and to obtain an equitable and consistent determination of water rights. The consent to jurisdiction given by the McCarran Amendment bespeaks a policy that recognizes the availability of comprehensive state systems for adjudication of water rights as the means for achieving these goals.^{236a}

The McCarran Amendment does not deprive the federal court of jurisdiction over such cases. Thus, the state court and the federal district court may have concurrent jurisdiction. In such a situation, the federal court must consider whether deference to the jurisdiction of the state court would be appropriate under the Colorado River doctrine.^{236b} According to the United States Supreme Court, a federal district court should consider four factors in its decision whether to defer exercise of its jurisdiction in favor of the state court: (1) the clear federal policy of avoiding piecemeal adjudication of water rights in a river system, as evinced by the McCarran Amendment; (2) prior assumption of jurisdiction over the property involved in the litigation by the state court; (3) the geographic inconvenience of the federal forum; and (4) the order in which jurisdiction was obtained by the concurrent state and federal forums.^{236c} Although no one factor is determinative, some factors may receive more weight than others, based on the specific facts of the case.^{236d}

Under Section 1 of the McCarran Amendment, the waiver extends to those instances where there is an adjudication involving all claimants.²³⁷ The amendment does not authorize suit to determine water rights between the government and some of the claimants.²³⁸ The fact that not all water

^{236a} Colorado River Water Conservation District v. United States (1976) 424 U.S. 800, 819 [96 S.Ct. 1236, 1247] [47 L.Ed.2d 483].

^{236b} Colorado River Water Conservation District v. United States (1976) 424 U.S. 800 [96 S.Ct. 1236] [47 L.Ed.2d 483]; State Engineer of the State of Nevada v. South Fork Band of the Temoak Tribe (D. Nev. 2000) 114 F.Supp.2d 1046, 1047.

^{236c} Colorado River Water Conservation District v. United States (1976) 424 U.S. 800, 818 [96 S.Ct. 1236, 1247] [47 L.Ed.2d 483]; State Engineer of the State of Nevada v. South Fork Band of the Temoak Tribe (D. Nev. 2000) 114 F.Supp.2d 1046, 1048.

^{236d} Colorado River Water Conservation District v. United States (1976) 424 U.S. 800, 818 [96 S.Ct. 1236, 1247] [47 L.Ed.2d 483]; Arizona v. San Carlos Apache Tribe of Arizona (1983) 463 U.S. 545 [103 S.Ct. 3201] [77 L.Ed.2d 837]; State Engineer of the State of Nevada v. South Fork Band of the Temoak Tribe (D. Nev. 2000) 114 F.Supp.2d 1046, 1048.

²³⁷ Dugan v. Rank (1963) 372 U.S. 609 [83 S.Ct. 999].

²³⁸ Dugan v. Rank (1963) 372 U.S. 609, 618 [83 S.Ct. 999]; Metropolitan Water Dist. v. United States (9th Cir. 1987) 830 F.2d 139, 144; see United States v. Oregon Klamath

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rights recognized by the state are not subject to an adjudication may not defeat the comprehensiveness requirement.^{238a} The “river system” within the meaning of the McCarren Amendment must be read as embracing the system within the particular state’s jurisdiction.^{238b}

Section 2 of the McCarran Amendment provides a waiver of sovereign immunity when the United States is the owner or is in the process of acquiring water rights by appropriation under state law, purchase, exchange, or otherwise and is a necessary party to the suit.²³⁹ However, there is no independent waiver under Section 2. The Section 2 waiver extends to those situations when there has previously been a judicial determination of the federal government’s water right pursuant to Section 1.²⁴⁰

The waiver of sovereign immunity authorizes state courts to determine the extent of all federal water right claims, including the federal reserve right²⁴¹ and rights acquired before the enactment of the McCarran Amendment.^{241a} Once the state court’s jurisdiction is established, it retains exclusive jurisdiction over the administration of the decree.^{241b} However, the McCarran Amendment does not waive substantive federal law.²⁴² Thus, the federal government is not required to comply with state procedures as a precondition to asserting a federal reserved right claim.²⁴³

Allottees Water Users Assn. (9th Cir. 1994) 44 F.3d 758, *cert. denied*, 516 U.S. 943 (1995) (no requirement to include all hydrologically related water sources); *see also* Gardner v. Stager (9th Cir. 1996) 103 F.3d 886, *cert. denied*, 522 U.S. 811 (1997).

^{238a} United States v. Oregon Klamath Allottees Water Users Assn. (9th Cir. 1994) 44 F.3d 758, *cert. denied*, 516 U.S. 943 (1995).

^{238b} *See* United States v. District Court for Eagle County (1971) 401 U.S. 520, 523 [91 S.Ct. 998] [28 L.Ed.2d 278] “No suit by any state could possibly encompass all of the water rights in the entire Colorado River which runs through or touches many states.”

²³⁹ 43 U.S.C. § 666; *see* Fent v. Oklahoma Water Resources Board (9th Cir. 2000) 235 F.3d 553, 556 rejecting the application of the McCarren Act because of the exotic claim, not the contractual source of title.

²⁴⁰ *See* Barcellos & Wolfsen Inc. v. Westlands Water Dist. (9th Cir. 1990) 899 F.2d 814; South Delta Water Agency v. United States (9th Cir. 1985) 767 F.2d 531, 540–541.

²⁴¹ United States v. District Court in and for County of Eagle (1971) 401 U.S. 520, 524 [91 S.Ct. 998].

^{241a} State Engineer of Nevada v. South Fork Band of Te-Moak (9th Cir. 2003) 339 F.3d 804.

^{241b} State Engineer of Nevada v. South Fork Band of Te-Moak (9th Cir. 2003) 339 F.3d 804.

²⁴² Arizona v. San Carlos Apache Tribe of Arizona (1983) 463 U.S. 545, 571 [103 S.Ct. 3201].

²⁴³ *See* Cappaert v. United States (1976) 426 U.S. 128, 145–146 [96 S.Ct. 2602].

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The waiver extends to adjudications of stream system, not to determinations of every claim related to a federal reserved right. Nor does the federal government submit to all the state laws related to an adjudication. For example, the federal government may not be compelled to pay state fees to administer an adjudication.^{244a} Nor does it submit to a waiver of sovereign immunity to determine priority between the federal government and specific claimants simply because it has waived its sovereign immunity in the context of a full stream adjudication.^{244a}

In *Orff v. United States*, farmers aggrieved by water shortage allocations sought to sue the federal government for money damages, seeking to enforce an earlier waiver of sovereign immunity under the McCarren Amendment.^{244b} However, the Ninth Circuit rejected the effort to use issue preclusion to establish a waiver and to allow a waiver under a third party beneficiary and trust beneficiary theories brought under 43 U.S.C. Section 390uu.^{244c} Absent “a clear intent to the contrary,” members of the public are deemed incidental beneficiaries.^{244d} Moreover, the beneficiary of a trust is not the real party in interest and may not sue in the name of the trust unless the trustee has refused to act. Because there was no evidence that the trustee had refused to act, the predicate to the application of the theory had not been presented.^{244e} The United States Supreme Court granted review of the *Orff* opinion and issued its 2005 decision finding that the federal government was immune from suit by non-parties to federal contracts.^{244f} The waiver found in 43 U.S.C. Section 390uu of the Reclamation Reform Act was only a partial waiver of sovereign immunity and did not extend

²⁴⁴ *United States v. Idaho* (1993) 508 U.S. 1 [113 S.Ct. 1893]; *United States v. Oregon Klamath Allottees Water Users Assn.* (9th Cir. 1994) 44 F.3d 758, *cert. denied*, 516 U.S. 943 (1995); *see also* *Fent v. Oklahoma Water Resources Board* (9th Cir. 2000) 235 F.3d 553, 556 “action to recover allegedly illegal debt payments and obtain treble damages therefor cannot by any stretch of the legal imagination be characterized as an effort to obtain a comprehensive adjudication of all water rights in a water system.”

^{244a} *Orff v. United States* (9th Cir. 2004) 358 F.3d 1137, 1142–1144, *cert. granted*, 125 S.Ct. 309.

^{244b} *Orff v. United States* (9th Cir. 2004) 358 F.3d 1137, *cert. granted*, 125 S.Ct. 309.

^{244c} *Orff v. United States* (9th Cir. 2004) 358 F.3d 1137, 1142–1143, *cert. granted*, 125 S.Ct. 309.

^{244d} *Orff v. United States* (9th Cir. 2004) 358 F.3d 1137, 1145–1147, *cert. granted*, 125 S.Ct. 309.

^{244e} *Orff v. United States* (9th Cir. 2004) 358 F.3d 1137, 1148–1149, *cert. granted*, 125 S.Ct. 309.

^{244f} *Orff v. United States* (2005) —U.S.—, 125 S.Ct. 2606, 2610.

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third-party beneficiaries a right to sue the United States.^{244g}

Moreover, the McCarren Amendment does not preclude federal courts from exercising jurisdiction over water rights taking claims and does not limit a federal court's jurisdiction to hear water rights takings claims.²⁴⁵ Federal court deference to a pending state stream adjudication might allow a federal taking for years while the state proceeding is resolved.²⁴⁶ However, a federal court dismissal of a water rights suit is proper when there is a pending comprehensive adjudication in which the United States is a party.²⁴⁷ When federal courts have concurrent jurisdiction, they have generally abstained from determining important matters of state law if there are pending state court proceedings. "Where Congress has expressly addressed the question of whether federal entities must abide by state water law, it has almost invariably deferred to the state law."²⁴⁸

In *Colorado River Water Conservation District v. United States*,²⁴⁹ the United States brought suit, in its own behalf and on behalf of two Indian tribes, seeking a declaration of water rights to certain rivers and their tributaries in Colorado. The District Court for the District of Colorado dismissed the case based on the doctrine of abstention. The Tenth Circuit Court of Appeals reversed the District Court, and the Supreme Court reversed the Court of Appeals. In doing so, the Supreme Court held that although the case did not fit within the parameters of the various abstention doctrines, it was still appropriate to dismiss the action and defer to the state courts given the underlying state's interest.²⁵⁰

^{244g} *Orr v. United States* (2005) —U.S.—, 125 S.Ct. 2606, 2610.

²⁴⁵ *Hage v. United States* (1996) 35 Fed. Cl. 147, 159–160, amended by 1998 U.S. Claims LEXIS 271 (Fed. Cl. No. 17, 1998).

²⁴⁶ *Hage v. United States* (1996) 35 Fed. Cl. 147, 159–160, amended by 1998 U.S. Claims LEXIS 271 (Fed. Cl. No. 17, 1998).

²⁴⁷ *Gardner v. Stager* (9th Cir. 1996) 103 F.3d 886, *cert. denied*, 522 U.S. 811 (1997); *cf. Arizona v. San Carlos Apache Tribe of Arizona* (1983) 463 U.S. 545, 569–570 [103 S.Ct. 3201].

²⁴⁸ *United States v. New Mexico* (1978) 438 U.S. 696, 701 [98 S.Ct. 3012] [57 L.Ed.2d 1052]; *United States v. State of Nevada* (D.Nev. 2000) 123 F.Supp.2d 1209; *see United States v. Orr Water Ditch Co.* (9th Cir. 2004) 391 F.3d 1077, 1081 "We have consistently held that state law governs applications to change the use of water rights under the Orr Ditch Decree."

²⁴⁹ *Colorado River Water Conservation District v. United States* (1976) 424 U.S. 800 [96 S.Ct. 1236] [47 L.Ed.2d 483].

²⁵⁰ *Colorado River Water Conservation District v. United States* (1976) 424 U.S. 800, 817 [96 S.Ct. 1236, 1246] [47 L.Ed.2d 483].

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However, the existence of a substantial doubt as to whether the state proceeding will resolve the federal action precludes the granting of a stay.²⁵¹ The *Colorado River* doctrine is a narrow exception to the obligation of the federal courts to exercise its jurisdiction.²⁵²

²⁵¹ Smith v. Central Arizona Water Conservation District (9th Cir. 2005) 418 F.3d 1028, 1033.

²⁵² Smith v. Central Arizona Water Conservation District (9th Cir. 2005) 418 F.3d 1028, 1033.