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The U. S. Supreme Court held in *California v. United States*, 98 S. Ct. 2985 (1978), that under section 8 of the Reclamation Act of 1902, a state may impose on a permit granting water to the United States for a federal reclamation project any conditions which are not inconsistent with federal statutes. The six-three majority opinion, written by Justice Rehnquist, marks a significant departure from prior cases which had severely limited the role of state law in federal reclamation projects. A strongly worded dissent argued that the federal government must follow state law to a limited extent in the acquisition of water rights for a reclamation project, but need not defer to state law at all in the determination of the use or distribution of the water.

This note will examine the background, reasoning, and implications of *California v. United States*, a controversy which involves the New Melones Dam of California's Central Valley Project, and will conclude that despite the majority's gesture toward state control over reclamation water, the Court's failure to define the permissible scope of state control may well result in California's victory being a hollow one.

I. HISTORICAL BACKGROUND

A. The Reclamation Act of 1902

The commerce, property, and general welfare clauses of the Constitution together authorize virtually complete federal control over the

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1. Section 8 provides:

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


2. 98 S. Ct. at 3003. The dissent was written by Justice White with Justices Brennan and Marshall concurring in the dissent.
nation's water resources. Until the early 1900's, however, federal inactivity in the field of water use and development reflected Congress' apparent willingness to defer to control by the states over water within their borders.

The Reclamation Act of 1902 was passed to encourage development of the extensive arid and semiarid lands in the western states by providing financial assistance to states unable to undertake large-scale irrigation projects by themselves. After 1902, Congress began gradually to expand its assertion of authority over water resources. Today the federal government dominates in the areas of navigation, irrigation, production of hydroelectric power, and flood control. Each expansion of federal activity has resulted in a displacement of state control and a concomitant increase in the number of federal-state conflicts over the use of this valuable resource.

B. The Central Valley Project

The State of California undertook the Central Valley Project in the 1920's in an effort to solve some of the state's critical water problems, including flood damage and a need for irrigation. Failing in its attempts to finance the undertaking, which envisioned an ambitious network of dams and canals on the Sacramento and San Joaquin Rivers,

3. See note 29 infra.
5. California, 98 S. Ct. at 2995.
6. King, supra note 4, at 17.
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California sought the help of the federal government.\(^9\) Congress took over the project in 1935\(^10\) and has repeatedly expanded its scope, making the Central Valley Project the largest undertaking to date under the federal reclamation program.\(^11\)

C. The New Melones Dam

The New Melones Dam, a multipurpose project on the Stanislaus River, was authorized as a part of the Central Valley Project in 1944.\(^12\) The watershed which supplies the water involved in the project is contained entirely within California. As with all such projects, Congress directed that it be operated in accordance with federal reclamation laws,\(^13\) chief among which is the Reclamation Act of 1902. The project is intended to serve the purposes of flood control, irrigation, municipal and industrial supply, hydroelectric power, recreation, water quality control, and fish and wildlife preservation.\(^14\)

II. PROCEDURAL HISTORY

A. State Board's Response to Federal Request

In accordance with its usual practice, the United States, through the Bureau of Reclamation of the Department of the Interior (the Bureau), applied to the California State Water Resources Control Board

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\(^10\) Act of Aug. 30, 1935, ch. 831, § 1, 49 Stat. 1028, 1038 (1935). The project was reauthorized by the Rivers and Harbors Act of 1940, in which the purposes of the project were stated to be improving navigation, regulating the flow of the San Joaquin River and the Sacramento River, controlling floods, providing for storage and for the delivery of the stored waters thereof, for construction under the provisions of the Federal reclamation laws of such distribution systems as the Secretary of the Interior deems necessary . . . . , for the reclamation of arid and semiarid lands . . . . , and other beneficial uses . . . .

Rivers and Harbors Act of 1940, ch. 895, § 2, 54 Stat. 1198, 1200 (1940). Authority over the project is given to the Secretary of the Department of the Interior. \(Id.\) The Department administers reclamation projects through the Bureau of Reclamation. California, 98 S. Ct. at 3001.

\(^11\) California, 98 S. Ct. at 2989.


\(^14\) \(Id.\) at 1191, 1192.
(the Board) for permits to appropriate water for the New Melones Project from the Stanislaus River. The Board determined that unappropriated water was available, but found that the Bureau had failed to show an actual present or projected need for the water or a specific plan for its use. In addition, the Central Valley Project had already generated substantial quantities of water which were not being used. Because the project was expected to result in serious damage to fishing, wildlife habitat, and recreation in the area above the dam, the Board granted the permits subject to twenty-five conditions. The first major condition deferred impoundment of water for "consumptive" purposes, including irrigation, until the Bureau could show (a) a need for such use which outweighs the resulting environmental damage, and (b) firm commitments from water users to purchase project water for irrigation. The second major condition imposed by the Board disallowed, until further order of the Board, consumptive use of project water outside the four counties of origin making up the watershed in which the project is located.

15. United States v. California, 403 F. Supp. 874, 880 (E.D. Cal. 1975). Four separate applications were filed: the Bureau filed two applications and in addition sought assignment of two others which had originally been filed in 1952 by the California Department of Finance. Under California law, assignment of these applications would give the Bureau an appropriation priority senior to applications filed after 1952. Id. at 880, n.7; CAL. WATER CODE § 1450 (West 1971).

16. New Melones Project Water Rights Decision, Cal. State Water Resources Control Bd. Decision 1422, at 10 (April 4, 1973) [hereinafter cited as Decision 1422]. Under California law, the Board in granting an application must determine that unappropriated water is available and that the proposed use is "reasonable, beneficial and in the public interest." Id. at 15 (emphasis in original). See CAL. WATER CODE §§ 1201, 1240, 1253, 1255 (West 1971); Comment. Water Allocation, supra note 7, at 353. "The Board undertakes a balancing of competing demands and policy considerations and has broad discretion ...." Decision 1422, supra at 15 (citations omitted).


18. Id. at 14.


21. Id. at 29–30.

22. Id. at 31. See note 53 infra (discussion of California county of origin statute). Other major conditions reserved jurisdiction to the Board to impose further requirements on the Bureau to ensure that the water is beneficially used, established reporting requirements, set deadlines for construction and application of water to the authorized.
B. Lower Court Rulings

The United States sued in the U.S. District Court for the Eastern District of California for a declaratory judgment that: (1) the United States may appropriate unappropriated water for a federal reclamation project in California without applying to the Board for a permit, and (2) if the United States chooses as a matter of comity to apply to the Board, the Board must grant a permit if unappropriated water is available and may not impose any terms or conditions in the permits which are not specifically authorized by federal laws or regulations. The district court held that the United States was required as a matter of comity to apply to the state for a permit to appropriate water but that the state must grant a permit without any conditions if it determines that unappropriated water is available. The court of appeals affirmed but held that the United States was required to apply for state permits not as a matter of comity but rather as a requirement of section 8 of the Reclamation Act of 1902. The U.S. Supreme Court reversed that portion of the court of appeals decision which held that California cannot condition its allocation of water for a federal reclamation project. The Court held that states may impose any conditions not inconsistent with congressional provisions authorizing the project. The Court remanded the case for findings on the issue of whether the Board's conditions were consistent with the Reclamation Act and with the legislation authorizing the project.

24. Id. at 889–90.
25. Id. at 901.
26. United States v. California, 558 F.2d 1347, 1351 (9th Cir. 1977). The court of appeals relied primarily on the reasoning of the district court and on two recent Supreme Court decisions. In Hancock v. Train, 426 U.S. 167 (1976), the Court held that the Clean Air Act does not subject a federal installation to state permit requirements. The court of appeals read Hancock as imposing a "requirement of clear language to bind the United States." 558 F.2d at 1349. The other case relied on by the court of appeals was Environmental Protection Agency v. California, 426 U.S. 200 (1976), which held that under the Water Pollution Control Act, "[f]ederal installations are subject to state regulation only when and to the extent that congressional authorization is clear and unambiguous." Id. at 211.
27. 98 S. Ct. at 3001.
28. Id. at 3003. The United States argued that the Board's conditions are inconsistent with the general purposes in the project authorization act, which include irrigation,
III. ANALYSIS OF THE HOLDING

A. The Court's Attempt to Distinguish Contrary Precedents

Both the United States and California conceded to the district court that Congress can preempt state law entirely in the reclamation field if it so chooses. The issue was to what extent Congress, through section 8 of the Reclamation Act, intended to preempt state law in determining how project water is to be used. The Court’s ruling therefore turned on an interpretation of that portion of section 8 which states:

[N]othing in this Act shall be construed as affecting or intended to affect or to in any way interfere with the laws of any State or Territory relating to the control, appropriation, use, or distribution of water used in irrigation, or any vested right acquired thereunder, and the Secretary of the Interior, in carrying out the provisions of this Act, shall proceed in conformity with such laws . . . .

The Court placed primary reliance on the Reclamation Act's legislative history and the clear language of section 8. Both appear to support the Court’s conclusion that, absent express preemption in a project authorization act, Congress intended state law to control both the appropriation of water and the distribution and use of water involved in federal projects. While there was some concern in Congress in 1902 about whether a cooperative federal-state scheme was hydroelectric power, flood control, and domestic, municipal, and industrial consumption. The purposes of the project are allegedly undermined primarily by those conditions which defer impoundment of water for irrigation, and which prohibit distribution of water outside the four counties of origin comprising the project’s watershed. The United States anticipates that the conditions will have numerous disruptive effects on the project, including (1) delay of the expeditious impoundment of water in the reservoir for congressionally mandated purposes, (2) delay in initiating the irrigation and power components of the projects, and (3) adverse impact on the economic viability of the project. The sale of hydroelectric power and water for irrigation generates revenues which partially offset project costs. The Board's denial of water for these purposes thus imposes an additional financial burden on the Bureau. See Brief for the United States at 57-86, California v. United States, 98 S. Ct. 2985 (1978).


30. See Sax, supra note 7, at 51.


32. See 98 S. Ct. at 2995-98.

33. For example, Representative Mondell, a prime sponsor of the bill in the House, stated: “Every act since that of April 26, 1866, has recognized local laws and customs
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workable, \(^{34}\) the Court concluded that the Act recognized local control over water appropriation and distribution. \(^{35}\)

However, the Supreme Court in prior interpretations of the Reclamation Act had construed section 8 to require compliance with state law only in the acquisition of water and not in its distribution or use. \(^{36}\) The Court in *California* attempted to distinguish these cases by isolating a narrow holding in each which does not directly conflict with its current result, and by disavowing as dicta the portions of those opinions which interpreted section 8 as barring states from exerting any control over water use or distribution.

appertaining to the appropriation and distribution of water used in irrigation, and it has been deemed wise to continue our policy in this regard." 35 CONG. REC. 6679 (1902) (remarks of Rep. Mondell). Representative Mondell went on to cite sections of several federal statutes, regulations of the General Land Office, statements of President Roosevelt, and the Republican Party Platform of 1900, to the effect that distribution of water for irrigation was a matter for state control. Id. Senator Clark stated:

[T]he question of reservoir sites and reservoir building is one that appeals to the Government as a matter of national import, but the question of State or Territorial control of waters after having been released from their bondage in the reservoirs which have been provided is a separate and distinct proposition . . . . It is right that the General Government should control, should conserve, and should reservoir the headwaters of these streams. In this it is a national and not a State proposition. But in the distribution of these waters . . . it is right and proper that the various States and Territories should control in the distribution. The conditions in each and every State and Territory are different. What would be applicable in one locality is totally and absolutely inapplicable in another.

*Id.* at 2222 (remarks of Sen. Clark).


35. 98 S. Ct. at 2997-98. A contrary reading of the legislative history was reached by the district court, 403 F. Supp. at 884-89. A helpful discussion of the ambiguities in the Act's history is contained in Goldberg, supra note 7, at 27-31. The author's conclusion supports the district court's view:

The old argument of the United States seems to be correct: section 8 is directory, not mandatory. This is not necessarily because the Government owns all the unappropriated water, but rather because Congress has authorized federal conduct inconsistent with state law and thereby shown that section 8 refers to state law for a standard of compensation rather than of conduct.

*Id.* at 31 (footnote omitted).

36. The cases in which the Supreme Court has actually construed section 8 of the Reclamation Act are *Arizona v. California*, 373 U.S. 546 (1963), *City of Fresno v. California*, 372 U.S. 627 (1963), and *Ivanhoe Irrig. Dist. v. McCracken*, 357 U.S. 275 (1958). Three important earlier cases dealing with federal-state conflicts in the reclamation area are *United States v. Gerlach Live Stock Co.*, 339 U.S. 725 (1950) (damage to land values as result of construction of Friant Dam in the Central Valley Project are compensable because Congress elected to treat the dam as a reclamation project and not as a project authorized under the commerce power; thus Reclamation Act provisions for reimbursement for state-created rights taken under eminent domain are applicable to the claims); *Nebraska v. Wyoming*, 325 U.S. 589 (1945) (granting an equitable
In *Ivanhoe Irrigation District v. McCracken*, the Court found that California law directly conflicted with section 5 of the Reclamation Act, which prohibits delivery of project water to tracts of more than 160 acres under single ownership. The Court held that the "specific and mandatory" congressional limitation overrode section 8's general requirement of state control and thus preempted the inconsistent state law. In reaching this conclusion, however, the *Ivanhoe* Court said:

As we read § 8, it merely requires the United States to comply with state law when, in the construction and operation of a reclamation project, it becomes necessary for it to acquire water rights or vested interests therein . . . . We read nothing in § 8 that compels the United States to deliver water on conditions imposed by the State.

The *California* Court found that because *Ivanhoe* presented a direct conflict between a state law and a specific provision of the Reclamation Act, the above language was unnecessarily broad. However, the *Ivanhoe* language was referred to in two Supreme Court cases construing section 8, *City of Fresno v. California* and *Arizona v. California*, and was given precedential weight both by the Supreme

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apportionment of the water of the North Platte River and rejecting as unnecessary a determination of the United States' claim to ownership of all unappropriated water); *Nebraska v. Wyoming*, 295 U.S. 40 (1935) (the Secretary of the Interior's rights as an appropriator in Wyoming for projects under the Reclamation Act are subject to Wyoming laws; thus in a suit to determine the rights of Nebraska and Wyoming in the waters of the North Platte River the Secretary will be bound by an adjudication of the rights of Wyoming, and is not an indispensable party).

40. Id.
41. 98 S. Ct. at 3000. The dissenters were troubled by the majority's attempt to save the actual holding in *Ivanhoe* while rejecting the reasoning on which the holding was based:

It is plain enough that in response to the argument that § 8 subjected the § 5 contract provisions to the strictures of state law, the [Ivanhoe] Court squarely rejected the submission on the ground that § 8 dealt only with the acquisition of water rights and required the United States to respect the water rights that were vested under state law. That the Court might have saved the § 5 provision on a different and narrower ground more acceptable to the present Court majority does not render the ground actually employed any less of a holding of the Court or transform it into the discardable dictum the majority considers it to be.

Id. at 3009 (White, J., dissenting).
Court in those cases\textsuperscript{44} and by the district court in \textit{California v. United States.}\textsuperscript{45} The \textit{Ivanhoe} language, including a statement which the \textit{California} Court omitted from its quotation,\textsuperscript{46} had given rise to a traditional distinction between the \textit{acquisition} of water for federal projects, over which state law exerted some influence, and the \textit{distribution} of water from those projects, in which state participation was wholly excluded.\textsuperscript{47} That distinction was the major premise of the dissenters' argument in \textit{California}.\textsuperscript{48} The majority resolved the "tension" between the often quoted \textit{Ivanhoe} statements and its current holding by dis-

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\textsuperscript{44} The \textit{Fresno} Court stated:

Petitioner seems to say that § 8 of the Reclamation Act . . . requires compliance with California statutes relating to preferential rights of counties and watersheds of origin and to the priority of domestic over irrigation uses. However, § 8 does not mean that state law may operate to prevent the United States from exercising the power of eminent domain to acquire the water rights of others. This was settled in \textit{Ivanhoe} . . . . Rather, the effect of § 8 in such a case is to leave to state law the definition of the property interests, if any, for which compensation must be made. 372 U.S. at 629-30. In \textit{Arizona} the Court said:

The argument that § 8 of the Reclamation Act requires the United States in the delivery of water to follow priorities laid down by state law has already been disposed of by this Court in \textit{Ivanhoe} . . . and reaffirmed in \textit{City of Fresno} . . . . In \textit{Ivanhoe} we held that, even though § 8 of the Reclamation Act preserved state law, that general provision could not override a specific provision of the same Act . . . . We said:

"As we read § 8, it merely requires the United States to comply with state law when, in the construction and operation of a reclamation project, it becomes necessary for it to acquire water rights or vested interests therein. . . . We read nothing in § 8 that compels the United States to deliver water on conditions imposed by the State." . . .

Since § 8 of the Reclamation Act did not subject the Secretary to state law in disposing of water in that case, we cannot, consistently with \textit{Ivanhoe}, hold that the Secretary must be bound by state law in disposing of water under the [Boulder Canyon] Project Act.

373 U.S. at 586-87 (citations omitted).

\textsuperscript{45} United States v. California, 403 F. Supp. 874, 891-93 (E.D. Cal. 1975).

\textsuperscript{46} "But the acquisition of water rights must not be confused with the operation of federal projects." \textit{Ivanhoe}, 357 U.S. at 291. See 98 S. Ct. at 3000.

\textsuperscript{47} State "influence" over acquisition extended primarily to the definition of vested rights for which compensation must be made in the exercise of federal eminent domain power. \textit{See} note 36 \textit{supra}. The distinction between acquisition and distribution is not supported by the language of section 8, and is particularly unhelpful when a state prohibits the impoundment of water for a particular purpose, as California has done. In such a case, conditions on the acquisition of water are clearly aimed at control of the eventual distribution.

\textsuperscript{48} 98 S. Ct. at 3009 (White, J., dissenting). The distinction apparently was discarded by the majority. 98 S. Ct. at 2997-98 n.21.
missing them as dicta, both in *Ivanhoe* and where they later surfaced in *Fresno*\(^49\) and in *Arizona*.\(^50\)

In both *Fresno* and *Arizona*, provisions of the congressional act which authorized the project in question were held to override state laws which would have required a distribution of project water different from that contemplated by Congress and the Bureau. Moreover, both opinions appear to have assumed that *any* state priorities or control over water distribution would be inconsistent with federal law,\(^51\)

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\(^{49}\) *Id.* at 3000. In *Fresno*, the Court faced a conflict between the federal law authorizing the Friant Dam Project and California's water code. The federal statute prohibited the Secretary of the Interior from making contracts for municipal water use unless the Secretary found that the "efficiency of the project for irrigation purposes" would not be impaired. 372 U.S. at 630 (quoting Reclamation Project Act of 1939, § 9(c), 43 U.S.C. § 485h(c) (1976)). The city asserted that section 8 gave precedence to California statutes granting priority to municipal and domestic use over irrigation. In holding that the specific congressional provision prevailed, the Court's decision in *Fresno* is arguably consistent with both *Ivanhoe* and the California Court's holding. In rejecting the city's claim that the state priorities prevented the exercise of federal eminent domain power, the *Fresno* Court had said that "the effect of § 8 in such a case is to leave to state law the definition of property interests, if any, for which compensation must be made." *Id.* The California Court "disavow[ed] this dictum... to the extent that it implies that state law does not control even where not inconsistent with such expressions of congressional intent." 98 S. Ct. at 2999 n.24.

\(^{50}\) 98 S. Ct. at 3000-01. *Arizona* involved a dispute between the United States and the states of Arizona, California, Nevada, New Mexico, and Utah over the apportionment of water of the Colorado River and its tributaries. The Boulder Canyon Project Act contained language very similar to that of section 8, and it was contended that the project act thus gave states control over use of the project water. The Court concluded that the specific provision in the project act which gave the Secretary of the Interior authority to contract for water delivery impliedly gave the Secretary power to choose among water users without regard to state law. This conclusion followed from the Court's view that the contracting power was a necessary means of carrying out a congressional scheme in the project act for apportionment of the river. *Id.* at 579–81, 588. The Court relied on *Ivanhoe* for the proposition that section 8, or a similar provision, does not permit state law to regulate the disposition of water. See note 44 *supra* (quotation from *Arizona*). The California Court stated that because there was no need in *Arizona* to define the scope of section 8 "except as it related to the singular legislative history of the Boulder Canyon Project Act," the broader use of the *Ivanhoe* language was dictum. 98 S. Ct. at 3000–01. A thorough analysis of the protracted *Arizona* litigation is contained in Trelease, *Arizona v. California: Allocation of Water Resources to People, States, and Nation*, 1963 Sup. Ct. Rev. 158.

\(^{51}\) The dissent in *California* took the view that the *Ivanhoe* interpretation of section 8 was necessary to the *Arizona* Court's result. The dissent pointed out that "[t]he particular terms of the Secretary's contracts [in *Arizona*] were not authorized or directed by any federal statute. The Court's holding that he was free to proceed as he did was squarely premised on the proposition that § 8 did not control the distribution of the project water." 98 S. Ct. at 3010 (White, J., dissenting). If this analysis of the reasoning in *Arizona* is correct, *Arizona* and *California* cannot stand together, and the *California* Court would have been more forthright by expressly overruling *Arizona*.
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and to that extent they were expressly disavowed by the California Court.\(^5^2\)

B. Federal Eminent Domain Power Under the Reclamation Act: The Import of Footnote 21

The issue of the scope of federal eminent domain power under the Reclamation Act was raised in Fresno when the plaintiff city argued that California statutes which grant preference for water use to counties of origin operated to prevent the Bureau from diverting water beyond those counties until their needs had been satisfied.\(^5^3\) The city asserted that for the federal government to condemn water rights in those counties for diversion elsewhere would be to disregard California law and thus violate section 8. The Fresno Court rejected the claim, stating that “§ 8 does not mean that state law may operate to prevent the United States from exercising the power of eminent domain to acquire the water rights of others.”\(^5^4\)

\(^5^2\) 98 S. Ct. at 3000-01. The Court also quoted from two decisions in a water rights controversy between Nebraska and Wyoming, Nebraska v. Wyoming, 295 U.S. 40 (1935) and Nebraska v. Wyoming, 325 U.S. 589 (1945), to support its conclusion that states may impose conditions not inconsistent with federal laws. 98 S. Ct. at 3001-02. In the 1935 case, however, no conflicting state law or condition was in issue. In holding that the United States was not a necessary party to an apportionment of water between Nebraska and Wyoming, the Court said,

The bill alleges, and we know as a matter of law [citing section 8], that the Secretary . . . must obtain permits and priorities for the use of water from the State of Wyoming in the same manner as a private appropriator or an irrigation district formed under the state law. His rights can rise no higher than those of Wyoming, and an adjudication of the defendant's [Wyoming's] rights will necessarily bind him. Wyoming will stand in judgment for him as for any other appropriator in that state. He is not a necessary party.

295 U.S. at 43. Because the meaning of the language of section 8 was not in issue in that case, the opinion offers scant support for the California Court’s conclusion.

The second Nebraska decision offers clear support only for the proposition that the United States must comply with state laws and permit requirements for the appropriation of water. See 325 U.S. at 613-16. The United States there based its argument on the theory that it owned all the unappropriated water, id. at 611, a theory which was rejected by the Court and which has since been discredited. For a discussion of ownership theories advanced by both the states and the federal government, see Goldberg, supra note 7; Trelease, Government Ownership and Trusteeship of Water, 45 Cal. L. Rev. 638 (1957).

\(^5^3\) 372 U.S. at 628. The California county of origin statute prohibits the release or assignment of any appropriated water which “will, in the judgment of the board, deprive the county in which the water . . . originates of any such water necessary for the development of the county.” Cal. Water Code § 10505 (West 1971).

\(^5^4\) 372 U.S. at 630.
Although the issue was neither briefed nor argued before it, the California Court, in dictum in footnote 21, rejected the Fresno interpretation of section 8's impact on federal eminent domain power. After citing Ivanhoe and Fresno for the rule that "state water law does not control in the distribution of reclamation water if inconsistent with other congressional directives to the Secretary [of the Interior]," the Court went on in footnote 21 to state:

Whatever the intent of Congress with respect to state control over the distribution of water, however, Congress in the 1902 Act intended to follow state law as to appropriation of water and condemnation of water rights. Under the 1902 Act, the Secretary of the Interior was authorized in his discretion to "locate and construct" reclamation projects. As the legislative history of the 1902 Act convincingly demonstrates, however, if state law did not allow for the appropriation or condemnation of the necessary water, Congress did not intend the Secretary of the Interior to initiate the project. Subsequent legislation authorizing a specific project may by its terms signify congressional intent that the Secretary condemn or be permitted to appropriate the necessary water rights for the project in question, but no such legislation was considered by the Court of Appeals in its opinion in this case. That court will be free to consider arguments by the Government to this effect on remand.

This unusually broad language contradicts the Court's prior opinions in Fresno and its predecessor, Dugan v. Rank in which the express grant of authority to the Secretary to condemn water rights needed for

55. 98 S. Ct. at 2997–98 n.21.
56. Id. (emphasis in original).
57. Id. (emphasis added).
58. 372 U.S. at 630. See text accompanying notes 53–54 supra. The footnote 21 language referring to "state law [which does] not allow ... for condemnation" is a sloppy formulation of the Fresno issue, that is whether state priorities for distribution can operate to restrict the exercise of federal eminent domain power by virtue of section 8. No presently definable water right vests in any individual by virtue of California's county of origin statutes; rather a "priority as against the state is reserved to a class composed of the inhabitants and property owners within a protected area." Note, State Water Development: Legal Aspects of California's Feather River Project, 12 Stan. L. Rev. 439, 453 (1960). However, when an appropriation is made by a water user, and the appropriation is perfected by applying the water to a beneficial use, the appropriation can be condemned by the state. Cal. Water Code § 11575 (West 1971); Note, supra at 453–54.
reclamation projects in section 7 of the Reclamation Act was held to override the operation of state law under section 8.61

If the Court's statement in footnote 21 is taken literally, the effect would be to allow states to define the types of property rights which the federal government may condemn for a project. The language also suggests that a state may decide as a policy matter whether or not available water should be used for the federal project at all—effectively giving the state power to reject the project in its entirety. This reading would be difficult to reconcile with the rest of the opinion since the exercise of such a power by the state appears "inconsistent" with Reclamation Act provisions which direct the Secretary to construct projects authorized by Congress, and empower the Secretary to condemn "any rights or property" when necessary for the projects' completion.62

The dissent argued that the majority's conclusion would "permit a State to disentitle the Government to acquire the property necessary or appropriate to carry out an otherwise constitutionally permissible

60. Section 7 provides:
Where in carrying out the provisions of this Act it becomes necessary to acquire any rights or property, the Secretary of the Interior is hereby authorized to acquire the same for the United States by purchase or by condemnation under judicial process, and to pay from the condemnation fund the sums which may be needed for that purpose . . . .
Reclamation Act of 1902, § 7, 43 U.S.C § 421 (1976). The Attorney General is directed to institute suit at the request of the Secretary. Id. Similar language is contained in the Central Valley Project authorization, empowering the Secretary to acquire "by proceedings in eminent domain, or otherwise, all lands, rights-of-way, water rights, and other property necessary for said purposes." Rivers and Harbors Act of 1937, ch. 832, § 2, 50 Stat. 844, 850 (1937).

61. The City of Fresno intervened in Dugan, a suit brought against the United States by claimants to water rights along the San Joaquin River below Friant Dam. The city sought declaratory relief as to its statutory priorities in addition to the injunctive relief sought by the other plaintiffs; those claims were decided in City of Fresno v. California, 372 U.S. 627 (1963). The Dugan Court upheld a court of appeals finding that "the United States was authorized to acquire, either by physical seizure or otherwise, such of the rights of the claimants as it needed to operate the Project and that this power could not be restricted by state law." 372 U.S. at 617. The Court concluded that [t]he power to seize which was granted here had no limitation placed upon it by the Congress, nor did the Court of Appeals bottom its conclusion on a finding of any limitation. [The federal officers have] plenary power to seize the whole of respondents' rights in carrying out the congressional mandate . . . .

Id. at 622–23.

62. See note 60 supra.
and statutorily authorized undertaking." A somewhat narrower reading of footnote 21 is that the Bureau must find its authority to condemn water rights for a project in the provisions of that specific project’s authorization act and not under the more general mandates of the Reclamation Act. However, by relegating this crucially important issue to a footnote and dispensing with further elaboration, the Court has raised and left unresolved the question of the extent of state power over appropriation and condemnation.

In summary, the change most clearly wrought by the Court’s holding is to allow states, for the first time, to impose any conditions on permits granted to the United States which are not inconsistent with congressional directives to the Secretary. Conditions which conform to this standard apparently may be imposed on either the acquisition or distribution of project water. The holding expressly rejects the long-standing assumption that a state may impose no conditions regardless of the presence or absence of conflict between those conditions and federal laws.

The opinion correctly assesses the legislative history of the Reclamation Act as evidencing Congress’ intent to allow room for the operation of state law in the federal reclamation program. But in dealing with prior opinions on the scope of state control, the Court has attempted with varying degrees of success to retain the holdings while rejecting the reasoning on which the holdings were based. Also, apparently because the issue of whether a state law is inconsistent with a federal law depends in large part on the peculiar features and background of the federal statute in question, the Court has carefully avoided suggesting any guidelines or considerations to be used in

63. 98 S. Ct. at 3011 (White, J., dissenting).
64. In attempting to reconcile the Board’s conditions with the Court’s prior cases, California had emphasized in its brief that the Board had only deferred, rather than denied, the grant of water to the Bureau, and that in this case the state was not seeking to control the use of project water. Brief for Petitioners at 62, California v. United States, 98 S. Ct. 2985 (1978). This position is undermined by the nature and extent of the conditions imposed by the Board, but the Court’s holding does not turn on such distinctions.
65. The district court took an unusual approach in framing the issue as one of jurisdiction:

It appears to this court, however, that the question of the effect of Decision 1422 on the purposes of the New Melones Project is simply not material to the disposition of this case. As this opinion has previously noted, the “jurisdiction” of the Board in regard to the construction and operation of federal reclamation projects—once those projects have been approved—extends only so far as the determination of the availability of unappropriated water. Beyond that point, the Board has no jurisdiction. Therefore, any conditions or terms imposed by the Board must be considered ultra vires and “in conflict” with the purposes of the federal reclamation project. 403 F. Supp. at 901 (emphasis in original).
making such a finding. Finally, the Court in footnote 21 has added to the existing confusion which surrounds state power over appropriation and condemnation. This action is particularly unfortunate since the issue has major ramifications for the balance of state and federal power over water.

IV. IMPLICATIONS OF THE HOLDING

Because the lower courts rejected as impermissible all state conditions, the Supreme Court remanded the case for a ruling on the issue of whether the conditions imposed by the California Board are inconsistent with federal law. The Court has provided only the standard of allowing state conditions where "not inconsistent" or "not directly inconsistent" with congressional directives.

The lower court on remand will face only the issue whether the Board's conditions conflict with the Reclamation Act and the federal statutes authorizing the New Melones Project. But the outcome will have an impact on many federal water projects in the western states for essentially three reasons. First, the provisions of the Reclamation Act apply to all federal reclamation projects. Second, federal statutes which authorize specific projects are often similar in administrative provisions and in placing a high priority on those water uses which promote economic development and growth, especially irrigation and power. Third, the conditions imposed by California are likely to reflect concerns shared by many western states in attempting to strike a balance between the competing goals of development and environmental protection. Because of this commonality, the validity of the Board's conditions will be a crucial indicator of the scope of state power over reclamation water after California. This section will therefore examine the approaches which a court is likely to use in ruling on the consistency issue.

The first logical source of guidance would seem to be prior cases in which such a conflict was presented. The Court's reluctance to overrule Ivanhoe and Fresno indicates that federal laws will control in analogous situations. But those cases may be of little use in resolving the instant litigation: the reasoning on which those opinions were based has been largely rejected by the California Court, leaving only the narrow holdings that explicit and mandatory provisions in a fed-

66. 98 S. Ct. at 3003.
67. Id. at 3001.
68. Id. at 3002.
eral statute will override contrary state laws.\textsuperscript{69} Because in the instant case the conflict between state and federal law is less clearly presented, the \textit{Ivanhoe} and \textit{Fresno} opinions will offer no assistance. In the absence of such guidance, it is probable that courts will rely on general preemption principles for analysis of whether conflicts exist.\textsuperscript{70}

Application of the rule that, under the supremacy clause, a federal law is supreme over a conflicting state law is inevitably a matter of statutory construction. The meaning and scope of the federal statute must be ascertained before the nature of the conflict between the state and federal laws can be evaluated. As a result, few general standards are available to assist in this determination. Clearly, federal law supersedes state regulation where it is impossible to comply with the requirements of both.\textsuperscript{71} But a conflict may also be found where the effect of a state law is to frustrate the purposes and objectives of the federal act.\textsuperscript{72} One commentator has concluded that, "[g] enerally speaking, the Court will now sanction state regulations that supple-

\textsuperscript{69} See notes 38–39 & 49 and accompanying text \textit{ supra}.

\textsuperscript{70} The \textit{California} Court's decision is consistent with a modern trend toward finding that the existence of a federal regulatory scheme in an area is not alone sufficient to show congressional intent to preempt the exercise of state regulatory power entirely. In many early cases the Supreme Court had held that Congress, merely by regulating in an area, had shown an intent to "occupy the field" to the exclusion of all state regulation. \textit{See, e.g.}, \textit{Napier v. Atlantic Coast Line R.R.}, 272 U.S. 605 (1926) (Congress, in empowering the Interstate Commerce Commission to prescribe safety regulations for locomotives, intended to "occupy the field"; additional state-imposed requirements were therefore invalid although the ICC had made no conflicting regulations).

The more recent trend is to reconcile the operation of the state and federal regulations if possible. In a 1973 decision, the Court stated that "conflicting law, absent repealing or exclusivity provisions, should be pre-empted ... 'only to the extent necessary to protect the achievement of the aims of' [the federal statute]." \textit{Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Ware}, 414 U.S. 117, 127 (1973) (quoting \textit{Silver v. New York Stock Exchange}, 373 U.S. 341, 361 (1963)). "[T]he proper approach is to reconcile 'the operation of both statutory schemes with one another rather than holding [state regulation] completely ousted.'" \textit{Id.} (quoting \textit{Silver v. New York Stock Exchange}, 373 U.S. 341, 357 (1963)). \textit{Accord}, \textit{Florida Lime & Avocado Growers, Inc. v. Paul}, 373 U.S. 132, 142 (1963) ("federal regulation ... should not be deemed preemptive of state regulatory power in the absence of persuasive reasons—either that the nature of the regulated subject matter permits no other conclusion, or that Congress has unmistakably so ordained"); \textit{Huron Portland Cement Co. v. City of Detroit}, 362 U.S. 440 (1960).

\textsuperscript{71} See, \textit{e.g.}, \textit{Free v. Bland}, 369 U.S. 663 (1962) (U.S. savings bonds held in coownership pass on the death of one coowner to the survivor under Federal Treasury regulations, despite conflicting provisions of \textit{Texas} community property law).

\textsuperscript{72} See \textit{City of Burbank v. Lockheed Air Terminal, Inc.}, 411 U.S. 624, 627 (1973) (municipal restrictions on jet takeoffs from a city airport found to conflict with Federal Aeronautics Act objectives of "safety of aircraft and the efficient utilization of ... airspace" by increasing congestion and limiting the FAA's flexibility in controlling air traffic).
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ment federal efforts so long as compliance with the letter or effectuation of the purpose of the federal enactment is not likely to be significantly impeded by the state law.\footnote{73}{L. Tribe, American Constitutional Law § 6-24 at 379 (1978). A representative phrasing of the standard is that a state law is superseded where it "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." Hill v. Florida, 325 U.S. 538, 542 (1945) (quoting Hines v. Davidowitz, 312 U.S. 52, 67 (1941)).}

Applying these general rules to California first requires recognition that the primary goal of the Reclamation Act and of subsequent legislation authorizing specific projects is irrigation, although the projects frequently include other components such as flood control and production of hydroelectric power. The sale by the Bureau of project water for irrigation returns a portion of the project cost to the federal government.\footnote{74}{See note 28 supra.} Thus, any state conditions mandating priorities for water use other than irrigation would probably impair both the avowed federal goal for the project and the economic feasibility of the undertaking.\footnote{75}{One observer has concluded: If congressional authorization requires that the New Melones Dam be built as planned, then [Decision] 1422 cannot be enforced without destroying the economic feasibility of the project. There is no way that the irrigation and power purposes of New Melones can be achieved if the conditions of [Decision] 1422 remain unchanged. Comment, Water Allocation, supra note 7, at 373.}

At first glance, the California Board's order deferring impoundment of water for irrigation until a need has been shown\footnote{76}{Decision 1422, supra note 16, at 30.} appears to be defensible as a reasonable condition not disruptive of the project goal, because Congress presumably did not intend to finance wasteful or unneeded projects. But under the condition imposed, "need" will be defined by the Board, and a "need" for irrigation will be recognized only on a showing that the benefits will outweigh environmental damage to the watershed above the dam.\footnote{77}{Id.} The condition would thus allow the state to postpone indefinitely the achievement of federal objectives\footnote{78}{The 1962 New Melones project authorization provides "that the projects authorized herein shall be initiated as expeditiously and prosecuted as vigorously as may be consistent with budgetary requirements." Flood Control Act of 1962, Pub. L. No. 87-874, § 203, 76 Stat. 1173, 1180 (1962).} by asserting its own policies favoring environmental protection over irrigation.

Similarly, the Board condition disallowing consumptive use of
project water outside the four counties of origin\textsuperscript{79} may be invalidated not because the project act mandates a different distribution but because the Board has asserted the authority to decide how much water is needed for those counties and whether it is beneficially used. A similar preference for the basin area is contained in the project act, but the power to determine the water needs of that area is expressly given to the Secretary.\textsuperscript{80} In addition, the condition can be seen as materially impairing the flexibility of the Secretary's exercise of his broad discretion to contract for the sale of project water.\textsuperscript{81}

Thus, although the Court's decision is an invitation to states to impose conditions not inconsistent with federal laws, it is probable that California's two major conditions go too far. Even the tantalizing language of the Court's footnote 21\textsuperscript{82} offers little encouragement to states in fashioning regulations that will be upheld in the face of the federal statutes.

The conditions imposed by California attempt to further policies of environmental protection and water distribution which many of the western states subject to the reclamation laws are likely to share. Thus, the fate of the Board's order on remand will be of immense importance as an indication of how much state control will now be allowed. At the least, the California decision means that states may now participate in making reclamation policy to an extent which is not disruptive of the Bureau's preoccupation with irrigation. At the most, the Court's footnote 21 will be read to give states life-or-death power over congressionally authorized projects. The permissible reach of state

\textsuperscript{79} Condition 4 of Decision 1422 states:
Permits issued pursuant to Applications 14858 and 19304 shall authorize the use of water for consumptive purposes only in the counties of Stanislaus, Calaveras, Tuolumne and San Joaquin. A petition to amend the permits to include other specific areas will be considered by the Board upon a showing that water from other [Central Valley Project] sources is not available to serve such areas. Any use of water for consumptive purposes outside [those counties] that may be authorized later shall be subordinate to beneficial use within said counties and shall terminate when contracts are executed and the water is needed for beneficial use within said counties.

\textsuperscript{80} The Flood Control Act of 1962 provides:
Before initiating any diversions of water from the Stanislaus River Basin in connection with the operation of the Central Valley Project, the Secretary of the Interior shall determine the quantity of water required to satisfy all existing and anticipated future needs within that basin and the diversions shall at all times be subordinate to the quantities so determined . . . .


\textsuperscript{82} 98 S. Ct. at 2998 n.21; see notes 55–63 and accompanying text supra.
control will probably lie somewhere between these two extremes and will have to be defined on a case-by-case basis which will increase rather than reduce the conflicts between state and federal governments over control of water resources.

V. CONCLUSION

Despite its reluctance to overrule prior cases expressly, the Court in *California v. United States* abandoned the rule that state conditions on water appropriation and distribution are inconsistent per se with federal policy. Having at last found room for state control in the reclamation field, the Court has left the contours of that control almost wholly undefined. If this "victory" for state control is to have substance, either the courts or Congress must clearly indicate that states may impose reasonable conditions which allow for consideration of needs and goals other than irrigation. The legitimate environmental concerns of the western states should be considered by Congress and accommodated to the fullest extent possible in project authorization acts. Absent congressional recognition of such concerns, however, the permissible scope of state control can be expected to be limited to conditions which will not impair irrigation or other project purposes or imperil the substantial federal financial investment or the interests of the United States in pursuing an aggressive reclamation program. Few conditions which further substantive state policies are likely to pass this standard.

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